

Civil Asset Forfeiture: When Good Intentions Go Awry

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Thank you for inviting me to testify today on Pennsylvania's efforts to examine and reform its civil asset forfeiture laws. My name is John Malcolm. I am the Director and the Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

A great many states and Congress are currently considering measures to make the system more fair and to reign in the abuse of civil asset forfeiture laws, and I am pleased that Pennsylvania is joining them in addressing an area of law urgently in need of reform.

The History of Civil Forfeiture

Civil asset forfeiture is a legal tool whereby law enforcement agencies seize property suspected of being involved in, or the fruits of, illicit activity. It is premised on a legal fiction, albeit one of ancient lineage, that property itself can be guilty of a crime and thereby forfeited to the sovereign. This process does not require any individual to be charged with, much less convicted of, any crime related to that property.

The history of civil forfeiture law in the United States can be traced to admiralty and customs law, when vessels found to contain contraband were seized and forfeited, oftentimes

because the owner of the cargo or vessel was beyond the reach of U.S. courts. For the next two centuries, other than a brief outburst of activity related to Prohibition when laws were revised to permit the seizure of vehicles used by bootleggers, forfeiture law largely remained confined to the enforcement of customs law. In 1984, however, with the passage of the Comprehensive Crime Control Act, Congress brought civil asset forfeiture into mainstream law enforcement.

The goal was to empower federal law enforcement officials to go after the illegal profits and ill-gotten property of drug kingpins and criminal organizations, thereby undercutting the profit incentives of the illegal drug trade -- an admirable goal to be sure and one which remains important today.

While forfeiture law initially had a narrow and commendable goal, its scope has since expanded dramatically. Today, more than 400 federal statutes covering a wide array of crimes authorize forfeiture. In addition, virtually every state has its own body of forfeiture laws. These statutes allow for the seizure of all manner of real and personal property, from a family's home to a small business's bank account.

As forfeiture's reach has grown, so too has the risk of seizing property from innocent people. Unfortunately, there are few procedural protections for innocent property owners. It is fair to characterize forfeiture law as being stacked against innocent owners in nearly every way possible.

Moreover, what began as a means to a laudable end has, in many instances, become the end itself, where law enforcement authorities appear to focus more on forfeiting money and property than catching and convicting criminals. The reason for this is the perverse profit incentive built into civil forfeiture law: Much, if not all, of the proceeds of successful forfeiture cases are retained by the agencies that do the initial seizing, providing them with a funding mechanism that is totally outside the normal legislative appropriations and oversight process. Police and sheriff's departments and prosecutors' offices often end up having a significant budgetary stake in the outcome of forfeiture cases and of the process in general. Indeed, a deputy sheriff in Kane County, Illinois, wrote in a training book that, "All of our home towns are sitting on a tax-liberating gold mine.¹

The scope of civil asset forfeiture has also been dramatically expanded by the federal government's equitable sharing program. Under this program, state and local agencies may partner with the federal government, which prosecutes forfeiture cases under federal law and returns a portion -- up to 80 percent -- of the proceeds to the original seizing agency. In 2013, the Department of Justice paid out \$657 million in equitable sharing payments. Last year, Pennsylvania law enforcement agencies received nearly \$10.1 million under this program -- funds that are, pursuant to federal rules governing the program, completely beyond the jurisdiction of the Pennsylvania state legislature. This has the effect of encouraging state and local law enforcement authorities to circumvent any state forfeiture laws which make it more difficult to seize and forfeit assets, or which impose greater control over how forfeiture funds may be spent.

Hundreds of law enforcement agencies and task forces across the country have grown dependent on forfeiture funds, seizing the equivalent of 20% or more of their annual budgets. It is this direct financial stake in the scale and scope of forfeiture operations that has led some to denounce civil asset forfeiture as "policing for profit." After all, government agencies should not be permitted to finance themselves independently from the legislative process. If a judge's salary and office budget were determined to a great degree by the number and amount of fines that he imposed on criminal defendants appearing before him, many would question the judge's objectivity and the fundamental fairness of the process. The same is true with respect to civil asset forfeiture as it is currently practiced in most jurisdictions.

That “intersection of power and profit” led Texas Supreme Court Justice Don Willet to pen a sharp dissent in a recent forfeiture case before the Texas high court, criticizing modern civil forfeiture as a system that “victimiz[es] innocent citizens who’ve done nothing wrong.” In *El-Ali v. Texas*, Zaher El-Ali challenged Texas’s “innocent owner” defense, which, like federal law and the law in most states puts the burden on citizens in forfeiture cases to, in effect, prove their own innocence. Ali argued that this violated his due process rights under the Texas constitution, a challenge the Texas Supreme Court opted not to hear.

In his dissent to the denial of review, Justice Willet took modern forfeiture to task for treating property owners worse than criminals, with innocent owners “presumed guilty and required to prove their innocence.” In Justice Willet’s view, decades of steadfast determination to expand the reach of his state’s forfeiture regime has resulted in a system that tests constitutional boundaries and prioritizes steady revenue streams over the legal rights of the citizens. As Justice Willet warned, “[w]hen agency budgets grow dependent on asset forfeiture, not as an occasional windfall or supplement but as indispensable revenue to fund basic operations, constitutional liberties are unavoidably imperiled.”

Now, I would like to make something crystal clear. I believe that the vast majority of law enforcement officers are dedicated public servants who perform their duties in a forthright and ethical manner. I also firmly believe that law enforcement authorities play a vital role in our society and have an incredibly difficult and dangerous job to do. And I also have little doubt that many, possibly even the vast majority, of the forfeiture cases that are filed are, in fact, meritorious. For these and other reasons, law enforcement authorities should be adequately, indeed generously, funded. That having been said, I recognize that states have many competing needs, policies, and goals. If forfeiture funds were deposited into a general revenue account, rather than retained by law enforcement agencies, there would be much greater accountability and oversight. Other agencies and interest groups must submit budget requests and justify these requests, and there is no reason this principal of good government ought not apply to law enforcement agencies as well. And regardless, even if law enforcement authorities *are* permitted to keep some or all of the proceeds from forfeitures that they initiate, the process for seizing and forfeiting property from its owners should be open and fair and the uses to which those funds are put should be transparent, which is not the case today. To do otherwise will only engender disrespect for the rule of law and will create an unnecessary and regrettable divide between law enforcement authorities and the general public.

Lack of Legal Protections in Civil Asset Forfeiture

One of the main criticisms against civil asset forfeiture is that the deck is stacked against any property owner who wishes to contest the forfeiture. Because the legal proceedings are, as noted, against property rather than a person, property owners do not enjoy many of the ordinary constitutional protections that would be afforded to them if they were facing criminal charges.

First, a large number of forfeiture cases never see the inside of a courtroom. At the federal level, some have estimated that as many as 80 percent of cases are handled administratively – that is, the agency that stands to gain financially from the forfeiture gets to act as investigator, prosecutor, judge, and jury. The rules and deadlines governing these proceedings are complicated and opaque, and are replete with technicalities and traps for the unwary (and likely unrepresented) property owner.

Second, unlike in a criminal case, there is usually no entitlement to representation by counsel or to a preliminary hearing. Forfeitures are often for amounts small enough that it makes no rational economic sense to challenge a property seizure, since in many cases attorneys’ fees

will outweigh the value of whatever has been seized. With no preliminary hearing, a person's property can be tied up for months, even years, potentially creating extreme hardship, especially for those of modest means or those who are trying to run small businesses.

Third, unlike in criminal cases, where prosecutors must prove a defendant's guilt beyond a reasonable doubt, in civil forfeiture cases in Pennsylvania, prosecutors need only establish the basis for the forfeiture by a preponderance of the evidence, a low standard given that the property at issue could be a person's life savings or a family's home. A "clear and convincing" standard should not be an unduly burdensome standard for law enforcement authorities to satisfy in meritorious cases and would be much more protective of property owners and more appropriate given the quasi-criminal nature of the proceedings.

Fourth, in criminal cases, prosecutors must prove that the person who used or obtained the property subject to forfeiture acted intentionally or at least was willfully blind to its illicit misuse. In a civil forfeiture case, under Pennsylvania's "innocent owner" defense, it is incumbent upon the property owner to prove that he did not know that his property was being used for an illegal purpose which essentially requires him to prove a negative -- a difficult thing to do -- and inverts the legal axiom that in a criminal context, one is innocent until proven guilty.

In an effort to compensate for these deficiencies, some states, most recently New Mexico, have adopted a criminal conviction requirement in civil forfeiture -- that is, someone (usually the property owner) must be convicted of a crime before civil forfeiture of associated property is authorized. I understand the sentiment behind such a move. Many of the organizations Heritage has worked with on the forfeiture reform issue espouse such a standard. However, I believe that requiring conviction in all cases (or otherwise abolishing civil forfeiture) may be a bridge too far.

Consider a situation in which law enforcement authorities discover property clearly tied to criminal activity, such as a large sum of money in close proximity to a large quantity of drugs in a stash house, but cannot locate the property's owner. Clearly nobody will return to claim the property now that the police are on the scene. In such a circumstance, it would make little sense to prevent the property from being forfeited until the owner can be located. Or suppose the owner is located but no charges are filed against him because either he is immunized in return for his cooperation against others or the charges are dismissed because of some procedural irregularity. In such circumstances, civil asset forfeiture might still be appropriate even though no conviction was obtained. Similarly, situations may arise where a property's owner is beyond the reach of U.S. authorities, and therefore not able to be brought to trial. The property owner could be a fugitive from justice or a resident of a country without an extradition treaty.

Circumstances such as these were the primary motivating factor behind the earliest admiralty forfeiture laws. In situations like these, a criminal conviction requirement would make it unduly difficult to achieve a just outcome. While I fully endorse reforming forfeiture laws to make them more fair and transparent, I do not want to throw out the baby with the bath water. Any reform effort should take such circumstances into account.

Perverse Incentives of Forfeiture

Under Pennsylvania law, forfeited property is transferred to the custody of either the district attorney or the state attorney general (depending on the jurisdiction of the original seizing agency), who may keep the property for official use or sell it. Forfeited cash or the proceeds from the sale of forfeited property are deposited into the general fund for the district attorneys' county, and counties are commanded under state law to immediately and "without restriction" make these funds available to the DA. Under this arrangement, 100 percent of forfeiture proceeds are retained by law enforcement agencies, and may be spent as they see fit, provided that they

finance enforcement of “the provisions of The Controlled Substance, Drug, Device and Cosmetic Act.”

In 2012, Pennsylvania law enforcement authorities generated \$13.8 million in revenue from forfeiture cases pursued under state forfeiture law. There is seemingly little oversight of these funds, and even less transparency. While each county is required to conduct an annual audit of all property and proceeds obtained through forfeiture, state law requires that these reports not be made public. At no point do forfeiture funds come under the control of any body outside the law enforcement establishment. At the very least, such an opaque arrangement raises troubling questions of fundamental fairness and impartiality in the enforcement of the law.

There is perhaps no better example of the consequences of this sort of arrangement than Philadelphia. The city has earned a reputation for its particularly aggressive and sweeping use of civil forfeiture. Each year, the Philadelphia district attorney seeks forfeiture of between 300 and 600 homes and other real property, and files for forfeiture in thousands of cases targeting cash, cars, and other property. Based on an analysis of Philadelphia forfeiture data between 2011 and 2013, it appears the DA’s office forfeits roughly 100 homes, 150 vehicles and \$4 million in cash each year. That is roughly \$5 million in annual revenue (some estimates place this figure closer to \$6 million), equivalent to 20 percent of the appropriated budget for the Philadelphia district attorney’s office, available to be spent entirely outside the normal budget and appropriations process.

