



Forfeiting Property Rights in the Name of Fighting Crime?

By Jack Kenny

March 24, 2015

May 22, 2013 started out as a peaceful, quiet day for Carole Hinders, the proprietor for nearly 40 years of Mrs. Lady's Mexican Food in Spirit Lake, Iowa. She had just finished breakfast with her grandchildren and was about to start a crossword puzzle when there came a knock on the door. She opened it and found two men standing there with some news about her bank account.

“It was two IRS agents who then told me that they had closed my business bank account and had seized all my money which was almost \$33,000 dollars,” Hinders said. Hinders does not take credit cards at her restaurant and, unwilling for security reasons to let cash receipts accumulate, she was accustomed to making frequent cash deposits at her bank. That left her vulnerable to a government-created “Catch-22.” Congress in 1970 passed the Bank Secrecy Act, requiring banks to report transactions of \$10,000 or more to assist government investigators in the tracking down of foreign or drug-related money-laundering operations.

In the mid-'80s, Congress made it a felony to break down deposits into smaller amounts in order to evade the reporting requirement, a crime called “structuring.” So if you deposit \$10,000 or more, you're a suspect. If you make a series of deposits of less than \$10,000, you could be a felon. But in the practice known as civil asset forfeiture, the government may keep your property without charging, much less convicting, you of any crime. Unlike criminal forfeiture, in which the loss of property is contingent on the owner's conviction of a crime, in civil forfeiture it is the property itself that is “accused” of involvement in criminal activity, and it is up to the owner to prove the taking was wrong. Or in the words of attorney Scott Bullock of the Institute for Justice (IJ), the legal assistance group representing Hinders, “Welcome to the down-is-up and white-is-black world of civil forfeiture.”

Standing Justice “on Its Head”

“Civil forfeiture turns the principle of innocent until proven guilty on its head,” said former IJ attorney Larry Salzman. “Once the property is taken, it's up to you to prove your own innocence to get it back in expensive litigation with the federal government.” Meanwhile, the owner has to find ways to survive without the money — or car, or house or business — the government has seen fit to confiscate.

“I had to scramble, I had to borrow, I had to beg, I had to put money on my credit card, things I’d never done before,” said Hinders, insisting she had done nothing wrong. “How can I be committing a crime by depositing money I worked for and deposited in my own bank account?” she asked. “In 30 years of banking with the same bank, no one’s ever mentioned that I was making my deposits wrong.”

The irony of the Bank Secrecy Act is that it sounds like something to protect the privacy of your bank account. On the contrary, it is to keep secret from you whatever reports your bank may be making to the government about your financial transactions. Not only are banks required to report anything that looks suspicious, but they are also forbidden to tell customers that they’ve informed the government about their accounts. “Bank *personnel* found to have neglected their duties to report suspicious customer behavior can also be criminally charged and sent to prison,” wrote libertarian blogger and *Washington Post* columnist Radley Balko. That creates an incentive for the bank to over-report by construing broadly what constitutes “suspicious activity.”

“The problem, of course, is that when you force banks to cast such a wide net, they’re going to report a lot of people who have done nothing wrong,” Balko wrote. “And some of those people are going to find themselves in legal trouble.”

Seizing “Criminal” Buildings

Most Americans would, like Hinders, find the sudden forfeiture of \$33,000 a significant burden to bear. But it is a mere pittance compared to some of the grander seizures and attempts at forfeiture made by law-enforcement officials ever since the “war on drugs” became a profit-making enterprise for federal, state, and local law-enforcement agencies. In the mid-1990s, the state of New Hampshire pursued civil forfeiture of a Bedford house, then appraised at around \$300,000, because one of the residents had purchased a small amount of marijuana from a police informant who had come calling on him. At his criminal trial, the defendant was found not guilty after his lawyer argued the sale was a police entrapment scheme. Yet the state continued with forfeiture proceedings, claiming the house was the site of an illegal drug sale, whether or not the resident was guilty of a crime. After the case drew negative publicity, the state’s attorney general quietly abandoned the attempted seizure.

A federal lawsuit against a motel in Tewksbury, Massachusetts, shows both how profitable civil forfeiture can be for police departments and how devastating it can be to property owners. Russ Caswell in 2012 found himself faced with the loss of the motel his father built in 1955 and that had become the source of income that would fund the retirement of Caswell and his wife, Pat. But because about 30 of the motel’s customers had been arrested on drug charges over a period of nearly 20 years, Tewksbury police teamed up with federal prosecutors in an effort to seize the motel, worth an estimated \$1.5 million, and sell it. Under the federal “equitable sharing” program, the Tewksbury Police Department would get 80 percent of the proceeds, while the “feds” would keep the remaining 20 percent. “Equitable sharing,” apparently, means what belongs to the government is the government’s and what’s yours is the government’s, too.

