



Department of Justice

STATEMENT FOR THE RECORD

U.S. DEPARTMENT OF JUSTICE

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

FOR A HEARING ENTITLED

THE NEED TO REFORM ASSET FORFEITURE

APRIL 15, 2015

Statement for the Record
United States Department of Justice
Committee on the Judiciary
United States Senate
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The Department of Justice appreciates the opportunity to submit this Statement for the Record as Congress considers the important and complex topic of asset forfeiture reform. The Department is committed to ensuring that federal asset forfeiture laws are appropriately and effectively used to combat crime and compensate victims, consistent with civil liberties and the rule of law. The Department has undertaken several major policy reforms as part of our ongoing comprehensive review of the Asset Forfeiture Program. We believe these carefully crafted changes have significantly improved the landscape and look forward to apprising this Committee of those efforts.

Asset forfeiture is a critical legal tool that serves a number of compelling law enforcement purposes. Some of the changes being considered, such as raising the standard of proof in civil forfeiture cases, may have the unintended consequence of rewarding the most sophisticated criminal actors and terrorists. At the same time these changes would reduce the effectiveness of one of the most important tools available to the government. Without asset forfeiture it would be impossible to deprive criminals of the proceeds of their crimes, to break the financial backbone of organized criminal syndicates and drug cartels, and to recover property that may be used to compensate victims and deter crime.

Introduction

While the Department proudly recognizes the value and importance of its asset forfeiture program, we are keenly aware of concerns raised about certain seizure and forfeiture practices. The Department takes seriously any and all allegations of perceived or actual abuse of the forfeiture program, and the Department welcomes the opportunity to address some of those concerns with this submission. While asset forfeiture plays a unique and multifaceted role in our legal system, the Department is constantly looking for ways in which the asset forfeiture program can be improved.

Against this backdrop, this submission will discuss the Department's ongoing internal review of the asset forfeiture program, the initial results of which were announced in the last few months. It also will explain the various types of asset forfeiture, with a particular focus on civil forfeiture and the extensive safeguards in place to protect innocent property owners. Further, it will highlight the various circumstances in which civil forfeiture is the best, and sometimes the only, legal mechanism to recover criminally-tainted assets. In the process, this submission will attempt to debunk some misconceptions about forfeiture law and practice that are routinely cited as justification for curtailing asset forfeiture authorities. The Department hopes that this hearing will foster a more common understanding of forfeiture and promote a constructive dialogue about sensible ways to improve the asset forfeiture program.

I. Department of Justice Review of the Asset Forfeiture Program:

As evidence of the Department's commitment to improving the asset forfeiture program, over the past year we have been engaged in a comprehensive review of forfeiture practices and policies. The goal of this review is to ensure that federal asset forfeiture authorities are appropriately and effectively used consistent with civil liberties and the rule of law.

As a result of that review, on January 16, 2015, the Attorney General issued an order strictly limiting when agency participants in the Department of Justice Asset Forfeiture Program are authorized to adopt assets seized by state or local law enforcement under state law. "Adoption" refers to when a state or local law enforcement officer seizes a piece of property under state or local legal authority and then gives that property to federal law enforcement so that the property can be forfeited under federal law. Pursuant to this recent order, federal agencies are only permitted to adopt assets seized by state and local law enforcement that directly implicate public safety concerns, including firearms, ammunition, explosives, and property associated with child pornography. The adoption of all other property, including, but not limited to vehicles, valuables, and cash, is prohibited.

This policy went into effect immediately and is expected to significantly reduce the number of adoptions. It does not affect the ability of state and local authorities to seize and forfeit property under existing state laws, nor does it govern seizures made under a federal warrant or pursuant to a joint-federal investigation or task force. This new policy will ensure that asset forfeiture can continue to be used to take the profit out of crime and return assets to victims, while safeguarding civil liberties. At the same time, it will encourage joint investigations between federal and state and local law enforcement, to continue strong working relationships with state and local partners including the sharing of law enforcement intelligence.

