



New Mexico Governor Signs Asset Forfeiture Reform Bill

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New Mexico Governor Susana Martinez has signed into law a bill banning the seizure and sale of property alleged to have been used for criminal activities where the property owners are not convicted or even charged with a crime. The bipartisan bill, HB 560, outlaws the law-enforcement procedure known as civil asset forfeiture.

Though it passed both houses of the legislature without a single dissenting vote, the governor had not indicated whether she would sign the bill. Some wondered, given her background as a district attorney, if she might be unwilling to support the curbing of police power to confiscate property without convicting the owner of any crime. In the statement she issued announcing the signing, Martinez expressed her support for constitutional protections of property, while taking issue with those who call asset forfeiture "policing for profit" — a slogan based on the fact that money gained from the forfeiture goes to fatten the budgets of federal, state, and local law-enforcement agencies.

“This is a good day for the Bill of Rights,” said Peter Simonson, executive director of the New Mexico chapter of the American Civil Liberties Union. “For years police could seize people’s cash, cars, and houses without even accusing anyone of a crime. Today, we have ended this unfair practice in New Mexico and replaced it with a model that is just and constitutional.”

“Convicted criminals will still see the fruits of their crime confiscated by the state,” said Paul Gessing, president of the Rio Grande Foundation, “but innocent New Mexicans can now rest easy knowing that their property will never be seized by police without proper due process.”

New Mexicans may not be all that secure in their property rights, since the federal government has more than 400 civil asset forfeiture statutes, and local police departments, from one end of the country to the other, have been known to make end runs around state laws by calling on the federal government for drug busts or other arrests in cases where federal statutes have been violated. In Massachusetts, where state forfeiture law is more restrictive than the federal statutes, Tewksbury police in 2012 teamed up with federal prosecutors against a motel where some of the guests had allegedly carried out drug transactions. The owner was not charged with being involved in the transactions or even knowing about them. But under the “equitable sharing” provision of federal forfeiture law, the windfall from the seizure and sale of the motel, estimated

to be worth \$1.5 million, would be split, with a generous 80 percent going to the Tewksbury Police Department and 20 percent to federal law enforcement.

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. Anaheim police sought the assistance of national law enforcement, since state regulated marijuana use for medical treatment is legal in California, though still prohibited under federal law. The owner, Tony Jalali, stood to lose his entire commercial building, in which he had invested his life savings, though he was never charged with a criminal offense. He merely leased 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.

Not everyone has the means to fight a forfeiture, and anyone who tries comes up against an inversion of normal legal rules. “Civil forfeiture turns the principle of innocent until proven guilty on its head,” declared Larry Salzman, a lawyer formerly with the non-profit Institute for Justice, an advocacy group defending property rights. “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, house or business — the government has seen fit to confiscate.

Some businesses have had their bank accounts emptied by federal agents without any due process, under a “Catch 22” feature of federal law. Deposits of \$10,000 or more must be reported by the bank to the federal government, which may then investigate a possible “laundering” of money from drug sales or other criminal activity. Frequent deposits of smaller amounts, however, can bring the depositor under suspicion of “restructuring” accounts to conceal money-laundering activity, another federal crime. Bi-County Distributors, a family-owned Long Island company that sells cigarettes and candy to convenience stores, is one company that got cut off from its cash reserves by that two-edged legal sword.

Because many of its customers pay in cash, Bi-County made the type of small and frequent deposits that can trigger suspicion of restructuring. In the spring of 2012, IRS agents cleaned out the company’s bank account, seizing \$446,651.11. Loretta Lynch, U.S. attorney for the Eastern District of New York, reportedly handled the case for the federal Justice Department, a matter that drew added attention when Lynch was nominated late last year by President Obama to succeed Eric Holder as U.S. attorney general. The Senate has yet to vote on confirmation, but many noticed the interesting coincidence that the case against Bi-County Distributors — which had drawn considerable negative publicity — was dropped and the company’s money returned

just one week before Lynch went before the Senate Judiciary Committee for her confirmation hearing in January, nearly three years after the forfeiture was executed.

“The Hirsch brothers and their business survived,” observed Adam Bates of the libertarian Cato Institute, “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?” In an editorial titled, “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.”

Civil forfeiture actions often violate one or more constitutional 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.

Bipartisan legislation has already been introduced in both houses of Congress to reform federal civil asset forfeiture laws. The Fifth Amendment Integrity Restoration (FAIR) Act has been introduced in the Senate by Senator Rand Paul (R-Ky.), Senator Angus King (I-Maine), and Senator Mike Lee (R-Utah). In the House, Representative Tim Walberg (R-Mich.), Representative Scott Garrett (R-N.J.), Representative Tony Cárdenas (D-Calif.), Representative Keith Ellison (D-Minn.), and Representative Tom McClintock (R-Calif.) introduced an identical version of the FAIR Act.

While it is surely encouraging to see a bipartisan movement to rein in the overextended powers of the federal government, it should also be noted that, beyond the prohibitions in the Bill of Rights, the Constitution not only delegates to the federal government no power to confiscate property without due process of law, but it also grants no authorization to outlaw most of the activities Congress has made federal crimes. The Constitution grants Congress the power to punish treason, counterfeiting, “Piracies and Felonies committed on the high Seas and Offenses against the Law of Nations.”

Yet today we have an estimated 4,500 federal criminal statutes and a vast number — perhaps beyond all counting — of federal regulations, violations of which may involve criminal penalties, including prison time. The federal statutes alone have become so voluminous that when Harvey Silvergate, a lawyer and civil libertarian, wrote a bestselling book about the number of crimes an otherwise law-abiding American might unknowingly commit in the course of leading an ordinary life, it was published under the title *Three Felonies a Day*.

It is surely a good sign when lawmakers come together in an effort to reform bad laws. It would be even better if they would spend a considerable amount of time *repealing* bad laws.