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CURBING CIVIL ASSET-FORFEITURE ABUSE

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INTRODUCTION

An encouraging legislative development of recent years can be found in the way policymakers in Congress and across the states continue to pursue criminal-justice reforms in a bipartisan fashion. Of particular interest has been the U.S. House Judiciary Committee's Criminal Justice Reform Initiative. Measures moved through committee under this ambitious and inclusive initiative have included bills to reduce mandatory-minimum sentences for nonviolent offenders; to improve prisoner re-entry programs; including academic and vocational education for incarcerated offenders; and attempts to rein in the national epidemic of "overcriminalization."

One notable recent reform on the committee's agenda is an effort to address problems in civil asset forfeiture. Rep. Jim Sensenbrenner, R-Wis., has introduced H.R. 5283, also known as the Deterring Undue Enforcement by Protecting Rights of Citizens from Excessive Searches and Seizures Act of 2016, or more simply, the Due Process Act.¹ Passed through

committee by voice vote May 25, the measure proposes a number of fixes that would establish desperately needed safeguards to the civil asset-forfeiture system.

While the bill does not address all of the problems that advocates would like to see ameliorated, it would go a long way toward curtailing abuse. Its passage by the full U.S. House would be a significant step toward reform.

THE CASE FOR REFORM

There has been growing interest in recent years in law enforcement's ability to, as one *Washington Post* editorial put it, "seize money and property without evidence that a crime has been committed."² The myriad ways federal and state law-enforcement agencies have abused forfeiture laws have been the focus of award-winning, in-depth journalistic investigations³ and even made their way into late-night comedians' sketches.⁴

The history of civil asset forfeiture can be traced to the era of swashbuckling pirates, when ships carrying illegal imports could be seized by naval authorities and have their cargoes forfeited.⁵ During America's Colonial Period, abusive property seizures by the British Crown, particularly in Boston, were impetus for some of the key legal protections enshrined in the Constitution and Bill of Rights.⁶

Forfeiture grew in popularity as a law-enforcement tool during the Prohibition Era, when laws were implemented to allow seizure of vehicles and other property used by bootleggers. It regained favor during the 1980s as part of the ongoing "War on Drugs." Current federal forfeiture practices and procedures were codified in this period via the Comprehensive Crime Control Act of 1984 and then, more recently, with the Civil Action Forfeiture Reform Act (CAFRA) of 2000.⁷

Civil asset-forfeiture proceedings are unusual in American jurisprudence in that it is the seized property itself, rather than the person or persons in whose possession that property was found, that is put on trial. Such trials do not generally go before a jury, although a 1998 decision by the New Jersey Supreme Court did find that British common law from 1685 required jury trials.⁸ There is no requirement that the seized property's owner ever be charged with a crime, and the property itself is considered "guilty until proven innocent." As John Malcom of the Heritage Foundation outlines:

In an administrative proceeding, the agency that stands to gain directly from the forfeiture acts as investigator, prosecutor, judge, and jury. The rules and deadlines governing these proceedings are complicated and opaque, a minefield of technicalities full of traps for an unwary (and often unrepresented) property owner.⁹

Frequently, the value of seized property is less than the legal expense to pursue a challenge, making it irrational for owners to hire counsel. This also has contributed to critics characterizing forfeiture practices with the epithet “legalized theft.”¹⁰

The 14th Amendment of the U.S. Constitution commands that no state shall “deprive any person of life, liberty, or property, without due process of law.” Whether civil asset forfeiture, as it currently is practiced in the United States, meets the constitutional bar for Due Process remains a subject of controversy.¹¹

DUE PROCESS ACT

The Due Process Act offers a balanced approach to revise federal forfeiture practices and procedures, most of which were set down 16 years ago by CAFRA. What follows is brief analysis of highlighted sections of the Due Process Act, as well as a note about one important civil-asset forfeiture reform not addressed by this measure that legislators should keep in mind as they consider policy change.