In addition, on March 31, 2015, the Department issued a policy limiting the use of asset forfeiture authorities in connection with structuring offenses under Title 31 U.S.C. § 5324(a). Generally speaking, structuring occurs when, instead of conducting a single transaction in currency in an amount that would require a report to be filed or record made by a domestic financial institution, the violator conducts a series of currency transactions, willfully keeping each individual transaction at an amount below applicable thresholds to evade reporting or recording. In addition to being a stand-alone offense, structuring is a crime that often occurs in connection with other criminal activity.

The new policy restricts the use of civil or criminal forfeiture for structuring offenses until after a defendant has been criminally charged. Under the new policy, in the absence of criminal charges, judicially authorized warrants to seize bank accounts involved in structuring can only be obtained in two ways. Under the first method, the prosecutor must develop probable cause of additional federal criminal activity and that determination must be approved by a supervisor. Otherwise, a prosecutor may ask a judge to issue a seizure warrant in structuring cases only if either the U.S. Attorney or the Chief of the Criminal Division's Asset Forfeiture and Money Laundering Section personally determines that seizure would serve a compelling law enforcement interest.

The new policy also imposes important protections after a seizure has taken place. The policy requires that, if a prosecutor determines that there is insufficient admissible evidence to prevail in a criminal or civil trial, within seven days the prosecutor must direct a seizing agency to return funds. The policy also imposes a 150-day deadline to file a criminal indictment or civil complaint against the funds seized, or otherwise directs a return of the full amount of the seized funds. Finally, the policy requires a formal, written settlement agreement vetted by a federal prosecutor for settlements of structuring offenses.

The Department's review of asset forfeiture is still ongoing and includes those aspects of the program currently under review by the Committee such as, for example, the structure of the Equitable Sharing Program and appropriate procedural protections. The recent policy changes on adoptions and structuring cases should leave little doubt that, where appropriate, the Department will address concerns. And, the Department continues to participate in the Law Enforcement Equipment Working Group, which will provide recommendations to the President regarding actions that can be taken to improve programs that help local law enforcement obtain equipment.

II. Overview of U.S Forfeiture Law

Though some have called forfeiture an unusual legal concept, the fact is that forfeiture has been an integral part of American jurisprudence dating back to the Nation's founding. One of the first acts of Congress in 1789 was to enact a forfeiture statute subjecting vessels and cargoes to civil forfeiture for violation of the customs laws. Congress codified the traditional maritime law principle that a ship involved in crime was subject to forfeiture even if the owner was not criminally charged or convicted. The vessel was civilly forfeited as an instrumentality of the offense so that it could not be reused in criminal activity. This explains why asset forfeiture law has its roots in admiralty law. Since that time, forfeiture has been broadened to a wider range of criminal activity in an effort to deter criminal activity and compensate victims of crime.

1. Types of Asset Forfeiture

There are three types of asset forfeiture – criminal, civil, and administrative. While each is governed by different authorities and practices, all three require that the government bear the burden of proof.

The bulk of this submission will focus on civil forfeiture pursuant to various sections of Title 18, but for comparative purposes we begin with a brief overview of criminal and administrative forfeiture.

a. Criminal Forfeiture:

Criminal forfeiture is an action against a defendant that includes notice of the intent to forfeit property in a criminal indictment. A criminal conviction is required, and forfeiture is part of the defendant's sentence. Criminal forfeiture is limited to the property interests of the defendant, including any proceeds earned by the defendant's illegal activity. Further, criminal forfeiture is generally limited to the property involved in the particular counts on which the

defendant is convicted. As part of sentencing, a court may order the forfeiture of a specific piece of property listed in the indictment, of a sum of money as a money judgment, or other property as substitute property. The government must establish by a preponderance of the evidence the requisite connection between the crime of conviction and the asset. After a preliminary order of forfeiture is entered, a separate, ancillary proceeding begins to determine any third-party ownership interests in the property the government seeks to forfeit. While the defendant himself cannot contest the forfeiture in this proceeding, often others connected to the defendant (such as family members and associates) do contest the forfeiture.

b. Administrative Forfeiture:

Administrative forfeiture, which is part of the civil forfeiture regime, refers to property forfeited to the United States without filing a case in federal court. Rather, the forfeiture process occurs before an administrative agency that has custody of the assets. The law provides many procedural safeguards, including strict time limits, to govern administrative forfeiture and protect the interests and rights of property holders. First, any seizure of property subject to administrative forfeiture must be based on probable cause in accordance with the Fourth Amendment to the U.S. Constitution. Any amount of currency can be administratively forfeited, subject to the \$5,000 and \$1,000 minimums discussed in Section V, *infra*. Personal property can only be administratively forfeited if it is worth \$500,000 or less. Administrative forfeiture cannot be used for real property.

