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DOJ makes it easier for Maine law enforcement to seize property without charges

A recent Portland asset forfeiture case involving possible illegal gambling is bringing a controversial practice to light, even as the DOJ is encouraging law enforcement to use it.

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The seizure of roughly \$850,000 in cash and luxury watches from four Portland residents this spring shed light on a little-used and controversial practice known as civil asset forfeiture.

The people whose assets were seized could eventually be charged – court documents suggest they are being investigated for illegal gambling – but even if charges are never filed, there is no requirement that those assets be returned. They could remain the property of the federal government indefinitely or until the original owners petition to have them returned – at their expense.

The case involving Portland property owner Stephen Mardigan, his longtime partner Patricia Nixon, and two others – William Flynn and Steven DePaolo – is unusual because of the amount of money (a dozen of Mardigan’s properties also could be forfeited) but this type of practice could soon become more common.

U.S. Attorney General Jeff Sessions issued a directive last month that encourages state and local law enforcement to use civil asset forfeiture more aggressively. It calls for the Justice Department to lift a ban on adoptive seizures, when a state law enforcement agency seizes property and then immediately transfers it to the federal government. The government then forfeits assets under federal law with the understanding that the state agency gets a share of any proceeds. State or local agencies do this is to get around state laws that often are stricter than federal laws.

Although the practice of civil forfeiture has been widely criticized – by Democrats and Republicans alike – and although many states have been moving toward increased protections for citizens, it didn’t stop Sessions from loosening strict rules put in place by his predecessor, Eric Holder.

Federal authorities have filed documents that indicate they intend to prevent the sale of these apartment buildings at 55 Chestnut St. in Portland, left, and 54, 56, and 58 Chestnut St. owned by Stephen Mardigan.

U.S. Sen. Angus King on Thursday announced that he and five other senators from both sides of the aisle had written a letter to Sessions protesting the expansion of the DOJ's civil forfeiture policy and urging the department to reconsider, citing the Fifth Amendment's protection against deprivation of property without due process of law, or seizure of private property for public use without compensation.

The sudden shift backward has also drawn criticism from civil rights advocates.

"Ordinary Americans see that civil forfeiture is unconstitutional, and 24 states have taken steps to roll back civil forfeiture laws," said Darpana Sheth, senior attorney with the Institute for Justice. "The attorney general's plan to increase forfeitures is jarringly out of step with those positive developments."

Assistant U.S. Attorney Donald Clark, the asset forfeiture specialist for Maine, said he doesn't think the DOJ's shift will have much impact in Maine simply because it doesn't happen here often. He said the overwhelming majority of forfeiture cases handled by his office are either criminal cases – often involving assets seized during drug raids – or cases that start out as civil matters but end with criminal charges.

Straight civil forfeiture cases – cases that never result in criminal charges – are rare.

However, civil rights advocates are concerned that civil forfeiture is even an option.

"The idea that the government can take property from you without trial or due process of law and that you might never be charged or convicted flies in the face of everything this country stands for," said state Sen. Eric Brakey of Auburn, who unsuccessfully pushed legislation this past session that would have further tightened Maine laws on civil forfeiture.

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Zach Heiden, legal director for the American Civil Liberties Union of Maine, said that although civil forfeiture occurs rarely in Maine, he worries about the message being sent.

"If we're talking about increasingly going after the assets of people who haven't been convicted of a crime, that's troubling," Heiden said. "What's most concerning about the attorney general's announcement is not only a potential expansion of civil forfeiture but also he seems to be incentivizing local government to use this more."

Property, Cash Seized – But No Charges

Clark would not discuss the case involving Mardigan, Nixon, Flynn and DePaolo, since no charges have been filed.

Attempts to reach each of them have not been successful. Some tenants of Mardigan's properties – most located along a stretch of Forest Avenue – also declined to talk about their landlord.

But the case represents an example of how authorities can use civil proceedings to seize property.

The assets seized included \$500,000 in cash from a safe deposit box rented by Nixon, along with a substantial bank account, additional cash and expensive watches owned by her and Mardigan.

In addition to the cash from the safe deposit box, the list of confiscated items includes nearly \$143,000 in cash seized from the home where Mardigan and Nixon live, most of it in plastic filing cabinets. Investigators in the case also seized nearly \$75,000 in cash from Flynn and nearly \$8,000 from DePaolo.

Federal prosecutors also have filed documents with the Cumberland County Register of Deeds that indicate authorities will likely seek to keep Mardigan from selling any of his significant real estate holdings, including four buildings on Chestnut Street in Portland that the city leases for use as homeless shelters, and two waterfront homes in Cape Elizabeth valued by the town at more than \$1 million each.

