

# Property Seizures on Trial

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By Richard Miniter

Americans are losing their homes, cars, cash and other valuables - to the police. Civil forfeiture - an ancient legal doctrine expanded to prosecute the war on drugs - allows the police to arrest property, charge it with a crime and hold it indefinitely, though the owner may never be charged with a crime.

"Because the property itself is the defendant, the guilt or innocence of the property owner is irrelevant," E. E. "Bo" Edwards, chairman of the Forfeiture Abuse Task Force of the National Association of Criminal Defense Lawyers, told Congress in September.

Forfeiture, which traces its roots to medieval legal theory, has turned modern law enforcement into a money-raising enterprise in many parts of the nation. Law enforcement officials have seized more than \$2.6 billion worth of houses, cash, cars and other assets since 1985. Another \$1.5 billion in seized assets are currently "in process," according to the Justice Department's Executive Office for Asset Forfeiture. The loot is typically divided among law enforcement agencies all the way from local sheriff's offices to the federal Drug Enforcement Administration.

The result is a policy very popular with police, their paymasters and citizens eager to hit criminals in the wallet. Police insist that forfeiture is a necessary weapon in the war on drugs. Without being able to strip ill-gotten gains from drug kingpins and other lawbreakers, they say, law and order would break down. Besides, say advocates, forfeiture produces a kind of poetic justice - making criminals pay for law enforcement.

But critics say that, as legal weapons go, forfeiture is more of a nuclear warhead than a smart bomb. Besides criminal defense lawyers, the opposition ranks include civil or economic libertarians, property rights activists and a growing number of judges.

There are two types of forfeiture, criminal and civil. Criminal forfeiture involves the surrender of property after the owner has been convicted of a crime. Civil forfeiture is much more controversial, allowing government officials to seize property without warning or compensation if they believe it can be linked to criminal activity. The burden of proof is on the owner if he seeks to recover his property, even if he has never been convicted of or even charged with a crime.

Civil forfeiture had been a quiet backwater of the law since the Civil War. Then, in 1984, Congress passed the Comprehensive Crime Control Act, empowering federal and local officials to seize the emblems of success from drug dealers - their cars and yachts, houses and bank accounts. But forfeiture is not limited to drug cases. Federal and local lawmakers have expanded its use to cover a large number of criminal activities. Some cities, for example, now seize the automobiles of men suspected of soliciting prostitutes. "The process has run amok," says Edwards. "Law enforcement agencies, in their zeal, have turned the war on drugs into a war on the Constitution."

The Pittsburgh Press, after a 10-month investigation by Pulitzer Prize-winning reporters Mary Pat Flaherty and Andrew Schneider, estimated in 1991 that 80 percent of people whose property is seized by the government are never charged with a crime.

And most of the property taken is not the high-priced cars, speedboats and other toys of drug lords. Only 17 percent of the assets of the more than 25,000 items seized in 1989 and 1990 are valued at more than \$50,000, according to a DEA data base.

The six-part series by Flaherty and Schneider uncovered a number of anomalies in the use of forfeiture. Most disturbing was the potential they uncovered for money to sway the decisions of law enforcement. Many forfeitures, for example, begin with tips from informers who are paid with the proceeds. Most informers receive about 10 percent of any cash seized by the DEA as a result of their tips.

This money doesn't always go to the most savory characters. Anthony Tait, a Hell's Angel and confessed drug user, earned about \$1 million from the FBI in the late eighties, \$250,000 of which came from assets forfeited thanks to his information.

Informers are often themselves convicted felons who are trying to win reduced sentences. Juries frequently don't believe them and acquit the accused, but the police get to keep the property anyway. Steve R. Mudd, who earned \$4.65 an hour for his undercover work in Kirksville, Mo., in 1989 and 1990, fingered 35 people who he said sold him drugs. Mudd, who didn't wear a hidden microphone, insisted on working alone. Taking Mudd at his word, police searched homes and made several arrests. All of the cases fell apart when Mudd recounted details in court that contradicted his own written reports and when the "drugs" Mudd said he bought turned out to be powdered Tylenol 3.

This was small comfort for Matthew Farrell, whose 60-acre farm was seized by city and county police based on Mudd's testimony that Farrell had grown marijuana that he sold to Mudd. Though police searches turned up no evidence, Farrell's house and farm became a federal forfeiture case. The prosecutor told the Press reporters that the Farrell property was turned over to the federal government because 80 percent of the proceeds would come back to the local police that way; Missouri keeps all nonfederal forfeiture proceeds for its general fund.