To put those figures into perspective, Philadelphia secures forfeiture of greater sums of cash and property than any other city or county in the state of Pennsylvania. In fact, Philadelphia’s forfeiture operation outstrips other, much larger, jurisdictions across the country by several orders of magnitude. In 2010, Philadelphia forfeited assets equal to five times the value of Los Angeles County’s forfeiture operations, despite having only one-sixth the population. To reach these numbers, Philadelphia authorities file thousands of forfeiture cases annually, routinely seeking forfeitures of small amounts of cash with values as low as \$100, and continuing to seek forfeiture even when property owners are acquitted or criminal charges are dropped. Philadelphia’s forfeiture practices have invited a class action lawsuit by the Institute for Justice, a public interest law firm.

Unfortunately, the financial incentive to seize cash and valuable property are so high that forfeiture sometimes warps the priorities of law enforcement officials. Authorities have been known to allow people to commit crimes, just so they can later seize the cash that was earned from those crimes. The City Attorney of Las Cruces, New Mexico, for example, was caught on videotape telling a roomful of people how police officers waited outside a bar hoping that the owner of a 2008 Mercedes would walk out drunk because they “could hardly wait” to get their hands on his vehicle.

In Tewksbury, Massachusetts, Russ Caswell had to fight for years to win back his family-run motel after local authorities partnered with the DEA to seize and forfeit the property. The government’s rationale in that case: there had been 15 drug-related arrests at the Motel Caswell over a 14 year period. In the same period, he had rented over 200,000 rooms. In each case, Mr. Caswell had cooperated with the authorities, even going so far as to offer them free rooms as they conducted drug enforcement operations. During a deposition in that case, one DEA agent admitted that financial gain played a significant role in determining which properties would be selected for forfeiture. Mr. Caswell’s property, which he owned outright and later sold for \$2.1 million, was a target too lucrative to pass up.

Regrettably, there have also been alarming instances where the object of law enforcement operations was clearly to seize property rather than arrest suspected criminals. Minnesota’s

somewhat infamous Metro Gang Strike Force was shut down after it was revealed that strike force personnel were seizing property from citizens for their own personal use, including television sets, cars, and cash. In another case in Tennessee, officers of the 21st Judicial District Drug Task Force pulled over a refrigerated truck and discovered nearly \$500,000 in cash, plastic wrapped and hidden throughout the vehicle. That money may well have been drug money, but the officers had absolutely no interest in arresting the potential courier, or even questioning him about his activities – they were caught on dashboard cameras pressuring the driver into signing away all rights to the money in exchange for his freedom.

Highway stops in general have become a real problem in some areas. A local news investigation in Tennessee revealed that drug task force officers were ten times more likely to patrol the westbound lanes of I-40 than the eastbound lanes. Why? It was well known that illegal drugs from Mexico were transported into Nashville and across the state on the eastbound side of the highway, while the illegal drug *profits* flowed back on the westbound side of the road. The same thing happened, and may still be happening, in Volusia County, Florida, Tenaha, Texas, and other locations.

Forfeiture-related traffic stops follow a common pattern. Drivers – usually those with out-of-state license plates – are stopped on some pretext. The officer then engages the driver in conversation and asks whether he is carrying any cash, and whether it is alright if the officer searches the car. If large amounts of currency are found, the officer claims it is somehow drug-related, even if no drugs or traces of drugs are present, and then seizes it. If a driver refuses to consent to a search of his vehicle, which he has a right to do, drug dogs are often brought in.

This is what happened when Straughn Gorman was stopped for a minor traffic violation on a highway in Nevada. Gorman told the trooper he was on his way to California to visit his girlfriend, and intended to move there. He acknowledged that he was carrying cash, but refused to allow a search of his motorhome. The State Trooper let Gorman go, but then contacted another officer and alerted him that Gorman was heading his way, that he believed Gorman's motorhome had large amounts of currency onboard, and that he should have his drug-sniffing canine standing by to ensure that troopers would have probable cause to search the vehicle.

Gorman was pulled over for a second time shortly thereafter, on the pretext of a moving violation. Again, he refused to consent to a search of the vehicle. The second State Trooper had his drug dog sniff the vehicle, and the canine alerted to narcotics. A search ensued which uncovered over \$167,000 in cash but no drugs of any kind. The entire sum was seized. Gorman elected to fight the seizure, and his case recently went to trial. The trial court judge ruled that it was clear that the state troopers had conspired to deprive Gorman of his 4th Amendment rights, and, worse still, that the U.S. Attorney's office handling the case had not disclosed critical facts tying the two traffic stops together. The judge ordered that Gorman's money be returned and invited him to file for attorney's fees. That case is now being appealed.

Motorists are often threatened with criminal charges and pressured to sign away their rights to the property on the spot in exchange for not being arrested. In Tenaha, Texas, officials threatened to take children into child protective custody as a means of coercing parents to part with cash and valuables. Tenaha settled a class-action lawsuit on behalf of the dozens of motorists subjected to this treatment, and agreed to a multi-million dollar payout.

The perverse incentives of forfeiture do not stop at the side of the road. The IRS and other agencies have seized and forfeited the bank accounts of individuals and small businesses for alleged "structuring" violations – even when the authorities have no reason whatsoever to believe that the money in those accounts was derived from an illegal source. There are a great many legitimate and sensible reasons why honest businesses make regular cash deposits under \$10,000, yet this did not stop the seizure of \$63,000 from Maryland dairy farmers Randy and Karen Sowers, or \$33,000 from Iowa restaurateur Carole Hinders. Mrs. Hinders was lucky

enough to win her money back with the assistance of the public interest law firm, the Institute for Justice. The cash-strapped Sowers, however, were not so fortunate. They agreed to a “settlement” in which the IRS kept roughly \$30,000 of the Sowers’ hard earned money.

There are hundreds of documented instances where property or money has been seized from individuals under highly-questionable circumstances. There are likely hundreds, if not thousands, more undocumented instances. The simple fact is that the perverse incentives of civil forfeiture encourage the seizure of property and a skewed legal system offers too few protections for innocent property owners.

Forfeiture – A Disproportionate Response

Another problem with civil forfeiture is that some seizures appear to be wildly disproportionate and unfair in relation to the alleged offense. In Detroit, Michigan, authorities raided a “Funk Night” event at the Contemporary Art Institute and seized 40 cars from the 130 attendees, on the theory that the attendees were somehow responsible for the failure by organizers of the event to obtain a proper alcohol permit. Since the cars had transported the guests to the event, they were subject to seizure as “facilitating” property, and each attendee had to pay \$900 to get his or her car back. A judge later determined the seizure was unconstitutional.

In Philadelphia, law enforcement authorities have made a disturbing habit of seizing family homes because of minor crimes perpetrated on the property without the knowledge of the property owner. For example, Rochelle Bing’s son, Andrew Bing, sold crack cocaine to an undercover informant working for the Philadelphia police. Because the sales were conducted out of his mother’s house, Philadelphia moved to evict her and forfeit her home. Ms. Bing fought the forfeiture for two years, appearing in court 23 times before prosecutors finally agreed to drop the forfeiture action and let her keep her home. Philadelphia authorities also attempted to seize the home of Chris and Markela Sourovelis, whose son had, unbeknownst to them, sold \$40-worth of heroin to an undercover cop. In both instances a crime was unquestionably committed, but do such minor offenses merit rendering families homeless, especially when the home owners were unaware of the crime?

Then there is the case of 77-year-old Margaret Davis, whose Philadelphia home was targeted for forfeiture after a drug dealer – in the midst of a police chase, no less – *broke into her home* and attempted to hide the drugs in his possession. The dealer had been able to gain easy access because Davis, bedridden due to serious medical ailments, relied on her neighbors to provide her care. She frequently left her doors unlocked so they could come in and tend to her. Despite the fact that Davis clearly was not involved, the Philadelphia DA filed a motion to seize the property. Were it not for pro bono representation from a legal clinic at the University of Pennsylvania Law School, it is likely that Ms. Davis would have lost her home. Even with the clinic’s counsel, it took 18 months for the city to drop its efforts to seize Davis’s home.

In 2008, the Pennsylvania Supreme Court upheld a civil forfeiture of \$18,235 in cash that was seized from a car in close proximity to 3.07 grams of marijuana (which is just over one-tenth of an ounce, with a street value of roughly \$39). Did that money come from the sale of marijuana? Who knows. The state certainly could not and did not prove that; seemingly, the most they could prove is that he possessed a small amount of marijuana. Instead, the State chose to rely on a Pennsylvania law which provides that “[a]ll monies, coin, and currency found in close proximity to *any* amount of forfeitable substances” is presumed to be forfeitable, and that the burden of proof is on any claimant to rebut that presumption.

My point in raising this case is not to criticize the Court’s legal reasoning in affirming that forfeiture, nor do I wish to be understood as endorsing drug legalization or decriminalization

in any way. Rather, I cite these examples to point out that some forfeitures can be quite draconian in relation to the crime, that the process for obtaining the forfeiture is skewed against property owners, and that such forfeitures can lead to understandable outrage on the part of the general public.

Lack of Accountability and Oversight

Here in Pennsylvania, state law requires counties to regularly audit their asset forfeiture funds, and report their findings to the attorney general, a fundamentally sound and sensible measure. However, state law also requires that these audits not be made public. As a result, much of the detailed inner workings of civil forfeiture – how forfeiture funds are spent, for example – are shielded from public scrutiny. In 2012, the Philadelphia City Paper filed a Right to Know request with the city’s district attorney, seeking a detailed accounting of Philadelphia’s forfeiture fund expenditures. The request was denied, citing state law requirements that records pertaining to forfeiture be kept confidential.

I certainly understand the need to keep certain records private, such as those related to ongoing law enforcement investigations or to protect the identities of any witnesses or innocent parties. That being said, these limited and narrow justifications cannot justify a blanket policy of withholding from the public the particulars of how forfeited property is used or how the resulting proceeds are spent. It is difficult to imagine any other government agency generating and spending such significant sums of money in total secrecy, answerable to neither state nor local legislators. Such opacity creates the conditions for corruption and malfeasance. Even if forfeiture expenses are entirely above board, the public might be hard pressed to believe law enforcement authorities’ assertions of beneficence given their unwillingness to face public scrutiny.

Indeed, in jurisdictions throughout the country where forfeiture laws provide police and prosecutors with an influx of cash and no real accountability, some law enforcement officials have spent their forfeiture funds in highly questionable ways. In Georgia, the Fulton County District Attorney used forfeiture proceeds to purchase sports tickets, paid for office parties, made donations to a lawyers’ group that inducted him into its hall of fame, and paid for a personal home security system for his private residence. A former sheriff in Camden County, Georgia spent \$90,000 of forfeiture funds on a Dodge Viper to impress school kids as part of the Drug Abuse Resistance Education (DARE) program. He also used forfeiture money to pay prison inmates to build a private weekend home for himself, and donated \$250,000 to his alma mater to finance a scholarship in his own name.

In Oklahoma, audits of county forfeiture funds have revealed significant discrepancies and questionable practices pertaining to forfeited assets. One assistant district attorney disregarded a court order to sell a forfeited home at auction, instead deciding to live in it rent-free for five years. Another assistant district attorney used \$5,000 in forfeiture funds to make student loan payments. Law enforcement officials in other jurisdictions have used forfeiture funds to finance lavish “training” trips to exotic locales, to purchase margarita machines and a zamboni, and, believe it or not, to procure marijuana and prostitutes.

