

White Paper: Civil Asset Forfeitures in South Carolina

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Summary

Civil asset forfeiture is a legal process which authorizes the seizure and eventual forfeiture of property which may have been involved with criminal activity. Arising out of ancient admiralty rules, and later applied to combatting drug trafficking and organized crime, in recent years the scope of civil asset forfeiture laws has greatly expanded. What was once a simple crime-fighting tool has evolved into a substantial revenue source for law enforcement agencies.

Today's expansive forfeiture laws, rather than divesting drug kingpins and massive criminal enterprises of their illicit gains as was the original purpose, instead allow for - and even *incentivize* - the seizure of property, especially currency, from ordinary Americans based on little or no evidence of actual criminality. This is done without the due process protections most Americans view as their right, and frequently occurs without a criminal charge even being *filed*, let alone a conviction obtained. However, many states have now begun to scale back their civil forfeiture laws. These states have come to recognize that not only are such laws running roughshod over our constitutional protections and property rights, but that the process is largely unregulated and unsupervised.

The time has come for South Carolina to follow their lead, and to rein in South Carolina's out-of-control "policing for profit" racket. Legislation was proposed this year which would do precisely that.

Overview of Civil Asset Forfeitures

Civil asset forfeiture laws are premised on the concept that property *itself*, and not merely its owner, can be found guilty of a crime, and therefore it may be seized and forfeited even if its owner never faces criminal charges.¹

Historically, American civil forfeitures were largely limited to admiralty (maritime) law and, primarily, customs enforcement. This was due to the fact that the actual owner of a ship engaged in smuggling was often domiciled in a foreign country, and was thus beyond the reach of American authorities; consequently, the only remedy available to the government was the seizure of his ship and its cargo. In the 1980s, however, federal and state governments began to expand the role of civil forfeitures as a means of combatting illegal drug distribution and organized crime. Civil asset forfeiture became a mainstream law enforcement tool, and its use was encouraged by allowing law enforcement agencies to retain some or all of the proceeds of successful property forfeitures.

¹ Such actions are referred to as *in rem* proceedings, because the property *itself* is the nominal defendant. By contrast, criminal actions against an individual are known as *in personam* proceedings.

Once authorities seize private property under these laws, the ensuing civil process differs dramatically from the customary rules of American criminal law. In fact, the process essentially turns on its head the burden of proof, and substantially relaxes the normal evidentiary standards. The specifics differ from state to state, but as a general rule rather than having to prove guilt “beyond a reasonable doubt” (the normal criminal standard), property is forfeited under a far lesser “preponderance of the evidence” standard. And the burden of proof is on the *owner*, not on the state, to prove that he neither knew of nor consented to the property’s use in a crime. Effectively, the property owner is deemed guilty until proven innocent. Rarely is there the protection of a jury trial.

Furthermore, property owners have no guaranteed right to counsel in forfeiture cases. Those who cannot afford an attorney will *not* have one appointed by the state; they are left to their own devices in what can be extremely complicated proceedings with short and strictly enforced timelines. Under these circumstances the chances of even an innocent person regaining his property are low. Often there is no practical alternative but to simply walk away, even from property or cash worth tens of thousands of dollars. It is rarely worth the difficulty and expense of making any effort at all to recover lesser amounts.

Once forfeited, the property is retained, in whole or in substantial part, by the seizing law enforcement agency to spend as it pleases. Often there is no meaningful oversight. In addition, federal law enforcement agencies generally have “equitable sharing” programs whereby they share the forfeiture proceeds with the state or local agencies which participated in the seizure. In practice that share is 80%. The result of all this has been the explosive growth in what has come to be called “policing for profit”, whereby property is seized (often on the flimsiest of pretexts) with no expectation of *ever* charging its owner with a crime. Some jurisdictions have become notorious for their “catch and release” policies, under which vehicles are stopped and searched, cash and property seized, and the driver is then released without even a ticket being issued.

Many law enforcement agencies, inadequately funded by political authorities, have come to rely upon property seizures and “equitable sharing” revenues as significant sources of revenue which comprise a material portion of their budgets. It is little wonder that the strongest opponents of civil asset forfeiture reform are the law enforcement agencies which are the direct beneficiaries of the current system.