The Justice Department paid informers about \$24 million in 1990 and about \$22 million in 1991. Of the informers without a criminal record, perhaps the most ambitious are airline ticket agents who tip off federal drug agents to large cash sales. Sometimes eager clerks finger people such as Willie Jones.

Jones, who owns a Tennessee landscaping service, testified before a House Government Operations subcommittee hearing on forfeiture last September on his travails. In February 1991, he paid cash for a round-trip ticket from Nashville to Houston, apparently making the ticket agent suspicious. Before he could board the plane, airport police stopped him for questioning. Though a search revealed no drugs, the two officers found his wallet contained \$9,600. Jones explained that he was going to Houston to buy shrubbery, as he does twice every year, and the growers wanted to be paid in cash. The agents seized the cash, giving Jones a DEA receipt that read "unspecified amount of U.S. currency."

Jones later produced documents showing that he regularly made trips each spring and fall to buy plants from nurseries in other states for his business. A father of three girls, he had no police record, except for traffic offenses.

As in all such cases, Jones was required to prove that he deserved his money back, a procedure that can't get under way until the owner posts a bond for 10 percent of the amount seized. And that's only the first hurdle. The level of proof the government must meet to hang on to property seized under civil forfeiture is much lower than in other courtroom proceedings.

This "allows the government to dispossess property owners based only on hearsay and innuendo - `evidence' of insufficient reliability to be admissible in a court of law," writes Terrance G. Reed, a partner at the Washington law firm Asbill, Junkin and Myers, in a recent paper for the Cato Institute.

Jones fell afoul of an increasingly controversial police practice of stopping people who fit statistical "profiles" of likely drug suspects, profiles that some critics say amount to thinly veiled racial prejudice. In one celebrated case, Kevin Belcher, a former center for the New York Giants, was searched in the Dallas/Fort Worth airport because he fit the profile of a drug courier. Acting on a tip from the Detroit airport where Belcher departed, DEA agents in Dallas stopped and searched him.

Belcher, who wasn't charged with a crime, gave the agents more than \$18,000 that he was carrying, saying he was going to attend an auction of vintage cars in El Paso that required cash bids. The profile that he fit, according to the agents cited in the Press, was that he had bought a one-way ticket on the day of departure, was traveling to a city considered to be a major exporter of marijuana, and was carrying \$100, \$50, \$20, \$10 and \$5 bills.

Sometimes simply carrying large amounts of cash is enough to warrant a search; many police do not think there is any legitimate reason to carry large amounts of cash. In another case uncovered by the Press, a Mexican-American man, Johnny Sotello, had \$23,000 seized by sheriff's deputies in Jefferson Davis Parish, La., when his truck overheated in April 1989. The deputies stopped at the disabled vehicle, offering to help and asking to search his vehicle. He agreed and told them when asked that he was carrying the cash. A licensed buyer of heavy equipment, he explained he was attending auctions. The officers pulled a door panel from the truck and said it could be used as a hiding place for drugs. They seized the truck and the cash, but did not arrest Sotello.

Sotello, who was never charged with a crime, fought for two years for the return of his money and property. In March 1990, the Sheriff's Office offered him a deal - the return of the truck and half the cash. Sotello accepted and the Sheriff's Office kept \$11,500.

Local and state police now routinely seize any large amount of cash carried by suspected drug couriers, even if no drugs are found. And the suspects are disproportionately minorities. In the 121 alleged drug courier cases examined by Flaherty and Schneider in which money was seized and no drugs were found, more than three-fourths of the targets were black, Hispanic or Asian.

Complaints that "profiling" violates the rights of minorities have limited its use as a courtroom argument of prosecutors. Instead, when cash is impounded, police usually say the money is tainted with drugs. That may testify as much as anything to advances in detecting ever more

minute amounts of illegal substances. Even if a specially trained drug-sniffing dog detects the scent of, say, cocaine, that doesn't mean the currency was used in the drug trade.

Dogs have sniffed as little as a nanogram of contraband - one billionth of a gram. At that level of scrutiny, technicians say, almost all the currency in circulation can be described as tainted with drugs. About 96 percent of the currency examined over a seven-year period by Toxicology Consultants Inc., a Miami-based private lab, was found to be contaminated by cocaine, and other labs report similar levels. The FBI recently admitted that as much as 80 percent of the cash in circulation is tainted by trace amounts of drugs.

The taint of marijuana is also easily transferred to innocent parties. One suitcase with a small amount of marijuana stored in an airplane compartment can give all the other suitcases a faint aroma of drugs that police dogs can easily sniff out. Dogs have reacted to containers months after marijuana has been removed from them.

