

**MICHIGAN ADVISORY COMMITTEE OF THE
UNITED STATES COMMISSION ON CIVIL RIGHTS
TESTIMONY OF STEFAN CASSELLA**

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Introduction

Thank you for the opportunity to present my views on this important question.

By way of background, I was a federal prosecutor for 30 years, specializing in asset forfeiture and money laundering under federal law.

I had the opportunity to teach these subjects at the training facility for federal prosecutors and agents for many years,

- and to work with Governments and law enforcement agencies in numerous countries that have implemented or are implementing civil and criminal forfeiture laws based on the U.S. model.

Next month, for example, I will be traveling to Botswana to assist in the use of the forfeiture and money laundering laws to suppress the trade in wildlife that is endangering the population of elephants and rhinos in that part of the world.

Let me make these key points:

1. Civil forfeiture applies to a wide variety of conduct

Civil forfeiture is not a new idea and it is not limited to drug cases

- The first civil forfeiture statutes were enacted in the 18th Century to combat piracy and slave trafficking, and they have been expanded over time to cover the vast array of criminal offenses that violate federal law

For example, the Government uses civil forfeiture to

- Recover property for fraud victims
- Enforce the child pornography laws and suppress human trafficking
- Stop terrorist financing and international money laundering
- Recover money stolen by dictators in developing countries
- Recover firearms and cultural property, and

- Enforce the Endangered Species Act, and the copyright laws and to protect intellectual property

These are just a few examples

The point is that the drug cases, which have everyone's attention, are a fraction of the civil forfeiture cases,

- and the police seizures of small amounts of money are a small fraction of the drug cases.

When considering changes to the civil forfeiture laws, we must be aware of the scope of the issue

- And avoid the “baby and the bathwater” problem
- You don't want to do something that seems to make sense in one narrow context only to find out that you've made it impossible to recover the life savings of an elderly widow, or artifacts looted from a native American gravesite

2. Civil forfeiture is an essential tool of law enforcement;

Civil forfeiture is an essential tool of law enforcement

- not because it contributes an important fraction of the budgets of law enforcement agencies
- But because it is often the only way to recover property for victims, enforce certain statutes, and deprive criminals of the proceeds of their crimes.

If every case could (or should) be prosecuted criminally, criminal forfeiture would be all we would need

- But not every case can (or should) be prosecuted criminally
- And in those cases civil forfeiture is the only way to enforce the law and recover the property involved in the offense

Here are some examples:

1. when the wrongdoer is dead or is incompetent to stand trial;

- much of the money in the *Madoff* case was forfeited civilly – and returned to the victims -- because a co-conspirator was deceased

2. when the defendant is a fugitive or a foreign national beyond jurisdiction of the United States;

I am working on a civil forfeiture case now where the defendant defrauded dying cancer victims and fled to Mexico leaving her proceeds behind in Tulsa;

- Without civil forfeiture there would no way to recover the money for the victims or their families, other than to leave them to their own devices in private lawsuits against a person they cannot serve with legal process

I have another case where a corrupt dictator laundered his criminal proceeds in a US bank account

- The United States does not want to be the repository of the proceeds of public corruption by every petty dictator in the world; but without civil forfeiture we could not lay our hands on that property when the money is here but the dictator is abroad

Similarly, the Government has a civil forfeiture action pending in a case where someone in Afghanistan stole \$70 million in U.S. Government aid and deposited the money into an Afghan bank account

- Civil forfeiture is the only way to recover that money for the benefit of our taxpayers

3. when the statute of limitations has run on the criminal case, but authorities have found the forfeitable property;

4. when we have recovered the property but do not know who committed the crime giving rise to the forfeiture;

- there are many examples of this
 - money taken from a drug courier – we know its drug money but the courier is a low-level functionary who doesn't know whose money he is carrying
 - painting stolen by the Nazis that show up in an auction house

- flight simulator be shipped to Iran
5. when the defendant pleads guilty to a crime different from the one giving rise to the forfeiture;
 6. similarly, when there is no federal criminal case because the defendant has already been convicted in a state or foreign or tribal court;
 7. when there is no criminal case because the interests of justice do not require a conviction;
 - not every violation of federal law requires a criminal conviction and a term of incarceration
 - the jails are crowded enough;
 - we don't need to put more people in them
 - civil forfeiture provides a non-incarcerative alternative for less serious offenses

For example, there was a case last year in Washington State where a 70-year old woman bought some guns at a gun shop for her son who was a convicted felon

Given the three alternatives –

- Do nothing
- Prosecute mom and give her a criminal record
- Forfeit the gun

The civil forfeiture alternative made the most sense

- enforcing the law and protecting the public in a way that was proportional to the crime
8. when the evidence is insufficient to prove that the defendant committed the offense beyond a reasonable doubt;
 - for example, in analog drug cases where proving that the synthetic drug is chemically similar to a controlled substance involves a battle of experts who disagree on the scientific evidence

9. Finally, when the defendant uses someone else's property to commit the crime and that person is not an innocent owner.
- If a robber uses his brother's gun to hold up a convenience store and shoots the clerk, we want to forfeit the gun
 - But if the brother is not prosecuted in a criminal case, we cannot forfeit the gun even if the brother knew all about it
 - That's because third party property cannot be forfeited in a case in which they were unable to participate; it's a matter of due process
 - But there is a way to forfeit property that third parties allow others to use to commit crimes
 - It's called civil forfeiture

The point is that in all of these instances, you cannot enforce the law appropriately without civil forfeiture

- Which is why countries all over the world are enacting civil forfeiture laws based on the American model

I will have to make my remaining points more succinctly

3. Civil forfeiture does not violate due process

Civil forfeiture does not violate due process

Civil forfeiture does not require a criminal conviction, but it does require proof of two things:

- that a crime occurred *and* that the property was derived from or used to commit that crime

There is a common misconception that because law enforcement officers can seize property based solely on probable cause, that that is the end of the inquiry

- that is not so
- seizure is to forfeiture as arrest is to conviction
- the seizure of the property is not the end of the process, it is only the beginning

In a civil forfeiture case, the Government starts the process by seizing the property, generally with a warrant, or in the case of real property, by filing a complaint without seizing the property.

