MIMESIS LAW

Everyone Who Believed Fop President Chuck Canterbury, Raise Your Hand

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January 5, 2017

A couple days ago, Chuck Canterbury, National President of the Fraternal Order of Police, the nation's biggest police union, took to the pages of the Daily Caller to make the case that civil asset forfeiture programs are the coolest thing ever and an indispensable tool in law enforcement's fight against crime. So let's pay him a visit and see how persuasive these public-union spokespeople can be.

> Amidst the current national furor against "fake news" is another, more pervasive issue of creating "fake issues" like the myth of policing for profit. There's been widespread discussion about the need to end the Federal equitable sharing program because a journalist or columnist writes a sympathetic piece describing a case in which the system may not have functioned as intended.

What's the "myth of policing for profit?" What are these isolated cases where "the system may not have functioned as intended," the ones journalists insist on holding up as if they were representative? Canterbury doesn't say. Instead, he wants to talk about how much he and his union love civil asset forfeiture reform.

> The FOP does not disagree that there is a need for civil asset forfeiture reform. In fact, we worked very closely with Senator Jeff Sessions on this issue going back to the Civil Asset Forfeiture Reform Act (CAFRA) of 2000.
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> The law enforcement community came together to make the necessary changes to the program to ensure due process protections while preserving equitable sharing as a critical law enforcement tool. In fact, the FOP was an early supporter of administrative changes made to the program by then Attorney General Holder in January 2015.

It's hugely tempting to go on from here and fisk the rest of what Canterbury has to say. But others, including Scott Shackford at Reason, have already done a terrific job of dismantling his argument. Instead of duplicating their efforts, I'd like to devote the rest of the post to this claim and expose how misleading it is.

The first thing to note is that working with Jeff Sessions to fix civil asset forfeiture is a lot like working with Colonel Sanders to fix fried chicken. For decades, the man's been one of the biggest congressional boosters of programs that expropriate from Americans who haven't

ever been charged with, let alone convicted of, a crime. But it is true that Sessions, together with other notable civil liberties fans like Chuck Schumer, Strom Thurmond and Dianne Feinstein, introduced a version of CAFRA, the Civil Asset Forfeiture Reform Act, in the late '90s.

Twenty years ago, the American public was furious over a federal forfeiture program that, hard as it may be to believe, was even more illiberal than today's. Under the Comprehensive Crime Control Act of 1984, the federal government could seize and keep property if it could show probable cause – an extremely low standard – that it was used in the commission of or purchased with proceeds from a crime. Nor were property owners put on trial or charged with anything. Instead, civil asset forfeiture proceedings, then as now, were "*in rem*," brought against the property itself. This typically happens before a judge instead of a jury, with the owner relegated to the status of a third-party claimant.

Once the feds had made their showing of probable cause, the burden, then as now, shifted to the claimant to prove his property wasn't the proceeds or instrumentality of a crime. Needless to say, that requires him to prove a negative. Even better, while the government only had to show probable cause, the claimant, in proving his negative, had to prove it by a higher standard: a preponderance of the evidence.

There were countless other inequities, like the fact that the government could use hearsay as evidence while claimants couldn't. All in all, the deck was about as stacked against property owners as one could imagine. Then as now, federal, state and local law enforcement worked together to loot Americans' property and share it out among themselves.

High-profile cases like that of Jason Brice, a Houston motel owner who nearly lost his business to forfeiture after he angered local police by refusing to jack up his prices to drive out drug-addicted customers, convinced the public that reform was needed. And contemporary congressional testimony reveals the extent of Americans' revulsion at this lawless, wanton practice. As Roger Pilon, then the director of the Cato Institute's Center for Constitutional Studies, put it before the House Judiciary Committee in 1996:

> A body of "law" that enables law enforcement personnel to stop motorists and seize their cash on the spot, to destroy boats, cars, homes, airplanes, and businesses in often fruitless drug searches, and even to kill and maim in the course of seizure operations is out of control. Even lawyers, when they come upon this area of the law for the first time, are taken aback by the injustice—indeed, by the utter irrationality—of it all.