Following seizure, the government is required to send direct written notice of the administrative forfeiture proceeding to every person who appears to have an interest in the seized property and whose identity is known to the government. To ensure notice to interested persons whose identities are not known to the government, the government publishes notice of the administrative forfeiture proceeding on a dedicated website www.forfeiture.gov. If anyone files a claim with the administrative agency contesting the forfeiture, the agency refers the case to a United States Attorney's Office, which then has to decide whether to proceed with a judicial forfeiture action or to return the property. If no claim is filed, the administrative forfeiture still is not finalized until it has been reviewed for legal sufficiency by agency counsel.

The primary benefit of administrative forfeiture is to avoid burdening the courts with judicial actions when no one claims an interest in seized property.

c. Civil Forfeiture:

Civil judicial forfeiture is an *in rem* proceeding that may be brought against property that was derived from or used to commit an offense, rather than against a person who committed an offense. Unlike criminal forfeiture, there is no criminal conviction required, although the government is still required to prove in such actions that the property was linked to criminal activity.

The *in rem* form of the action allows the court to gather anyone with an interest in the property in the same case and resolve all the issues with the property at one time. In a civil forfeiture case, the government is the plaintiff, the property is the defendant, and any person who claims an interest in the property is a claimant. The civil forfeiture action proceeds like a normal

civil action, except there are some special rules that apply only to forfeiture cases, which are set forth in the Federal Rules of Civil Procedure.

2. Phases of a civil forfeiture proceeding

a. Proving that an asset is subject to forfeiture:

In a civil action to forfeit property linked to crime, the government has the burden of proving by a preponderance of the evidence that a crime occurred, and that the seized property was connected to that crime. If the government is seeking to forfeit the proceeds of an offense, it must establish that the property was obtained directly or indirectly as a result of the commission of the offense giving rise to forfeiture, and any property traceable thereto. 18 U.S.C. § 981(a)(2)(A). If the government is seeking forfeiture based on a facilitation or “involved in” theory, it must establish that there was a substantial connection between the property and the offense. 18 U.S.C. § 983(c)(3).

b. Innocent owner defense:

Even if the government meets its burden of establishing the nexus between the property and the offense that forms the basis for the forfeiture that does not necessarily end the inquiry. The law entitles any individuals with standing to assert a claim that they are an innocent owner of the property at issue, after the government has proven its case. 18 U.S.C. § 983(d)(1). There are two types of innocent owner defenses: one applicable to persons who owned the property when the illegal activity was occurring, and the other applicable to persons who acquired their interest in the property after the illegal conduct occurred.

Persons asserting an innocent owner defense who owned an interest in the property as the illegal activity was occurring must show, by a preponderance of the evidence, one of the following: They did not know of the illegal conduct or, if they did know, that upon learning of the conduct they did all that reasonably could be expected, under the circumstances, to terminate the illegal use of the property, including giving timely notice of the conduct to law enforcement and revoking, or making a good faith attempt to revoke, permission of those engaged in the illegal conduct to continue using the property or taking other reasonable steps to discourage or prevent such illegal use. 18 U.S.C. § 983(d)(2).

Persons who acquired an interest in the defendant property after the illegal conduct occurred must show that they qualify as a bona fide purchaser for value of the interest and that, at the time they acquired the interest, they did not know and were reasonably without cause to believe that the property was subject to forfeiture. 18 U.S.C. § 983(d)(3). The innocent owner defense is unavailable as to property that qualifies as contraband or other property that is illegal to possess. 18 U.S.C. § 983(d)(4).

3. Right to Counsel and Attorneys’ Fees

As part of the comprehensive reforms included in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), a claimant in a civil forfeiture case may be entitled to counsel and/or attorneys’ fees and costs. A claimant is entitled to appointed counsel if the claimant already has

appointed counsel in a related criminal proceeding, or if the defendant property is the primary residence and the claimant is financially unable to obtain representation (18 U.S.C. § 983(b)(1) and (2)). CAFRA also provides that when a claimant substantially prevails in a civil forfeiture action, the government is liable for the claimant's attorneys' fees and litigation costs. 28 U.S.C. § 2465(b). This is a significant deviation from the general rule that litigants bear their own legal costs, win or lose.