Direct contamination is not the only way drug dollars get back into circulation. Most law enforcement officials deposit cash seized in drug busts in local banks. And the amounts are large. In 1991, the most recent year for which figures are available, the Justice Department alone deposited \$643 million. Since 1985, asset seizures under federal forfeiture laws have increased more than 1,500 percent.

This has meant a bonanza for law enforcement officials at all levels. More than \$1 billion in forfeited cash and property has been transferred to more than 3,000 state and local police departments since 1986. A record \$289 million was disbursed in 1991 alone. Pennsylvania district attorneys handled some \$4.5 million in forfeitures in 1990.

No town is too small to make big bucks from civil forfeiture. Lenexa, Kan., a Kansas City suburb with a population of only 29,000, seized at least \$250,000 in forfeitures in 1991. This "frenzied quest for cash," Louisville defense attorney Donald Heavrin told the Pittsburgh Press, "is destroying the judicial system."

Even small amounts can loom large in cash-strapped police departments.

Virginia's Forfeited Asset Sharing Program has netted \$1.5 million for state and local law enforcement agencies since it was launched in July 1991, with about \$100,000 a month now being distributed locally. The program has been described as most helpful to rural police departments.

Civil forfeiture is now included in more than 100 federal statutes, ranging from fraud and gambling to importing tainted meats and transporting intoxicants onto Indian lands. "It is kind of like the old saying 'kill them all and let God sort them out,' only now government is saying 'seize it all and let the innocent sue to get it back,'" says Scott Bullock, an attorney with the Institute for Justice, a Washington nonprofit legal group.

Forfeiture does more than take the profit out of crime. Government can seize entire bank accounts even if only a fraction of the money is linked to a crime. The justification: The balance of the money acted as cover for the criminal funds.

Detroit police raided a store to make a drug bust in 1989 but didn't find any drugs. Then police dogs sniffed traces of cocaine on three \$1 bills. The police seized the entire contents of the cash

register and the store safe - \$4,384. In a 1991 case, the government seized both a house and a car when the car, parked in the driveway, was the site of a cocaine sale.

Critics charge that since law enforcement officials get part of the take, forfeiture creates perverse incentives to seize valuable property only tenuously connected to crime. After all, who wants to seize an abandoned building in the inner city that is used as a crack house?

Flaherty and Schneider recounted numerous examples of what seems to be the profit motive at work. Consider Joseph and Frances Lopes, who lost their home in Hawaii due to the actions of their son. In 1987, 28-year-old Thomas was caught growing marijuana in the back yard of the Lopes's Maui home. Though they knew about the drug cultivation and opposed it, the Lopeses did not take action, they said, because their son threatened to kill himself every time they tried to cut his plants down. Because it was his first offense, Thomas received probation and the court ordered him to see a psychologist each week. The Lopeses thought that was that. But in early 1991, a police officer scouring old records for new forfeiture cases realized that the house could be seized because the parents knew about their son's dope patch.

The Lopes family has been allowed to stay in the house until the forfeiture action is complete. Still, Joseph Lopes, who worked 30 years on sugar plantations, living in rented camp housing until he saved enough to buy his first home, stands to lose all that he's worked for.

Most federal forfeitures statutes require that the police limit the use of the funds raised through forfeiture to "law enforcement purposes." The term is elastic enough to have covered a new air conditioning system for Philadelphia police and the use of a confiscated Corvette by an assistant prosecutor in New Jersey.

Property owners seeking to recover goods taken under civil forfeiture soon discover that many suspected armed robbers enjoy more procedural rights than they do. The property owner has no immediate recourse to contest the seizure before a judge and no right to a public defender. Usually the owner must pay a "cost bond" - typically about 10 percent of the estimated value of the property - within 30 days to preserve his right to sue for recovery. (If the bond is not paid, the property is automatically forfeited to the government.)

After paying the cost bond, the owner may wait months or years for a hearing. And since it's a civil dispute, the government must satisfy the court only that it had a "preponderance of evidence" that the property was linked to criminal activity.

On the other hand, if a person is arrested for a criminal offense without a warrant, he has the right to be brought before a judge within 48 hours. Then the government must show that it had "probable cause" - a higher standard of proof - to suspect him of committing a crime in order to hold him or demand bail for his release. The suspect, as the saying goes, is considered "innocent until proven guilty" and has the right to legal counsel. And in order to convict someone of a crime, the government must show "guilt beyond any reasonable doubt" - a much higher standard of proof than in civil cases. In criminal cases, legislators have set maximum penalties for each offense; not so with the amounts that can be taken in a civil forfeiture.

