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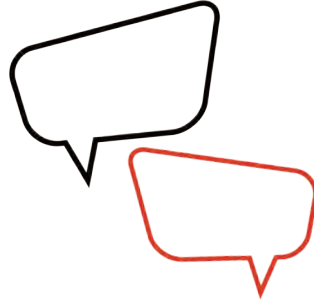
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The role of civil forfeiture

POINT COUNTERPOINT

By DAVID SMITH AND STEFAN CASSELLA

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The role of civil forfeiture

Are forfeiture-of-assets proceedings fair or in need of reform?

Under federal law, property is forfeited if it is contraband, if it is an instrumentality of a criminal offense, or if it is constituting, derived from, or traceable to any proceeds obtained from criminal activity. The federal government seizes roughly 30,000 property assets every year. Approximately 80-85 percent of the seizures are forfeited administratively with no one making a claim on the property after appropriate notice. The courts resolve the remaining 15-20 percent of seizures. Whether the government treats everyone equitably under forfeiture-of-assets proceedings is under increased scrutiny. In particular, the legitimacy of asset forfeiture as a law-enforcement tool has been challenged because forfeited assets generate substantial revenue for the government. Here, attorneys **DAVID B. SMITH** and **STEFAN D. CASSELLA** address whether civil forfeiture of assets plays a legitimate role in the judicial system.

SMITH: I believe that civil forfeiture *can* play a legitimate, if diminished, role in the judicial system if it is reformed so there are additional safeguards for the rights of property owners, including (1) the right to appointed counsel for indigents – since few people can afford or even find adequate counsel to litigate a civil forfeiture case – and (2) the abolition of the so-called “earmarking” system in place since 1984, which creates irresistible incentives to use forfeiture (both civil and criminal) as a means to raise off-budget revenue for federal and local law enforcement agencies rather than for traditional enforcement purposes.

Most of the needed reforms are encompassed in the DUE PROCESS Act of 2016, H.R. 5283, a civil forfeiture reform bill with great bipartisan support in both houses of Congress. The bill was unanimously approved after a mark-up session by the House Judiciary Committee in May 2016. A companion Senate bill has broad bipartisan support in the Senate Judiciary Committee, including from Chairman Chuck Grassley and Ranking Member Patrick Leahy. I know that criminal forfeiture does not compare favorably with civil forfeiture in terms of protecting property rights. (See my July 30, 2015 Legal Memorandum for the Heritage Foundation, *A Comparison of Federal Civil and Criminal Forfeiture Procedures: Which Provides More Protections for Property Owners?* at <http://report.heritage.org/lm158>.) I’m also concerned that the government would charge many people criminally in order to pursue criminal forfeitures – citizens who would “merely” face civil forfeiture penalties otherwise.

CASSELLA: Civil forfeiture plays an essential role in the judicial system. No one who understands how civil forfeiture works – and the limitations of the criminal forfeiture alternative – could seriously suggest otherwise.

Criminal forfeiture requires a conviction in a criminal case, but a criminal prosecution is not always possible, or even advisable. Accordingly, without civil forfeiture, there would be no way to recover property derived from a crime committed by a person who is deceased or is a fugitive. Every year, the government recovers millions of dollars for victims and the taxpayers in such cases using the civil forfeiture laws. Without civil forfeiture there also would be no way to recover property invested in the United States by a corrupt foreign dictator, stolen from a U.S. aid program in a developing country, or passing through the United States on its way to a sanctioned country such as North Korea – all cases where a criminal prosecution is unlikely if not impossible.

Civil forfeiture is also essential in international money laundering cases and a host of others, including human and wildlife trafficking, the theft of antiquities, and other instances where the property can be recovered but the perpetrator is unknown or committed the offense from a place that is beyond the reach of the U.S. courts. Finally, civil forfeiture is essential when the interests of justice do not require a criminal conviction, but an alternative sanction is the appropriate remedy. When a 70-year-old woman buys firearms for her son who is a convicted felon, should she be indicted, or is the appropriate remedy to seize and forfeit the guns?