Section II

CAFRA established tight filing deadlines for property owners who want any chance to reclaim their property. If an owner misses one of these deadlines, he or she could forfeit any shot to reclaim what is theirs. The Due Process Act would expand the time window in which a property owner must respond to a government seizure from 35 days to 65 days. Additionally, the bill would reduce the amount of time a government agency has to respond to a property owner’s request for mitigation or remission from 60 days to 30 days.

Current law allows the government to extend the process unilaterally, slow-walking legal proceedings in a way that puts property owners in legal limbo and limits their ability to fight a seizure. The Due Process Act would cap such extensions at 90 days, requiring agreement from both sides for any further extensions. The legislation also establishes a property owner’s right to an initial hearing. At that hearing, a magistrate judge shall inform the owner of their rights, including the right to counsel.

If a seizure was not made according to newly established standards specified elsewhere in the bill, the court would order the immediate release of the owner’s property.

Section III

Current law only extends a right to counsel to indigent property owners at judicial proceedings. This tends to exclude them from any defense in forfeiture cases, most of which never see a courtroom. They are instead conducted administratively, with the presiding agency that initiated the for-

feiture also rendering a final decision. The Due Process Act extends the right to counsel to all civil-forfeiture proceedings, granting those with limited resources a chance to recover their property.

Section IV

Under current policy in both the federal courts and 31 states, the burden of proof standard for seized assets is a “preponderance of evidence.” The Due Process Act would raise that standard to “clear and convincing” evidence, as currently is the case in six states. Though a lower standard than “beyond a reasonable doubt,” which currently holds only in Massachusetts and North Dakota, this change would mark a significant step in the direction of Due Process. (The remaining 11 states employ various “hybrid” standards.)¹²

Section V

In its February 2014 decision in *Kaley v. United States*, the U.S. Supreme Court found that a criminal defendant indicted by a grand jury is not entitled to challenge a probable cause finding that leads to asset forfeiture, even where those assets are needed to pay defense costs.¹³

The Due Process Act would reverse the Kaley decision, granting defendants the ability to move for a hearing to determine whether the seizure should be modified or reversed to preserve the defendant’s ability to pay counsel. This is the legislation’s only change to criminal asset-forfeiture law and would strengthen the Sixth Amendment’s right to counsel.

Section VII

Current law and procedure offer few firm boundaries on the degree to which law enforcement may rely on civil asset forfeiture. This has led to widespread abuse and an inability to hold reckless actors accountable. The Due Process Act would require the Department of Justice’s inspector general to conduct an audit of federal civil asset forfeitures. This audit would be designed to ensure federal civil-forfeiture practices comply with constitutional and statutory law.

The legislation also requires the Department of Justice to establish publicly available databases, articulated in Section VIII of the bill. The first would offer a real-time catalog of federal forfeitures, while the second would detail the types of forfeiture, agencies involved and explain what triggered the asset seizures.

Section X

Because seized assets are presumed guilty and must be proven “innocent,” owners who seek to challenge such designations face an extremely arduous process. The Due Process

Act establishes new protections by requiring the federal government to prove a substantial connection between a seized asset and a specific offense. Agencies would be asked to demonstrate the property owner “intentionally used the property in connection with the offense; knowingly consented to the use of the property by another in connection with the offense; or should have reasonably known that the property was being used in connection with the offense.”

Section XI

Current procedure allows a federal judge to alter the quantity of seized assets only when the forfeiture is so egregiously disproportionate to the underlying accusation that it rises to the level of a constitutional violation under the Eighth Amendment. The Due Process Act would give judges more discretion to reduce the size of a forfeiture penalty, pending the following factors: property value, seriousness of the offense in question, level of culpability, prior criminal record and financial status.

DOJ'S EQUITABLE SHARING PROGRAM

Local law-enforcement agencies currently are permitted to circumvent state civil asset-forfeiture laws, opting to be governed by federal practices, by participating in the Department of Justice's Equitable Sharing Program. Created by the Comprehensive Crime and Control Act of 1984, the program allows federal agencies to “adopt” assets seized by state agencies in cases that involve a federal crime. In such cases, federal forfeiture laws and procedures govern the seized property.

