

the Rumble

An old law written for pirates lets police steal your stuff today

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It's a concept that's fairly simple to understand –at least on the surface – where uniforms and years of childhood games give us the simple tools we need to distinguish the good guys from the bad guys. But when the uniform you've been taught to trust takes your car, your home and your money without a criminal charge those childhood lines of right and wrong quickly begin to blur. That is the basic concept behind civil forfeiture which turns cops into robbers and is much more common than you'd think.

The practice of civil forfeiture was originally conceived in the early colonial days when the British Empire was in need of a legal method for dealing with pirates and trade ships whose owners were on a different continent. If a ship was seized and its beneficiary was not present to account for crimes of smuggling or piracy, the British Crown would charge the ship itself and seize its cargo as evidence.

“But we don't live in those times anymore,” Dan Alban, an attorney and spokesperson for the Institute for Justice (IJ), a non-profit public interest law firm, tells *the Rumble*, “This has somehow transformed into something that applies to anyone who is driving down any highway anywhere.”

It's a law that has affected thousands like the Slatik family of Sand Diego, California where the District Attorney's office seized \$100,000 from their bank accounts without charging them with a crime.

Police accused Med-West [the family's medical marijuana company] of operating a “clandestine” drug lab, even though the business complied with state medical marijuana laws, operated publicly for two years, and paid its taxes.

Or Terry and Ria Platt of Arizona who had their car seized for what was reported as a window tint violation, while it was being driven by their son who was in possession of a small amount of marijuana at the time, but does not own the car that authorities confiscated.

There is an obvious pattern here of drug related near-crimes for which neither of the property owners were charged because it was never the owners who committed any crimes.

“Forfeiture operates based on a legal fiction that it’s the property that is somehow guilty of committing the crime.” Alban says.

That legal fiction has resulted in ridiculous sounding court cases like *The United States v. \$124,700 in U.S. Currency* or *The United States v. 12 200-ft. Reels of Film*.

And since it’s difficult to get a gold watch to testify in a courtroom, the owner has to file as an interested party to prove that the inanimate object hadn’t done anything wrong. It’s a reality of law enforcement that sounds so bizarre it makes *Super Troopers* look like a documentary.

However odd and outdated it may seem, civil forfeiture is perfectly acceptable from a legal perspective. In fact, the Supreme Court has found that it does not violate the property owners rights – particularly the rights afforded in the Fifth Amendment which protects Americans from having their things taken from them by law enforcement without a trial.

In cases that have reached its steps, the Supreme Court has contended that despite the fact property was taken without a criminal charge, no rights had been violated because the property owner was still given the opportunity to dispute the case in court.

But as the ACLU said in a letter to Congress this year, this practice makes a joke of the justice system’s most basic values. “Property owners must prove they are “not guilty,” the letter points out, “turning the fundamental presumption of innocence on its head.”

Alban agrees, the law is outrageous and continues to outrage the more we dig below the surface. Civil forfeiture cases differ in a couple of major ways from criminal cases and one of those major differences comes with the burden of proof.

In order to prove that a car, home or approximately 64,695 pounds of shark fins (a real case) are guilty of the crime for which they were accused, a prosecutor only has to provide the minimum level of proof known as a preponderance of the evidence.

“In this one narrow instance,” says Alban, “you can allege that a crime was committed, but you don’t have to prove – beyond a reasonable doubt – that a crime was committed.”

In most cases, even that low bar is rarely met because the vast majority of civil forfeitures never see the inside of a courtroom; the second major difference between civil and criminal cases. Because the property owner was never charged with a crime, they have to foot the bill for a lawsuit to win their property back. That financial burden coupled with time restrictions for filing a claim and bargains struck to return a portion of the property seized result in few cases being brought to trial.

“Unlike criminal cases,” Alban points out, “you don’t have a right to a court appointed attorney in a [civil] forfeiture case. So the cost of litigating and hiring an attorney is very often much greater than the cost of what was seized.”

Civil cases make up nearly 90 percent of all forfeiture cases in the country. Of those, over 80 percent are never brought before a judge and become what is known as an administrative

forfeiture in which the property is never claimed and is therefore left to the law enforcement agency which seized it.

It's a practice that leaves a lot of cash and property in the hands of federal agencies and local police departments. According to the Department of Justice's (DOJ) Consolidated Asset Tracking System (CATS) database, obtained by IJ through freedom of information requests, in 2016 alone the DOJ seized nearly \$2 billion in cash and property.

In March of 2017, the DOJ's Office of the Inspector General looked into 100 forfeitures conducted by the DEA and found that more than half did not advance or relate to a criminal investigation (let alone a conviction in court). The report ultimately found that it, "cannot effectively assess whether asset forfeiture is being appropriately used".

But many agree that it is not appropriate. A recent poll from the CATO institute, a libertarian think tank, shows that 84% of Americans oppose civil forfeiture and both Democrat and Republican party platforms have expressed a need for reform.

With both sides of the hopelessly dysfunctional political aisle finding that they can agree on the moral imperfections of government sanctioned robbery, there are still a few holdouts that remain convinced that civil forfeiture is a net positive.

Among those forfeiture enthusiasts is Attorney General Jeff Sessions who, in late July, gave a speech to the National District Attorneys' Association (NDAA) praising the merits of civil forfeiture. As part of his new 'tough on crime again' agenda, Sessions said that he would expand civil forfeiture by removing the restrictions placed on it by the Obama-era DOJ.