The focus in the media on the use of civil forfeiture by local police departments to seize currency during traffic stops – a miniscule fraction of all federal civil forfeiture cases – has caused policymakers and the public to lose sight to the real role that civil forfeiture plays in the criminal justice system. The most obvious result is the proposed DUE PROCESS Act which would raise the procedural and evidentiary burdens on the government in a way that would make it virtually impossible to pursue the civil forfeiture remedy in the cases outlined above – which ironically are not the cases that anyone thinks are in need of “reform.”

The point is this: If seizures of currency by local police are problematic, policymakers should solve that problem without undermining the essential role that civil forfeiture plays in the vast majority of cases in which it is employed.

In this regard, it should be noted that the trend throughout the world in both developed and developing countries is to enact civil forfeiture statutes on the U.S. model, precisely to allow foreign governments to enforce their laws in circumstances where a criminal prosecution is either not possible or not in the interests of justice. Indeed, the U.S. is a party to, and the leading proponent of, numerous international agreements concerning the importance of combatting transnational crime that *require* participating states to enact and enforce civil forfeiture laws.

SEIZURE OF VESSELS WAS THE ONLY PRACTICAL MEANS OF ENFORCING THE NAVIGATION ACTS DURING THE COLONIAL PERIOD, RESULTING IN FORFEITURE OF ILLEGALLY CARRIED CARGOES AND THE VESSELS TRANSPORTING THEM. SINCE THEN, CONGRESS HAS ENACTED SCORES OF FORFEITURE LAWS BASED ON THAT PRECEDENT. ARE THE HISTORICAL REASONS FOR CIVIL FORFEITURE IN DETERRING AND PUNISHING CRIMINAL OFFENSES STILL VALID TODAY JUSTIFYING CIVIL FORFEITURE ACTIONS AS A QUASI-CRIMINAL-FIGHTING TOOL?

SMITH: In some circumstances, civil forfeiture remains the only practical way of enforcing certain U.S. criminal laws. The Coast Guard and Customs still seize drug or other smuggling vessels on the high seas or in our coastal waters and ports. Foreign fishing vessels are seized in Alaska for violating our fishing laws and regulations. International crime

... [A]dditional safeguards [are needed] for the rights of property owners, including the right to appointed counsel for indigents.

is now a much bigger problem than in the days of sailing ships.

In many cases, the foreign criminal who violates U.S. laws cannot be brought to justice in the United States because he cannot be found or because he cannot be extradited. Many countries do not permit extradition of their own citizens. However, the foreign criminal may have stashed ill-gotten gains in the United States or in countries that will cooperate with our law enforcement agencies and courts. The Department of Justice is using civil forfeiture aggressively to pursue the ill-gotten gains of foreign kleptocrats and other foreign criminals whom it cannot haul into our courts. I do have a problem with the Department’s use of the fugitive disentitlement doctrine to prevent foreign fugitives from even contesting the civil forfeiture of their property. The DOJ considers anyone who exercises his right to fight extradition to be a “fugitive.” Other civilized countries do not permit fugitive disentitlement (the modern equivalent of the rather barbaric medieval English concept of “outlawry”) in civil forfeiture cases on due process grounds. The DOJ’s “Kleptocracy Initiative” cases also raise serious jurisdictional issues when the assets sought to be forfeited are located abroad and the enforcement of any judgment in favor of the U.S. depends on balky foreign courts that have control of the res or when the criminal activity took place abroad. *See U.S. v. Batato*, 2016 U.S. App. LEXIS 14861, *55-64 (4th Cir. Aug. 12, 2016)(Floyd, J., dissenting)(“because the judgment purports to adjudicate rights in the *res* binding against the whole world, control of the *res* is the *sine qua non* of *in rem* actions. Absent control, the court’s judgment . . . merely advises the foreign sovereign that *does* control the property as to how a United States court believes the rights in the property should be settled.” This would be an improper advisory opinion because the requirement of Article III “that a judgment be binding and conclusive on the parties is absolute.”).

... [W]ithout civil forfeiture, there would be no way to recover property derived from a crime committed by a person who is deceased or is a fugitive.