Then it works like this:

- there are strict deadlines for starting a forfeiture action and sending notice to all interested parties
- the property owner has the right, once he files a claim, to seek the release of the property pending trial if the seizure is causing him a hardship
- he also has the right to move to suppress illegally-seized evidence, to put the Government to its proof in trial before a jury, to assert an innocent owner defense, and to recover attorney's fee if he prevails
- and even if the Government proves its case and prevails at trial, the forfeiture is limited by the Eighth Amendment so that it is proportional to the gravity of the offense.

The point is that civil forfeiture is not some bizarre action that deprives people of their property without due process

Rather, as Justice Kennedy said in a Supreme Court opinion some years ago, civil forfeiture is merely a procedural device for litigating everyone's interest in the property at the same time, without filing a separate action against each of them individually.

For example, if agents seize an airplane used to fly drugs into California from Mexico, claims may be filed by any number of people

- the pilot
- the owner of the plane
- his wife (who may have a marital interest)
- his ex-wife (to whom he may owe child support)
- a lien holder
- a foreign shell corporation with nominal title
- and someone with no interest at all who simply would like to have an airplane

Rather than file a separate action against all of those people – criminal or otherwise -- the Government brings a civil forfeiture action against the plane –

not because the plane did something wrong, but to get everyone with an interest in the property in the courtroom at the same time

- to sort out who has an interest, who has an innocent owner defense, and who does not.

4. Civil forfeitures do not disproportionately target minorities.

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To be sure, enforcing the drug laws disproportionately targets drug dealers, who may in some communities comprise more minorities than others

In the same way, if you were to enforce the racketeering laws in Rhode Island, where I started my career, or in New Jersey, where I am from, you would find that most cases involved Italian-Americans

- Not because the law or the law enforcement officers targeted Italian-Americans but because that who happened to be engaged in racketeering in those communities
- Similarly, in my time in Baltimore, we targeted retailers in cash-intensive businesses who were skimming profits and not paying taxes
- When we focused on liquor stores, the majority of the targets turned out to be Korean immigrants, because that's who owns the liquor stores in Baltimore
- And when we switched to gas stations and convenience stores, the majority of the targets turned out to be South Asians, because that's who runs the gas stations in Baltimore

I don't know Detroit, but in Baltimore it is highly likely that the targets of a drug enforcement operation are going to be minorities

- in the rural counties of Western Maryland it would be very different
- But I never thought that we should enforce the drug laws one place more than the other because of the racial composition of the class of people committing the crime
- And I did not see any reason to believe that we were doing so

Conduct is criminal or not, and the law should be enforced or not, regardless of who happens to be most active in committing the crime.

In my experience, mid-level drug dealers get involved in selling drugs in cities like Baltimore because they are poor, uneducated, and cannot find other jobs

- That is a serious social issue
- But I don't think we should blame the police or the prosecutors for enforcing the law while our society figures out how to solve that problem
- Either we think that selling cocaine and heroin to children, pregnant women and others is wrong or we don't
- Either we think that taking the money away from drug dealers to remove the incentive for selling drugs is an effective law enforcement tool or we don't
- As long as we're protecting everyone's rights to due process in the same way, as long as we're treating everyone the same, we should enforce the law without regard to what group the perpetrators happen to belong to

5. Remedies

Obviously, any tool, no matter how well-intentioned, essential or effective, can be abused.

There are differing views on the effectiveness and importance of seizing stacks of drug money

- Any economist will tell you that seizing huge quantities of money -- \$100s of thousands from luggage at airports or in concealed compartments of vehicles heading south toward the border -- is a more effective way to suppressing the drug trade than seizing the drugs coming in
- So we don't want to tell the police not to seize drug money
- But it's also true that police officers seizing small amounts of money -- 2, 3 or even \$10,000 during a traffic stop -- and not doing any follow-up

investigation, may be more interested in the money than in making a dent in the crime problem

The point is that any concerns about the improper use of civil forfeiture by police agencies in cases involving low-value seizures can be addressed without making changes that undermine the utility of civil forfeiture in the vast majority of cases where it is both essential and non-controversial.

For example, we could do what the Justice Department has already done

- Remove the incentive for low-level seizures that serve little law enforcement purpose by refusing to adopt local seizures for forfeiture under federal law unless there is a clear federal interest, in terms of the quantity of money, the involvement of a high-profile target, or its nexus to a criminal investigation
- You could also turn the distribution of the forfeited funds into a grant program in which all law enforcement agencies share equally, instead of returning all of the money to the one police department that made the seizure
- Or you could put a minimum threshold on the value of the property to be forfeited, or impose other criteria, so that the law was more likely to be used in the more important cases
- Or you could require all warrantless seizures to be ratified after-the-fact by a judge to insure that there was probable cause

These are just a few ideas

The point is that we can address any legitimate concerns with the way civil forfeiture has been used in some cases without limiting the effectiveness of a tool that has served the public well for over 200 years, and that continues to be an essential component of the effort to suppress crime in a huge variety of contexts,

- and to recover the property for the benefit of victims who look to their law enforcement agencies to recover for them what they cannot recover for themselves.