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www.ij.org and www.endforfeiture.com

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Thank you, Mr. Chairman and the members of this Committee, for the opportunity to testify today about the urgent need for civil forfeiture reform. My name is Dan Alban. I'm a Senior Attorney at the Institute for Justice and the Co-Director of our National Initiative to End Forfeiture Abuse. The Institute for Justice is a national 501(c)(3) nonprofit public interest law firm.¹ For thirty years, we have litigated cases on behalf of individuals and small businesses whose constitutional rights have been violated by the government.

IJ has been litigating and filing amicus briefs in civil forfeiture cases since the 1990s, and we are currently litigating over a dozen civil forfeiture cases in courts across the country. We have conducted extensive research on the use of civil forfeiture nationwide and have published numerous studies based on that research including three editions—in 2010, 2015, and 2020—of *Policing for Profit*, the nation's only comprehensive study on civil forfeiture laws in all 50 states and at the federal level.² In recent years, we have published multiple studies based on federal government data that found that civil forfeiture is ineffective at fighting crime, but is used to generate more revenue when there are budget shortfalls.³ In July 2020, we used data obtained through FOIA to publish a groundbreaking report on Department of Homeland Security currency seizures at airports, which found that from 2000-2016, DHS agencies seized more than \$2 billion at airports in more than 30,000 seizures, including more than \$500 million seized for missing paperwork.⁴ We have also just published a first-of-its-kind study on victims of forfeiture abuse based on a comprehensive survey of forfeiture victims in Philadelphia.⁵

INTRODUCTION

Civil forfeiture is a national disgrace. It is not just ripe for abuse; it is inherently abusive. Our civil forfeiture laws violate due process, encourage widespread abuses of civil liberties, pose a terrible threat to property rights, and distort and divert law-enforcement priorities away from preventing and solving crimes to raising revenue through roadside and airport "interdiction" programs.

Civil forfeiture permits the government to seize someone's property based on the mere suspicion that the property is connected to criminal activity and to permanently forfeit and keep that property without ever even bringing criminal charges against the owner, much less securing a criminal conviction. This is wholly unlike criminal forfeiture, which requires prosecutors to prove beyond a reasonable doubt that an owner is guilty of a crime and then, in the same proceeding, prove the property is connected to the crime. Civil forfeiture turns the presumption of innocence on its head and effectively permits the government to punish someone for a crime without actually convicting them of that crime. That is not just deeply unjust; it is un-American.

The federal government itself has recognized these grave deficiencies. In recent years, the Inspectors General of both the Department of Justice and the Department of Homeland Security

have published numerous reports detailing the very weak procedural protections for property owners in civil forfeiture cases and the accompanying high risk of civil liberties violations.⁶

And yet the vast majority of forfeitures done under federal law are civil in nature. From 2000 to 2019, 84% of all forfeitures done by DOJ agencies were civil forfeitures, while 98% of forfeitures done by Treasury agencies were civil forfeitures.⁷ That is because it is much easier for the federal government to prevail in a civil forfeiture case, where there is a much lower burden of proof and the property owner does not receive the same protections afforded to a criminal defendant.

OVERVIEW

Billions of dollars are forfeited every year from tens of thousands of seizures.

- From 2000-2019, IJ has documented **at least \$69 billion seized and forfeited** at all levels of government. This is a very conservative estimate that substantially undercounts the actual total, because many states were not reporting their forfeiture statistics for much of this time period (and some still do not).⁸
- Of that total, at least **\$45.7 billion** was deposited into federal forfeiture funds by federal law-enforcement agencies.⁹
- Every year, the federal equitable sharing program pays out hundreds of millions of dollars to state and local law enforcement agencies—**nearly \$9 billion** from 2000 to 2019.¹⁰
- From 2000 to 2016, DHS agencies seized over **\$2 billion** from air travelers at airports in over 30,000 seizures, with more than **\$500 million** coming from seizures over failure to file paperwork declaring that the traveler was traveling with more than \$10,000.¹¹ These airport currency seizures are almost never accompanied by any arrest.

Civil forfeiture is largely used to confiscate modest sums of money.