Civil forfeiture actions can also provide an effective means to enforce U.S. economic sanctions. We can’t prosecute the foreign countries or their leaders, but we can civilly forfeit their property if it is involved in violating our economic sanctions regime. A good example is the long-running civil forfeiture case under the International Emergency Economic Powers Act against a 36-story office building in Manhattan owned by Bank Melli, an Iranian state bank. *In re 650 Fifth Ave. and Related Properties*, 2016 U.S. App. LEXIS 13225 (2d Cir. July 20, 2016)(reversing grant of summary judgment for the government and remanding for further proceedings).

Congress could push the government in that direction by legislating a high minimum value, say \$1 million, for the property at issue in any civil forfeiture case. One advantage of this approach is that it would eliminate most of the cases in which the property owner cannot afford counsel. The United Kingdom’s forfeiture statute for the proceeds of crime requires that the property be worth at least 10,000 pounds. That isn’t much, but it’s something. U.S. forfeiture law has no minimum value at all, which encourages abuse.

CASELLA: In the 18th century, civil forfeiture was devised as a way of combatting crimes such as piracy and slave trafficking that were committed by persons who remained beyond the jurisdiction of the U.S. courts, but whose property could be seized and confiscated. That function of civil forfeiture remains unchanged. There are still pirates – we call them terrorists – and human trafficking remains a problem on a global scale, reaching from Eastern Europe to Southeast Asia. As noted above, the list of criminal offenses committed by persons who remain beyond ▶

The burden of proving the *mens rea* element should also be placed on the government rather than the claimant-owner.

... [A]s the Supreme Court held in *Bennis v. Michigan*, there is no constitutional right to an innocent owner defense *at all*.

Justice Brennan in the *Cale-ro-Toledo* case, that goes far beyond what the Constitution requires. It protects owners who

were truly unaware of the illegal use of their property, or who, upon learning of such illegal use, did what a reasonable person would have done to stop it. And it protects persons who acquire tainted property as bona fide purchasers for value.

No one can seriously argue that a person who knowingly allows his gun to be used to commit a murder should be allowed to recover the gun. Nor should the donee of fraud proceeds be allowed to retain the victim's money just because the perpetrator is at large and cannot be prosecuted. Requiring third-party claimants in civil forfeiture cases to establish the elements of the innocent-owner defense avoids these and untold other unjust results.

Moreover, as mentioned earlier, civil forfeiture provides an alternative, noncriminal remedy for wrongdoing committed by a person who, in the interests of justice, need not be subjected to criminal prosecution, but nevertheless should be sanctioned for his or her participation in a serious criminal offense. Think of the real property, jointly owned by husband and wife, used as a place where young women are forcibly employed in the sex trade, or where children are used to produce child pornography. If both husband and wife are prosecuted, their property is subject to forfeiture. If the husband is the key player in the scheme, however, and only he is prosecuted, but his wife was well aware of the offense and was in fact a minor player in the scheme, the only sanction the government has against the wife, short of including her in the indictment, is the civil forfeiture of her interest in the property. The government should not be forced to choose between having to indict the wife and allowing her to act with impunity, with no penalty for her role in the offense.

The reference to the Motel Caswell case by the opponents of civil forfeiture is hard to understand. In that case, the owner of a motel that was frequented by drug dealers was able to convince the court that he did indeed satisfy the requirements of the innocent owner statute. In other words, the system worked; the property owner prevailed (and was awarded attorney's fees).

If no one ever prevailed in asserting an innocent owner defense, one might question whether the

the reach of U.S. law enforcement is a long one. To give just three pending examples: the civil forfeiture action against the millions taken in violation of U.S. intellectual property laws in the MegaUpload case by persons operating from, and holding their assets in, Hong Kong and New Zealand; the civil forfeiture action against the \$4 billion stolen by Gen. Sani Abacha in Nigeria, laundered through U.S. banks, and deposited in accounts in France and Jersey; and the civil forfeiture action against \$77 million stolen from U.S. aid programs in Afghanistan and held on deposit in foreign bank accounts. In none of these cases is the use of civil forfeiture an "abuse." Nor would they constitute an abuse if the value of the property were significantly less. The forfeiture of \$50,000 in funds destined for a terrorist organization, being laundered by foreign drug traffickers, or derived from the ivory trade that is decimating the population of elephants in Africa is no less important than the forfeiture of millions stolen by kleptocrats.