The implications of this lawsuit should send shivers down the spine of anyone with the slightest respect for the right of privacy and a wholesome revulsion against a world in which “Big Brother” is always watching. A motel or hotel owner can’t possibly be aware of what is going on in all of the rooms all the time. The Caswells have installed security cameras on the grounds and, noted columnist George Will in writing about the case, “they photocopy customers’ identifications and record their license plates and they turn the information over to the police, who have never asked the Caswells to do more.”

So what’s next? Will hotel and motel owners feel obliged to install cameras in the rooms and report their findings to police in order to avoid the risk of having their property buildings confiscated for being the site of criminal activity? Are they doing that already? Who knows, if the cameras are hidden?

Because the government actions are against inanimate objects, the lawsuits often have odd titles — such as *United States of America v. 434 Main Street, Tewksbury, Massachusetts*. A similar case bore the equally strange moniker, *United States v. 2601 West Ball Road, Anaheim, Calif.* That case involved an effort by the federal government and the city of Anaheim to seize a building housing two medical marijuana dispensaries, despite the fact that the dispensaries are legal under California law. In what has rightly been called an “end run” around the state law, Anaheim sought the assistance of national law enforcement, since marijuana for medical or any other use is still contraband under federal law. The owner of the building, Tony Jalali, stood to lose his entire commercial building, in which he had invested his life savings, though he was never charged with any wrongdoing. He merely rented part of the space to parties engaged in activities legal under state law. Again the “equitable sharing” provided a powerful incentive for Anaheim to go after the building since the local police would receive 80 percent of the estimated \$1.5 million to be gained from the sale of the property.

Jalali was one of the lucky ones among the victims of civil forfeiture — if being forced to wage a year-long fight in federal court against the U.S. Department of Justice just to keep one’s own rightful property can be counted as good fortune. In October 2013, the government agreed to dismiss the case with prejudice, meaning the government gave up the right to file the case and threaten the property again.

More Than 400 Federal Forfeiture Statutes

Civil forfeiture as a law-enforcement tool is not a novel idea, though its use has been vastly expanded in recent decades. U.S. forfeiture laws were enacted at the beginning of the Republic, and their pedigree can be traced to the British Navigation Acts of the mid-17th century, during the period of England’s rapid expansion as a maritime power. The laws gave British ships a monopoly on the carrying of imports to and exports from “the sceptered isle,” with foreign ships seized, along with their cargo, and forfeited to the British crown, regardless of the guilt or innocence of the owners.

Civil forfeiture became part of American law when the first U.S. Congress passed laws to aid in the collection of customs duties, which in that small-government era accounted for about 80 to 90 percent of federal revenues. The Supreme Court upheld forfeiture laws, finding them necessary for enforcing admiralty, piracy, and customs laws, when alleged violators could not be reached, often because they were overseas. As Justice Joseph Story wrote in a 19th-century forfeiture case, the “vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner.” Story, however, held that such forfeitures were justified when they arise “from the *necessity* of the case, as the *only* adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party.”

Forfeitures increased during the Civil War and again during Prohibition, with the seizure of automobiles and other vehicles used in the transportation of liquor. But it was the second Prohibition, commonly called the “war on drugs,” that gave rise to today’s widespread taking of allegedly “guilty” properties from their lawful owners. Congress in 1984 amended the Comprehensive Drug Abuse and Prevention Act of 1970 to create the Assets Forfeiture Fund, with the proceeds from the seizure and sale of forfeited properties to go to the Department of Justice and other federal law-enforcement agencies, instead of going into the general fund. Many states followed the federal example, amending their statutes to give state and local law-enforcement agencies a share of forfeiture proceeds. Today law-enforcement agencies in 42 states receive some or all of the civil forfeiture proceeds they seize.

And the “equitable sharing” feature of today’s forfeiture laws makes it profitable for local law enforcement to call on the added resources of the federal government to increase the bounty taken and enjoy the return of 80 percent of the money raised by seizing suspect properties.

The Civil Asset Forfeiture Reform Act of 2000 made “a number of modest reforms,” wrote Bullock of the Institute for Justice, “but it did not change how forfeiture proceeds are distributed or otherwise ameliorate the profit incentive law enforcement agencies have in civil forfeiture.” In the institute’s brief historical recounting of civil forfeiture, entitled “Policing for Profit,” Bullock wrote:

No longer is civil forfeiture tied to the practical difficulties of obtaining personal jurisdiction over an individual. Released from its historical limitation as a necessary means of enforcing admiralty and customs laws, the forfeiture power has instead become a commonly used weapon in the government’s crime-fighting arsenal. And Congress and the states have expanded its application even beyond alleged drug violations to include a plethora of crimes at the federal and state levels. Today, there are more than 400 federal forfeiture statutes relating to a number of federal crimes, and all states have statutory provisions for some form of asset forfeiture.

Looting With Loretta

The *Washington Post* reported last September that the value of properties taken in civil asset forfeitures by the federal Department of Justice during a five-year period nearly doubled in an

inflation-adjusted dollar count, from \$508 million in 2008 to \$1.1 billion in 2013. The seizures come in amounts both large and small, noted Senator Rand Paul (R-Ky.).