Civil Asset Forfeiture Reform Movement

The issue of civil asset forfeiture abuse has gained considerable public attention in recent years. Some jurisdictions have grown extremely aggressive in their seizures, and numerous articles have been published in the popular press describing “horror stories” of assets wrongfully seized from wholly innocent persons, and the travails they have suffered as a result.² Indeed, it took a recent US Supreme Court decision to force the state of Colorado to return money seized from defendants who had been *acquitted*

² C.f., <https://www.forbes.com/sites/instituteforjustice/2014/03/12/cops-use-traffic-stops-to-seize-millions-from-drivers-never-charged-with-a-crime/#595bcca4f54b>

of the criminal charges.³ National publications as diverse as The Wall Street Journal,⁴ The Hill⁵ and The Huffington Post⁶ have all opined against forfeiture abuse, and among the general public national surveys show that substantial majorities favor reform.⁷ This is *not* a partisan issue.

The US Supreme Court itself is beginning to show evidence of discomfort with civil asset forfeitures,⁸ although to date it has not directly addressed the issue.

As a consequence, in the last few years a large number of states have enacted forfeiture reform, at least to some degree, and many more are actively considering it. A partial list of those states, together with a brief description of some of the reforms they have adopted, is attached as Appendix A.

Even the federal government has made a few tentative moves in the direction of asset forfeiture reform,⁹ although it must be noted that despite adopting some minor procedural protections the current US Attorney General appears to be *increasing* federal utilization of asset forfeitures (referring to the technique as a “key tool” in fighting crime, and noting that the government will “continue to encourage civil asset forfeiture whenever appropriate”).¹⁰ Of special note was the Attorney General’s statement that asset forfeiture “helps return property to the victims of crime”,¹¹ a curious remark given that forfeited property *always* goes to the government, not to crime victims.

Civil Asset Forfeiture in South Carolina

South Carolina’s civil asset forfeiture laws are codified at SC Code §§44-53-520 *et seq.*

Under current law, in order to seize property a law enforcement agency need only show “probable cause”, the same low standard needed to obtain a simple search warrant. There is no requirement that the property owner be convicted, or even *charged*, with a crime. But in order to regain his seized property an owner must show by “a preponderance of the evidence” that the forfeiture was improper, which is a much

³ *Nelson v. Colorado*, No. 15-1256, April 9, 2017. https://www.supremecourt.gov/opinions/16pdf/15-1256_5i36.pdf

⁴ <https://www.wsj.com/articles/trump-should-be-appalled-by-police-asset-forfeiture-1488751876>

⁵ <http://thehill.com/blogs/pundits-blog/lawmaker-news/320440-congress-must-reform-civil-asset-forfeiture-laws>

⁶ http://www.huffingtonpost.com/grantsmith/civil-asset-forfeiture-abuse_b_9517394.html

⁷ <https://www.cato.org/blog/84-americans-oppose-civil-asset-forfeiture>

⁸ See, Thomas, dissent to the denial of certiorari in *Leonard v. Texas*, No. 16-122, March 6, 2017. https://www.supremecourt.gov/opinions/16pdf/16-122_1b7d.pdf

⁹ https://www.washingtonpost.com/news/federal-eye/wp/2015/03/31/holder-announces-new-limits-on-civil-asset-forfeitures/?utm_term=.842724071a3b

¹⁰ See. <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state> and <https://www.documentcloud.org/documents/3897281-Asset-Forfeiture-Policy-Directive-17-1.html> This federal Policy Directive does contain some new safeguards: it eliminates most cash seizures of less than \$5,000 (and suggests that seizures of less than \$10,000 “may require additional safeguards”); it mandates legal review of all seizures; it makes some references to “probable cause” in state seizures; it establishes shorter timelines for states to request federal “adoption” of seized funds; and it is “enhancing” its asset forfeiture training programs.

¹¹ *Id.*

more difficult legal standard to meet than that applied to the forfeiture itself. Innocent owners must bear the burden of proving that they did not consent to the illegal use of their property, and there is no provision by which they may recover their costs should they ultimately prevail.