FEDERAL LAW RECOGNIZES THAT PROPERTY CANNOT BE FORFEITED OF AN INNOCENT OWNER WHO DID NOT KNOW OF THE CONDUCT GIVING RISE TO THE FORFEITURE OR UPON LEARNING DID EVERYTHING THAT WAS REASONABLY POSSIBLE TO TERMINATE SUCH USE OF PROPERTY. TO THE EXTENT THAT AN OWNER WHO KNOWS OF THE CONDUCT GIVING RISE TO THE FORFEITURE FAILS TO TAKE APPROPRIATE ACTION, IS IT A LEGITIMATE GOVERNMENT ACTION TO FORCE PROPERTY OWNERS TO TAKE ON A "POLICING" ROLE RELATED TO CONDUCT OCCURRING ON THEIR PROPERTY UPON PAIN OF LOSING THEIR PROPERTY TO CIVIL FORFEITURE?

SMITH: I believe it is legitimate for the government to force property owners, such as landlords, to take on a policing role related to conduct occurring on their property upon pain of losing their property to

civil forfeiture. However, I believe that the current federal "innocent owner defense" codified at 18 U.S.C. § 983(d) needs to be modified so that it places less onerous responsibilities on the property owner than having to show that he or she "did *all that reasonably could be expected* under the circumstances to terminate such use of the property." That is the constitutional minimum of due process protection. We can do better than that. The burden of proving the *mens rea* element should also be placed on the government rather than the claimant-owner. The current statutory language might be adequate protection for the property owner if prosecutors and courts interpreted the language *reasonably*. But sometimes they don't. The classic example of this is the notorious, highly publicized Motel Caswell case in Tewksbury, Mass. The district judge wrote a terrific, lengthy opinion interpreting this provision of the statute after a full trial. Her opinion shows how abusive this case was. *U.S. v. 434 Main St.*, 961 F. Supp. 2d 298 (D. Mass. 2013). Had a couple of very capable Institute for Justice lawyers not come to the rescue of Russell Caswell, the motel owner, as pro bono counsel, the cost of defending this long, outrageous case would have bankrupted him. He would have been forced to settle with the U.S. Attorney's Office. If this is the kind of "justice" promoted by the Department of Justice's forfeiture program, which sorely lacks adult supervision, we can do better without it. Mr. Caswell was the lead witness at the April 2015 Senate Judiciary Committee hearing on civil forfeiture reform.

CASSELLA: The "all reasonable steps" test of innocent ownership, which is codified in Section 983(d), is not the constitutional minimum. To the contrary, as the Supreme Court held in *Bennis v. Michigan*, there is no constitutional right to an innocent owner defense *at all*.

Historically, property owners were liable for the illegal use of their property whether they knew about it or not. In enacting Section 983(d), however, Congress created a defense, patterned after *dicta* by

burdens imposed on the government were too low, and those imposed on the property owner were too high. But what is the objection to a law that allows a property owner to prevail if the facts are on his side? Do defendants who are acquitted in criminal cases complain that the law that allowed them to be set free was unjust? If a murder suspect is acquitted does that mean that the burdens on the prosecution were too low? The attorneys in the Motel Caswell case were able to use the existing law to preserve their client's interest in a drug-infested nuisance. That, in the opinion of the district court, was the outcome dictated by current law. If anyone had cause to be critical of that result, it was the prosecutor who attempted to remove a public nuisance and hold the property owner responsible. It certainly does not suggest a need to increase the government's burdens beyond what they already are.

IN A FEDERAL CRIMINAL PROSECUTION, THE GOVERNMENT NEED NOT EXPRESSLY SPECIFY THE PROPERTY SUBJECT TO FORFEITURE, UNLIKE A CIVIL FORFEITURE ACTION IN WHICH THE GOVERNMENT MUST DESCRIBE THE PROPERTY WITH REASONABLE PARTICULARITY. IN A CRIMINAL CASE, THE COURT ORDERS THE FORFEITURE OF THE DEFENDANT'S INTEREST IN THE PROPERTY – WHATEVER THAT INTEREST MAY BE – AS PART OF SENTENCING IN THE CRIMINAL CASE. THIRD-PARTY CLAIMANTS ARE GIVEN AN OPPORTUNITY TO THEN RAISE CLAIMS IN AN ANCILLARY PROCEEDING. IN PRACTICE, IS THIS AN AREA FOR CONCERN?