While the overall money totals are large, the value of individual forfeitures is frequently quite small. By and large, these are not seizures of massive assets owned by drug lords, as portrayed by forfeiture proponents, but relatively modest sums of money that everyday people save to buy a vehicle, to put a down payment on a house, or to invest in new equipment for their business:

- The median federal currency forfeiture by DOJ agencies from 2016-2019, was **\$12,090**, meaning that half of all currency forfeitures were less than that.¹²
- The median federal currency forfeiture by Treasury agencies from 2015-2016 was even smaller: **\$7,320**.¹³
- At the state level, the median currency forfeiture across about 20 states with available data was about **\$1,000**. In most of those states, the median forfeiture is even smaller—often much smaller. For example, half of Michigan’s currency forfeitures were less than \$423; half of Pennsylvania’s were less than \$369.¹⁴

The evidence indicates civil forfeiture is ineffective at fighting crime.

The most common public defense of civil forfeiture is the vague claim that it helps fight crime, but the evidence is to the contrary. The Department of Justice’s own Inspector General has found, for instance, that the agency does not even track how forfeitures might be linked to criminal prosecutions.¹⁵ And a detailed report by Professor Brian D. Kelly statistically analyzed a decade of data from the federal equitable sharing program against federal data on local crime, drug use and economic indicators. Professor Kelly’s results showed that forfeiture has no meaningful effect on crime rates or drug use, but rather that forfeiture activity increased when local economies suffer, indicating that departments use civil forfeiture as a way to raise revenue.¹⁶

At the state level, recent research demonstrates the ineffectiveness of civil forfeiture as a crime fighting tool. When New Mexico abolished civil forfeiture in 2015, proponents claimed it would result in more crime. But the data show that crime rates did not increase and arrest rates did not drop following New Mexico’s reforms.¹⁷ In addition, earlier this year, IJ published Professor Kelly’s first-ever multistate study of the impact of civil forfeiture and found there is no data supporting the argument that its use decreases crime, and ample evidence that its primary purpose is to generate revenue.¹⁸

Federal equitable sharing creates a giant loophole that circumvents state law.

The federal government’s “equitable sharing” program has fueled significant forfeiture abuse. Through equitable sharing, state and local law enforcement seize property locally and then turn it over to federal prosecutors for forfeiture under federal law—and get back up to 80% of the proceeds. Every year, the federal equitable sharing program pays out hundreds of millions of dollars to state and local law enforcement agencies—more than \$8.8 billion from 2000 to 2019.¹⁹

By enabling state and local law enforcement to “partner” with federal law enforcement on forfeitures in exchange for a “cut” of the proceeds, equitable sharing enables them to evade any restrictions their state legislatures have imposed on civil forfeiture—including, for example, higher burdens of proof under state law or requirements sending all forfeiture proceeds to the state treasury, as is the practice in several states. This poses a threat to federalism and undermines state forfeiture reform efforts.

The federal forfeiture system is incredibly complex and stacks the deck against property owners.

The federal forfeiture system involves a labyrinthine set of procedures that is nearly impossible for a layman to navigate, and even confuses many attorneys. Combined with the low median value of a forfeiture (and the comparatively high cost to hire an attorney to contest a forfeiture), this leads to very high rates of defaults in forfeiture cases.

We have developed an infographic, which is being distributed with my testimony, that demonstrates the incredible complexity of the federal forfeiture system, particularly the administrative forfeiture process.²⁰ As the graphic shows, there are many ways to lose a civil forfeiture case, but very few ways to win. The deck is stacked against property owners.

There is no judicial oversight for the vast majority of civil forfeitures, which are decided by the seizing agency using administrative forfeiture.

At the federal level and in about a dozen states, agencies can use “administrative forfeiture” to forfeit property without ever stepping into court. Administrative forfeiture permits government agencies to decide forfeiture cases themselves without any judicial oversight—not even from an administrative law judge. Depending on the agency, about 80-95% of all federal forfeitures are finalized through the administrative forfeiture process, where the same agency that seized the property acts as judge and jury.²¹ For example, from 2000-2019, of the 84% of DOJ forfeitures that were civil in nature, 93% were processed administratively.²²

With administrative forfeiture, the government need not file a complaint against property in court. Instead, agencies just have to send a notice to owners that puts the burden on property owners to decide the course of their case. If property owners fail to respond within about 30 days, and in a very particular way mandated by law, their property can be forfeited automatically.

Even when owners do respond, agencies can often still forfeit property administratively. Federal law (and some states) let the seizing agency—which stands to benefit financially from forfeitures—decide whether an owner submitted his or her claim in just the right way and gets to proceed to court. For example, DOJ data indicate that between 1997 and 2015, one-fifth of all claims filed for seized property—and more than one-third of claims filed for seized cash—were deemed deficient by the seizing agency.²³ The data suggest federal agencies reject claims largely for technical reasons, most commonly (68%) because they were not “executed and sworn to by the claimant.”²⁴ Claims that were merely signed by the property owner were deemed insufficient.