A lack of public oversight and accountability can also breed carelessness, sloppiness, and indifference on the part of some law enforcement officers. Consider the situation facing Hank Mosley and Tanya Andrews, residents of a boarding house who had the misfortune of living in the same building as a suspected drug dealer. When Philadelphia police raided the dealer’s room in 2011, officers also broke into Mosley and Andrews’ rooms, seizing \$2,000 in cash from Mosley and another \$1,500 from Andrews despite the fact that neither had any affiliation with the drug dealer. Several weeks later the dealer received notice that the district attorney intended to forfeit his assets. Mosley’s and Andrews’ cash was somehow listed as being in his possession,

and thus subject to forfeiture. It was an easily resolvable error, but the city refused to acknowledge the mistake. Both had to hire attorneys. Andrews appeared in court five times before a judge ordered her funds returned. Mosley, meanwhile, had moved to Colorado, missed a court appearance, and lost his money by default.

A lack of adequate oversight and accountability makes situations like these not only possible, but exceedingly difficult to detect. The effect is to create an atmosphere where public officials can bury indiscretions rather than identify responsible parties, effectively shielding themselves from public scrutiny. There is a strong public interest in rooting out government corruption, and an equally strong governmental interest in avoiding even the appearance of it. Neither interest is adequately served by the present system.

Funding Law Enforcement Without Civil Forfeiture

Forfeiture proceeds should be redirected to a neutral account or general revenue fund controlled by legislators, and appropriated through normal budgetary processes. Many in the law enforcement community view such a reform as a significant threat. I understand their concerns. Governments at all levels have endured hard times of late, with public funds – always a precious commodity – especially scarce. While many other governmental agencies can reduce the scope of their missions to deal with budget shortfalls, the job of policing our streets and protecting our communities is not often one that can be safely scaled back.

In light of these budget pressures, many have argued that police, sheriffs, and prosecutors will be inadequately funded without their continued control of forfeiture funds. While that is certainly possible, I am skeptical for several reasons.

First, it is worth noting that law enforcement agencies have only had access to forfeiture proceeds as a revenue source since 1985, when Congress first allowed federal agencies to retain the proceeds of their seizures. For two centuries before that, it was a well-established precept that proceeds derived from forfeiture were to be deposited into the general revenue fund.

Second, forfeiture reform is about rebalancing a skewed system, not about reducing the budgets of law enforcement agencies. If a particular agency's approved budget does not adequately cover its needs, it will likely have a compelling case to make before the legislature as to why its budget allocation should be increased. Again, law enforcement agencies should be generously funded, but they should not be able to write their own check to subsidize their approved budgets, especially utilizing a process that is insufficiently protective of the rights of innocent property owners.

The power of the purse has historically rested with the elected legislators of our communities, our states, and our nation. This has always been considered essential to keeping the various agencies of government accountable to the people. There may well be harm to a particular agency if a legislature does not fully fund it. The harm to society is far greater, however, if that agency is able to circumvent the political process entirely. And given the powerful incentives and procedural deficiencies of current forfeiture law, the risk of abuse is simply too great.

Reforming Civil Forfeiture

There have been some positive developments, particularly at the state level, that may help to ameliorate some of these abuses, which you may wish to consider as you go about the task of reforming your own civil forfeiture law. The Justice Department is engaging in a "top-to-

bottom” review of its forfeiture program and has already revised some of its policies regarding the equitable sharing program and seizures in “structuring” cases. Congress is presently debating legislative reforms, such as the Fifth Amendment Integrity Restoration Act, which seeks to rectify many of the inequities in federal forfeiture law.

Several states have recently passed forfeiture reform measures. For instances, Maine, North Dakota, and Vermont require that forfeiture funds be deposited into the state’s general treasury, and Missouri places those funds into an account earmarked for public education. Others, such as Connecticut, Florida, and Utah, have raised the standard of proof that the government must establish for a “preponderance of the evidence” to “clear and convincing evidence,” while Nebraska and Wisconsin require proof “beyond a reasonable doubt” to justify forfeiture. Others, such as the District of Columbia, place the burden on the government to prove that an owner either did know, or was willfully blind to the fact, that his property was being used for an illegal purpose. Washington, D.C.’s reform also raised the burden of proof to “clear and convincing” when the property being seized is real property. And Minnesota, North Carolina, New Mexico, and Colorado have essentially abolished civil forfeiture at the state level, requiring a conviction or guilty plea from the property owner before a forfeiture proceeding can be instituted. And Michigan’s legislature recently passed a reform package that would raise the standard of proof to “clear and convincing” and impose a host of new reporting requirements designed to bring greater transparency to the state’s forfeiture system.

Recently, The Heritage Foundation’s Meese Center released *Arresting Your Property*, a detailed report on civil asset forfeiture. In it, we propose nine common-sense measures, some of which may be pertinent to and suitable for your purposes, that are intended to serve as guiding principles of forfeiture reform:

- 1. Restore Legislative Control of Forfeiture Proceeds By Redirecting Them to the General Fund.** Law enforcement should not be a profit center. Lawmakers should bar law enforcement agencies from retaining the forfeiture funds they generate and mandate that these proceeds go instead to a jurisdiction’s General Fund.
- 2. Eliminate Equitable Sharing.** The federal government should not be encouraging state and local law enforcement to bypass state and local laws. Equitable Sharing hampers state efforts to protect innocent property owners and reinforces the profit motives at the core of forfeiture abuse. Internal Justice Department policy changes are insufficient; the program should be abolished. Until then, states should consider policy reforms that disallow their law enforcement agencies from bypassing their own laws.
- 3. Raise the Burden of Proof.** The government should be required to demonstrate that property is subject to forfeiture by “clear and convincing evidence,” a standard significantly higher than the current “preponderance of the evidence.”
- 4. Reaffirm the Presumption of Innocence.** Property owners should not have to disprove the government’s case; rather, the burden should be on prosecutors to demonstrate that owners knew their property was being used in the commission of a crime.
- 5. Ban ‘Bartering.’** Property owners should not be pressured into

waiving their rights on the side of a road or in the heat of the moment. All law enforcement agents should be barred from “bartering”—offering to let property owners go if they sign away their property on the spot.

6. Provide for Indigent Defense. Forfeiture is a highly complex system that most citizens are ill-prepared to face alone. Because of its quasi-criminal nature, claimants who cannot afford counsel should be able to petition a court for the appointment of counsel at the government’s expense, and victorious property owners who retained counsel should be afforded a chance to recoup their attorney’s fees.

7. Protect Property Owners’ Rights in Administrative Forfeitures.

Most federal civil forfeiture cases begin and end in the bowels of a federal agency. Agencies should be required to reform their internal procedures to make the process fairer and more transparent, clearly advising potential claimants about their rights to contest a seizure and to legal representation. Property owners should also be afforded the right to a prompt pre-seizure or immediate post-seizure hearing before a judge.

8. Ensure Transparency Through Reporting Requirements. Law enforcement agencies involved in civil forfeiture cases should be required to record the details of their seizures and forfeitures.

These reports should specify what was seized, the amount or value of the seized goods, the alleged criminal conduct giving rise to the forfeiture, whether anyone was ever arrested for, or convicted of, said criminal conduct, whether the forfeiture action was challenged, the final disposition of the property or currency, and how forfeiture funds have been spent.

9. Provide for Review of Forfeiture Settlements. Given the complexity of forfeiture law and the tremendous pressure that property owners face to settle forfeiture cases (sometimes because they are threatened with criminal charges if they continue to contest the forfeiture), in cases in which a claimant is not represented by counsel, any proposed settlement should be reviewed by a neutral third party, preferably a judge.

These reforms have been endorsed by 15 bipartisan national organizations, from the American Civil Liberties Union to the Institute for Justice. The full report is attached to this testimony.

The recently introduced Senate Bill 869 is a comprehensive piece of legislation that proposes a number of these reforms. SB 869 requires a criminal conviction before seized assets may be forfeited, eliminating civil forfeiture entirely. Once prosecutors secure a conviction, the government would be required to prove that property is subject to forfeiture by “clear and convincing” evidence, a more appropriate standard than the current “preponderance of the evidence” standard. Property owners can secure the release of seized property and assets pending the outcome of forfeiture proceedings if their continued restraint creates undue hardship on the owner, even in circumstances where the assets may be destroyed or expended, and therefore unavailable for forfeiture. Courts would be required to consider the proportionality of the forfeiture to the underlying offense, and property owners who substantially prevail in forfeiture

proceedings are entitled to reasonable attorneys fees.

In addition to significantly enhanced due process protections for property owners, SB 869 tackles the financial conflicts of interest inherent in forfeiture. Forfeiture proceeds would be redirected to the general revenue fund of either the state or county, depending on the jurisdiction, thereby eliminating the financial incentives that have led to so many problems. Pennsylvania law enforcement authorities would be barred from transferring seized property to federal authorities, and similarly would be barred from retaining any property or funds returned to Pennsylvania agencies from the federal government, closing the equitable sharing loophole that has enabled – indeed, encouraged – state and local agencies to circumvent reforms like those in this bill. The proposal also makes the required annual reports accessible to the public via the state’s Right-to-Know Law, an important step towards genuine public accountability.

While I am not endorsing this or any other particular piece of legislation, I would encourage you to seriously consider the sort of reforms this bill contains, with one caveat. As I have noted, I am skeptical of the necessity for a criminal conviction in all forfeiture cases. There are circumstances where property is undeniably linked to criminality, but where that property’s owner is simply beyond the reach of U.S. authorities, or where criminal prosecution may be otherwise impossible or unadvisable. In my view, such circumstances should be taken into consideration as part of any reform effort. Regardless, enhancing procedural protections for property owners will help ensure a fair system that protects the innocent.

Addressing the financial incentives of forfeiture is crucial. The best policy would be to restore legislative control of forfeiture funds. Alternatively, Pennsylvania could consider creating an oversight committee made up of retired judges and prosecutors and other interested and responsible members of the public (in other words, knowledgeable individuals who are not directly affiliated with the law enforcement office seeking the funds) that would be charged with approving the use of forfeiture funds by law enforcement authorities and with monitoring whether those funds were, in fact, used in the approved manner. While this would not eliminate the profit motive of law enforcement agencies, it would at least provide the public with a greater degree of confidence that forfeiture proceeds were being used in an appropriate manner that would best serve the public’s needs.

Despite forfeiture’s noble intentions, the many stories of innocent victims and law enforcement abuses -- too many to ignore -- indicate that the pendulum has swung too far in favor of law enforcement and that systemic problems exist that should be rectified. Yet, in reforming civil forfeiture laws, we must be careful not to swing the pendulum too far in the opposite direction. For the sake of all citizens, the process must be made fair and transparent, and the profit incentive in forfeiture should be abolished, or at the very least severely constrained and subjected to considerable oversight. Civil asset forfeiture should remain focused on its original purpose of depriving criminals of their ill-gotten gains, but we must be sure that it is criminals and only criminals who are being impacted.

Thank you for your invitation to testify today. I would be happy to answer any questions you may have.

Appendix

ARRESTING YOUR PROPERTY

HOW CIVIL ASSET FORFEITURE TURNS POLICE INTO PROFITEERS



ARRESTING YOUR PROPERTY?

HOW CIVIL ASSET FORFEITURE TURNS POLICE INTO PROFITEERS

Civil asset forfeiture is a law enforcement tool with a dark side. Meant to ensure that “crime does not pay,” civil forfeiture laws allow police to seize property they merely suspect was involved in criminal activity. In many states, law enforcement authorities can keep whatever they seize as profits—leading some agencies to treat civil forfeiture as a way to raise revenue, often at the expense of innocent property owners.

Every American knows that in a court of law they are innocent until proven guilty, but civil forfeiture flips this on its head: Your property is guilty until you prove your own innocence.

ARRESTING YOUR PROPERTY highlights egregious examples of cops seizing homes, money, and cars on dubious grounds. Fortunately, federal and state reforms can stop the abuse of this law enforcement tool, restoring due process protections for citizens caught in civil forfeiture’s pernicious web.