SMITH: The utter lack of notice of the nature or scope of the criminal forfeiture sought by the government in a criminal indictment or information is in stark contrast with the requirement that a civil forfeiture complaint be pled with particularity. *Contrast* Rule 32.2(a) of the Federal Rules of Criminal Procedure with Supplemental Rule G(2). It is not just the *property* that must be particularly described in the civil complaint. The alleged *conduct* triggering the civil forfeiture must also be described in great detail – enough detailed facts to “support a reasonable belief that the government will be able to meet its burden of proof at trial.” Rule G(2)(f). In a complex case, this often requires the government to file a very lengthy and detailed civil complaint. This is but one of the many ways in which a property owner's rights are, ironically, much better protected under current civil

forfeiture law than in a criminal forfeiture proceeding. However, these procedural protections are of relatively little value if, as is usual, the civil forfeiture claimant is unable to afford, or even to locate, a competent lawyer to defend his case.

The ancillary hearing process for third-party claimants in criminal forfeiture cases is also inadequate to protect their rights. And innocent third parties, unlike the defendant, are not entitled to a court-appointed attorney. (This is all discussed in my July 30, 2015 Legal Memorandum for the Heritage Foundation, cited in ¶11, above. For a fuller discussion, please see volume 2 of my forfeiture treatise, *Prosecution and Defense of Forfeiture Cases* (Matthew Bender 2016).)

CASELLA: There is nothing wrong with the way criminal forfeiture works. The notice required by Rule 32.2(a) informs the defendant that the government will be seeking the forfeiture of his property, but it does not interfere with his use or enjoyment of the property in any way. To prevent the dissipation of the property and to preserve it for forfeiture, the government must obtain either a restraining order or a seizure warrant based on a showing of probable cause. See 21 U.S.C. §§ 853(e) and (f).

Upon the entry of a guilty verdict in a criminal case, the court enters a preliminary order of forfeiture against any property derived from or used to commit the offense (in terms of the applicable criminal forfeiture statute), without regard to the ownership of the property. Rule 32.2(b), F.R.Crim.P. Then, in recognition of the due process rights of third parties who have had no opportunity to contest the entry of the forfeiture order, the court must conduct a post-conviction ancillary proceeding in which third parties have the right to object to the forfeiture on the ground that the property belongs to them. Proof of ownership is an absolute defense in the ancillary proceeding: Even a person who was complicit in the offense, but who has not been convicted, can successfully contest the entry of the forfeiture order. Indeed, as mentioned earlier, that is one of the reasons why civil forfeiture remains an essential law enforcement tool.

THE PROCEEDS OF PROPERTY FORFEITED UNDER FEDERAL LAW ARE USED TO FUND BOTH FEDERAL AND STATE LAW ENFORCEMENT. DOES THIS RAISE INHERENT CONFLICTS OF INTEREST AND POTENTIAL ABUSE?

SMITH: The federal and state laws enacted in 1984 and subsequent years, which allow law enforcement agencies to keep forfeited property and thus pad their budgets with self-generated, unappropriated money, are recognized as the root cause of forfeiture abuse.

This has been documented many times by the press and academics. The 1984 law was intended to incentivize federal law enforcement agencies and prosecutors to use forfeiture as a crime-fighting weapon. At that time, forfeiture was a legal backwater and was not used much. But as civil and criminal forfeiture laws were steadily expanded and law enforcement “got the hang” of it, the earmarking of forfeited property for law enforcement turned out to provide too great an incentive to seize assets for the sake of raising off-budget money rather than for traditional law enforcement reasons. This warped the priorities of law enforcement agencies around the country as they became increasingly dependent on forfeiture revenues. In a survey of over 1400 law enforcement executives nearly 40 percent of police agencies reported that civil forfeiture proceeds were a necessary budget supplement. *Policing for Profit: The Abuse of Civil Asset Forfeiture* 10 (Institute for Justice 2010) (citing J.L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budget Necessity in Contemporary Law Enforcement*, J. Crim. Justice 29, 171-187 (2001)). “In Texas, it isn't uncommon for forfeiture revenue to constitute a third or more of a *district attorney's* budget, according to a December 2014 report by the Texas Office of Court Administration. Forfeiture dollars routinely cover expenses like salaries, overtime, equipment and travel budgets.” *Efforts to Curb Asset Forfeitures by Law Enforcement Hit Headwinds*, Wall St. J., June 3, 2015.