Some agencies also try to pressure property owners to settle even after they’ve filed a valid claim, which is supposed to deprive the agency of jurisdiction. According to a 2020 DHS Office of Inspector General report, U.S. Customs and Border Protection (CBP) routinely refrained from sending claims to a U.S. Attorney’s Office (USAO) while it pressured property owners into settling. The OIG concluded: “By negotiating settlements in cases where a USAO declines the case referral or in cases that were not referred to a USAO, CBP may be taking a portion of property from innocent property owners.”²⁵

In addition, property owners frequently fail to understand that by submitting an administrative petition to the seizing agency, instead of a claim seeking federal judicial proceedings, they may not be able to appeal the agency’s decision in court. Of federal law-enforcement agencies that seize and forfeit property, only CBP permits property owners a second chance to file a claim and take their case to court if they don’t like the outcome of the administrative proceedings. Property owners whose property was seized by DOJ agencies such as DEA or FBI get no such opportunity to “appeal” the agency’s decision.

SOLUTIONS

The simple truth is that civil forfeiture continues throughout the United States because law enforcement has a very specific financial incentive to use it: *it gets to keep the money*. In the federal system and most states, the property that is seized and forfeited is not delivered to the federal or state treasuries, but instead is kept by the law enforcement agencies themselves. The proceeds are then spent not by Congress or state legislatures, but by the same law enforcement agencies that have sent their agents into the streets to collect it.

Congress can, and should, address this improper financial incentive in several ways.

First, Congress should eliminate the profit incentive that drives most civil forfeiture by diverting all forfeiture proceeds to the general fund.

Currently, all forfeiture proceeds seized by federal agencies are deposited into one of two funds, the Department of Justice's Assets Forfeiture Fund (AFF) or the Department of Treasury's Treasury Forfeiture Fund (TFF). Both the AFF and TFF are controlled by their respective agencies and can only be spent on law-enforcement purposes. Because expenditures are not approved through the normal appropriations process, there is very little oversight of these funds and how money is spent from them.

These funds pose a threat to the separation of powers. They improperly merge the power of the sword with the power of the purse, and give these agencies—and all of their sub-agencies, such as DEA, FBI, CBP, etc.—the power to not just enforce the law, but also to provide for their own funding. This is the engine that drives the billions of dollars in forfeitures each year and leads to the abuses that frequent the front pages of the nation's top newspapers. And by allowing agencies to self-fund outside the normal appropriations process and with little oversight, this profit incentive undermines legislatures' power of the purse and invites questionable expenditures, such as \$70,000 for a muscle car in Georgia, \$250,000 for lavish travel and meals in New York, and \$300,000 for an armored vehicle in Iowa.²⁶

Second, Congress should abolish the federal "equitable sharing" program, which drives so much abuse at the state and local level.

The federal government has no business running a program that is designed to help state and local police evade state laws. The equitable sharing program should be abolished in order to preserve federalism and let states implement greater protections for property rights than are available under federal forfeiture law.

Third, Congress should eliminate the byzantine administrative forfeiture process that makes it extremely difficult for property owners to contest the seizure.

The administrative forfeiture process stacks the deck in favor of the government. Its tremendous complexity, hamstringing property owners, and, in the vast majority of cases, permits agencies to order the forfeiture themselves without any judicial oversight. Property owners trapped in this system are generally unable to appeal the agency decision to the courts, leaving them entirely at the mercy of the very agency that seized their property and stands to profit from the forfeiture.

Property owners deserve their day in court—in a real court with a neutral Article III judge. They should not lose their property because the office of forfeiture counsel for the seizing agency makes a self-serving determination that the agency was right to seize and forfeit their property.

Finally, Congress should address the procedural deficiencies that violate owners' rights to due process.

The problems with civil forfeiture begin with the financial incentive, but they do not end there. In the federal system, any innocent person whose property is unjustly seized through this system faces a profoundly difficult, time-consuming, and often prohibitively expensive process to get it back, one in which the property is presumed guilty, the innocent owner has no right to

legal representation, and the government has no obligation to meet criminal standards of proof. These procedural deficiencies, all of which favor the seizing agency, are contrary to due process and make civil forfeiture inherently abusive.