Law enforcement agencies have a powerful financial incentive for aggressively seizing property. Under state law they retain 95% of forfeiture proceeds, with 75% going to the police and 20% to the prosecutors with whom they work. The remaining 5% is deposited into the state's General Fund.¹² Using the state's Freedom of Information Act to quantify and analyze the 5% contributed to the General Fund, the Institute for Justice has estimated that between 2009 and 2014 law enforcement agencies in South Carolina collectively obtained \$22.7 million in forfeiture proceeds, an average of \$3.8 million per fiscal year.¹³ The US Department of Justice has reported that in 2015 Greenville County alone received \$336,932 in "equitable sharing" distributions¹⁴, and that was only the amount paid by the federal government; direct seizures are not included in the total. Clearly, there is a significant amount of money at stake.

Not only do our current laws fail to protect innocent property owners, but they also fail to provide much transparency. Law enforcement agencies are not required to track or report their forfeitures. They are only required to maintain an inventory of seized property and share that information with the appropriate prosecution agency. Nor is there even any requirement that the money be applied to combatting drug crime: In 2015 the Sheriff of Greenville County boasted that his office had spent \$26,000 of seized funds in a year-long investigation of a local strip club.¹⁵

Proposed Reforms

In March 2017 the *Asset Forfeiture and Private Property Protection Act* (H. 3918)¹⁶ was introduced in the South Carolina House of Representatives by Alan Clemmons and Todd Rutherford. (No parallel bill has yet been introduced in the Senate.) This bill would make badly needed reforms to the state's civil asset forfeiture laws. It creates an entirely new chapter in Title 17 of the SC Code of Laws to deal with asset forfeitures, and in the process it repeals or supersedes all forfeiture provisions contained in other sections of the Code. The forfeiture rules would then all be in one place.

In a significant change from current law, H. 3918 abolishes civil asset forfeiture *per se*, strictly limiting its use to violations of laws which explicitly provide for such a remedy (for the most part, this means drug trafficking). With very limited exceptions it requires that there be a criminal *conviction* before prosecutors can proceed with a forfeiture action. It also directs that all forfeiture proceeds go into the state's General Fund, thus eliminating the perverse "policing for profit" incentive at the local level. And it

¹² SC Code §44-53-530(e)

¹³ <http://www.ij.org/report/policing-for-profit/>

¹⁴ <http://www.wyff4.com/article/sc-police-agencies-rake-in-millions-from-civil-forfeitures/7023880>

¹⁵ <http://www.greenvilleonline.com/story/news/local/2016/09/03/platinum-plus-greenville-county-nelson-mullins/89660190/>

¹⁶ http://www.scstatehouse.gov/sess122_2017-2018/bills/3918.htm

bans law enforcement agencies from attempting to circumvent the law by passing cases on to federal agencies so they can participate in “equitable sharing” programs; the only exceptions are for very large-value seizures (greater than \$50,000) and truly federal cases involving interstate drug trafficking.

The bill contains provisions which protect the claims of innocent third parties (including the holders of *bona fide* security interests, such as mortgages) with respect to seized property, and it prohibits seizures which are “grossly disproportional to the seriousness of the offense.”¹⁷ The same jury which rules on the defendant’s guilt or innocence in his criminal trial will also rule on the validity of the asset forfeiture. Finally, this bill requires the filing of detailed annual reports with the Attorney General, and specifically provides that all asset seizure records are disclosable under the state’s Freedom of Information Act.

One area in which this bill could be improved would be the addition of a requirement that all “equitable sharing” monies received from federal agencies also be remitted to the state’s General Fund. However, this is a small quibble, easily remedied, and should not deter passage of this badly-needed reform measure.

Conclusion

The *Asset Forfeiture and Private Property Protection Act* fairly balances all of the competing rights, claims and interests in this matter:

- it preserves the due process rights of the accused;
- it protects the interests of innocent third parties having lawful claims on the seized property; and
- it furthers the legitimate law enforcement interests of the state.

It also eliminates the perverse financial incentives which exist under current law.

This is a good bill which deserves serious consideration by the South Carolina legislature.

Upon its filing, H. 3918 was referred to the House Judiciary Committee, where (as of this writing) it has received no action. It should be taken up, debated and enacted promptly once the General Assembly reconvenes in January 2018.

¹⁷ Id., §17-32-130(A).