Around one half of states have forfeiture statutes like Texas, requiring the police and sheriffs to share their forfeiture booty with the district attorney's office. This is even worse than giving all of the money to the police because it is a violation of due process to fund prosecutors' offices with the financial penalties they obtain. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250, 100 S. Ct. 1610 (1980); *Sourovelis v. City of Philadelphia*, 2015 U.S. Dist. LEXIS 61796, at *31-32 (E.D. Pa. May 12, 2015); *People v. Eubanks*, 14 Cal. 4th 580, 59 Cal. Rptr. 2d 200, 927 P.2d 310, 319-20 (Cal. 1996). Yet no state court has called a halt to this or even raised its judicial eyebrows. Many state statutes even give the courts the sensitive task of determining ►

the appropriate division of forfeited loot among the state law enforcement agencies. But the U.S. Supreme Court has taken note of DOJ's self-interest in filling its coffers through forfeiture and its aggressive efforts to do so, observing that this evidences its "lack of neutrality." *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 502 (1993).

Although this bounty-hunting system clearly lies at the root of forfeiture abuse, it has proven *politically* impossible to change the rules because police and prosecutors around the country have grown so dependent on forfeiture revenues in an age of comparative budget austerity. Congress wanted to end the DOJ's notoriously slipshod "Equitable Sharing Program" once and for all, but that reform had to be stricken from H.R. 5283, the far-reaching civil forfeiture reform bill moving through Congress, in order to pacify the state and local law enforcement lobbies that threatened to derail the bill. The same thing happened in 1999-2000, when the Civil Asset Forfeiture Reform Act (CAFRA) was enacted. At a Senate Judiciary Committee hearing on the bill in 2015, Chairman Grassley, its main Senate sponsor, said that civil forfeiture laws have created a "perverse incentive" for police to cut corners and seize cash and property without clear evidence of a crime. The opposition from the Fraternal Order of Police "dismisses the need for real reform and demonstrates the absurdity of a system of justice in which some in law enforcement appear to value funding their own operations over protecting civil rights," Grassley said. *Grassley clashes with police association over curbs to controversial asset seizures*, Washington Post, Apr. 16, 2015 at A17.

CASELLA: Federal law enforcement agencies *do not* retain the property forfeited in federal cases. To the contrary, the forfeited assets are deposited into a fund from which money is allocated for law enforcement purposes based on various criteria and appropriations approved by Congress. There is no relationship between the amount of money deposited into the fund in connection with enforcement actions by a given agency and the amount of money allocated to that agency in the next year's budget (as complaints by the DEA regarding that agency's relatively small allocation over decades will surely attest!).

The concern regarding improper incentives applies to state and local agencies that are permitted to

retain a percentage of the forfeited assets reflecting their participation in a federal case that results in forfeiture under federal law. This is mandated by statute, 18 U.S.C. § 981(e). The protection against improper police activity that may be motivated by a need to enhance law enforcement resources has always been to ensure due process in the forfeiture proceeding. There is nothing wrong with providing law enforcement agencies with an incentive to combat criminal activity by focusing on the economic foundations of the illegal enterprise if the protections guaranteed by the Fourth and Fifth Amendments are preserved. If the current post-seizure procedures are considered insufficient for that purpose, or the incentives for abuse are nevertheless considered too great, the remedies would include allocating the forfeited funds to a pool for the benefit of state and local law enforcement, limiting federal adoption of state and local seizures to cases involving a threshold amount of money or cases in which there is a significant federal interest, or requiring post-seizure probable cause hearings where the seizure occurred without a warrant. But they certainly would not include increasing the burdens on the government and the courts in cases that have nothing to do with the sharing of funds with state and local law enforcement agencies.

IF YOU BELIEVE REFORMS ARE NEEDED IN FEDERAL CIVIL OR CRIMINAL FORFEITURE LAWS, WHAT CHANGES WOULD YOU LIKE TO SEE?

