



Written Statement of

DARPANA M. SHETH
Attorney, Institute for Justice

before the

United States House of Representatives Committee on the Judiciary

**Subcommittee on Crime, Terrorism,
Homeland Security, and Investigations**

concerning

Civil Asset Forfeiture

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Institute for Justice
901 North Glebe Road
Suite 900
Arlington, Virginia 22203
(703) 682-9320
www.ij.org
www.endforfeiture.com

Chairman Goodlatte, Subcommittee Chairman Sensenbrenner, Subcommittee Vice Chairman Gohmert, and Distinguished Members of the Subcommittee:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸ *Id.*

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

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

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

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

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

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

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

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

¹¹ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹ *Id.* at 226.

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

Act of 1984²¹ authorized, for the first time, the forfeiture of property used (or intended to be used) to “facilitate” a drug offense.²² Congress also has expanded forfeiture beyond alleged instances of drug violations to include myriad crimes. Today, there are more than 400 federal forfeiture statutes relating to a number of federal crimes, from environmental crimes to the failure to report currency transactions.²³ Moreover, the creation of the federal “Equitable Sharing Program”²⁴ (discussed more fully in Section III) has expanded the use of civil forfeiture by state and local law enforcement by giving them the lion’s share of forfeiture proceeds for simply referring forfeiture cases to federal authorities.²⁵

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

By allowing law-enforcement officials to retain forfeiture proceeds, federal forfeiture laws create a perverse financial incentive to maximize the seizure of forfeitable property. Consequently, unlike its early relatives in the Prohibition Era when forfeiture was merely incidental, with today’s forfeiture laws, forfeiture of property is often the primary purpose of the seizure. As the former chief of the federal government’s Asset Forfeiture and Money Laundering Offices observed, “We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the

²¹ Pub. L. No. 98-473, 98 Stat. 1976.

²² See 21 U.S.C. §§ 881(a)(6)-(7).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁴ U.S. Dep’t of Justice, *FY 2013 Asset Forfeiture Fund Reports: Total Net Deposits to the Fund by State of Deposit as of September 30, 2013*, <http://www.justice.gov/jmd/afp/02fundreport/2013affr/report1.htm>; see also Rep. Tim Walberg, Op-Ed., *Stopping the Abuse of Civil Forfeiture*, WASH. POST, Sept. 4, 2014, http://www.washingtonpost.com/opinions/tim-walberg-an-end-to-the-abuse-of-civil-forfeiture/2014/09/04/e7b9d07a-3395-11e4-9e92-0899b306bbea_story.html.

³⁵ *Id.*

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

³⁷ *Id.*

The Treasury Department maintains its own robust forfeiture program³⁸ which includes participation by the:

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

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

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

III. THE FEDERAL EQUITABLE SHARING PROGRAM

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

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

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

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

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

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

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

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

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

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

⁴² *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵¹ *Id.*

⁵² *Supra* note 45.

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

The Justice Department itself has acknowledged the limited reach of this policy change, noting that “[o]ver the last six years, adoptions accounted for roughly three percent of the value of forfeitures in the Department of Justice Asset Forfeiture Program” which includes both criminal and civil forfeitures.⁵⁴ And according to Justice Department data reviewed by IJ, adoptions only accounted for about 10 percent of overall Justice Department seizures from 2008 to 2013.⁵⁵

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

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

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

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

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

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

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

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

⁵⁵ See Appendix B.

⁵⁶ See Appendix A.

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

⁵⁸ U.S. Const. art. I, § 9, cl. 7.

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

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

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

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

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

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

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

⁶⁰ THE FEDERALIST NO. 58 (James Madison).

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

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

⁶³ 273 U.S. 510 (1927).

⁶⁴ 409 U.S. 57 (1972).

⁶⁵ 481 U.S. 787 (1987).

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

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

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

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

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

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

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

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

⁶⁶ *Id.* at 805-07.

⁶⁷ 446 U.S. 238, 250 (1980).

⁶⁸ *Id.* at 249-50 (internal citations omitted).

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

Moreover, property owners who have had their money seized have no opportunity to contest the seizure until the forfeiture trial itself, which can be months or even years away. Failing to provide a prompt hearing at which property owners can contest the validity of the seizure can prevent innocent individuals from securing counsel for the forfeiture trial. It can also deprive an individual “of the very means by which to live while he waits” for the forfeiture trial.⁶⁹ Holding onto seized funds until final adjudication without a preliminary hearing can harm the ability of those of more modest means “to obtain essential food, clothing, housing, and medical care”;⁷⁰ to make mortgage⁷¹ or car payments; or pay utility⁷² and other bills. Moreover, the restraint can damage a person’s credit rating, reducing the ability to obtain a loan to pay for these necessities.⁷³ The Supreme Court has repeatedly recognized that the Due Process Clause requires a hearing before the government can deprive individuals of property needed to pay for living expenses.⁷⁴

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

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

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

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

⁷⁰ *Id.*

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

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

⁷³ *Doehr*, 501 U.S. at 11.

