

Take the Money and Run

The crazy perversities of civil asset forfeiture.

By Radley Balko

Last month, the Supreme Court tossed out the case *Alvarez v. Smith*, a challenge to a portion of the asset forfeiture in Illinois that allows the government to keep seized property for up to six months before giving its owner a day in court. The Court declined to rule on the case after determining it to be moot—all of the parties had settled with the government by the time the case made it to Washington.

That's too bad, because the Illinois law should be struck down, and also because the country could benefit from a discussion about the continuing injustice of many states' civil asset forfeiture laws.

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Civil asset forfeiture, an outgrowth of the drug war, rests on the legal theory that **property can be guilty** of a crime. Once authorities establish a nexus between a piece of property and criminal activity—most commonly drug cases, but also prostitution, DWI, and white collar crime—the owner must prove his innocence or lose his property, even if he's never charged with an underlying crime. In most jurisdictions, seized cash and the proceeds from the auctioned property go back to the police departments and prosecutors' offices responsible for the seizure. The scheme, which creates unsavory incentives for public officials, became popular because of a 1984 federal bill designed to encourage aggressive enforcement.

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After a number of **outrageous forfeiture cases** made **national headlines**, Congress reformed federal civil forfeiture law in 2000. But egregious abuses are **still common at the state level**. The Indiana case of Anthony Smelley illustrates just how perverse forfeiture proceedings can get.

Early on a morning in January 2009, Smelley, who is 22, was pulled over while driving along I-70 in Putnam County, Indiana. Months earlier, he'd been in a car accident and won a \$50,000 settlement. He states in court documents that he had taken around \$17,500 with him that January day en route from his home in Detroit to St. Louis, to buy a new car for his aunt.

Smelley was pulled over for making an unsafe lane change and driving with an obscured license plate. He was also driving with an expired driver's license. His traffic stop should have ended with citations for those infractions. Instead, the police officer asked Smelley to get out of the car and patted him down, finding the cash. The officer then called in a K-9 unit for a sniff search of Smelley's car for drugs. The dog alerted twice. Smelley and two passengers were arrested, and the police seized Smelley's money.

A subsequent hand search of Smelley's car turned up no illicit drugs, and no criminal charges were ever filed against Smelley or his passengers. Smelley produced a letter from a Detroit law firm confirming he had been awarded the \$50,000 from the accident. That didn't matter. Putnam County has since held Smelley's money for more than a year.

When I started looking into Smelley's case as part of a **feature story** for *Reason* magazine, I noticed that the attorney representing Putnam County, Christopher Gambill, wasn't Putnam County prosecutor Timothy Bookwalter or anyone who works for him. Gambill is a private attorney. He told me by phone that he handles civil forfeiture cases for several Indiana counties on a contractual basis and, incredibly, pockets a third to a quarter of what he wins in court.

Allowing police departments to benefit from forfeiture proceeds is bad enough. It creates perverse incentives for cops to err on the side of taking property and can lead to mass civil rights violations like **those exposed last year in Tenaha, Texas**. And

forfeiture critics argue that allowing public prosecutors' offices to benefit is even worse, and likely a violation of due process. It's the prosecutors who decide what cases the state will bring in court—their offices shouldn't materially benefit from those policy decisions.

But allowing unelected *private* attorneys to oversee a county's forfeiture proceedings on a contingency basis is the worst option yet. These private attorneys, unaccountable to the public, are making decisions about which cases to go after that directly affect their own personal wealth. Steven Kessler, a New York attorney and author of a treatise on state forfeiture laws, says he's never heard of anything like it. "This is scandalous," Kessler told me in a phone interview. "It's blatantly unconstitutional."

It isn't clear just how widespread the practice is in Indiana. The office of Indiana Attorney General Greg Zoeller and the Indiana Prosecuting Attorneys Council didn't return my calls for comment. But according to Mark Rutherford, chairman of the Indiana Public Defender Commission, it goes well beyond the four counties that work with Gambill. "It's just sort of accepted here that this is the way things are," Rutherford says. "There are attorneys who have amassed fortunes off of these cases."

Smelley's case also demonstrates the zeal an unelected attorney might display to win his fee. At a summary judgment hearing last February, Putnam County Circuit Court Judge Matthew Headley asked Gambill how he planned to tie Smelley's seized money to drug crimes, given the letter Smelley produced about his accident settlement. Gambill responded that while he couldn't show that Smelley had *obtained* the money illegally, he planned to show that the money "was being transported for the purpose of being used to be involved in a drug transaction." In other words, Gambill wanted to take Smelley's money because of a crime Smelley hadn't yet committed. When I asked Gambill to clarify, he replied, "We can seize money if we can show that it was intended for use in a drug transaction at a later date." As Kessler put it, this is "like something out of that movie *Minority Report*."

Smelley's case then got even stranger. At the preliminary hearing last February, Judge Headley actually ruled in Smelley's favor. But under state law, Putnam County had an additional 10 days to amend its brief. Three days after his ruling, Headley mysteriously pulled himself from the case. Gambill thinks he knows why. "Several months ago, [the

judge] asked the Putnam County prosecutor if he could have \$5,000 from the forfeiture fund to buy some new AV equipment for his courtroom. He was turned down," Gambill said. "Since then Judge Headley has had, well, I'll just say he's had a much different demeanor in forfeiture cases." Gambill thinks that in his eagerness to question the county, Headley misstated state law during Smelley's preliminary hearing, then took himself off the case once he realized his mistake.

Headley confirmed to me that he had made the AV equipment request. But he denied that the denial of his request for forfeiture funds had any bearing on his ruling. Maybe that's true, and Gambill is wrong. But think about the impropriety of it all: A judge asked for \$5,000 to upgrade his courtroom from a fund filled with money from defendants over whose cases he presides.

Indiana's state constitution requires that forfeiture proceeds go to the public schools. So under the spirit of the law, there shouldn't even be a forfeiture fund for a judge to request money from. And yet as this case reflects, there are ways around the requirement. One tactic is to get a defendant to settle by handing over an amount of money somewhat less than it would cost him to fight the case. Because this isn't actually a court-ordered forfeiture, the money can go to the police department instead of the schools fund. In another scheme, called "adoption," state law enforcement agencies call in the feds on a forfeiture case. The case then is governed by federal law—which allows for up to 80 percent of the money to go back to local law enforcement after the federal government takes its cut, effectively circumventing state legislators.

The 2000 reforms to the federal civil forfeiture laws didn't address this problem. Many state laws are still a mess, too. In the end, the abuses in Indiana, Texas, and elsewhere really aren't surprising. When you incentivize corruption, it isn't exactly shocking to later learn that your public officials have been corrupted. As for Anthony Smelley, he finally had his new hearing last Friday. But it could be another month or more to hear whether he'll get his money back.