Because state forfeiture laws often are more stringent than their federal counterparts, local agencies have an incentive to take advantage of the federal channel. The DOJ program entitles local agencies to claim up to 80 percent of the assets they initially seize. A recent Institute for Justice study found that states with tougher civil asset-forfeiture standards receive more in payouts from the Equitable Sharing Program, verifying that the program is the very definition of a loophole.¹⁴

The Department of Justice temporarily paused the program at year-end 2015, but quickly reinstated it in the spring of 2016.¹⁵ DOJ representatives have made clear they want to maintain the program as long as they are able.¹⁶ If the program is going to be reformed, Congress must step in. Many advocates for asset-forfeiture reform have called on Congress simply to eliminate the Equitable Sharing Program altogether, as is proposed by the Fifth Amendment Integrity Restoration (FAIR) Act, sponsored by Sen. Rand Paul, R-Ky., and Rep. Tim Walberg, R-Mich.¹⁷

The Due Process Act does not address the Equitable Sharing Program. One likely reason for its absence is the strong opposition of local law-enforcement officials to ending the program. Local agencies have expressed they could not run their agencies effectively without ESP funds.¹⁸ While this essentially is an argument that the ends justify the means, such universal opposition from an important and politically influential group makes completely dismantling the program difficult, if not impossible.

While lawmakers are reluctant to suspend the program outright, there are a number of more modest measures that could serve to limit abuse.

For one, the Equitable Sharing Program's assets could be directed to a general fund, rather than directly back to the seizing agencies. Local agencies would instead apply for need-based or grant-based access to those fund, but there no longer would be a guaranteed “revenue” share. This could ease concerns about lost funding streams, while reducing local agencies' incentive to participate in the federal program, rather than more tightly regulated state programs.

An alternative approach would be to make ESP payouts contingent on obtaining a conviction. This would be a higher standard than most local requirements, helping ensure local agencies do not circumvent state law simply to abuse the system.

States also could play a big role in reforming the Equitable Sharing Program. Some states have restricted use of the Equitable Sharing Program by local agencies. New Mexico and the District of Columbia have ended local participation in the program completely, while other jurisdictions mandate that state civil-forfeiture requirements be met before local agencies can transmit assets to federal law enforcement.

CONCLUSION

The Due Process Act represents a balanced approach to reform federal civil-asset-forfeiture policy. While it does not end the DOJ's egregious Equitable Sharing Program, the bill enacts a number of much-needed reforms to bring accountability and curb reckless abuse.

There is no excuse to perpetuate the status quo. Due Process is essential to our nation's judicial system. This bill serves as a proper first step to address government abuse and preserve individual liberty.

ABOUT THE AUTHOR

Nathan Leamer is a policy analyst and the outreach manager for the R Street Institute.

Immediately prior to joining R Street, Nathan served as the legislative and coalitions associate for GenOpp, a D.C.-based millennial advocacy organization. In this role, Nathan worked regularly with congressional leaders and staff on issues of particular importance to young Americans. In this capacity, he also managed GenOpp's "Free the Brews" project, a nationwide campaign highlighting the tax and regulatory barriers facing small microbreweries.

Previously, Nathan spent four years on the legislative staff for Rep. Justin Amash, R-Mich., where he worked on a number of policy issues, specifically education, civil liberties and agriculture.

