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An Overview of Recent State-Level Forfeiture Reforms


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Civil asset forfeiture laws allow for the seizure of property suspected of having been involved in, or derived from, criminal activity. In most states and at the federal level, no criminal charges or convictions are necessary because the resulting civil proceeding targets the property, not its owner. Civil forfeiture laws grant individuals challenging forfeiture cases considerably fewer legal protections than they would enjoy if they were defendants in criminal cases, and allow the law enforcement agencies that execute the seizures to retain the proceeds of successful forfeitures, creating a significant incentive to seize property. For decades, states have expanded the scope and reach of civil forfeiture, but within the past few years—driven by a growing number of accounts of abusive forfeitures and a recognition of the power of the forfeiture funding mechanism to distort the priorities of law enforcement organizations—many have reevaluated their civil forfeiture laws, scaling back or totally abolishing the tool. The message is clear: outside the law enforcement community, there is little support for the forfeiture status quo.

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Civil asset forfeiture is a law enforcement tool that enables the seizure and eventual forfeiture of real and personal property that may have been involved in criminal activity. States are beginning to scale back their civil forfeiture laws, and with good reason. Today's expansive forfeiture laws, rather than relieving drug kingpins and criminal organizations of their ill-gotten gains (as was their original purpose), instead allow for—and even incentivize—the seizure of property and currency from ordinary Americans based on little or no evidence of actual criminality.^[1]

An Overview of Civil Forfeiture

Modern civil forfeiture laws hold that property can be guilty of a crime, and therefore may be seized and forfeited even if that property's owner never faces criminal charges. For two centuries, American civil forfeiture law was largely restrained to admiralty and customs enforcement. In the 1980s, Congress and the states turned to civil forfeiture to combat rampant drug distribution and organized crime. Civil forfeiture became a mainstream law enforcement tool and Congress and the states encouraged its use by allowing law enforcement agencies to retain the proceeds of successful property forfeitures.

KEY POINTS

1. Civil asset forfeiture laws were ramped up in the 1980s to target the illicit proceeds of drug kingpins and criminal organizations.
2. Today, hundreds of state and federal laws authorize the seizure of property for all manner of alleged criminal activity.
3. Many states allow law enforcement organizations to retain the proceeds of successful forfeitures, and spend this revenue without oversight, creating a powerful incentive to seize property even when there is little evidence of criminality.
4. Driven by concern over the fundamental fairness of the process and the ability of law enforcement agencies to self-finance, states have begun to reform their civil forfeiture laws.
5. Some states have abolished civil forfeiture entirely, while others have pursued more modest reforms to bring

Once authorities seize private property, the resulting civil proceeding differs dramatically from the customary standards of American criminal law.

First, the proceeding targets the *property* rather than the *owner*. Under forfeiture law at the federal level and in most states, the evidentiary standard requires “a preponderance of the evidence,” not the criminal law standard of “beyond a reasonable doubt.” Thus, prosecutors need prove only that it is more likely than not that the property is tied to crime and is thus forfeitable.

Second, the prosecution need not prove that an owner used the property to commit a crime or was willfully blind to its use, as is the case in ordinary criminal trials. In a forfeiture proceeding, the burden falls on the owner to disprove these facts by demonstrating that he neither knew of, nor consented to, the property’s illicit use.

Third, property owners in forfeiture cases, unlike defendants in criminal cases, have no guaranteed right to counsel. Consequently, if an owner cannot afford an attorney, he must navigate a tortuous legal landscape alone. Oftentimes, the cost of hiring a lawyer exceeds the value of the seized property or currency; hence, a large number of defendants opt not to retain counsel even if they can afford the expense.^[2]

With such low odds of victory in forfeiture cases, many innocent property owners simply walk away: A vast majority of federal civil forfeiture cases—88 percent by some estimates—never see the inside of a courtroom.^[3] In these “administrative forfeiture” cases, the agency that originally seized the property, and stands to gain financially from keeping it, acts as investigator, prosecutor, judge, and jury all in one.^[4]

Forfeiture and the Equitable Sharing Link

Once a federal forfeiture is completed, federal law enforcement agencies may retain and spend the proceeds or, through a program known as “equitable sharing,” transfer a portion of the proceeds—in practice, up to 80 percent—to any state and local agency “which participated directly in any of the acts which led to the seizure or forfeiture of the property.”^[5]

The Treasury and Justice Departments operate equitable sharing programs. Since 2000, both have doled out more than \$5 billion in forfeiture revenues.^[6] This money may be spent only by the seizing agency, and then only for law enforcement purposes. The funds are not subject to control by state and local legislatures. As a result, federal law allows, and even financially incentivizes, state and local law enforcement agencies to bypass state laws that attempt to curtail or ban civil forfeiture. This loophole blunts the force of state-law forfeiture reforms and flies in the face of federalism, government transparency, and accountability.