So far, none of the four has been criminally charged with any wrongdoing, although documents filed in connection with the seizure contain references to portions of federal law that relate to illegal gambling.

But authorities didn't need to demonstrate any probable cause before seizing Mardigan's assets. They needed only to show that a preponderance of evidence suggested the assets were connected to crimes.

William Bly, a Biddeford defense attorney who has represented clients who have had assets seized, said preponderance of evidence is the lowest standard of proof in the entire justice system.

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"Whenever I had a client where this has happened, they are shocked to hear the government can do this," he said.

Prior to 2000, civil forfeiture among law enforcement agencies went virtually unchecked. But instances of abuse led to a landmark federal law, the Civil Asset Forfeiture Reform Act.

The practice varies widely from state to state depending, in part, on laws there.

The Institute for Justice tracks civil forfeiture and grades states on their laws. Maine got a B+ in its most recent report, largely because its forfeiture proceeds go into the state's general fund rather than to specific departments. Other states allow law enforcement agencies to directly profit from civil forfeitures they conduct themselves, or put proceeds into a special crime fighting fund, which also could incentivize forfeiture.

The DOJ's new directive takes that even further: It allows state or local agencies to circumvent their own laws by partnering with federal agencies on adoptive seizures. For instance, Maine State Police could make a seizure of \$100,000 related to suspected drug trafficking. That money, per state law, would then go directly into the general fund. But if the state police worked with

federal authorities – the Drug Enforcement Administration, for instance – it could received 80 percent of that total directly.

In 2014, the year before the practice of adoptive seizures was halted, approximately \$65 million in assets were seized.

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Robert Everett Johnson, an attorney at the Institute for Justice, sharply criticized the new directive in a Politico piece in July.

“By reauthorizing adoptive seizures, the attorney general’s policy will allow state police to circumvent protections for property rights put in place by state legislatures,” he wrote. “Worse, because proceeds from the sale go to state law enforcement, the federal government actually pays state police to circumvent their own law. It’s practically an open invitation to corruption and abuse.”

An Effort To Roll Back Reforms

The Institute for Justice found that Maine law enforcement agencies participated sparingly in the DOJ’s sharing program. Between 2000 and 2013, law enforcement agencies received nearly \$5.8 million in DOJ equitable sharing proceeds – only about \$400,000 per calendar year. Only four states received less.

“We have some good laws in place right now that sets us apart from some other states,” said Brakey, the state senator and now U.S. Senate candidate.

Brakey sponsored a bill this past session that would have required the owner of a property to be convicted of a crime before that property could be forfeited. It also would have prohibited state or local agencies from referring or transferring property to a federal agency. The bill failed.

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Brakey said the lack of support for his bill doesn’t give him confidence that trying again next session makes sense. But if the new DOJ directive leads to more potential abuse, he would reconsider.

Other than reopening a revenue stream, it’s not clear why the Justice Department chose to make the policy change. Both Republicans and Democrats have called for asset forfeiture reform and a poll conducted last year by the libertarian-leaning Cato Institute found that 84 percent of Americans opposed the practice.

It’s too early to tell whether the assets seized this spring in Portland will result in criminal charges for any or all of the people involved. No one connected to the four people whose assets were seized has been willing to talk.

In other cases elsewhere, though, even family members or associates can get caught up in forfeitures unwittingly.

In 2016, Terry and Ria Platt of Washington had their car seized after their adult son was pulled over while driving it. Police found cash and a small amount of marijuana. Acting on the belief that the son may be involved in drug dealing, police seized the car, too, even though it didn't belong to him. The Platts had to go to court at their own expense to get their car back.

"It's incredibly painful for people," said Bly, the defense attorney. "Let's say they seize \$5,000 but then it costs you \$3,500 just to get it back. That's how it happens."

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Additionally, to get property back, people have to prove their innocence – the opposite of how jurisprudence is supposed to work in the U.S.

A study of highway stops on Interstate 40 in Tennessee compared seizures on the highway's eastbound lanes (where cars are more likely to carry drugs coming in from Mexico) with seizures on the westbound lanes (where cars are more likely to carry cash). The study found that officers made 10 times as many stops on the westbound lanes. Given the choice between stopping drug sales or confiscating money, law enforcement chose the money.

Brakey noted that too and said he was curious to see the breakdown in seizures on northbound vs. southbound stops of I-95.

Although law enforcement agencies are required by Maine law to maintain an inventory of what they seize and forfeit, those reports do not need to be given to any centralized authority and do not need to be published online. There is no simple way to find out how often it occurs.

Heiden said the Justice Department's shift on civil forfeiture comes at a time when such policies had been moving in the opposite direction.

"There is a broader effort to roll back some of these things," he said, "whether it's voting rights or re-engaging on the failed and racist war on drugs."