SMITH: H.R. 5283, the DUE PROCESS Act of 2016, contains all or nearly all of the most significant reforms I would advocate in the civil forfeiture area, with the one big exception noted immediately above – that it doesn't end "equitable sharing." But I know that political compromise with state and local law enforcement was necessary to get the bill introduced. As I mentioned already, this legislation has cleared the House Judiciary Committee unanimously and has wide bipartisan support in both houses of Congress (just like the CAFRA, enacted unanimously by both houses in 2000). Criminal forfeiture has never been reformed and it has gotten steadily more unfair and oppressive due to unwise criminal rule changes and bad judicial decisions sought by prosecutors. The *criminal* forfeiture reforms I want to see are detailed in my July 30, 2015, Legal Memorandum for the Heritage Foundation (<http://report.heritage.org/lm158>).

Of utmost importance, as I've stated, is ensuring the right to appointed counsel.

CASELLA: There are many ways in which the forfeiture laws could be improved. Property subject to criminal forfeiture should be subject to pretrial preservation orders based on a finding of probable cause whether or not the property is directly traceable to the offense or forfeitable on the ground that it will be needed to satisfy a forfeiture money judgment. Victims who depend on the application of the federal forfeiture laws to recover their property see no reason why a criminal defendant who succeeds in spending his criminal proceeds while retaining an equivalent amount of untainted funds should be allowed to spend down the funds that would otherwise be used to satisfy a forfeiture order, and to reimburse the victims for their losses. Now that the Supreme Court in *Luis v. United States* has removed the Sixth Amendment issue from this debate – by holding that there must be an exemption from any pretrial order restraining untainted funds to allow the defendant to use the money to retain counsel – there is no reason why victims' rights and the interests of law enforcement in imposing an appropriate sanction on wrongdoers should not take precedence over the defendant's ability to spend forfeitable funds on a luxurious lifestyle.

Other improvements to the forfeiture laws would include expanding the reach of forfeiture to the proceeds of *all* crimes, foreign and domestic, as virtually all other countries have done, and creating an exemption to the innocent owner defense in certain cases, such as the enforcement of the Endangered Species Act, the recovery of cultural property that belongs to foreign governments or indigenous people or artwork stolen during the Holocaust or from museums, and limiting the award of attorney's fees in civil forfeiture cases to a level commensurate with the value of the property that was the subject of the litigation – thus discouraging the over litigation of claims in minor cases.

SHOULD THERE BE A RIGHT TO APPOINTED COUNSEL IN JUDICIAL FORFEITURE ACTIONS OR ARE THERE GOOD ALTERNATIVES SUCH AS ALLOWING FEE AWARDS TO PREVAILING CLAIMANTS IN CIVIL AND ANCILLARY CRIMINAL FORFEITURE ACTIONS?

SMITH: The most important reform in H.R. 5283 is the appointment of counsel provision, because

without counsel the other procedural and substantive reforms lose much of their impact. Federal civil forfeiture is too complicated for a nonlawyer to understand. Indeed, it is difficult to find a lawyer who really understands it. The appointment of counsel provision in the CAFRA House bill (1999) was stripped out in the Senate in order to reach a deal with the DOJ that enabled passage by unanimous consent – the only way to enact the bill in 2000. No such compromise is needed this time. CAFRA's mandatory fee-shifting provision was a poor substitute for the original appointment of counsel provision. The DOJ, assisted by friendly judges, has gutted much of the fee shifting provision (28 U.S.C. § 2465(b)). H.R. 5283 would overrule some of the bad case law that has developed around the fee-shifting provision but, more importantly, would also require appointed counsel under the CJA for all indigents seeking to contest a judicial civil forfeiture.