“The government takes your cash — \$1,000, \$500, whatever it is,” Paul said in a February 4 interview on Fox News, announcing he would vote against the confirmation of Loretta Lynch, President Obama’s nominee for attorney general, because of her support for civil forfeiture. “This program predominantly has targeted black individuals, poor individuals, Hispanic individuals,” Paul said. “I wish [Lynch] had a little more concern for people who live in poverty before taking their stuff.”

Senator Mike Lee (R-Utah) raised the issue with Lynch during her confirmation hearing with the Senate Judiciary Committee:

Senator Lee: Do you think it’s fundamentally just and fair for the government to be able to seize property from a citizen without having to prove that the citizen was guilty of any crime, and based solely on a showing that there was probable cause that that property was in some way used in connection with a crime?

Attorney Lynch: Senator, I believe that civil forfeiture — civil and criminal forfeiture — are very important tools of the Department of Justice, as well as our state and local counterparts through state laws, in essentially managing or taking care of the first order of business, which is to take the profit out of criminal activity. With respect to civil forfeiture, certainly as implemented by the Department of Justice, it is done pursuant to supervision by a court, it is done pursuant to court order, and I believe the protections are there.

While civil forfeiture may be taking the profit out of crime in some cases, in others it is taking the livelihood away from law-abiding individuals and businesses. As U.S. attorney for the Eastern District of New York, Lynch handled the case against Bi-County Distributors, a family-owned Long Island company that sells cigarettes and candy to convenience stores. Because many of its customers pay in cash, Bi-County, like Mrs. Lady’s restaurant in Iowa, made frequent bank deposits of less than \$10,000 and came under suspicion of structuring. In the spring of 2012, the IRS, working with Lynch’s office, took hold of the company’s bank account.

“Without so much as a criminal charge,” wrote Adam Bates for the libertarian Cato Institute, “the federal government emptied the account, totaling \$446,651.11.” According to the Institute of Justice, the Hirsch brothers, owners of the business, were denied a prompt hearing, a violation of the Civil Asset Forfeiture Reform Act. Since the case generated a good deal of negative publicity, it was perhaps no coincidence that the money was returned just one week before Lynch’s confirmation hearing in January, nearly three years after it was taken.

“The Hirsch brothers and their business survived, but just how many law-abiding small businesses can afford to give the government a 33-month, interest-free loan of nearly half a million dollars?” Bates asked. No one knows the answer to that, of course, nor do we know how many other small business owners have had their money confiscated, though innocent of any

wrongdoing. In an editorial entitled “Loretta Lynch’s Money Pot,” the *Wall Street Journal* observed: “Ms. Lynch’s office is a major forfeiture operation, bringing in more than \$113 million in civil actions from 123 cases between 2011 and 2013, according to the Justice Department.”

The FAIR Act

Civil forfeiture actions often violate one or more constitutionally protected rights, including the Fourth Amendment right to be free of “unreasonable searches and seizures” and the Fifth Amendment guarantee that no one will be “deprived of life, liberty, or property, without due process of law.” When hundreds of thousands of dollars are seized or properties worth millions are taken, there might also be violations of the Eighth Amendment ban on excessive fines, even if the owner of the accused property should eventually be convicted of some criminal offense.

Senator Paul and Representative Tim Walberg (R-Mich.) have sponsored legislation entitled the Fifth Amendment Integrity Restoration (FAIR) Act. The bill would take the profit out of civil asset seizures by abolishing the Equitable Sharing Program that distributes the proceeds among local, state, and federal law-enforcement agencies. That, say the sponsors, encourages police to seize property under federal law, which requires less evidence than most state laws do. The bill would also require “clear and convincing evidence,” rather than the current requirement of a mere preponderance of evidence, that the property qualifies for forfeiture. It would also require clear and convincing evidence that the owner of the accused property is responsible for the allegedly criminal use of it. The bill would limit forfeiture for “structuring” to only when the owner “knowingly” sought to avoid bank reports of “funds not derived from a legitimate source.” And it would require courts in forfeiture cases to provide legal representation to all who can’t afford it.

“The FAIR Act would provide essential protections for innocent property owners who have for decades lost their cash, cars, homes and other property without being convicted of or even charged with a crime,” said Bullock. “This legislation would also go a long way toward stopping the perverse practice of policing for profit.”

Paul and Walberg introduced the bill in the last session of Congress, but it went nowhere. It may take an aroused citizenry to awaken Congress to the dangers of a liberty-crushing strategy for fighting crime that representatives and senators have repeatedly endorsed and authorized. Innocent victims of civil forfeiture would be well and justly served if their countrymen showed the same fighting spirit Carole Hinder expressed at her restaurant in Iowa. “I decided to fight this because, I didn’t do anything wrong,” she said. “At least they should have to prove that I did something wrong before they took my money. And I want to stand up for it because I don’t want it to go on.”