One major deficiency with current forfeiture procedures is that owners whose property is seized have no opportunity to promptly contest that seizure. Under federal law, there is no prompt post-seizure hearing to determine who gets to possess the property in the interim while the forfeiture case is being litigated. For owners of seized vehicles—who often need their vehicle to get to work, take children to school, and run errands—that typically means having to purchase or lease an additional vehicle while awaiting the outcome of forfeiture proceedings that may take years to resolve. Even if those owners ultimately prevail, that delay and cost imposes a tremendous burden on people who have not been adjudged guilty of a crime, and who often are not even criminally charged.

The best way to correct these procedural deficiencies is to eliminate civil forfeiture altogether and replace it with criminal forfeiture. No one should be able to enjoy the fruits of their crime, and so the federal government should rightly forfeit the proceeds and instrumentalities of illegal activity *after the property owner has been convicted of a crime*.

Until forfeiture is limited to criminal matters, the government will continue to punish people for alleged unlawful activity without actually convicting them of a crime. That is contrary to the American system of justice and must be corrected.

CONCLUSION

Civil forfeiture poses a tremendous threat to civil liberties and private property rights. It is an inherently abusive process that violates due process and is contrary to American values.

Congress should not allow this unjust civil forfeiture regime to continue any longer. The most optimal solution is to eliminate civil forfeiture altogether and rely instead on criminal forfeiture after a crime is proven. Congress alternatively could eliminate the financial incentive rot at the core of civil forfeiture by sending all federal forfeiture funds directly to the general Treasury fund and eliminating the “equitable sharing” program that distorts local law enforcement decision making and undermines state laws. At a bare minimum, Congress should address the procedural deficiencies that deprive property owners of their due process rights, including by eliminating the inherently biased administrative forfeiture system.

Thank you for the opportunity to testify.

Dan Alban is a Senior Attorney at the Institute for Justice, where he co-directs IJ’s National Initiative to End Forfeiture Abuse. Dan litigates cutting-edge constitutional cases in federal and state courts that defend economic liberty, free speech, and private property rights.

Dan has successfully represented civil forfeiture clients in securing the return of all of their seized property in Connecticut, Michigan, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, and Wyoming. He is currently litigating civil forfeiture cases in Arizona, Pennsylvania, South Carolina, and Texas, including two national class-actions challenging forfeiture abuses by CBP, TSA, and DEA.

¹ See www.ij.org.

² For the most recent (2020) edition of *Policing for Profit*, see <https://ij.org/report/policing-for-profit-3/>.

³ See Prof. Brian D. Kelly, *Fighting Crime or Raising Revenue?: Testing Opposing Views of Forfeiture*, <https://ij.org/report/fighting-crime-or-raising-revenue/> (June 2019) (reviewing and cross-indexing a decade of data from the federal equitable sharing program with federal data on local crime, drug use, and economic factors to conclude that forfeiture has no meaningful effect on crime fighting, but forfeiture activity does increase when local economies suffer as a means of replacing lost revenue); Brian D. Kelly, *Does Forfeiture Work?: Evidence From the States*, <https://ij.org/report/does-forfeiture-work/> (Feb. 2021) (reviewing data from five states that use forfeiture extensively—Arizona, Hawaii, Iowa, Michigan and Minnesota—to find forfeiture doesn’t work to fight crime but is used to raise revenue); see also *Policing for Profit*, (2020), “New Research: Eliminating Civil Forfeiture Does Not Increase Crime,” <https://ij.org/report/policing-for-profit-3/pfp3content/civil-forfeiture-laws-fail-to-protect-property-owners/new-research-eliminating-civil-forfeiture-does-not-increase-crime/> (studying crime rates before and after New Mexico’s abolition of civil forfeiture on July 1, 2015 in comparison with crime rates in neighboring Colorado and Texas and finding no increase in crime after civil forfeiture was eliminated).

⁴ *Jetway Robbery: Homeland Security and Cash Seizures at Airports*, (July 2020) <https://ij.org/report/jetway-robbery/>.

⁵ *Frustrating, Corrupt, Unfair: Civil Forfeiture in the Words of Its Victims*, (Oct. 2021) <https://ij.org/report/frustrating-corrupt-unfair/>.