Appendix A

Civil Asset Forfeiture Reforms in Other States¹⁸

Since 2014, approximately twenty-three states and the District of Columbia have enacted some form of civil asset forfeiture reform, ranging from the substantive to the procedural. These reforms include the following (which list is by no means exhaustive):

- Arizona. H.B. 2477 does *not* require criminal conviction prior to forfeiture, but it increases the standard of proof to seize property from "preponderance of the evidence" to "clear and convincing evidence," and it adds some transparency, reporting and auditing requirements. It also prohibits circumventing the state law through "equitable sharing" arrangements with federal agencies.
- Colorado. H.B. 17-1313 creates extensive new reporting requirements for forfeited property, but makes no other substantive changes to state law. However, it prohibits "equitable sharing" with federal agencies unless it is a federal case and the property is worth >\$50,000.
- Connecticut. H.B. 7146 requires a criminal conviction before property can be forfeited, although the forfeiture process itself remains a civil action with a lower standard of proof.
- District of Columbia. Bill 20-48 is an early example of forfeiture reform, and serves as a model for many other states. It raises the evidentiary standard; shifts the burden of proof to the government; requires a criminal conviction of the owner before property can be forfeited; and remits all forfeiture proceeds to the city's General Fund.
- Florida. S.B. 1044 applies a criminal standard of proof; requires "actual knowledge" of criminal activity by the property owner; and requires that the seizing agency post a \$1,500 bond before bringing the case (which is paid to the owner if he prevails).
- Illinois. H.B. 303 shifts the burden of proof in asset forfeitures from the property owner to the state; institutes new notice requirements; and implements substantial additional public disclosure and transparency provisions. *[Awaiting the governor's signature as of 6/26/17.]*
- Indiana. S.B. 388 requires police and prosecuting attorneys to make annual reports on forfeitures, including those conducted in conjunction with the federal government.
- Iowa. SF 446 requires criminal conviction before property worth <\$5,000 can be forfeited. It also shifts the burden of proof to the government;

¹⁸ Portions of this Appendix have been adapted from Snead, *An Overview of Recent State-Level Forfeiture Reforms*, August 23, 2016, published by The Heritage Foundation.
<http://www.heritage.org/crime-and-justice/report/overview-recent-state-level-forfeiture-reforms>

establishes a “clear and convincing evidence” standard; and implements new recordkeeping and disclosure requirements.

- Maryland. S.B. 528 and H.B. 336 together raise the standard of evidence in forfeiture proceedings; place the of proof burden on the state; permit the forfeiture of cash only in connection with the “illegal manufacture, distribution, or dispensing of controlled substances”; and although the state permits local law enforcement agencies to keep much of the forfeiture proceeds it imposes on them substantial new disclosure requirements and spending limitations.
- Michigan. Seven forfeiture reform bills were enacted in 2015, which together impose strict new forfeiture reporting requirements and raise the standard of proof in forfeiture cases to “clear and convincing” evidence.
- Minnesota. S.F. 874 requires a criminal conviction before seized property can be forfeited, as well as proof that the property was related to the offense.
- Montana. H.B. 463 requires both criminal conviction and proof that the forfeited property was either an “instrumentality” of the crime or its illicit proceeds.
- New Hampshire. S.B. 522 requires a criminal conviction before the state can forfeit property, as well as proof that the property owner “was a consenting party to the crime”.
- New Mexico. H.B. 560 abolishes civil asset forfeitures without both a criminal conviction and “actual knowledge” of the underlying crime, and requires that all forfeiture proceeds go to the state’s General Fund.
- Nebraska. L.B. 1160 is similar to New Mexico’s law but the criminal conviction must be for drugs, child pornography, or illegal gambling.
- Nevada. S.B. 138 requires a criminal conviction for seized property to be forfeited, and adds new annual reporting requirements.
- Utah. S.B. 87 provides that persons who have been acquitted of the related crime must have their property returned, and that any agency which seizes property valued at under \$10,000 must return the property to the claimant unless prosecutors file criminal charges within 60 days of filing a forfeiture complaint.

Limited reforms have also been adopted in Georgia, Virginia and Mississippi which basically increase transparency with respect to the collection and expenditure of forfeited funds.