Civil forfeiture also makes it hard, in a number of indirect ways, for property owners to prevail. Prosecutors and law enforcement agencies maintain that the high percentage of forfeitures that go

uncontested is tribute to their good judgment. While some forfeiture cases are doubtless clear-cut, defense attorneys maintain that many seizures aren't contested because people find it hard to mount a defense when they have been deprived of their assets. Sometimes, too, the price of the legal proceeding is higher than the value of the lost property.

The price is high because law enforcement officials usually seize the property under federal statutes, which usually return more money to them than do state laws. The resulting trial is a battle in a federal district court between a government agency and a property owner who cannot even mortgage his house to pay for his defense.

Nevertheless, even liberal lawmakers who usually are skeptical of enhancing police powers and favor expanding the rights of the accused tend to praise civil forfeiture. Without it, "the United States would be virtually powerless to act when drug traffickers evade arrest," Sen. Joseph Biden, the Delaware Democrat who is chairman of the Judiciary Committee, has warned. Biden, responding to a citizen's letter, calls forfeiture "the single most effective deterrent {against} profit-motivated crime."

Innocent owners are protected by a clause in most forfeiture statutes, but proving innocence can be an ordeal. The case of Billy Munnerlyn is often cited by advocates of reform. Munnerlyn ran a flourishing air charter business out of Las Vegas till he agreed to fly an elderly man named "Sullivan" and four locked blue plastic boxes to Los Angeles. Three hours after they landed in his 1969 Lear jet, Munnerlyn was arrested by DEA agents and hauled off to Cucamonga County Jail. His 74-year-old passenger turned out to be Albert Wright, a convicted cocaine dealer, and the blue boxes contained more than \$2.7 million in cash. Three days later Munnerlyn was released. No charges were filed. But when he went to pick up his plane, he was told "it belongs to the government now." The government also kept the \$8,300 charter fare and \$200 tip.

Munnerlyn began a long fight in the fall of 1989 to get his plane back, running up more than \$80,000 in legal bills. He had to sell his other three planes and his office equipment to pay his debts, and was temporarily stuck driving an 18-wheeler, making 22 cents a mile. Then the government offered him a deal: Pay us \$6,500 and we'll give you back your plane. According to Paul Levine of the defense lawyers association, he settled for a slightly smaller sum.

Even if they get their property back, owners often have to pay storage costs. And as Munnerlyn learned, the government has no obligation to maintain or safeguard the property in its custody - despite the storage fees. In April 1991, he finally got a look at his plane at the U.S. Marshal's Service storage hangar in Midland, Texas. It had been torn apart in a fruitless search for drugs. He estimates that repairs to let it fly again will cost \$50,000.

For a small-business man like Munnerlyn, forfeiture can destroy a thriving, legal enterprise. Though no economist has estimated the cost of forfeitures to the economy, it is believed to be significant.

Forfeiture operates under the legal principle that property, rather than the property owner, is potentially guilty of illegal activity. Since the property itself is charged, an array of constitutional safeguards are bypassed. The result is a docket full of cases with names like United States vs.

\$12,390.00, United States vs. One 1976 Mercedes Benz 280S and State vs. Real Property known as 451 Avenue.

Because prosecutors are able to charge homes and cars with crimes under forfeiture law, they can sidestep rights that property owners would otherwise enjoy. "Forfeiture law," as a result, "has become one of the biggest threats to our civil rights," says Clint Bolick, author of *Unfinished Business: A Civil Rights Strategy for America's Third Century* and an aide to Clarence Thomas when the Supreme Court justice worked under the Reagan administration.

The roots of forfeiture can be traced to the medieval law of deodands, from the Latin phrase *Deo dandum*, which means "that must be given to God." The law called for inanimate objects linked to the death of a person to be forfeited to the king for the good of the dead man's soul. If a knight accidentally rode into a tree, for example, it was chopped down and offered as a deodand. "If a man falls from a boat, or a ship in fresh water, and is drowned, it hath been said, that the vessel and cargo are in the strictness of law a deodand," wrote the English legal scholar Sir William Blackstone.

This reasoning lived on in Supreme Court Justice Joseph Story's oft-quoted 1827 opinion in the *Palmyra* case upholding forfeitures against innocent owners because "the thing is primarily considered the offender." This long-standing precedent has been upheld many times by the Supreme Court. But with the recent expansion of the types of crimes for which "things" may be held accountable, and the tenuous link between thing and crime that characterizes the modern law, the controversy has come before the court again in several cases this term.