As a result, two dueling proposals emerged in the House. The first was drafted by Henry Hyde, a strongly reform-minded Republican from Illinois who'd recently written a book on the subject. It was first put forward in 1996, then reintroduced in an amended form as H.R. 1835 in 1997.

Although H.R. 1835 did nothing to address the fundamental absurdities of civil asset forfeiture, like the "personification doctrine" that, then as now, allows the government to put inanimate objects on trial, the reforms he proposed went some way towards giving the expropriated a fighting chance. One of the elements of the Hyde bill that ended up in the final version of

CAFRA was a provision abolishing cost bonds for claimants in civil asset forfeiture proceedings, which typically took the form of 10% of the value of the property on trial.

Another authorized the release of seized property pending trial if the claimant filed and prevailed on a petition showing "hardship." This was meant to fix Catch-22s where claimants needed the money seized by the government to finance a challenge to the government's seizure.

And then there was the other bill, H.R. 1745, which was drafted by the Clinton administration's Justice Department and put forward by Democratic Rep. Chuck Schumer in 1997. Much more so than Hyde's bill, Schumer's proposal characterized the version of CAFRA that made it into law. Most of its signature provisions, like the rules eliminating hearsay evidence and raising the government's burden of proof to preponderance of the evidence, started with H.R. 1745.

But as you might expect of a bill that was drafted by the same feds that turned civil asset forfeiture into a booming business, there were two steps back for every step forward. Notably, H.R. 1745 and its successors included a number of new, law-enforcement friendly provisions, most of which made it into the final version of CAFRA. Here are a few examples:

-Before CAFRA, "fungible" property could be forfeited even if the government couldn't tie the assets before it to a crime, but only in money laundering cases. CAFRA extended that provision to all civil asset forfeiture cases.

-CAFRA reinstated the fugitive disentitlement doctrine, which banned fugitives in criminal cases from trying to recover their assets.

-CAFRA amended 28 U.S.C. § 2461 to authorize criminal forfeiture whenever civil forfeiture was allowed. This let the government seize people's assets before they were tried on criminal charges, thus potentially depriving them of the ability to fund their defense.

-In a PR coup, CAFRA authorized law enforcement to give forfeited funds to crime victims as restitution.

And the list goes on and on. In a nutshell, CAFRA was a lot less reform-y in many ways than its name suggests.

So where does the FOP come in? In 1999, the House passed a version of Hyde's bill that hewed fairly close to his original intentions. But when the bill hit the Senate, a hearing was conducted at which President Clinton's Deputy Attorney General testified. The Deputy AG, a gentleman by the name of Eric Holder, presented DoJ's "counterproposal" to Hyde's bill. It amounted to an updated version of Schumer's pro-law enforcement demands.

That testimony was then turned into a "substitute" bill put forth by Chuck Schumer, who'd gotten elected to the Senate in '98, and – you guessed it – Jeff Sessions. The Schumer-Sessions bill, S.1701, took Schumer's law-enforcement-friendly original and doubled down on it, adding yet more provisions only a prosecutor or cop could love. And when CAFRA finally passed in 2000, a compromise version of S.1701 and the remains of Hyde's effort at reform, it was much more the result of Schumer's and Sessions' work than anyone else's.

So what Canterbury said was absolutely true: FOP did work closely with Sessions to pass CAFRA. And it's thanks in part to that collaboration that civil asset forfeiture was able to stay a growth industry during the Noughties. As Radley Balko points out, the federal government's asset forfeiture fund grew by 250% during the Bush administration – hardly the sign of a practice in decline.

The really galling thing is how Canterbury tried to palm off the FOP's and Schumer's joint effort to keep federal civil asset forfeiture alive and well as his union's commitment to reform. We may have been forced to forfeit a great deal over the years, but surely we haven't given up enough of our brains to buy what the FOP prez's selling.