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DOJ Turns Up the Heat on Asset Forfeitures

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Last week, Attorney General Jeff Sessions announced that the United States Department of Justice ("DOJ") is returning to its past practice of aggressively pursuing asset forfeiture cases and sharing the proceeds of those seizures with local law enforcement agencies. The federal forfeiture regime allows the government to divest a person of his or her belongings—from cash to real estate—with minimal procedural safeguards. The government's restrictions on these assets can occur before any criminal conviction, or even criminal charges. In fact, the government may never bring a criminal case against the individual deprived of his or her property.

One major reason for the widespread use of asset forfeiture is a practice euphemistically known as "equitable sharing." Equitable sharing allows assets seized under federal forfeiture laws to be "shared," or given, to local law enforcement agencies. The system was designed to enhance the robustness of the program, and it worked. In 2014, more than \$5 billion was taken through asset forfeiture. That same year, Americans lost about \$4 billion from burglaries.

As it has grown in scope, federal asset forfeiture has come under fire from voices across the political spectrum, with critics ranging from John Oliver to the Cato Institute to the National Review and Supreme Court Justice Clarence Thomas. Abuses in the system are notorious. Law enforcement officials routinely seize or restrain any assets they can obtain. To get their own property back from the government, citizens must raise a legal challenge to the restraint. Of course, this is oftentimes difficult to do because the assets restrained are the same that the person would use to hire a lawyer to challenge the seizure.

In 2015, then-Attorney General Eric Holder enacted new policies purportedly limiting asset forfeiture to the most serious illegal transactions. Attorney General Holder explained the shift as an effort to protect Americans' civil liberties. In reality, even the Holder policy did little to curb the expansion of the forfeiture program.

Attorney General Sessions has now reversed the minimal restraints of the Holder policy. He proposes to curb abuses by expediting notice procedures and requiring that local law enforcement agencies engage in training before participating in equitable sharing programs. However, these steps will be weighed against local law enforcement's interest in keeping the assets they seize—a way to get around tight state and local budgets. With this incentive system in place, it is reasonable to expect the number of forfeiture cases to continue to rise under this new policy.

Federal asset forfeiture is highly technical and complex. The vast majority of seizures and restraints are never challenged. Due to law enforcement's aggressive tactics, errors are common and skilled counsel can help evaluate the government's actions for mistakes and weaknesses. However, the cases often involve quick deadlines and draconian penalties for inaction or incorrect action.