Forfeiture law has only sporadically been a matter of public debate in America. In colonial days, the British used civil forfeiture to take John Hancock's schooner, *Liberty*, when he failed to pay the much-hated duties on a cargo of Madeira wine. Hancock, defended by John Adams, lost his case but won the hearts of many of his pamphlet-reading countrymen. Only because some 70 percent of the young republic's revenue came from import fees did the first Congress allow civil forfeiture - linked in the popular mind to the predatory British - and then only as a means of punishing tax evasion.

The fairness of civil forfeiture again became an issue in 1862, when the federal government used it to seize the estates of Confederate soldiers. Afterward, it was a dead issue until the 1970s, when Congress revived forfeiture as part of the Racketeer Influenced and Corrupt Organization Act, aimed at organized crime, and dramatically expanded its application in the drug war of the eighties.

One case that the justices will decide later this year turns on whether forfeitures in cases where the owner admits criminal guilt can amount to an unconstitutionally excessive fine, despite the traditional understanding of forfeiture as something distinct from the criminal sentence. In *Austin vs. United States*, a man who pleaded guilty to possession of cocaine lost his business and mobile home in a forfeiture proceeding.

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The liveliest controversy before the court, however, is the question of how closely the thing seized must be linked to the crime that justifies its forfeiture. A feature of forfeiture known as the

"relation back doctrine" has been most worrisome to bankers, who often hold mortgages on seized property. This doctrine holds that the government's claim on the property begins the moment a crime is committed and, further, that the government's claim trumps all other claims, past or future. (In a limited ruling in mid-December, the Supreme Court made it marginally easier for mortgage holders to attempt to recover their losses when the federal government auctions off seized property.)

Legal scholars as long ago as 1814 inveighed against the relation back doctrine. Calling it "monstrous," Story criticized it as "founded probably on feudal principles, or the barbaric character of the times" and worried that "no man, whatever may be his caution or diligence, can guard himself against injury and perhaps ruin" if property he innocently acquires is later found to be forfeitable.

Despite the arguments of great jurists, the relation back doctrine is thriving today. A sort of invisible lien on property, it makes commercial transactions very uncertain. Congress enacted "innocent owner" provisions in the late 1980s, but these can be finessed if prosecutors think releasing the property will jeopardize their case.

The relation back doctrine is at the heart of *U.S. vs. 92 Buena Vista Ave.*, the Supreme Court's first major test of broad forfeiture laws passed in the last decade. The case began when a drug dealer gave money to his longtime girlfriend, who later bought a house in Rumson, N.J. The government seized the house. The girlfriend contends that she is an innocent owner, doesn't know where the money came from and is entitled to the house. The government contends that since the drug money was earned by illegal means, any later use of it is also illegal and subject to government seizure.

As forfeiture critics put it, this means that the 10th owner of a home could lose it if the second owner purchased the property with drug profits - a prospect that makes bankers and title insurers nervous. From the time the illegal act is committed, "the title to the property vests irreversibly in the government," Justice Department attorney Amy Wax told the Supreme Court when it heard arguments in October. Seizure can therefore take place at any point in the future. Waving aside Wax's assurances that the government would use its discretion, Justice Antonin Scalia got to the heart of the matter: "I know you're very generous and wouldn't do it, but we're talking law, not policy."

As a matter of law, Wax said the government can seize the property of people wholly ignorant of criminal activity. If the Supreme Court - expected to rule shortly - decides in the government's favor, the innocent owner defense will be gutted.

The justices' decision is going to be closely watched by people such as Ruth Allen. She lent her car to her boyfriend, who used it to sell cocaine. The police seized the car. A Missouri judge approved the seizure even though he concluded that Allen "was unaware of and uninvolved in" the illegal use of her car.

Bankers also will be watching the case very closely because they rely almost exclusively on the innocent owner defense when trying to reclaim forfeited property. If the court allows the innocent owner defense to atrophy, "financial institutions will restrict the flow of credit or other banking

transactions to individuals to when there is even the slightest suspicion of illegal activity," writes John Byrne, counsel to the American Bankers Association, which represents more than 90 percent of the nation's commercial lenders. That could mean that law-abiding citizens in crime-ridden neighborhoods would be denied credit out of hand. Put another (MORE)

Photos (color), A) Money forfeited is plowed back into police work: poetic justice to some.; B) Drug-sniffing dogs may have noses sensitive enough to react to faint odors in suitcases that never held contraband.; C) Trace amounts of cocaine may taint most currency in circulation, A) By Allan Tannenbaum/Sygma; B) By Rick Kozak/Insight; C) By Roger W. Yargo/Sygma co

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