To view the booklet online go to: www.heritage.org/ForfeitureReform and to view more examples of the abuse of forfeiture laws visit: www.heritage.org/ForfeitureAbuse

TABLE OF CONTENTS

How good intentions made bad policy: Federal forfeiture’s history	4
How civil forfeiture affects an average citizen: Matt’s story.....	6
How hard is it to fight for your money?	10
Where do forfeiture funds go? Follow the money	12
Equitable Sharing: The link between the feds and the states.....	13
Shocking examples of unjust civil forfeiture.....	14
Reforms: What can be done?	17
Resources to learn more	18
Endnotes	19



How Good Intentions Made Bad Policy: Federal Forfeiture's History

Civil asset forfeiture is a tool that allows law enforcement officials to seize property that they assert has been involved in certain criminal activity. Forfeiture rests on the legal fiction that *property* itself can be guilty of a crime. This means that police and prosecutors can seize cars, homes, money, or valuables without ever having to charge, much less convict, the *property owner* with a crime.

The roots of civil forfeiture can be traced back to Medieval English common law, but in the U.S., these laws only came to the forefront during the Civil War and later during Prohibition, to enable the seizure of vehicles transporting illegal alcohol.¹ Today, though, the use of these once-dormant laws has expanded exponentially, with the value of forfeitures measured in the billions and instances of abuse catalogued in nearly every state.

SO HOW DID WE GET TO WHERE WE ARE TODAY?

During the 1980s, federal and state law enforcement officials dramatically expanded the use of civil forfeiture as a tool in the war on drugs. Their reasoning was simple: By seizing the assets and ill-gotten gains of criminal kingpins, they could remove the financial incentive to commit crime. In 1984, Congress went a step further. It created the Assets Forfeiture Fund and enabled law enforcement agencies to retain the proceeds of their seizures.² Prior to this reform, forfeiture funds were directed to the General Fund of the Treasury. Agencies now had a direct financial stake

in generating forfeiture revenues, creating a perverse incentive for some overzealous investigators to engage in a form of legalized bounty hunting. States quickly followed suit—42 states dangerously shifted their law enforcement priorities toward the pursuit of profit.³ It is not surprising that with these direct financial incentives, civil forfeiture actions skyrocketed. Innocent and guilty citizens alike became targets for forfeiture.

In 2000, Congress took up the cause of innocent property owners and passed the Civil Asset Forfeiture Reform Act (CAFRA).⁴ CAFRA afforded modest due process protections for citizens but left in place forfeiture's perverse financial incentives. The result: A system that encourages forfeitures and is stacked against innocent property owners.

While many of these forfeitures involve people who have committed crimes, startling stories continue to surface of cops and prosecutors seizing homes, money, and cars on dubious grounds and leaving innocent victims in their wake. As abuses abound, it has become clear that the system is broken and is in dire need of reform.

Civil forfeiture proceedings do not carry many of the basic legal protections Americans expect in their justice system:



Legal Representation. Anybody who has watched *Law and Order* knows that in a criminal trial, if you cannot afford a lawyer, one will be provided at the government's expense. No such right exists in civil forfeiture proceedings. Property owners must pay for their own lawyers, an expense that often exceeds the value of what has been seized. It is no surprise, then, that many property owners elect to navigate the impossibly complex forfeiture system alone or never even challenge a seizure in the first place.

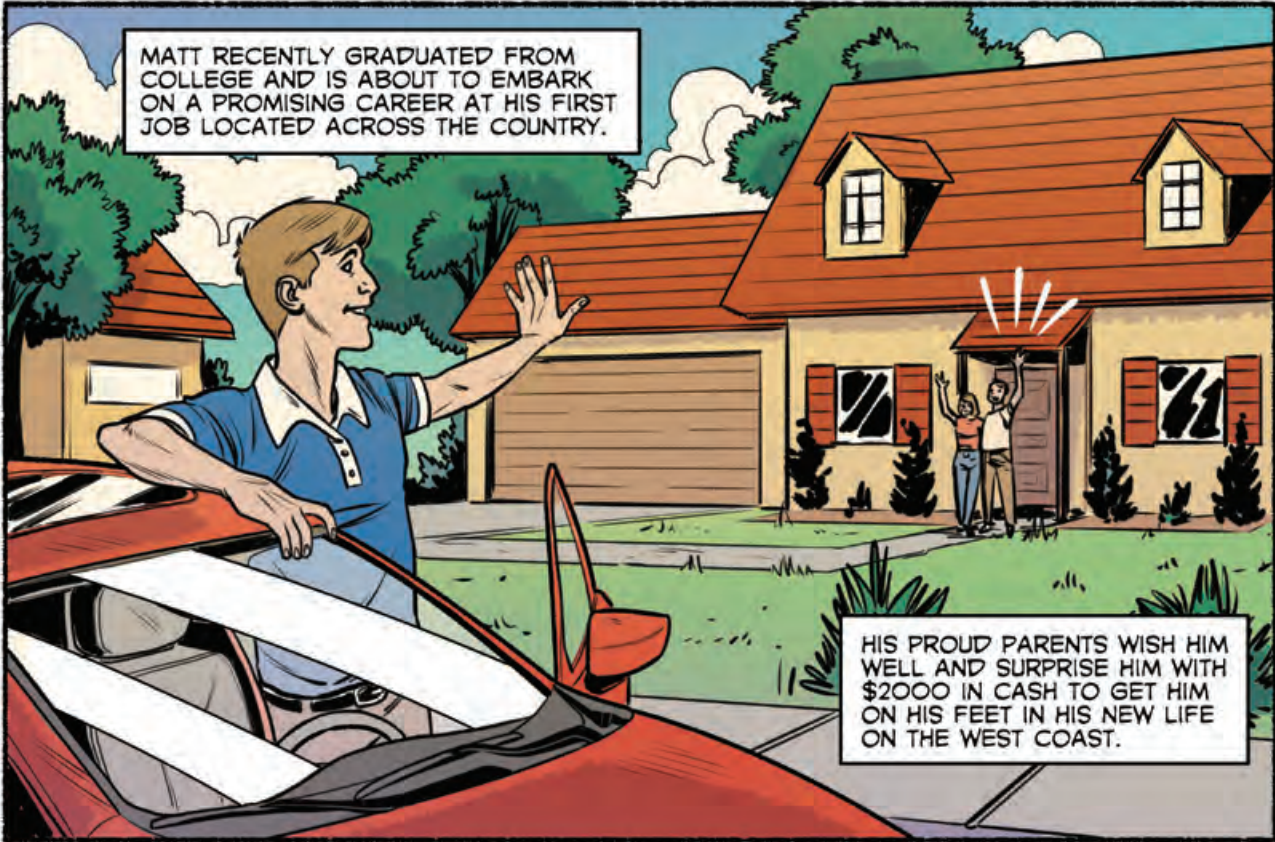


Burden of Proof. Unlike criminal cases, where the burden is "beyond a reasonable doubt," in civil forfeiture cases in most jurisdictions the government need only show that property is subject to forfeiture by a "preponderance of the evidence," a much lower burden. And to seize property in the first place, the burden is lower still—mere probable cause. The bottom line: It is easy for property owners to get pulled into the forfeiture system and incredibly hard for them to escape it.



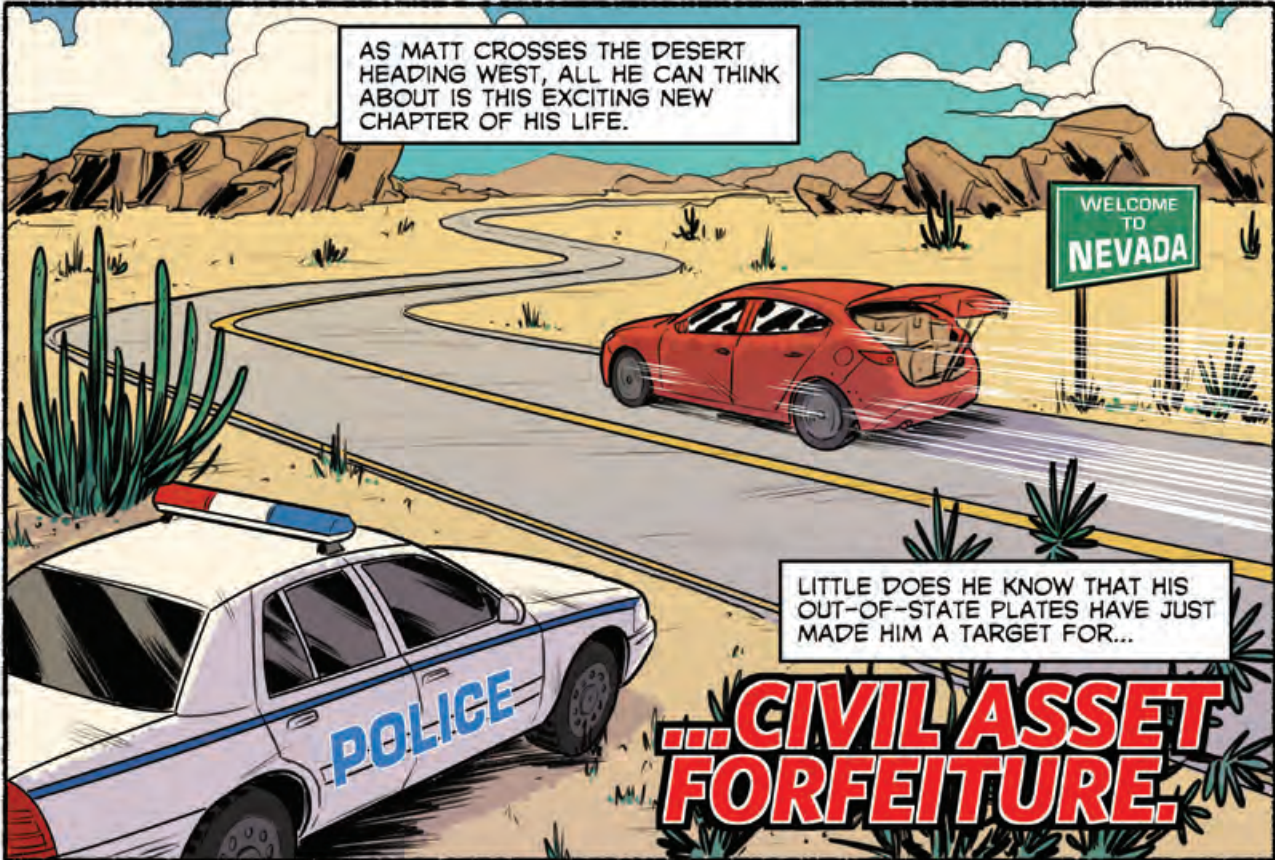
Presumption of Guilt. In a criminal trial, the government must prove guilt beyond a reasonable doubt, but in civil forfeiture proceedings in most jurisdictions, this basic legal tenet is flipped. The "innocent owner" defense requires that property owners prove a negative—that they did not know their property was involved in a crime. In effect, property owners must prove their own innocence to avoid forfeiting their property.

How does civil forfeiture affect an average citizen? See Matt's story on the next page.



MATT RECENTLY GRADUATED FROM COLLEGE AND IS ABOUT TO EMBARK ON A PROMISING CAREER AT HIS FIRST JOB LOCATED ACROSS THE COUNTRY.