Comprehensive Forfeiture Reforms

Over the past few years, a number of states have enacted broad forfeiture reform bills incorporating restrictions on the ability of state and local law enforcement authorities to transfer property to the federal government or receive the consequent revenues.

New Mexico

On April 10, 2015, New Mexico Governor Susana Martinez (R) signed into law H.B. 560, a sweeping

transparency and greater due process protections to civil forfeiture.

6. The pace of the reform movement at the state level is indicative of the lack of support for the forfeiture status quo.

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forfeiture reform bill passed unanimously by the legislature.^[7]

H.B. 560 abolished civil forfeiture in the state. As of July 1, 2015, prosecutors must obtain a criminal conviction before property may be forfeited. However, a conviction alone does not automatically result in the forfeiture of property. The state must also prove by clear and convincing evidence that the owner of the property had “actual knowledge of the underlying crime giving rise to the forfeiture.” Now innocent owners whose property was used to commit a crime without their knowledge or consent will not find themselves unjustly penalized for the conduct of others.^[8]

H.B. 560 also abolished the forfeiture funding mechanism. Now any proceeds derived from the seizure and forfeiture of property must be deposited in the state’s general fund, available for appropriation by elected legislators. H.B. 560 also curtails the ability of New Mexico’s law enforcement agencies to circumvent state laws by transferring property to the federal government in exchange for payments under the equitable sharing program. State agencies may transfer property only when:

- Its value exceeds \$50,000;
- The underlying criminal conduct is interstate in nature or sufficiently complex to justify the transfer; or
- The property may only be forfeited under federal law.

Even in these situations, no property transfer may take place “if the transfer would circumvent the protections of the Forfeiture Act that would otherwise be available to a putative interest holder in the property.”^[9]

New Mexico’s efforts have been hailed by many as the gold standard for how to reform forfeiture law. Brad Cates, who headed the Asset Forfeiture Office at the Department of Justice between 1985 and 1989 and was an early architect of the federal forfeiture ramp-up, has publicly decried what civil forfeiture has become, writing that while the “program began with good intentions [], having failed in both purpose and execution, it should be abolished.”^[10] In his capacity as counsel to New Mexico’s House Judiciary Committee, Cates was able to help craft and advocate for the bill that did just that in his home state.

Nebraska

Just over a year after New Mexico’s forfeiture bill was passed, Nebraska Governor Pete Ricketts (R) signed L.B. 1106, a forfeiture bill similar to its counterpart in New Mexico.^[11]

Like New Mexico’s H.B. 560, the Nebraska act requires a criminal conviction, essentially abolishing civil forfeiture in the state. Property may still be forfeited, but only after the state first obtains a criminal conviction on drug, child pornography, or illegal gambling charges, and then only after demonstrating by clear and convincing evidence that the property sought for forfeiture was used or intended to be used to commit the crime, or represents the proceeds of the offense.

L.B. 1106 also restricts the ability of Nebraska law enforcement agencies to circumvent the new law by transferring property to the federal government. Such transfers may take place only if the property or cash seized exceeds \$25,000 in value; if the property was physically seized by an agent who is actually employed by the federal government (thereby preventing a local officer who has been deputized by a federal agency from skirting the restriction); or if the person from whom the property was seized is the subject of a federal prosecution.

However, a financial incentive to seize property in the state remains in place. Article VII-5 of the Nebraska Constitution preserves 50 percent of forfeiture revenues for use by law enforcement agencies for drug enforcement efforts, with the remainder preserved to finance public education. Because the profit incentive is enshrined in the state's constitution, only a constitutional amendment can change this.

Maryland

The Old Line State has adopted two significant pieces of forfeiture reform legislation in the span of just a few months. The first, S.B. 528,^[12] became law in January 2016 after the state legislature overrode Governor Larry Hogan's (R) veto.^[13] On May 19, 2016, Governor Hogan signed a second reform bill, H.B. 336, into law.^[14]

Under these reforms, the standard of proof has been raised from a mere "preponderance of the evidence"—a low standard given the quasi-criminal nature of the proceeding and what is often at stake for the property owner—to "clear and convincing" evidence, and places the burden of proof squarely on the state.