In January of 2015, former AG Eric Holder placed restrictions on a forfeiture practice called adoptive seizures, in which a local law enforcement official can bypass local laws that restrict forfeiture by referring that seizure to a federal agency like the DEA, FBI, IRS or any other agency that applies. Under Holder's guidelines, adoptive seizures would only be permitted in the most extreme cases.

It was a move that was seen as necessary to ensure states' rights to enforce their own laws – especially after many states enacted legal marijuana laws and sought to limit federal interference – but also to limit the practice itself.

From 2007 to 2014, The DEA, ATF and FBI accounted for \$880 million in adoptive seizures among 32,000 cases that were referred by local law enforcement.

In the short-lived reign of Holder's limited restrictions, administrative seizures went from raking in millions to just thousands worth of property according to CATS data.

Sessions' announcement to re-instate adoptive seizures will aim to fight crime in the spirit of, "guilty until proven innocent" by allowing local and federal law enforcement to once again join forces in seizing assets from citizens without a charge.

The NDAA offered praise for the policy at the initial announcement last month in Richmond, Virginia, but refused further comment on the issue. Their website did not include a regular press release and no members of the association were made available for interview.

In his announcement, Sessions sold the policy as an effort for greater co-operation between law enforcement and the DOJ, painting a rosy picture in which the two are, “just a simple phone call” away. It was a relatively short portion of his speech that almost seemed as though it was said in passing.

“we hope to issue this week a new directive on asset forfeiture—especially for drug traffickers,” Sessions said to the NDAA, “With care and professionalism, we plan to develop policies to increase forfeitures. No criminal should be allowed to keep the proceeds of their crime. Adoptive forfeitures are appropriate as is sharing with our partners.”

Considering that the DEA accounts for a large majority (88 percent) of adoptive seizures, the case could certainly be made that forfeitures are solely a tool of the war on drugs. In fact, the practice was almost unheard of after the prohibition-era until the mid-80s when drug related reforms were made to the criminal code and signed into law by Ronald Reagan.

If you listen to what the Reagan administration was saying at the time, It’s clear that the practice was intended as a catch all that would fund police and fight crime at the same time.

“It’s now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation.” Reagan’s AG Richard Thornburgh boasted in 1989.

But while it effectively funded local police forces for decades, the evidence on forfeiture’s effectiveness in combating drug crime is unclear.

“There is some evidence that forfeiture laws do incentivize police to make more drug arrests, though it is not clear whether those types of arrests actually reduce crime.” says Keith Whittington, a William Nelson Cromwell Professor of Politics at Princeton University.

Whittington believes that the DOJ new policy is sure to draw some backlash among the 15 states which have passed laws to limit civil forfeiture. Among these are blue states and red states including Florida, California, Illinois and New Mexico, which have either tied the practice to a need for conviction or outlawed it entirely.

But in local jurisdictions like Albuquerque, New Mexico, lawmakers have had a difficult time getting local police to obey the law for one very compelling reason:

“From the perspective of law enforcement agencies this is a source of funding.” Whittington says, pointing out that there is substantial evidence that police respond to the financial incentive to make use of civil forfeiture, “local police make use of the type of federal asset forfeiture programs Sessions is promoting to get around more restrictive state rules and to engage in more forfeiture activity.”

Just as the Reagan administration intended, forfeiture is doing quite well to provide funding to law enforcement and it's difficult to cut that source of funding once the money begins to flow.

“They like having this off budget money because it's money they don't have to ask the city council or the state legislature for.” Albin agrees, going on to say that these funds are used for everything from basic needs like body armor to one instance in which seized money was spent on a margarita machine because it was a morale booster.

So when the state tries to cut off the tap, adoptive seizures allow local police to call in their federal big brothers to lend a hand.

“In a number of states law enforcement isn't allowed to keep the proceeds from forfeiture under state law,” Says Albin, “but if they go through adoptive seizures under federal law they can circumvent that and still receive 80 percent of the money.”

As a result, the policy has become less about fighting crime and more about replacing regular channels of funding with funding through seizures. In this way, according to Whittington, forfeiture distorts normal police practices and leads police to focus their efforts on activities that are likely to generate income rather than reduce crime.

“They can say all they want about taking money away from drug dealers, but until they convict someone, they're not actually taking money from criminals.” says Albin, “What this is really driven by is profit incentive. They get to keep the money that they seize.”

That incentive for funding perks and necessities at the station has lead to practices like patrolling known smuggling routes and setting traps on the side of the highway that is most likely to have cash rather than drugs. It's a policy that gets many innocent people caught in the mix and having to prove that they aren't drug dealers.

It also creates an interdependent relationship between police and cartels in which funding for law enforcement is dependent on the survival of criminal organizations and their continued smuggling operations. Where politicians of the 80s seriously miscalculated is in their cyclical model of crime fighting, because while it looks good on paper, if you break the cycle the model falls apart.

This dead end situation is one reason that Whittington suggests, “the best safeguard against abuse is to eliminate civil asset forfeitures as a tool of criminal law enforcement.”

Recent reform measures – like the RESPECT Act which focuses on seizures by the IRS and received bipartisan support in the House earlier this year– have moved toward requiring criminal convictions before assets can be forfeited or requiring the government to meet a strong standard of evidence.

But many of the measures taken to curb civil forfeiture have been made at a local and state level and with a DOJ that seems enthusiastic about the benefits of forfeiture it seems like that is going to be the case for at least the next 4 years.

That local focus is not entirely discouraging for both Republicans and Democrats who would like to see reform. It's clear that there are many across the country and the political spectrum that would like to see a change, but the key seems to be convincing local law enforcement that this is not the best way to fund the department. That's where local government's will have to step in and pay the price innocent Americans have been paying for them.