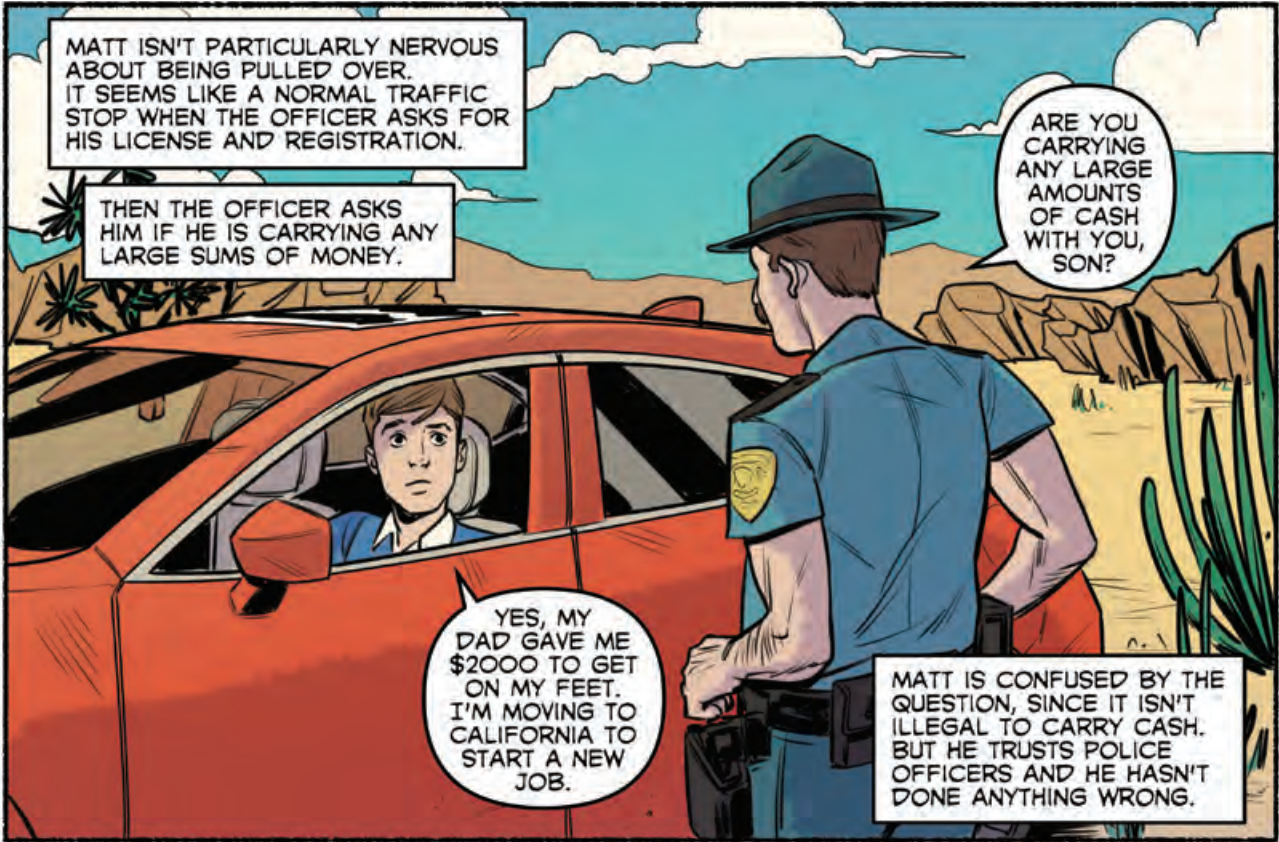
HIS PROUD PARENTS WISH HIM WELL AND SURPRISE HIM WITH \$2000 IN CASH TO GET HIM ON HIS FEET IN HIS NEW LIFE ON THE WEST COAST.



AS MATT CROSSES THE DESERT HEADING WEST, ALL HE CAN THINK ABOUT IS THIS EXCITING NEW CHAPTER OF HIS LIFE.

LITTLE DOES HE KNOW THAT HIS OUT-OF-STATE PLATES HAVE JUST MADE HIM A TARGET FOR...

...CIVIL ASSET FORFEITURE.



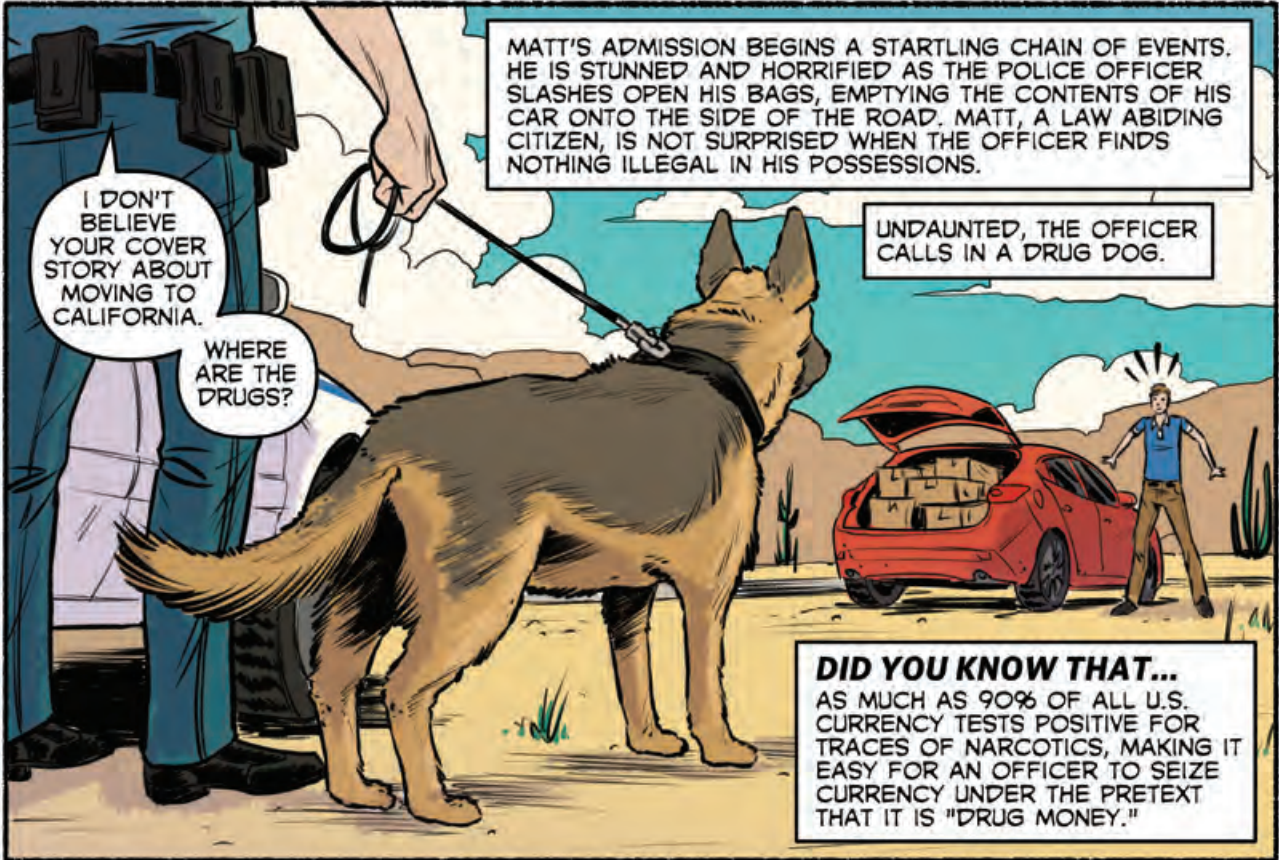
MATT ISN'T PARTICULARLY NERVOUS ABOUT BEING PULLED OVER. IT SEEMS LIKE A NORMAL TRAFFIC STOP WHEN THE OFFICER ASKS FOR HIS LICENSE AND REGISTRATION.

THEN THE OFFICER ASKS HIM IF HE IS CARRYING ANY LARGE SUMS OF MONEY.

ARE YOU CARRYING ANY LARGE AMOUNTS OF CASH WITH YOU, SON?

YES, MY DAD GAVE ME \$2000 TO GET ON MY FEET. I'M MOVING TO CALIFORNIA TO START A NEW JOB.

MATT IS CONFUSED BY THE QUESTION, SINCE IT ISN'T ILLEGAL TO CARRY CASH. BUT HE TRUSTS POLICE OFFICERS AND HE HASN'T DONE ANYTHING WRONG.



MATT'S ADMISION BEGINS A STARTLING CHAIN OF EVENTS. HE IS STUNNED AND HORRIFIED AS THE POLICE OFFICER SLASHES OPEN HIS BAGS, EMPTYING THE CONTENTS OF HIS CAR ONTO THE SIDE OF THE ROAD. MATT, A LAW ABIDING CITIZEN, IS NOT SURPRISED WHEN THE OFFICER FINDS NOTHING ILLEGAL IN HIS POSSESSIONS.

UNDAUNTED, THE OFFICER CALLS IN A DRUG DOG.

I DON'T BELIEVE YOUR COVER STORY ABOUT MOVING TO CALIFORNIA.

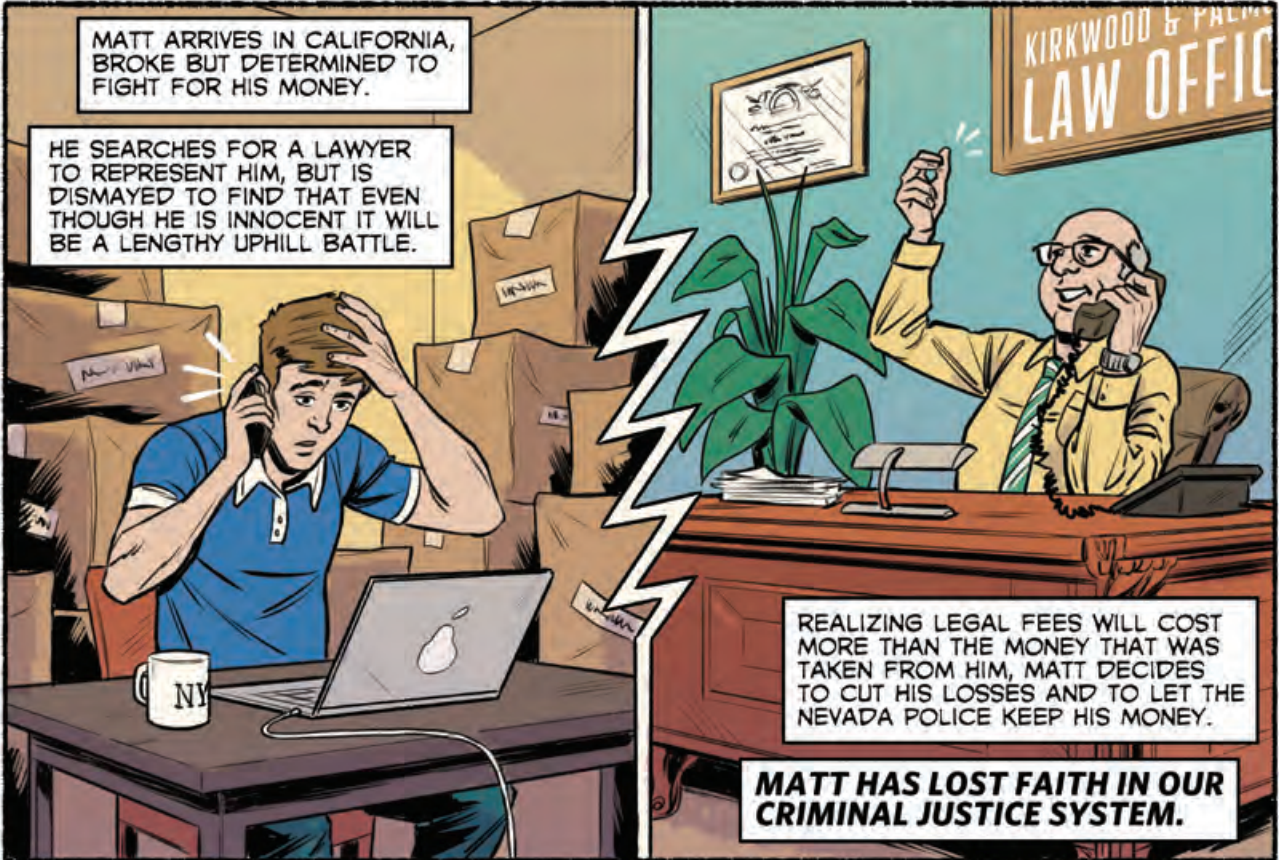
WHERE ARE THE DRUGS?