Furthermore, Maryland law enforcement agencies may forfeit cash only in connection with the illegal manufacture, distribution, or dispensing of controlled substances. Cash seizures based on simple possession are no longer allowed. Agencies will also be subjected to a host of reporting requirements designed to increase transparency, including documenting how they spend "any funds appropriated to the [agency] as a result of forfeiture," the disposition of any related criminal proceedings, demographic data, and the reporting of proceeds received via an equitable sharing agreement. H.B. 336 also mandates that 20 percent of all forfeiture revenues deposited into the general fund be spent on drug abuse treatment and education programs.^[15]

Property transfers to the federal government now face new limits, with transfers only taking place if:

- The property owner consents to the transfer;
- There is an ongoing federal criminal case related to the seizure;
- The property is \$50,000 or more in cash; or
- The transfer is the result of a federal seizure warrant.

In other words, like New Mexico and Nebraska, Maryland is not preventing cooperation between state and federal agencies, but is restricting it to preserve the authority of state law over state institutions, and to refocus joint forfeiture activities on ongoing criminal cases and the targeting of major sources of drug funds.

Washington, D.C.

With the passage of Bill 20-48, the Civil Asset Forfeiture Amendment Act of 2014, Washington, D.C., became an early leader in the forfeiture reform movement.^[16] At the time, Washington's legislation was the most comprehensive forfeiture package in the nation since the initial ramp-up of civil forfeiture powers in the 1980s; in fact, Heritage Foundation scholars identified it as a model for states to follow.^[17]

Bill 20-48 made several monumental shifts in District forfeiture law. The burden of proof in forfeiture cases was shifted squarely to the government to prove that an owner either knew his property was being used for an illicit purpose or was willfully blind to its use. In cases dealing with the forfeiture of vehicles or real property, the evidentiary standard was raised from a "preponderance of the evidence" to the much higher standard of "clear and convincing." In cases

where District officials seek forfeiture of an owner's primary residence, the homeowner must first be convicted. Should the city prevail in a forfeiture case, Bill 20-48 mandates that all forfeiture revenues be returned to the city's general fund rather than be retained by law enforcement agencies.

Before Bill 20-48, city law allowed for the confiscation of any amount of cash found in proximity to a controlled substance, regardless of any direct connection between the drugs and the money. As a result, fully half of all cash seizures between 2009 and 2014 were for amounts less than \$141—hardly the “kingpin” money that is purportedly the main target of civil forfeiture. Under the new law, any amount of money below \$1,000 in value is not forfeitable, ending commonplace petty cash seizures. Bill 20-48 also ended the practice of requiring vehicle owners to pay a “penal sum” of up to \$2,500 merely for the right to challenge the seizure of their car. These challenges could take months or even years, forcing owners to undergo the dual hardship of being without both their vehicle and a significant sum of money.

City Councilmembers also took aim at District law enforcement's participation in the equitable sharing program. As noted by the committee report accompanying the city's legislation, the Metropolitan Police Department had budgeted for \$2.7 million in *future* forfeiture earnings derived from equitable sharing payments through 2018. Such expectations only serve to incentivize the seizure of property, and on increasingly dubious grounds as fiscal years wear on and concerns about hitting quotas arise. This is the reason “anticipating” future proceeds is strictly prohibited by federal officials. It is telling that such a blatant disregard for the rules went unnoticed and unchallenged right under the Justice Department's nose. While law enforcement officials protested the loss of funds, the City Council directed that District law enforcement agencies deposit federal equitable sharing payments into the city's general fund beginning on October 1, 2018. This mandate runs directly afoul of equitable sharing rules that require money be retained and spent *only* by a law enforcement agency. It is expected that the move will force an end to property transfers at that time.

Forfeiture Procedural Reforms

Other states have enacted forfeiture reform legislation which, despite not addressing the equitable sharing loophole or forfeiture funding mechanism, are significant steps toward a more fair and balanced forfeiture system.

Florida

On April 1, 2016, Governor Rick Scott (R) signed S.B. 1044, which had passed unanimously out of both chambers of the state legislature.^[18]

In forfeiture proceedings, under S.B. 1044, the state must prove its case beyond a reasonable doubt—the same standard required in criminal cases, a significant hike from the prior “clear and convincing” standard. Moreover, the state must prove that an owner had “actual knowledge of the criminal activity,” preventing innocent third parties from being stripped of their possessions.

S.B. 1044, while not requiring a criminal conviction, does mandate that, in most cases, an arrest be made before property may be seized. Exceptions to this are if the owner is a fugitive, deceased, or becomes a confidential informant, or if the property that is seized is cash. Cash seizures qualifying as an exception to the arrest requirement ignores the fact that currency is the most commonly seized type of property. Most jurisdictions report that the value and volume of seized currency far exceeds any form of real or personal property.^[19] Indeed, many law enforcement officials consider that possession of large amounts of U.S. currency is sufficient evidence to justify a seizure, despite

the absence of any law which makes the mere possession of currency, in any amount, illegal.^[20] Exempting cash seizures from the arrest requirement provides a significant loophole for law enforcement agencies to continue seizing property based on little evidence of actual illegality.