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

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

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

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

CONCLUSION

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

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

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

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

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

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

APPENDIX A

FEDERAL GOVERNMENT



FORFEITURE¹
LAW GRADE

FORFEITURE LAW

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

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

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

U.S. DEPARTMENT of JUSTICE ASSETS FORFEITURE FUND²

| | | Deposits to Fund | | |
|------------------|--------------------|---------------------------|---------------|------------------|
| | Net Assets in Fund | Cash and Cash Equivalents | Property | Total Deposits |
| FY 2005 | \$448,000,000 | \$514,900,000 | \$80,600,000 | \$595,500,000 |
| FY 2006 | \$651,100,000 | \$1,009,200,000 | \$115,700,000 | \$1,124,900,000 |
| FY 2007 | \$734,200,000 | \$1,409,000,000 | \$106,700,000 | \$1,515,700,000 |
| FY 2008 | \$1,000,700,000 | \$1,222,600,000 | \$63,400,000 | \$1,286,000,000 |
| FY 2009 | \$1,425,883,000 | \$1,376,423,000 | \$68,145,000 | \$1,444,568,000 |
| FY 2010 | \$1,687,400,000 | \$1,502,466,000 | \$70,864,000 | \$1,573,330,000 |
| FY 2011 | \$1,760,544,000 | \$1,580,584,000 | \$157,381,000 | \$1,737,965,000 |
| FY 2012 | \$1,620,387,000 | \$4,194,465,000 | \$120,245,000 | \$4,314,710,000 |
| FY 2013 | \$1,855,767,000 | \$1,826,480,000 | \$185,769,000 | \$2,012,249,000 |
| Total | | \$14,636,118,000 | \$968,804,000 | \$15,604,922,000 |
| Average per Year | | \$1,626,235,333 | \$107,644,889 | \$1,733,880,222 |

¹ Following the grading methodology for states from Marian R. Williams, Ph.D., Jefferson E. Holcomb, Ph.D., Tomislav V. Kovandzic, Ph.D., & Scott G. Bullock, Policing For Profit: The Abuse Of Civil Asset Forfeiture (Institute for Justice, 2010), available at <http://www.ij.org/policingforprofit>.

² Data retrieved from Assets Forfeiture Fund Annual Financial Statements: <http://www.usdoj.gov/jmd/afp/01programaudit/index.htm>.

U.S. DEPARTMENT of TREASURY FORFEITURE FUND³

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

³ Data retrieved from Treasury Forfeiture Fund Annual Accountability Reports: <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Pages/annual-reports.aspx>

APPENDIX B

By the Numbers:

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

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

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

Most Equitable Sharing Seizures Continue

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



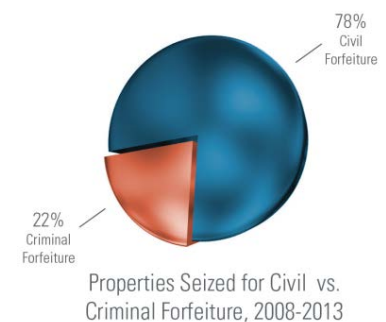
Most DOJ Seizures Continue

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



Forfeitures Without Convictions Continue

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



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

APPENDIX C



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

The Washington Times

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



INVESTOR'S
BUSINESS
DAILY

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



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

The Philadelphia Inquirer

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

THE WALL STREET JOURNAL.

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

Deseret News

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

The Washington Post

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

StarTribune

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

The Des Moines Register

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

Richmond Times-Dispatch

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

The Des Moines Register

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

ORANGE COUNTY REGISTER

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

LAS CRUCES SUN-NEWS

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

The Times-Tribune

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



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

THE WALL STREET JOURNAL.

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



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

The Times

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

The Des Moines Register

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

The Dallas Morning News

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

The Philadelphia Inquirer

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

The Press OF ATLANTIC CITY

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

THE WALL STREET JOURNAL.

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

The Gainesville Sun

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

U-T San Diego

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

LAS VEGAS REVIEW-JOURNAL

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

The Augusta Chronicle

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

The Star-Ledger

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

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