III. Why Use Civil Forfeiture?

In order to demonstrate the real world utility of civil forfeiture, the following highlights certain circumstances and categories of cases that would not be possible without civil forfeiture.

Property in the possession of a third party:

- Either by design or accident, criminally-tainted property is often in the possession of someone other than the person who committed the crime. Experience has shown that the most sophisticated criminals frequently hide assets in the possession of third parties, like family members or trusted confederates. In such cases, civil forfeiture enables the government to recover property when criminal prosecution of the possessor of the property may not be appropriate or feasible.

As Justice Kennedy observed of statutes authorizing civil forfeiture: “[these] statutes are not directed at those who carry out the crimes, but at owners who are culpable for the criminal misuse of the property. The theory is that the property, whether or not illegal or dangerous in nature, is hazardous in the hands of this owner because either he uses it to commit crimes, or allows others to do so. The owner can be held accountable for the misuse of the property.” *United States v. Ursery*, 518 U.S. 267, 294 (1996) (concurring opinion; internal citation omitted).

Criminals located outside the United States:

- **Terrorists** — In the *Bridge Investments* case, the government is seeking to forfeit a \$6.5 million investment account owned by an al Qaeda operative who is located outside the United States.
- **Kleptocrats** — In the *Obiang* case, the government secured the forfeiture of \$10.3 million in corruption proceeds from a sitting Vice President of Equatorial Guinea, Teodoro Nguema Obiang Mangue, as well as an additional \$20 million to be given to a charitable organization for the benefit of the people of Equatorial Guinea.
- **Fugitives** — In the *Benitez* case, involving a \$110 million Medicare fraud orchestrated by three brothers, the brothers escaped to Cuba, where they remain fugitives. Two civil forfeiture actions resulted in the recovery and civil forfeiture of millions of dollars of property, including a hotel, a water park, 30 vehicles, a car rental agency, houses, condos, and apartments.

The internet has opened new avenues for international organized criminals to commit crimes in the United States without leaving foreign countries that are safe havens from extradition. Civil forfeiture can be the only tool to secure their ill-gotten gains and return them to victims.

Criminal defendant is deceased:

- In the *Enron* case, Kenneth Lay died after he was convicted by a jury but before he could be sentenced. Civil forfeiture was the only way to secure millions of dollars of Lay's assets, which were then used to compensate victims of the Enron fraud.

Living or perishable property:

- In the case of Michael Vick, the government was able to use civil forfeiture to move quickly to protect the abused dogs, rather than waiting for the criminal case to be fully resolved. The United States civilly forfeited 52 pit bulls, many of which were then adopted.

Impossible to identify a defendant:

- Stolen art and other items of cultural significance often appear in an auction house with no clear path to the person or group that originally stole the artifact. There are many such examples, including in the *Argentinean Sauropod* case involving three rare dinosaur eggs stolen from Argentina and brought to the United States. Despite being unable to identify the smugglers, the U.S. government was able to civilly forfeit the stolen eggs and return them to Argentina.

IV. Assisting Victims of Crime:

Not only does asset forfeiture punish criminals by removing their tools and illicit proceeds, it also enables the government to compensate the victims of crime. In fact, asset forfeiture laws, including civil asset forfeiture laws, are frequently the most effective tool in recovering the proceeds and property of crime for victims. Since 2000, the Department has returned over \$4 billion in assets to the victims of crime through asset forfeiture, of which \$1.87 billion was recovered through civil forfeiture. In addition, the Department expects to distribute approximately \$4 billion civilly forfeited as a result of the Madoff investigation and related forfeiture proceedings involving the estate of Madoff's partner Jeffrey Picower in 2010, JP Morgan Chase Bank in 2014, and other actions tied to the Madoff fraud scheme. Once the process needed to resolve more than 60,000 Madoff victim claims is complete, the total amount of victim compensation provided through forfeiture will stand at more than \$8 billion. At that point, victim compensation from forfeited funds will far exceed the nearly \$5.4 billion of forfeited funds that have been shared with state and local law enforcement partners to fight crime as part of the Equitable Sharing Program discussed below.