DID YOU KNOW THAT...
AS MUCH AS 90% OF ALL U.S. CURRENCY TESTS POSITIVE FOR TRACES OF NARCOTICS, MAKING IT EASY FOR AN OFFICER TO SEIZE CURRENCY UNDER THE PRETEXT THAT IT IS "DRUG MONEY."



AFTER ALL THAT EFFORT, THE POLICE OFFICER FINDS NO EVIDENCE OF ILLEGAL ACTIVITY. MATT THINKS THE ORDEAL IS ALMOST OVER, BUT THE POLICE OFFICER STILL "SUSPECTS" THAT THE CASH WAS INVOLVED IN A DRUG TRANSACTION.

THE OFFICER DECIDES HE HAS PROBABLE CAUSE TO SEIZE MATT'S MONEY EVEN THOUGH HE HAS NO REAL EVIDENCE THAT MATT IS A CRIMINAL. MATT IS ANGRY BUT HE HAS NO CHOICE: THE OFFICER TAKES THE CASH, WRITES MATT A RECEIPT, AND TELLS HIM TO "MOVE ALONG."

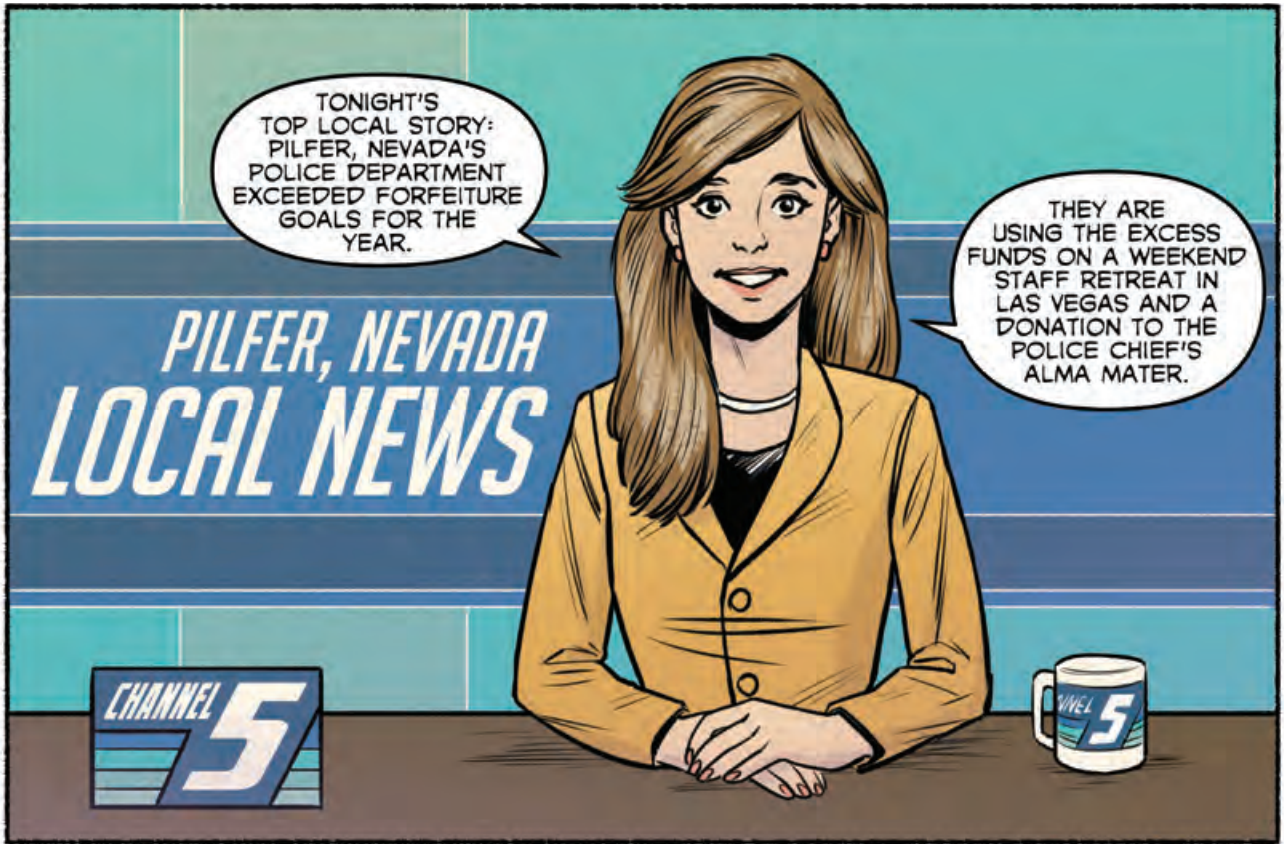


MATT ARRIVES IN CALIFORNIA, BROKE BUT DETERMINED TO FIGHT FOR HIS MONEY.

HE SEARCHES FOR A LAWYER TO REPRESENT HIM, BUT IS DISMAYED TO FIND THAT EVEN THOUGH HE IS INNOCENT IT WILL BE A LENGTHY UPHILL BATTLE.

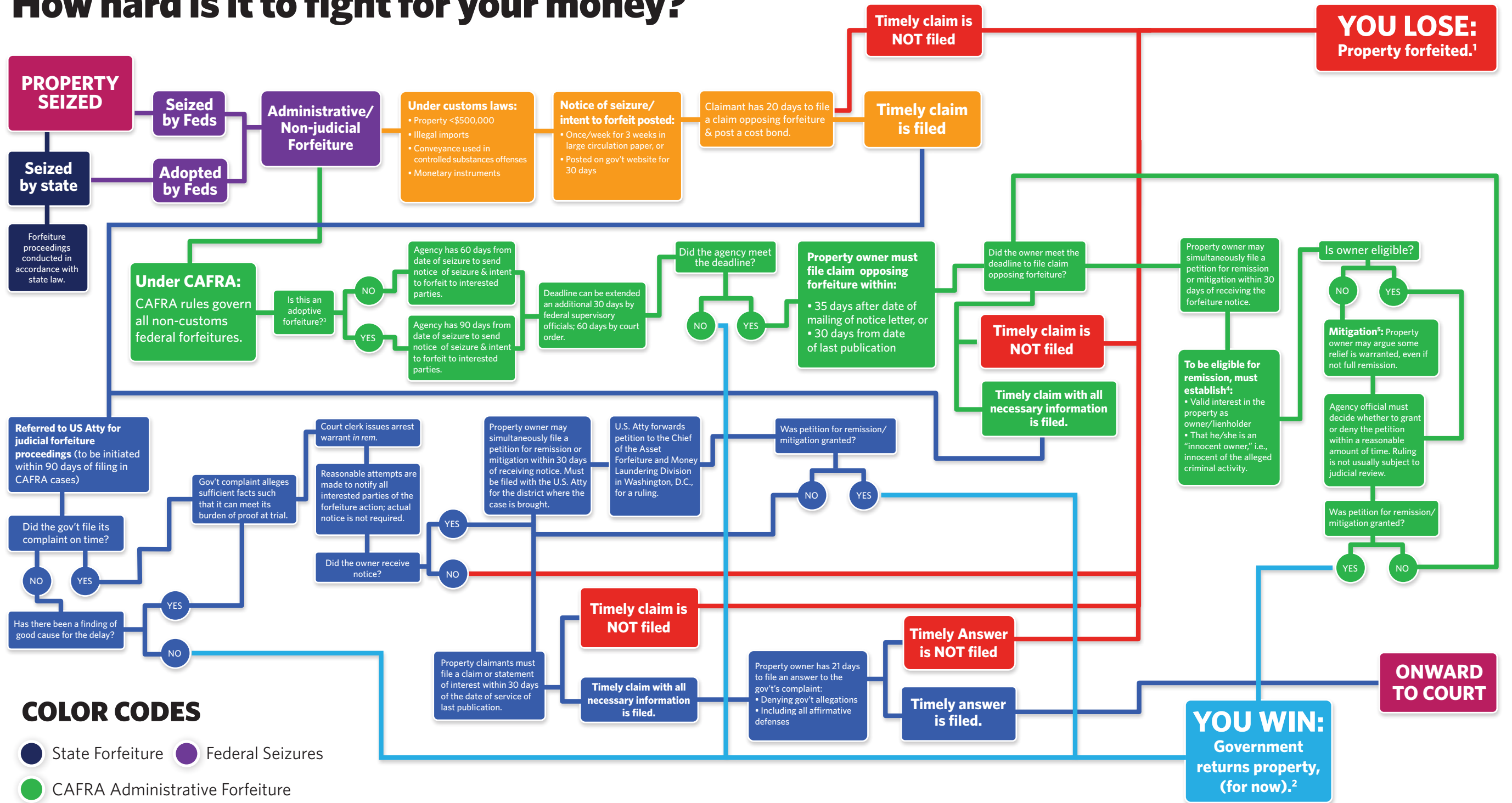
REALIZING LEGAL FEES WILL COST MORE THAN THE MONEY THAT WAS TAKEN FROM HIM, MATT DECIDES TO CUT HIS LOSSES AND TO LET THE NEVADA POLICE KEEP HIS MONEY.

MATT HAS LOST FAITH IN OUR CRIMINAL JUSTICE SYSTEM.



**THE SHOCKING
STORY YOU JUST
READ IS BASED ON A
REAL INSTANCE OF
CIVIL ASSET
FORFEITURE.**

How hard is it to fight for your money?



1 The agency has made a final determination that all "right, title, and interest in [the] property [is] vest[ed] in the United States." 18 U.S.C. § 981(f).
2 Possession of the property is transferred back to the party challenging the forfeiture. This does not necessarily preclude future forfeiture actions.
3 Adoptive forfeitures have been largely limited by recent, internal DOJ policy.
http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf.
4 Remission is the return of seized property after some internal administrative process is conducted by the seizing agency.
5 Mitigation is the return of a portion of the seized property, after the owner admits it was used in illegal activity, and if the seizing agency finds extenuating circumstances to justify the return.

Where Do Forfeiture Funds Go? Follow the Money

As Columbia, Missouri, Police Chief Ken Burton described civil forfeiture funds, “It’s kind of like pennies from heaven. It gets you a toy or something that you need, is the way we typically look at it.”

