



## States caught in tug of war over whether cops can keep your stuff

**Maryland becomes latest to limit controversial asset forfeiture amid pushback from law enforcement**

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May 19, 2016

Maryland Gov. Larry Hogan on Thursday became the latest state leader to sign contentious legislation restricting civil asset forfeiture — the process that allows police to seize and keep property suspected of being connected to illegal activity, without having to convict, or even charge, the owner with a crime.

Hogan's signature represents a reversal for the Republican governor, who vetoed a bill on the same subject last year after buckling to pressure from high-profile law enforcement groups. The legislature promptly overrode his veto to pass that measure and then introduced additional changes this year that limit involvement in a federal program and require authorities to annually disclose what has been seized.

The measure signed in Annapolis was one of some 50 bills floated in at least 22 states this year proposing to limit civil asset forfeiture. Nine states passed some form of reform laws, while similar measures failed in another six, according to a Center for Public Integrity review of the legislation. Seven states still have 11 bills pending.

Widespread civil forfeiture emerged from the drug war of the 1980s, and has been the source of controversy since. The back and forth is part of a fresh round of battles being waged in statehouses nationwide amid a federal stalemate on possible changes — though a new congressional bill was introduced Thursday.

Those struggles are proving to be especially bitter because both backers and opponents of asset forfeiture represent influential constituencies used to getting their way in state capitals: Powerful local police groups and prosecutors are trying to preserve the lucrative cash-cow procedures that help them fight crime, while a potent national coalition of liberals and libertarians is decrying civil forfeiture as policing for profit that rides roughshod over individual rights.

Much of the legislation has emerged from a grouping of strange political bedfellows: conservative giants such as the American Legislative Exchange Council, the Charles Koch Institute, the Institute for Justice and the Cato Institute, plus traditionally liberal players such as Common Cause, the American Civil Liberties Union and the Drug Policy Alliance.

Together these organizations have distributed various forms of “model” legislation to lawmakers that would bar asset forfeiture in civil, rather than criminal, proceedings. The odds are stacked against property owners in civil forfeiture, because they must provide their own attorneys and the government has a lower burden of proof than in criminal cases.

The allies want criminal convictions to be the threshold for whether assets can be forfeited, public disclosure of what’s been taken and the creation of general funds to hold the forfeited goods, rather than accounts funneled directly to law enforcement agencies. The measures are also attempting to limit so-called equitable sharing, through which federal authorities and local police agencies divvy up the seized booty, which can range from cars and cash to bridal gowns.

“We are disregarding individuals’ property rights, which are sacrosanct for a reason,” said Dick Carpenter, the director of strategic research at the Institute for Justice, which has led the charge against the forfeiture laws. “At what cost do we justify a nominal benefit?”

But law enforcement groups have fiercely pushed back against the proposed changes, writing letters, testifying before committees and furiously lobbying— tactics that pushed Hogan and Wyoming Gov. Matt Mead to veto similar legislation last year, stalled bills in other states or weakened proposed legislative language. Fourteen forfeiture bills were introduced in Texas last year, but only one watered down measure passed, requiring the state attorney general to post public information online.

This year, many bills died in the face of fiery rhetoric: Oklahoma and Utah officials warned that their states would be taken over by savvy drug lords because cops wouldn’t have the resources to fight them.

"We all felt that the bill was detrimental to law enforcement and took away tools to curb criminal activity," said Gary Giles, the chief of police in Orem, Utah, and a representative of the Utah County Law Enforcement Executives Association. "It is a solution looking for a problem."

Cops say the funds help pay for important tools, such as money for drug buys in sting operations, equipment, weapons and police training programs. Significant cash is at stake even when not counting money shared with the feds: Utah collected about \$11.3 million in its forfeiture funds over 10 years, while California kept \$29 million in forfeitures in 2015. However, the total take in many places is obscured by poor reporting requirements. Thirty-six states don’t require agencies to post forfeiture reports online, and many don’t have a single agency that aggregates all state data.

This new round of statehouse struggles arose as Congress faltered on federal bills to end sharing between federal and local authorities and to require a higher burden of proof before seizing property. But a bipartisan group of congressional leaders, including Rep. Darrell Issa, R-Calif., became more vocal in recent weeks about a controversial seizure from a Christian rock band called Klo & Kweh Music Team in Oklahoma. During a traffic stop for a broken tail light, deputies seized \$53,000 in donations meant for a Thai orphanage and Christian school in Myanmar because a band member gave “inconsistent stories” about the money’s origin, according to a deputy sheriff’s affidavit.

“Unless Congress takes action, state efforts to stop civil forfeiture abuse mean very little,” Issa wrote in a *Los Angeles Times* op-ed.

National law enforcement groups including the Fraternal Order of Police and the National Association of Police Organizations have spoken out against such federal legislation.

“There are many areas on which I expect there may be broad agreement — preventing abuse, increased transparency,” Chuck Canterbury, the Fraternal Order of Police national president, testified before the Senate Judiciary Committee in April 2015. “However, we must remember that the purpose of this program is to combat and deter crime by ensuring criminal assets are shared with state and local agencies to benefit the community.”