There are two primary reasons why forfeiture is uniquely able to assist victims:

First, civil forfeiture laws allow for seizure, after a judicial finding of probable cause that the seized property represents the proceeds of crime or in some instances a court order preserving assets pending a final resolution of the forfeiture case. Experience has shown that a criminal defendant rarely has any of his illicit proceeds available by the time he is charged, convicted, and sentenced when the court will order restitution. It is the pre-conviction phase where civil asset forfeiture tools provide what is often the only means of preserving property subject to forfeiture so that it can ultimately be returned to the victims of the crime.

Second, over the years, a very efficient forfeiture management regime has been developed by the U.S. Marshals Service to maintain and eventually sell forfeited property. In cases where there are victims of the offense giving rise to forfeiture, this results in a much higher return for those victims.

V. Popular Misconceptions about Civil Forfeiture:

Because asset forfeiture is a complicated and often misunderstood body of law, it is understandable that public reporting frequently mischaracterizes fundamental features of forfeiture law and practice. This submission, therefore, addresses some of the most widespread misconceptions about asset seizure and civil forfeiture.

1. Asset Seizure:

The perceived abuse of asset seizure, most notably during highway interdiction stops, is often cited as one of the most offensive features of civil forfeiture. In particular, it has been alleged that during routine traffic stops law enforcement officers are seizing assets of innocent citizens with no evidence of criminal wrongdoing. It is not uncommon to see press reports suggesting, if not flatly stating, that such seizures are permitted by law.

Assets can be seized by the government either pursuant to a seizure warrant issued by a judge, or pursuant to an exception to the warrant requirement. In either instance, however, the law requires that there be probable cause linking the asset directly to criminal activity. The probable cause requirement is a core tenet of our legal system. It is the very same standard of proof that must be determined by a law enforcement officer prior to placing an individual under arrest. The forfeiture process, civil or otherwise, does not allow for the seizure of property in the absence of probable cause. That is not to suggest that warrantless seizures, like warrantless arrests, may not subsequently be determined to lack probable cause. But any suggestion that property can be legally seized without probable cause is erroneous. Moreover, even when probable cause is present, DOJ policy imposes minimums for cash seizures. Specifically, the minimum amount of cash that can be seized is \$5,000, unless the person from whom the cash was seized either was, or is, being criminally prosecuted by state or federal authorities for criminal activities related to the property, in which case the amount must be at least \$1,000.

2. Burden of Proof

Another frequent criticism of civil forfeiture is that owners of seized property are presumed “guilty” and thus have the burden of proving their “innocence” to regain their property. This, it is said, turns the bedrock legal principle of “innocent until proven guilty” on its head.

As previously noted, in all forfeiture proceedings, including civil forfeiture, the burden of proof is on the government. If the government fails to meet its burden of linking the property to criminal activity, it loses the case without the property owner having to make any showing of innocence. In other words, the property’s connection to crime must be proved by the government, not disproved by the owner. And while the Supreme Court has held that the

innocent owner defense is not constitutionally required, the law nonetheless provides a claimant the opportunity to demonstrate that despite the government having met its burden, the asset should nonetheless not be forfeited. As Justice Kennedy has observed, in civil forfeiture, “only the culpable stand to lose their property; no interest of any owner is forfeited if he can show he did not know of or consent to the crime.” *United States v. Ursery*, 518 U.S. at 294 (concurring opinion; internal citation omitted).

3. Criminal Conviction:

Critics also point out that civil forfeiture enables the government to take possession of a person’s property without charging or convicting that person of a crime, thereby suggesting that forfeiture in the absence of a conviction is illegitimate.

This criticism rests on the belief that the government should only be authorized to seize and forfeit property in connection with a criminal conviction, which is indeed how criminal forfeiture functions. But as previously noted, there is a range of criminals, including terrorists, kleptocrats, and fugitives, for whom prosecution is not possible or, when the property is in the hands of a third party, appropriate. For example, when a white collar criminal transfers fraud-generated assets to family members and friends, it is civil asset forfeiture that enables the seizure of those assets and the compensation of victims. When international organized crime figures orchestrate their criminal enterprises from far-flung havens immune from extradition, it is civil asset forfeiture that ensures the seizure of their ill-gotten gains. In such cases, the inability to prosecute should not affect the government’s compelling interest in recovering the proceeds and instrumentalities of crime. Civil forfeiture is the only means by which the government can pursue those interests.