“Need” may be too strong a word. Throughout the country, law enforcement agencies have made some highly questionable purchases with their forfeiture dollars, often depending on the money from forfeiture for a substantial portion of their budgets each year:

- **The town of Sunrise, Florida**, abused forfeiture laws to bring in millions of dollars, but the town did not have the legal staff needed to handle the volume of cases they were bringing and could not use forfeiture funds to pay for new staff. The solution? Use a local law firm instead. The town was knocked by the Justice Department for steering nearly \$375,000 to the firm in a sweetheart deal, without even being able to produce a contract for the firm’s services. The town also paid officers working asset forfeiture sting operations more than \$1 million in overtime and fringe benefits—all of it financed from the very forfeiture cases they were handling.⁵

- **The District Attorney of Fulton County, Georgia**, Paul Howard, spent thousands of dollars of forfeiture funds on office parties, alcoholic beverages, NBA tickets and other extravagances for his employees. Howard spent another \$6,000 in forfeiture proceeds on a home security system for his private residence. In an amazing display of the lax rules governing forfeiture expenses, all of these purchases were deemed above board.⁶

- **The Camden County, Georgia**, Sheriff’s office was banned from the federal Equitable Sharing program until the office repaid \$662,000 that an audit revealed had been used inappropriately. Over 15 years, the Camden County Sheriff’s office had seized over \$20 million in forfeiture funds. The Sheriffs were able to keep and spend this considerable amount of money with relatively few checks and balances. Sheriff

Bill Smith used some of it to pay for splurges, like a \$90,000 Dodge Viper for their D.A.R.E program that, according to the Sheriff’s spokesperson, is needed because “the whole point of this car is to grab the kids’ attention.” But that wasn’t nearly the worst of it. Smith paid jail inmates \$50 a week to renovate and build his weekend home, the Ponderosa, and donated \$250,000 to The Citadel, Sheriff Smith’s alma mater, to develop a scholarship in his name. Sheriff Smith was voted out of office in 2008, but the new sheriff, Tommy Gregory, worked to have Camden reinstated in the Equitable Sharing program—by *paying off the debt with increased state forfeiture funds*.⁷

- **The City of Philadelphia** has perfected turning their law enforcement personnel into bounty hunters. According to the Institute for Justice, from 2002 through 2012, Philadelphia seized \$64 million in funds, averaging about \$6 million a year. The forfeiture tally is incredible: 1,172 homes, 3,290 vehicles, and \$44 million in cash.⁸ They run their forfeiture program like a well-oiled machine—from the cop who seizes the property to the convoluted hoops people have to jump through to contest the seizure at City Hall. The process is dragged out for months, even years, putting property owners at the mercy of office schedulers and a few prosecutors. Facing a steep uphill battle and uneven odds, it is not surprising that many owners give up. Philadelphia law enforcement agencies are dependent on forfeiture revenue: The \$64 million forfeiture pot equaled 20 percent of the District Attorney’s office’s general budget. \$25 million was used to pay law enforcement salaries, including salaries of the prosecutors who bring the forfeiture actions against property owners.⁹ For many property owners, it’s not always sunny in Philadelphia.

Equitable Sharing: The Link Between the Feds and the States

Civil forfeitures are not always executed solely by state and local law enforcement in state courts or by federal agencies in federal courts. Sometimes, the two cooperate. Under a federal program known as “Equitable Sharing,”¹⁰ local or state law enforcement authorities that are “directly” involved in the seizure of property that is later civilly forfeited through federal procedures are eligible to receive up to 80 percent of the resulting proceeds.

“Participation” can mean taking part in a federal investigation or participating in a joint task force. Until recently, state and local authorities could also take advantage of a process known as “adoptive forfeiture,” where virtually any type of property could be seized under state law, and then handed off to the federal government for forfeiture under generally more permissive federal forfeiture laws. The originating agency would then receive up to 80 percent of the value of the cash or property. By order of the U.S. attorney general, adoptive forfeitures have been curtailed, but not ended. Federal agencies can still adopt forfeitures under a “public safety” exemption or they can obtain a federal seizure warrant for any property the exemption does not cover.

Equitable Sharing is big money for law enforcement agencies. Since 1984, when the Equitable Sharing program was first implemented, more than \$5 billion in forfeiture funds has been distributed. In one year alone, Justice Department payouts to state and local authorities totaled \$657 million.¹¹ Thousands of police departments and sheriffs’ offices participate; according to *The Washington Post*, hundreds of them rely on Equitable Sharing payouts for more than 20 percent of their budgets.¹²

However, there is a significant catch to these funds: They must be used exclusively for “law enforcement purposes.” This puts control of the funds—and their use—solely in the hands of the officials executing the seizures, outside of the control of legislators.

Equitable Sharing distorts local and state law enforcement priorities. In many jurisdictions, the forfeiture bounty has been great, but actual arrests and prosecutions have been few, which suggests that some agencies are more concerned with acquiring money than with stopping criminals. And as states enact laws to protect innocent property owners, Equitable Sharing offers a federal means to circumvent them.

In many states and on Capitol Hill, a growing chorus of lawmakers and policy experts has denounced this program.¹³ Starting in fiscal year 2019, the District of Columbia has mandated that all Equitable Sharing funds go directly to the city treasury, which will effectively take D.C. law enforcement out of the program altogether.¹⁴

Recently, the Justice Department announced that it would restrict the practice of “adoptive forfeitures,” with several significant exceptions.¹⁵ But this administrative change, while laudable, lacks the force of law and could be reversed at any time. It is also filled with caveats and special exceptions and touches only one small part of Equitable Sharing—adoptive forfeitures, which make up a small and diminishing percentage of the entire program. The bulk of the Equitable Sharing program is alive and well. Even taking into account this recent DOJ policy shift, the program deserves the attention of Congress.

Shocking Examples of Unjust Civil Forfeiture

These are just a few examples of innocent victims who have fallen prey to civil asset forfeiture abuse. For more instances go to www.heritage.org/ForfeitureAbuse.

G **GEORGIA** — Iraq War veteran Andrew Clyde owns a small gun shop armory in Athens, Georgia. In April 2013, the IRS seized nearly \$1 million from the company's bank account. Without any prior warning, two IRS agents showed up at his work with a seizure warrant. They justified their seizure citing a structuring offense—making repeated cash deposits under \$10,000 allegedly to avoid the creation of any record of those deposits. Even after his lawyer proved that all of the money was legitimately earned through lawful activity, the IRS still refused to return his money. Instead, the IRS offered a deal: If he let them keep \$300,000, the rest would be returned. Although Clyde decided to fight, after several months of costly (over \$150,000 in legal fees) and time-consuming negotiations, he settled before going to trial, forfeiting \$50,000. Testifying at a hearing on Capitol Hill, Clyde said, "I did not serve three combat terms in Iraq only to come home and be extorted by my government's use of civil forfeiture laws, but that is what I feel they have done to me, and I need you to stop it from happening to anyone else."¹⁶

IOWA — In Spirit Lake, Iowa, Carole Hinders owned and operated her restaurant, Mrs. Lady's Mexican Food, for nearly 40 years. In August 2013, through a secret warrant and with no warning, the federal government seized Carole's entire bank account—nearly \$33,000. She was not charged with any crime, nor did the government claim that her money was earned through any illegal activity; however, she was told by two IRS agents that they seized her account because she had made several cash deposits of slightly less than \$10,000. The IRS viewed this as an attempt to avoid a federal reporting requirement on deposits

DID YOU KNOW?

The IRS and other agencies can seize and forfeit bank accounts of individuals and small businesses for alleged structuring violations, using a law designed to help combat money laundering. The Bank Secrecy Act requires a bank to file a report for every transaction of more than \$10,000 in currency, but there is nothing in the law that says deposits must come from an illegitimate source. The government has increasingly used a law designed to catch criminals trying to launder their ill-gotten gains to target honest citizens. Between 2005 and 2012, more than a third of IRS structuring cases were civil cases where structuring itself was the only alleged offense. Over the same time period, funds seized purely for alleged structuring violations rose to \$26.5 million, an increase of 111 percent. Between 2007 and 2013, funds actually forfeited in these cases rose 490 percent.¹⁷ The Justice Department recently issued new rules limiting seizures of bank accounts and other financial assets involved in a structuring violation until after a defendant has been criminally charged or has been found to have engaged in additional criminal activity. While this is a step in the right direction, it still lacks the force of law and could be reversed at any time.

exceeding \$10,000. The simple explanation for this was that Carole's small establishment was cash-only; to avoid the danger of keeping large amounts of cash at the restaurant, she made frequent deposits to her bank account. Pro bono representation by the Institute for Justice made it possible for her to challenge the seizure, but the impact on her business was still devastating. After 16 months of litigation, the IRS agreed to return her money—she is one of the lucky ones. "I did not do anything wrong, but they took my money," said Ms. Hinders. "I was unable to pay my bills for the first time in my life. I had to borrow money, use my credit cards and beg vendors to extend me credit. This nightmare has left me broke, frightened and exhausted."¹⁸

MICHIGAN — At the Contemporary Art Museum in Detroit, Michigan, in 2008, a fun night out at a "Funk Night" event for 130 attendees morphed into a scene out of an action movie. Armor-clad police stormed the party with their guns drawn, forced attendees to the floor, and seized 40 vehicles from those in attendance. What heinous crime necessitated this treatment? It turned out that, unbeknownst to Funk Night patrons, the Art Institute failed to get a permit to serve alcohol. Using Prohibition-era reasoning combined with modern civil asset forfeiture law, the police determined that merely attending made everyone complicit. And because the cars were used to transport their users to the party, the cars were also "guilty" and subject to seizure. Police even seized a car parked in a friend's driveway over a mile away from the Art Institute. Attendees had to pay \$900 each to have their vehicles returned. Ironically, one of the patron's vehicles was stolen from the impound lot—a crime made possible by the Detroit police. Thankfully, a federal district court judge held the Funk Night seizures unconstitutional, calling the incident part of a "widespread practice" of detaining everyone present at a venue without an alcohol permit, searching them, and seizing their cars simply because of their presence.¹⁹

MINNESOTA — Minnesota's infamous Metro Gang Strike Force, a multi-jurisdictional task force, was dissolved over the widespread abuse of civil forfeiture laws. Strike Force personnel seized property from

Minnesotans *for their own personal use*. Among their prizes: Flat screen televisions, jewelry, sports memorabilia, and cash. One seized SUV was returned with 20,000 more miles on it than when it had been taken. Strike Force personnel were accused of physically assaulting those whose property was being seized. In one particularly disturbing incident, an officer attempting to kick a woman kicked her toddler in the head instead. The Strike Force was terminated in 2009 after its unconscionable tactics were made public. Victims of the illegal seizures and abusive tactics were awarded \$840,000 in a settlement. Minnesota reformed its forfeiture laws in 2014 to require a criminal conviction before property can be forfeited.²⁰

NEW YORK — For 27 years, brothers Jeffrey, Richard, and Mitch Hirsch ran Bi-County Distributor Inc., a small business that sold candy, snacks, and cigarettes to local convenience stores. In May 2012, three family business bank accounts totaling more than \$446,000 were seized by the IRS. Why? Just like in Carole Hinders's case, authorities alleged that the Hirsch brothers had committed a "structuring" violation by making repeated cash deposits of less than \$10,000. Two years later, none of them were charged with a crime, nor were they able to contest the seizure in front of a judge because federal prosecutors refused to file a forfeiture motion. They were literally left languishing while their money remained frozen. Bi-County was able to survive only because long-time, faithful vendors extended credit, but the toll has been demoralizing. "We're just hanging on as a family here," Jeff Hirsch said. "We weren't going to take a settlement, because I was not guilty."²¹ In January 2015, after considerable national media attention, including a front page article in *The New York Times* and an editorial in *The Wall Street Journal*, federal prosecutors agreed to return all of the seized funds to the Hirsch brothers.