ENDNOTES

1. H.R. 5283 - Deterring Undue Enforcement by Protecting Rights of Citizens from Excessive Searches and Seizures Act of 2016, introduced May 19, 2016. <https://www.congress.gov/bill/114th-congress/house-bill/5283/all-actions?overview=closed#tabs>
2. Editorial Board, "Forfeiture without due process," *Washington Post*, Jan. 2, 2012. https://www.washingtonpost.com/opinions/forfeiture-without-due-process/2011/12/22/gIQAckn3WP_story.html
3. Michael Sallah, Robert O'Harrow Jr., Steven Rich and Gabe Silverman, "Stop and seize," *Washington Post*, Sept. 6, 2014. <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?hpid=z3>
4. John Oliver, "Civil Forfeiture," *Last Week Tonight with John Oliver*, Oct. 5, 2014. <https://www.youtube.com/watch?v=3kEpZWGgJks>
5. John Malcolm, "Civil Asset Forfeiture: Good Intentions Gone Awry and the Need for Reform," Heritage Foundation, April 20, 2015. <http://www.heritage.org/research/reports/2015/04/civil-asset-forfeiture-good-intentions-gone-awry-and-the-need-for-reform>
6. Jason Pye, "From High Seas to Highway Robbery: How Civil Asset Forfeiture Became One of the Worst Forms of Government Overreach," FreedomWorks, July 22, 2015. <http://www.freedomworks.org/content/high-seas-highway-robbery-how-civil-asset-forfeiture-became-one-worst-forms-government>
7. U.S. Department of Justice, CIVIL ASSET FORFEITURE REFORM ACT OF 2000 (P.L. 106-185). <https://www.justice.gov/jmd/civil-asset-forfeiture-reform-act-2000-pl-106-185>
8. Tom Avril, "Talk About A Legal Precedent Case From 1685 Could Save N.J. Woman's 1990 Honda," *Philadelphia Inquirer*, July 16, 1998. http://articles.philly.com/1998-07-16/news/25736385_1_jury-trial-forfeiture-cases-common-law
9. Malcom, 2015.
10. The Leadership Conference, "FACT SHEET: Why Civil Asset Forfeiture is Legalized Theft," July 23, 2015. <http://civilrightsdocs.info/pdf/criminal-justice/Civil-Asset-Forfeiture-Fact-Sheet.pdf>
11. Robert O'Harrow Jr., Steven Rich and Shelly Tan, "Asset seizures fuel police spending," *Washington Post*, Oct. 11, 2014. <http://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/>
12. Dick M. Carpenter II, Lisa Knepper, Angela C. Erickson and Jennifer McDonald, "Policing for Profit: The Abuse of Civil Asset Forfeiture, 2nd Edition," Institute for Justice, November 2015. <http://ij.org/report/policing-for-profit/grading-state-federal-civil-forfeiture-laws/>
13. Amy Howe, "Opinion analysis: No right to challenge probable cause finding underlying asset freeze – even to pay your lawyers," SCOTUSBlog, Feb. 25, 2014. <http://www.scotusblog.com/2014/02/opinion-analysis-no-right-to-challenge-probable-cause-finding-underlying-asset-freeze-even-to-pay-your-lawyers/>
14. Dick M. Carpenter II, Larry Salzman and Lisa Knepper, "Inequitable Justice: How Federal 'Equitable Sharing' Encourages Local Police and Prosecutors To Evade State Civil Forfeiture Law For Financial Gain," Institute for Justice, October 2011. http://ij.org/wp-content/uploads/2015/03/inequitable_justice-mass-forfeiture.pdf
15. Press release, "Department of Justice resumes program to share federally seized assets with local law enforcement," Northern District of West Virginia, U.S. Department of Justice, March 28, 2016. <https://www.justice.gov/usao-ndwv/pr/departments-justice-resumes-program-share-federally-seized-assets-local-law-enforcement>
16. Kevin Glass, "A Setback for Justice," *U.S. News & World Report*, April 11, 2016. <http://www.usnews.com/opinion/articles/2016-04-11/obamas-doj-sets-back-justice-with-asset-forfeiture-program>
17. Jacob Sullum, "Here Is How Rand Paul's Bill Would Curtail Civil Forfeiture," *Reason*, Jan. 27, 2015. <http://reason.com/blog/2015/01/27/rand-paul-reintroduces-bill-aimed-at-cur>
18. Chuck Raasch, "DOJ resumes seized asset sharing program with local police," *St. Louis Post-Dispatch*, March 28, 2016. http://www.stltoday.com/news/local/illinois/doj-resumes-seized-asset-sharing-program-with-local-police/article_578af475-3eb2-5ba3-bc84-beb072d83677.html