4. Standard of Proof:

As noted above, the government always has the burden to prove the link between the property and criminality. The government must show this by a preponderance of the evidence, the conventional standard of proof in a civil case. Some have suggested that the government be held to a higher standard, such as “clear and convincing evidence.” Deviating from the usual civil standard in this way would benefit sophisticated criminals who are able to manipulate circumstances to distance their crimes from their proceeds.

For the first 200 years of our Nation’s history, civil *in rem* forfeitures were governed by the probable cause standard under which the government could sustain its burden of proof simply by establishing probable cause that the defendant property was “tainted” or subject to forfeiture under the statute in question. Only fifteen years ago, Congress raised the standard of proof for nearly all civil *in rem* forfeitures to the preponderance of the evidence standard, the common and conventional standard governing civil litigation in the federal and state courts.

While drafting CAFRA, Congress considered but ultimately declined to adopt the clear and convincing standard. Adopting the higher standard would have a perverse result in fraud cases, for example. When the weight of the evidence establishes by a preponderance that the funds in a bank account were derived from Medicare reimbursements for services never performed, under the law the government will prevail in establishing liability. But, if that

evidence does not meet the clear and convincing standard, the funds would be returned to the doctor committing the fraud rather than to the victim taxpayers. To avoid this perverse outcome, civil forfeiture claims should be held to the same exact evidentiary standards as other civil claims in our courts of law.

Moreover, forfeiture cases like those involving sophisticated international money laundering, which frequently rely on circumstantial evidence linking the funds to illegal activity, would be virtually unwinnable under the higher standard of proof. Consequently, the higher standard would result in the prosecution of fewer civil forfeitures, with a corresponding reduction in the disruption, deterrence and punishment of criminal organizations involved in illegal activity. In addition, making civil forfeiture more difficult will mean less money is recovered and returned to victims of crime.

All other civil actions involving property – such as cases involving bank fraud, health care fraud, and the submission of false claims to the government – use the “preponderance of the evidence” standard. Any amendment to raise the standard of proof for civil forfeiture would thus have the perverse effect of benefitting sophisticated drug dealers, terrorist financiers, and money launderers.

5. State and Local Participation in the Equitable Sharing Program

The Equitable Sharing Program was created by Congress, in part, as a way to strengthen law enforcement by fostering cooperation among federal, state, and local law enforcement agencies (LEAs) and encouraging participation in task force settings. Under the current system, once a forfeiture is successfully completed, the federal government disposes of the assets (for example, by selling or otherwise liquidating them) and then determines the net proceeds, if any. The government then pays expenses and provides for any applicable victim compensation for the case. Only after these expenses and victim payments are deducted, if there are any remaining proceeds, then those remaining proceeds are available for equitable sharing with state and local LEAs that participated in the seizure or forfeiture of the asset.

Federal law enforcement agencies and prosecutors require cooperation and assistance from numerous LEAs for many, if not most, serious federal criminal investigations. LEAs bring needed expertise, law enforcement information, and resources to the Department’s battle against organized, transnational criminal groups and terrorists. We have heard concerns that the current equitable sharing system distorts law enforcement incentives by linking payments to LEAs with individual asset seizures and forfeitures. As part of the aforementioned review of the asset forfeiture program, the Department is considering whether the Equitable Sharing Program should be adjusted to address concerns that have been raised regarding a direct nexus between particular seizures and financial sharing to a specific LEA. This review, and any subsequent policy change, however, will assess these concerns and take into account the sound counsel and legitimate needs of our state and local LEA partners.

Conclusion

The Department of Justice remains committed to fighting crime and returning monies to victims while protecting civil liberties and ensuring due process through the asset forfeiture process. The Department looks forward to working with the Congress to identify ways to improve the asset forfeiture program in a manner consistent with these ideals. The Department thanks the Committee for its interest in these critical issues.