⁶ See generally DHS Office of Inspector General (“OIG”), *DHS inconsistently implemented administrative forfeiture authorities under CAFRA*, (Aug. 2020), <https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-66-Aug20.pdf>; DOJ OIG, *Review of the Department’s Oversight of Cash Seizure Case and Forfeiture Activities*, (Mar. 2017), <https://www.oversight.gov/sites/default/files/oig-reports/e1702.pdf>; DOJ OIG, *Audit of the Drug Enforcement Administration’s Management and Oversight of Its Confidential Source Program*, (Sept. 2016), <https://oig.justice.gov/reports/2016/a1633.pdf>; DOJ OIG, *Investigative Summary of Findings Concerning the DEA’s Use of a TSA Airport Security Screener as a Paid Confidential Source*, (Jan. 2016), <https://www.oversight.gov/sites/default/files/oig-reports/f160107b.pdf>; DOJ OIG, *Review of the Drug Enforcement Administration’s Use of Cold Consent Encounters at Mass Transportation Facilities*, (Jan. 2015), <https://www.oversight.gov/sites/default/files/oig-reports/e153.pdf>.

⁷ *Policing for Profit*, “Federal Forfeitures by Type,” <https://ij.org/report/policing-for-profit-3/pfp3content/forfeiture-is-hard-for-owners-easy-for-the-government/easiest-forfeiture-procedures-predominate/owners-rarely-fight-back/>.

⁸ *Policing for Profit*, “Executive Summary,” <https://ij.org/report/policing-for-profit-3/>.

⁹ *Policing for Profit*, “The Federal Government,” <https://ij.org/report/policing-for-profit-3/?state=feds>.

¹⁰ *Policing for Profit*, “Trends in Equitable Sharing Revenues and Payments,” <https://ij.org/report/policing-for-profit-3/pfp3content/equitable-sharing-creates-a-giant-loophole/trends-in-equitable-sharing-revenues-and-payments/>.

¹¹ See *Jetway Robbery*, <https://ij.org/report/jetway-robbery/>.

¹² *Policing for Profit*, “The Federal Government,” <https://ij.org/report/policing-for-profit-3/?state=feds>.

¹³ *Id.*

¹⁴ *Policing for Profit*, “Big-Time Criminals or Small-Time Forfeitures?,” <https://ij.org/report/policing-for-profit-3/pfp3content/forfeiture-is-lucrative-for-governments-nationwide/big-time-criminals-or-small-time-forfeitures/>.

¹⁵ DOJ OIG, *Review of the Department’s Oversight of Cash Seizure Case and Forfeiture Activities* (Mar. 2017), at p. 16, <https://www.oversight.gov/sites/default/files/oig-reports/e1702.pdf>.

¹⁶ See Prof. Brian D. Kelly, *Fighting Crime or Raising Revenue?: Testing Opposing Views of Forfeiture*, <https://ij.org/report/fighting-crime-or-raising-revenue/> (June 2019).

¹⁷ See *Policing for Profit*, “New Research: Eliminating Civil Forfeiture Does Not Increase Crime,” <https://ij.org/report/policing-for-profit-3/pfp3content/civil-forfeiture-laws-fail-to-protect-property-owners/new-research-eliminating-civil-forfeiture-does-not-increase-crime/>.

¹⁸ See Prof. Brian D. Kelly, *Does Forfeiture Work?: Evidence From the States*, <https://ij.org/report/does-forfeiture-work/> (Feb. 2021).

¹⁹ *Policing for Profit*, “Trends in Equitable Sharing Revenues and Payments,” <https://ij.org/report/policing-for-profit-3/pfp3content/equitable-sharing-creates-a-giant-loophole/trends-in-equitable-sharing-revenues-and-payments/>.

²⁰ IJ’s federal forfeiture process infographic is now publicly available. See www.endforfeiture.com/federalforfeitureprocess.

²¹ *Policing for Profit*, “Federal Forfeitures by Type,” <https://ij.org/report/policing-for-profit-3/pfp3content/forfeiture-is-hard-for-owners-easy-for-the-government/easiest-forfeiture-procedures-predominate/owners-rarely-fight-back/>.

²² *Id.*

²³ *Policing for Profit*, “Easiest Forfeiture Procedures Predominate,” <https://ij.org/report/policing-for-profit-3/pfp3content/forfeiture-is-hard-for-owners-easy-for-the-government/easiest-forfeiture-procedures-predominate/>.

²⁴ *Id.*

²⁵ See DHS OIG, *DHS inconsistently implemented administrative forfeiture authorities under CAFRA*, (Aug. 2020), <https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-66-Aug20.pdf>.

²⁶ *Policing for Profit*, “Introduction,” <https://ij.org/report/policing-for-profit-3/pfp3content/introduction/>.