To take a forfeiture case to court, the seizing agency must pay a \$1,000 filing fee and post a \$1,500 bond which is payable to the property owner if he prevails. Taken together, these provisions raise the cost and risk to agencies seeking forfeiture, thereby deterring agencies from targeting small amounts of cash or bringing cases based on dubious evidence. However, this requirement could result in agencies resorting to pressuring property owners to “voluntarily” forfeit their property by settlement in order to avoid going to court.

Florida policymakers are to be commended for their novel approach to curbing forfeiture abuses. However, the legislature sadly neglected to address the principal reason for abusive forfeitures: the incentive to generate revenue. Under Florida law, agencies may retain up to 85 percent of their forfeiture revenues, and are still authorized to transfer property to federal authorities in exchange for payouts via the equitable sharing program. Florida has made progress with these reforms, but there is room for improvement.

Minnesota

In May, 2014, Governor Mark Dayton (D) signed S.F. 874 into law. Under state law, a criminal conviction is necessary for seized property to be forfeited.^[21] Once a conviction is obtained, the state must prove by clear and convincing evidence “that the property is an instrument or represents the proceeds of the underlying offense.”^[22] While certainly positive in nature, the reform is limited in scope. For example, if an individual other than the property’s owner is convicted, the burden is still on the innocent owner to prove he neither knew of, nor consented to, its illegal use.^[23]

However, even in cases where an innocent owner can meet this burden, the defense may be unavailable. In *Laase v. 2007 Chevrolet Tahoe*, the Minnesota Supreme Court held that in a drunk driving case where one owner of a jointly owned vehicle is convicted, the vehicle may be forfeited, and the second owner is not entitled to raise an innocent owner defense.^[24] Since drunk driving is just one of several offenses contained in the state statute allowing for vehicular forfeiture,^[25] the Court’s reasoning may extend to cases beyond just drunk driving, making an innocent owner’s defense difficult to assert.

Minnesota chose not to stop the practice of financing its law enforcement agencies via either state-law forfeiture or federal equitable sharing payments. In most cases, law enforcement agencies are entitled to retain 90 percent of the proceeds of successful forfeitures, and may spend this money with little outside oversight. Since 2000, state agencies have generated more than \$62 million in proceeds.^[26] In addition to this sum, state agencies have received more than \$26 million in equitable sharing payments from both the Justice and Treasury Departments.^[27] The financial incentive to seize property is alive and well in Minnesota.

Montana

On July 1, 2015, H.B. 463 took effect in Montana.^[28] Property forfeitures now must pass through a two-part process:

1. Property owners must first be convicted of a criminal offense specifically providing for property forfeiture.
2. The state must prove by clear and convincing evidence that the property was either an instrumentality of the criminal offense or constitutes the illicit proceeds of the offense.

There are exceptions to this process, including cases in which the seized property is a controlled substance or in which the property owner “dies, is deported, or is unknown or if the owner of the property flees after the prosecution is commenced and is not apprehended within 12 months.”

Under H.B. 463, the burden of proof in innocent owner cases is shifted to the state, which must prove that an “owner or person with an ownership interest in the property had actual knowledge of the crime associated with a forfeiture proceeding.”

However, Montana’s reform bill, like Minnesota’s, fails to address the financial incentives in forfeiture law. At present, local law enforcement agencies may retain the full value of seized and forfeited property and currency, and state agencies may keep 100 percent of proceeds up to \$125,000 (with any amount above that split evenly between the state’s general fund and the seizing agency’s coffers). Furthermore, Montana law enforcement authorities can still transfer property to federal authorities in exchange for equitable sharing payments. Since 2000, these payments have totaled in excess of \$6.5 million—all of which is beyond the control of state and local legislators.^[29] In sum, while H.B. 463 makes it more difficult to seize property from innocent people, the lingering presence of financial incentives greatly diminishes accountability and transparency in law enforcement funding.

Michigan

On October 20, 2015, Michigan Governor Rick Snyder (R) signed seven forfeiture reform bills into law.^[30] While the number of bills is impressive, the actual substance of the reform package is much more modest.