### **Where did forfeiture come from?**

U.S. civil forfeiture originated from 17th century British maritime law that normally applied to piracy or customs matters. The government sought an avenue to take and keep ships and cargo regardless of guilt, as trials were difficult when the owners were overseas or not in the country’s jurisdiction. So, officials created a process that charged the property itself — as opposed to a person — with a crime. (This is why proceedings are sometimes brought against an item, such as *The State of Oklahoma v. \$53,234 Cash* in the case of Klo & Kweh Music Team, the Christian rock band.)

As the war on drugs raged, Congress in 1970 gave police the power to keep vehicles transporting narcotics and expanded the law a decade later to include cash. In 1984, Congress created the Department of Justice Assets Forfeiture Fund, replacing the government’s general fund as the destination for the goods.

States began passing similar laws modeled after this federal legislation, opening the doors for local law enforcement to keep seized goods and cash. The programs quickly grew popular.

But in 2010, the nonprofit law firm Institute for Justice released its first “Policing for Profit” report, which argued that civil forfeiture laws in most states created a dangerous profit motive for police. *The New Yorker* and then *The Washington Post* published investigations highlighting cases of abuse.

Lee McGrath, the Institute for Justice’s legislative counsel, has proven to be a fervent and effective crusader — traveling all over the country from his Minnesota home for the past six years, armed with model legislation, a John Oliver video, copies of IJ’s pivotal report and a well-worn spiel to lawmakers. He has had a hand in at least 23 states’ legislative pushes.

“When cops, sheriffs and prosecutors can raise money themselves and have it supplement the budget, they are combining the purse and the sword and are violating the separation of powers.” McGrath said.

His firm represents people fighting forfeiture claims pro bono but may receive attorney’s fees in some states if an owner wins in court. More than 8,000 donors and foundations fund the

libertarian group based in Arlington, Virginia, including the Coors Foundation, billionaire industrialist David Koch and the Laura and John Arnold Foundation. (*The Arnold Foundation is a donor to the Center for Public Integrity.*) (*Update, May 20, 2016, 11:35 a.m.: The number of donors giving to Institute for Justice has been updated above from "more than 100."*)

What's unusual is how this group is working with so many partners on the other side of the political spectrum. McGrath said the collaboration with groups such as the ACLU occurred as they each started working on individual cases, outraged by the abuses of police power.

The advocates' biggest win came in April 2015 when New Mexico banned civil asset forfeiture entirely and required greater transparency for criminal forfeiture, in which conviction of a person is required before property can be kept. Proceeds must now go into a general fund, and agencies are effectively banned from sharing property with the federal government.

The Land of Enchantment is now among 10 states that require a criminal conviction, including California, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, Oregon and Vermont. Six of these states passed the measures in the last two years.

### **Tensions run high**

In other states, such as Utah and Oklahoma, the fight continues with striking intensity. Four bills died in Oklahoma this year, despite recent scandals involving forfeiture. An assistant district attorney paid part of his student loan with \$5,000 of forfeiture funds, according to state audits, while another lived in a house seized during a drug raid without paying rent, instead of selling the house and placing the proceeds in the county fund. The only bill that made it to Republican Gov. Mary Fallin, which she signed, allows owners to recoup attorney's fees if they win in court.

Stephen Mills, the police chief in Apache, Oklahoma (pop. 1,429), is among those who sought changes.

In 2010, Mills loaned his blue Ford F-250 to an employee to pick up supplies for the ranch he owned and operated. The worker stole some wire from an oil field, and Grady County Sheriff's deputies arrested the worker and seized the truck.

Mills, who was chief of an Army narcotics task force at the time, thought they were holding his vehicle in evidence. He spent the next four months calling twice a week, arguing with the department as deputies told him he could not prove his innocence.

"I knew under the law I would eventually get it back, but I couldn't believe they were making it so difficult," Mills said. "It was all about them keeping the truck instead of doing the right thing."

Mills went to his local newspaper, *The Chickasha Express-Star*, which called the district attorney. A few hours later, Mills' lawyer called him to say he could pick up his truck.

Mills testified in favor of new limits in Oklahoma last September, but the process became a circus. Quarreling lawmakers held two concurrent hearings on forfeiture 100 miles apart, with

mostly law enforcement officials testifying in opposition to policy change at the Tulsa Police Academy, as pro-reform advocates ripped forfeiture apart at the statehouse in Oklahoma City.

Then on an episode of the Pat Campbell Show on KFAQ-AM radio last November, Eric Dalgleish, then a major at the Tulsa Police Department, pushed the narrative that ultimately helped kill four bills.

“What it will do is enhance the drug trafficking organizations,” Dalgleish said. “They are politically savvy. They are political activists. If you think they’re not watching this and deciding what state to set up business in, we’re being naïve and we’re being ignorant.”