CASSELLA: No, there should be no right to appointed counsel in civil forfeiture cases beyond the existing statutory right that is codified at 18 U.S.C. § 983(b) (principally applying to the forfeiture of the family home). Civil forfeiture cases are *in rem* actions in which anyone alleging an interest in the property can file a claim. Often there are multiple claims; indeed, the claims in a major fraud case can number in the hundreds. In a recent case, agents executing a search warrant seized a quantity of currency from a safe in a particular person's residence. In the ensuing civil forfeiture action, that person's parents, wife, children and cousin – some of whom resided in the same residence and some of whom did not – all filed claims asserting competing ownership claims to some or all of the money. Who would get the appointed counsel? Suppose it were a case involving the forfeiture of millions of dollars of fraud proceeds to which hundreds of victims would lay claim if they were entitled to appointed counsel rather than waiting for the government to forfeit the property and distribute it through the remission or restoration process? And why should a person wholly without standing to contest the forfeiture be entitled to counsel? It is no answer to say that the standing issue would be determined by the court *before* counsel would be appointed; any statutory right to counsel would surely include the right to have counsel appointed to resist a motion

by the government to dismiss the claim for lack of standing. But a statute authorizing the appointment of counsel in such cases would surely open the door to frivolous claims filed by persons with no genuine interest in the property.

It has been suggested that the reason that 80 percent of civil forfeiture cases are uncontested is that there is no right to counsel. That is not true. Before CAFRA was enacted in 2000, it was similarly argued that the reason a similar fraction of cases was uncontested was that the burden of proof was on the claimant, there was no innocent owner defense, and claimants were required to post a cost bond before they could get in the courthouse door. Yet when reforms addressed to those issues were enacted by CAFRA, the fraction of contested cases remained virtually unchanged.

The real reason is that in most civil forfeiture cases, there is no defense to the forfeiture, or the property owner does not see it as being in his interest to raise one. If the government seizes \$60,000 in cash, a loaded handgun and a kilo of cocaine, potential claimants to the money may – and almost always do – walk away without filing a claim, *even if they are represented by counsel*. In fact, in a great many of the uncontested civil forfeiture cases there is a parallel criminal prosecution (as federal prosecutors who frequently must answer motions by convicted felons for the return of their administratively-forfeited property could readily attest).

The pending "reform" legislation would indeed "overrule some of the bad case law that has developed around the fee-shifting provision" – "bad," that is, from the point of view of defense counsel. For example, courts have held that when fees are awarded to a claimant who prevails in a civil forfeiture case, the money belongs to the client, not the attorney, and thus may be garnished to satisfy an outstanding criminal fine or restitution order to the client's victims, or money owed as child support to his former spouse. *See Astrue v. Ratliff*, 560 U.S. 586, 597 (2010). The bill would reverse that, giving

priority to the attorney over all others. There is little to recommend such a change in the law.

SHOULD SOCIETY AT LARGE CARE ABOUT FORFEITURE ACTIONS?

SMITH: Society at large does care a lot about widespread forfeiture abuse. Almost every substantial newspaper in the country has editorialized in favor of reforming civil forfeiture, both state and federal. A lot of the editorials focus on the evils of the "earmarking" system that provides irresistible incentives for abuse. Reading these editorials will convince you that there is overwhelming public support for reform, as there was in 2000 when the CAFRA was enacted. Nick Sibilla, *Over 100 Editorials Call For Civil Forfeiture Reform* (Institute for Justice, Dec. 3, 2015), <http://ij.org/over-100-editorials-call-for-civil-forfeiture-reform/#>. E.g., *Police rake in bonanzas from people who have committed no crime*, Washington Post, Sept. 10, 2014; *When police play bounty hunter: Our view*, USA Today, Nov. 19, 2014; *Loretta Lynch's Money Pot*, Wall St. Journal, Nov. 21, 2014; *Texas' asset forfeiture laws require changes*, Dallas Morning News, Dec. 30, 2014. *Congress must end abuses of seizures by feds*, Des Moines Register, Nov. 8, 2014; *Time is now to fix asset forfeiture*, Orange County Register, Nov. 13, 2014; *A cause for concern if civil forfeiture goes unchecked*, Deseret News, Sept. 9, 2014.

CASSELLA: Of course society should care about forfeiture actions as it should care about all law enforcement actions. Law enforcement protects us from terrorism, from fraud and other property crimes, from the abuse of children and other vulnerable persons, from having our financial institutions used by foreign kleptocrats and other international criminals, from trafficking in drugs, arms and human beings by foreign organized criminals, and from numerous other illegal acts, and forfeiture is an essential tool that law enforcement must be able to employ in that endeavor.



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