The reforms impose strict new forfeiture reporting requirements on law enforcement agencies throughout the state. Prior to these reforms, Michigan law required reporting only in drug forfeiture cases. Now, for the first time, Michigan agencies will have to track in all cases what they seize, the final disposition of forfeited property (including currency), the underlying offense giving rise to the forfeiture, and whether the property’s owner was ever charged with or convicted of that crime. This does not mean that law enforcement authorities must either charge or convict property owners to forfeit their property. The new bills do, however, raise the standard of proof in forfeiture cases to “clear and convincing” evidence, the standard that seems to be taking shape as the new normal in state forfeiture laws.

As is the case with Florida, Montana, and Minnesota, Michigan still retains a significant financial incentive to seize property under both state and federal law, which promise, respectively, returns of 100 percent and 80 percent of the value of the forfeited property. State-law forfeitures have generated more than \$270 million for Michigan law enforcement agencies since 2001.^[31] Federal equitable sharing payments totaled nearly \$150 million between 2000 and 2013.^[32] Improving the transparency of law enforcement agencies’ forfeiture funding mechanism will no doubt provide legislators and the public with useful data, but as long as the question of forfeiture revenues is unanswered, the pressure to seize property remains.

New Hampshire

On June 1, 2016, the New Hampshire legislature adopted S.B. 522, requiring a criminal conviction in most cases before the state can forfeit property.^[33] If the law is signed by Governor Maggie Hassan (D), New Hampshire will become the 11th state with such a requirement.

Under S.B. 522, once a conviction is obtained, the state will bear the burden of proving that a property owner “was a consenting party to the crime.” Thus, a property owner will no longer be compelled to prove his own innocence in court. Meanwhile, the standard of proof in forfeiture cases has been raised to “clear and convincing,” a significant hike from the current “preponderance of the evidence” standard.

S.B. 522 eliminates the financial incentive to seize property by requiring that all forfeiture proceeds be returned to the state’s general fund. However, this only affects state-law forfeitures. Property transfers to federal officials and the receipt of the resulting equitable sharing payments are still permitted. Under the former law, law enforcement organizations were only entitled to 45 percent of funds resulting from state forfeitures; consequently, New Hampshire law enforcement organizations exhibited a preference for the equitable sharing route, which promises up to 80 percent of proceeds. In fact, since 2000, New Hampshire agencies generated only \$1.15 million via forfeiture under state law^[34] but more than \$17 million in equitable sharing payments have been made to state and local agencies. Given the recent change in the law, it is reasonable to assume that state law enforcement authorities will take even greater advantage of the federal equitable sharing program. To better protect property owners, New Hampshire lawmakers should close this loophole.

Additional, but Limited, Reforms

While the states discussed above have enacted the most comprehensive reforms, other states have enacted meaningful, albeit more limited, reforms.

Georgia

In Georgia, the Georgia Uniform Civil Forfeiture Procedure Act (H.B. 233), was signed into law in 2015.^[35] While the Act did not address the profit motive or raise the standard of proof in forfeiture cases, it does improve transparency by creating a standardized reporting system which state and local authorities must use when disclosing their forfeiture activities.

Virginia

In Virginia, H.B. 771 also focuses on transparency.^[36] Signed into law in March 2016, H.B. 771 requires the state Department of Criminal Justice Services to provide the governor and General Assembly with an annual report detailing “the amount of all cash, negotiable instruments, and proceeds from sales” of forfeited property. H.B. 771 also prohibits law enforcement officials from attempting to “induce” an owner to waive his interest in seized property if “an information naming that property has not been filed,” an apparent effort to end the practice of pressuring property owners to give up their property at the moment of seizure.

Mississippi

In Mississippi, H.B. 1410 creates a “Forfeiture Transparency Task Force” responsible for “review [ing] all civil asset forfeiture laws and mak[ing] recommendations to the Legislature for amendments to Mississippi civil asset forfeiture laws.”^[37] The year-long Task Force is empowered to collect forfeiture data from state and local agencies and propose reforms aimed at improving the protections guaranteed to innocent property owners and provide for greater transparency “while ensuring that assets used or obtained through unlawful practices are removed from the possession of criminals.”

A Bright Future for Reform Efforts

The reforms outlined here vary in breadth and depth. Some states have elected to abolish civil forfeiture altogether, while others prefer a more incremental approach that focuses on procedural protections or reporting and transparency requirements.

The fact that these reforms have been adopted within the past three years is remarkable. Only a few short years ago America's civil forfeiture system was skewed at both the state and federal levels, seemingly invulnerable to public criticism and legal attack. Yet, with widespread support in their legislatures, states continue to enact significant forfeiture reform measures, often over the alarmist and overblown objections of police, sheriffs, and prosecutors. The message is clear: Outside the law enforcement community, support for the forfeiture status quo is remarkably thin.

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