In Utah, local prosecutors have repeatedly squared off against a local libertarian think tank, with both sides having a hand in crafting legislation. Tensions have run high since voters passed a referendum in 2000 that, among other things, banned police from reaping the proceeds of forfeited property and ended equitable sharing with federal agencies.

Thirteen years later, a 50-page bill that its sponsors said would only combine disparate parts of forfeiture law passed without much discussion. The law additionally made it optional for a court to award attorney’s fees to an innocent owner and limited the amount to 20 percent of the seized property’s value.

"Cleanup and changes were necessary because the law wasn't working," said Assistant Attorney General Wade Faraway.

After learning about the consequences of the law, the libertarian Libertas Institute publicized the changes and wrote a bill to eliminate the provisions, which legislators essentially adopted and passed the following year.

But the fight wasn’t over. This year local prosecutors successfully fought a bill to strengthen owner protections after testifying in hearings and participating in closed door meetings with legislators.

"You can see the history of the people of Utah resisting this and then the very political and very powerful special interest of law enforcement coming in and getting it back on the books," said Sen. Mark Madsen, R-Saratoga Springs, raising his voice during a Senate hearing on the failed bill this session.

### **‘The optics don’t look good’**

The most common point of disagreement in many statehouses is who should get the forfeited property. Seven states and the District of Columbia don’t allow police and prosecutors direct access to the seized goods. Lawmakers in other states who want the legislature to dole out the forfeited property have been met with intense resistance from coalitions of police and prosecutors.

This debate raged even in New Hampshire this winter, a state that made only about \$185,000 in forfeitures from July 2011 to June 2013, not including cash from the feds.

"This is a very small amount of money, a decimal-wise percentage of their funds, but the Association of Chiefs of Police are fighting tooth and nail on this," said New Hampshire Republican Rep. Michael Sylvia. "They tell us it's not about the money, but it's all about the money. It's a conflicting message."

A bill to move money to a general fund passed both chambers. But New Hampshire Gov. Maggie Hassan, a Democrat, said she will veto it to preserve funds for local law enforcement's drug-fighting efforts amid the deadly opioid epidemic that has struck the Granite State.

To address the conflict in Delaware, state Sen. Colin Bonini, a Republican who is running for governor, said he was determined to beef up police budgets, even though his proposed legislation moves forfeited property to a general fund. The bill is currently stuck in committee.

"I don't think police have misused that money," Bonini said. "But the optics don't look good, like 'I'm gonna take your stuff and go spend it.' The least we could do is make a transparent system that gives them money through regular budgetary procedures."

Even some cops involved in seizing property are uncomfortable with the process.

"During budget sessions, city administrators would attempt to plan our budget around seizures, prioritizing this funding stream in an attempt to cut the overall public safety budget and save money," said Diane Goldstein, who ran the Redondo Beach Police Department's forfeiture program in California. She said lawmakers must step in to "prevent the conflict of interest that arises when police have a budgetary stake in forfeited property."

### **'We watered down that bill'**

Maryland's forfeiture bill was one of just six bills Gov. Larry Hogan vetoed out of the 400-plus sent to his desk in 2015. Instead of rerouting forfeiture funds and placing a \$300 minimum value on property that could be forfeited, Hogan said he would follow the advice of the Maryland State's Attorneys' Association, the Maryland Chiefs of Police Association and the Maryland Sheriffs' Association. And he created a commission to review forfeiture laws.

Undeterred, lawmakers overrode the veto in January and passed the new bill that Hogan signed Thursday. The latest bill goes even further: It blocks Maryland from sharing funds less than \$50,000 with the feds and makes agencies submit an annual financial report detailing what property is seized, whether the property was returned and the outcome of any criminal charges.

The sponsor, Republican Sen. Michael Hough, had wanted to fill the "glaring holes" they didn't address last year in the wake of opposition from law enforcement and state's attorneys.

"We watered down that bill," Hough said of last year's legislation during a February hearing on the recently signed legislation. "I started to feel that I had made a grave mistake being a part of that."

*(Update, May 19, 2016, 10:45 p.m.: Hogan spokesman Matt Clark said the governor's position this year represented a response to technical issues in last year's legislation.)*

The Maryland Chiefs of Police Association and Maryland Sheriffs' Association did not take a position on this latest bill.

"After the governor's veto was overridden from last year, the message from the legislature was clear," said Karen Kruger, executive director of the Maryland Sheriffs' Association. "It did not appear any opposition was going to have any effect this time around." But Kruger said both new laws are complicated and will be difficult to implement.

"Frankly, I think politicians have a naïve view of how the drug trade works and how civil forfeiture rids criminals of their ill-gotten gains even if there is not sufficient evidence to prove a direct crime," she said.

However Maryland legislators also heard from officers opposing forfeiture. Among them: Garland Nixon, a retired officer from the Maryland Natural Resources Police, who said lawmakers shouldn't wait for a scandal to change the law.

"I don't want to be in a country where we have to trust that they won't do it," Nixon said in a Maryland Senate hearing. "I want to be in a country where the law says they can't do it."