PENNSYLVANIA — In March 2014, police arrested Chris and Markela Sourovelis's son for selling \$40-worth of heroin to an undercover police officer. Soon after the arrest, the Philadelphia Police Department raided their home, SWAT-style with guns drawn, and found small amounts of the drug in their 22-year-old

son's bedroom. As if it was not shocking enough to learn that their child had a drug problem, the Sourovelises discovered they were now homeless. Their home was being confiscated under civil forfeiture laws, which do not require the property *owner* to be the one who actually commits the crime.²² After a lengthy legal battle, the Philadelphia District Attorney's office was finally forced to back down in December 2014—a miracle just in time for the holidays.²³

TEXAS — Between 2006 and 2008, Tenaha, Texas, established itself as a hotbed for civil forfeiture abuse. Tenaha police executed dozens of traffic stops in which vast sums of money and property were seized, though no criminal charges were filed against drivers or passengers. One of the victims of this abuse, Dale Agostini, had set out to buy restaurant equipment with his fiancée, his young child, and an employee. Tenaha police stopped Agostini for allegedly driving on the wrong side of the road, searched his car, and discovered a treasure trove totaling \$50,000 in cash. Although Agostini had proof that the money was clean, police arrested him for money laundering, seized his cash, and turned his child over to child protective services. Police never charged Agostini and returned his child, but it took months before he got his money back. These deplorable tactics generated millions of dollars for Tenaha and prompted a class action lawsuit. The city settled in 2012.²⁴

VIRGINIA—In November 2012, Victor Guzman, a Pentecostal church secretary originally from El Salvador, and his brother-in-law were stopped for speeding near Emporia, Virginia on Interstate 95. The Virginia State Trooper did not issue them a ticket, nor did he charge them with a crime. Instead, the trooper searched Guzman's vehicle, discovering \$28,500 in cash. Guzman explained to the officer that the money came from donations to their church, and did not belong to them. He said that they were carrying the money with the church's permission in order to

purchase a trailer and a parcel of land for their parish, facts later confirmed by church officials. The trooper paid no attention, stating that their stories were "inconsistent" and that they had "disclaimed ownership of the money." This was not surprising since they told the trooper that the money belonged to the church and any "inconsistency" (more likely a misunderstanding) was probably due to the fact that Guzman's brother-in-law spoke no English whatsoever and English was Guzman's second language. The trooper seized the cash and left Guzman with a receipt. Guzman's church eventually got its money back, but only after a lawyer took on the case pro bono and challenged the seizure in court.²⁵

WISCONSIN — In Brown County, Wisconsin, Joel Greer was arrested by the County Drug Task Force, with bail set at \$7,500. As any good mother would, Beverly Greer immediately set to work gathering the funds necessary to free her son. Beverly called the Brown County jail, where Joel was being held, and was explicitly told to bring the bail *in cash*—even though Wisconsin law allows you to pay for a bond with a cashier's check, credit card, money order, or cash. A series of visits to ATMs secured the \$7,500, and Mrs. Greer reported to the jail to bring her son home. But rather than accept the cash and release her son on bail, Brown County police brought in a drug dog, which alerted to trace amounts of illegal drugs on the bills. Brown County police then seized the cash and refused to release Joel Greer. To justify this, the police simply ignored the ATM receipts proving she had withdrawn the money from her bank and called the cash "drug money." In reality, it was the family's hard-earned savings and Mrs. Greer's disability pay. The Greers didn't get their money back for four months—and only after an attorney got involved on their behalf. Under Wisconsin law, law enforcement authorities may keep half of any seized amount exceeding \$2,000, creating a perverse incentive for local law enforcement authorities to seize first and ask questions later.²⁶

What Can Be Done?

Civil forfeiture abuse threatens the integrity of our criminal justice system and ought to concern all Americans. Thankfully, there are a variety of common-sense reforms. These reforms include:

Restore Legislative Control of Forfeiture Proceeds by Redirecting Them to the General Fund. Law enforcement should not be a profit center. Lawmakers should bar law enforcement agencies from retaining the forfeiture funds they generate and mandate that these proceeds go instead to a jurisdiction's General Fund.

Eliminate Equitable Sharing. The federal government should not be encouraging state and local law enforcement to bypass state and local laws. Equitable Sharing hampers state efforts to protect innocent property owners and reinforces the profit motives at the core of forfeiture abuse. Internal DOJ policy changes are insufficient; the program should be abolished. Until then, states should consider policy reforms that disallow their law enforcement agencies from bypassing their own laws.

Raise the Burden of Proof. The government should be required to demonstrate that property is subject to forfeiture by "clear and convincing evidence," a standard significantly higher than the current "preponderance of the evidence."

Reaffirm the Presumption of Innocence. Property owners should not have to disprove the government's case; rather, the burden should be on prosecutors to demonstrate that owners knew their property was being used in the commission of a crime.

Ban "Bartering." Property owners should not be pressured into waiving their rights on the side of a road or in the heat of the moment. All law enforcement agents should be barred from "bartering"—offering to let property owners go if they sign away their property on the spot.

Provide for Indigent Defense. Forfeiture is a highly complex system that most citizens are ill-prepared

to face alone. Because of its quasi-criminal nature, claimants who cannot afford counsel should be able to petition a court for the appointment of counsel at the government's expense, and victorious property owners who retained counsel should be afforded a chance to recoup their attorney's fees.

Protect Property Owners' Rights in Administrative Forfeitures. Most federal civil forfeiture cases begin and end in the bowels of a federal agency. Agencies should be required to reform their internal procedures to make the process fairer and more transparent, clearly advising potential claimants about their rights to contest a seizure and to legal representation. Property owners should also be afforded the right to a prompt pre-seizure or immediate post-seizure hearing before a judge.

Ensure Transparency Through Reporting Requirements. Law enforcement agencies involved in civil forfeiture cases should be required to record the details of their seizures and forfeitures. These reports should specify what was seized, the amount or value of the seized goods, the alleged criminal conduct giving rise to the forfeiture, whether anyone was ever arrested for, or convicted of, said criminal conduct, whether the forfeiture action was challenged, the final disposition of the property or currency, and how forfeiture funds have been spent.

Provide for Review of Forfeiture Settlements. Given the complexity of forfeiture law and the tremendous pressure that property owners face to settle forfeiture cases (sometimes because they are threatened with criminal charges if they continue to contest the forfeiture), in cases in which a claimant is not represented by counsel, any proposed settlement should be reviewed by a neutral third party, preferably a judge.

Resources to Learn More



Policing for Profit: The Abuse of Civil Asset Forfeiture

By: Institute for Justice | www.endforfeiture.com



Civil Asset Forfeiture: Good Intentions Gone Awry and the Need for Reform

By: John G. Malcolm | The Heritage Foundation



Civil Asset Forfeiture: 7 Things You Should Know

By: The Heritage Foundation



National Association of Criminal Defense Lawyers

www.nacdl.org/forfeiture



American Civil Liberties Union

www.aclu.org/assetforfeiture



The Forfeiture Racket: Police and prosecutors won't give up their license to steal

By: Radley Balko | Reason.com



Taken: Under civil forfeiture, Americans who haven't been charged with wrong-doing can be stripped of their cash, cars, and even homes. Is that all we're losing?

By: Sarah Stillman | The New Yorker



Stop and Seize: *Aggressive police take hundreds of millions of dollars from motorists not charged with crimes*

By: The Washington Post—6 Part Series



Last Week Tonight with John Oliver

Segment on Civil Asset Forfeiture Abuse | HBO

Endnotes

- 1 See Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic, & Scott Bullock, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INSTITUTE FOR JUSTICE (March 2010), available at http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.
- 2 Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).
- 3 *Policing for Profit*, *supra* note 1.
- 4 Pub. L. No. 106-185, 114 Stat. 202 (2000).
- 5 See Office of the Inspector Gen., U.S. Dep't of Justice, Audit of the City of Sunrise Police Dept's Equitable Sharing Program Activities (2014), available at <http://www.justice.gov/oig/reports/2014/g4015003.pdf>.
- 6 See Report: *Fulton DA Spent Public Funds on Parties*, Athens Banner-Herald (June 7, 2013), <http://onlineathens.com/local-news/2013-06-07/report-fulton-da-spent-public-funds-parties>.
- 7 Terry Dickson, *Camden County Works Way Back into Federal Seized Assets Program*, FLA. TIMES UNION, Dec. 7, 2011, available at <http://jacksonville.com/news/crime/2011-12-07/story/camden-county-works-way-back-federal-seized-assets-program>.
- 8 See *Fighting the Philadelphia Forfeiture Machine: Philadelphia Deprives People of Their Rights While Trying to Forfeit and Profit from Their Property*, INSTITUTE FOR JUSTICE, available at <http://www.ij.org/philadelphia-forfeiture-backgrounder>.
- 9 *Id.*
- 10 21 U.S.C. § 881(e)(3).
- 11 See *Civil Asset Forfeiture: 7 Things You Should Know*, HERITAGE FOUNDATION FACTSHEET No. 141 available at <http://www.heritage.org/research/reports/2014/03/civil-asset-forfeiture-7-things-you-should-know>.
- 12 See Robert O'Harrow Jr., Sari Horwitz, & Steven Rich, *Holder Limits Seized-asset Sharing Process that Split Billions with Local, State Police*, WASH. POST, Jan. 16, 2015, available at http://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/2015/01/16/Oe7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html.
- 13 See Letter from Sens. Chuck Grassley (R-IA), Mike Lee (R-UT), and Reps. Jim Sensenbrenner (R-WI), & John Conyers (D-MI) to Eric Holder, Attorney General (Jan. 9, 2015), available at <http://sensenbrenner.house.gov/news/documentsingle.aspx?DocumentID=397679>.
- 14 See Jason Snead & Andrew Kloster, *Washington, D.C., Civil Forfeiture Reform: A Model for the States*, HERITAGE FOUNDATION ISSUE BRIEF No. 4312 (Dec. 5, 2014) available at <http://www.heritage.org/research/reports/2014/12/washington-dc-civil-forfeiture-reform-a-model-for-the-states>.
- 15 See ATTORNEY GENERAL, ORDER, PROHIBITION ON CERTAIN FEDERAL ADOPTIONS OF SEIZURES BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2015), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf.
- 16 Richard Morgan, *IRS Apologizes After Seizures Hammer Small Business*, N.Y. POST, Feb. 11, 2015, available at http://www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html?_r=0
- 17 See Dick Carpenter II & Larry Salzman, *Seize First, Question Later: The IRS and Civil Forfeiture*, INSTITUTE FOR JUSTICE (Feb. 2015) available at <http://www.ij.org/seize-first-question-later>.
- 18 Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. TIMES, Oct. 25, 2014, available at http://www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html?_r=1.
- 19 See, e.g., Press Release, Federal Judge Rules CAID Raid Arrests and Car Seizures Unconstitutional, ACLU (2012), available at <https://www.aclu.org/criminal-law-reform/federal-judge-rules-caid-raid-arrests-and-car-seizures-unconstitutional>.
- 20 OFFICE OF THE MINNESOTA COMM'R OF PUB. SAFETY, REPORT OF METRO GANG STRIKE FORCE REVIEW PANEL (Aug. 20 2009), available at https://dps.mn.gov/divisions/co/about/Documents/final_report_mgsf_review_panel.pdf.
- 21 Shaila Dewan, *supra* n. 18.
- 22 *What's Yours Is Theirs: A Homeowner Challenges Philadelphia's Abusive Civil Forfeiture Law*, WALL ST. J., Sept. 4, 2014, available at <http://www.wsj.com/articles/whats-yours-is-theirs-1409702898>.
- 23 Press Release, Institute for Justice, *Philadelphians Save Homes from Civil Forfeiture Machine—But Continue Legal Fight over City's Unconstitutional Program* (Dec. 18, 2014), available at <http://ij.org/philadelphia-forfeiture-release-12-18-2014>.
- 24 Sarah Stillman, *TAKEN: Under Civil Forfeiture, Americans Who Haven't Been Charged with Wrongdoing Can Be Stripped of Their Cash, Cars, and Even Homes. Is That All We're Losing?*, New Yorker, Aug. 12, 2013, available at <http://www.newyorker.com/magazine/2013/08/12/taken>.
- 25 Editorial Board, *Forfeiture Without Due Process*, WASH. POST, Jan. 2, 2012, http://www.washingtonpost.com/opinions/forfeiture-without-due-process/2011/12/22/gIQAckn3WP_story.html.
- 26 Jason Snead & Andrew Kloster, *Bail Bond Bait and Switch: Police Seize Money from Innocent Mother*, THE DAILY SIGNAL (Dec. 4, 2013), <http://dailysignal.com/2013/12/04/capitalizing-mothers-pain-civil-forfeiture-wisconsin/>.

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