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A Broadening Consensus to Narrow Asset Forfeiture

By Edmund W. Searby

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The Supreme Court as a whole appears aligned and motivated to review critically federal and state asset forfeiture procedures. In addition, Attorney General Sessions last month restored the federal forfeiture of property seized by state and local law enforcement ("federal adoptions"), but with certain additional safeguards.

Asset forfeiture has a long history in our legal system. We inherited it from the British, who used forfeiture as a weapon to combat piracy and customs offenses on the high seas. Modern asset forfeiture has expanded its reach from its maritime origins to a broad range of crimes in a three-part system of criminal, civil and administrative forfeiture. The three systems have varying procedures, but all allow the government to forfeit property that has been illegally obtained or used.

The U.S. Supreme Court has recognized that asset forfeiture "statutes serve important governmental interests such as 'separating a criminal from his ill-gotten gains,' 'returning property, in full, to those wrongfully deprived or defrauded of it,' and 'lessening the economic power' of criminal enterprises." *Honeycutt v. United States*, 198 L. Ed. 2D 73 (U.S. 6/5/17) (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629-30 (1989)). [For more about *Honeycutt*, see In the Courts, *infra*.] Today, federal and state governments forfeit billions of dollars in private property.

But as forfeiture moved into our neighborhoods and financial system, it provoked a growing opposition. This opposition is noteworthy for coming from across the political spectrum. Such politically diverse organizations as the Heritage Foundation, the Cato Institute, the American Civil Liberties Union (ACLU) and the National Association of Criminal Defense Lawyers have all expressed concerns about the perceived abuses of asset forfeiture. These concerns include the perceived lack of adequate procedural protections for property rights, and the financial incentives for law enforcement agencies to overreach in taking property for their own use. Opponents have leveled criticism particularly at civil forfeiture laws which authorize "in rem" actions against the property itself. Civil forfeiture allows for taking property on a lower preponderance of the evidence standard, and regardless of whether the owner has been charged with or convicted of a crime.

Addressing the Controversy

Congress previously responded to the criticism by reforming civil forfeiture law in 2000. But the criticism has not waned. If anything, it has broadened and intensified. As a result, Congress this year introduced additional legislation, including the Fifth Amendment Integrity Restoration (FAIR) Act of 2017 and the Deterring Undue Enforcement by Protecting Rights of Citizens from Excessive Searches and Seizures Act ("Due Process Act") of 2017.

These bills, which have bipartisan sponsorship, propose such reforms as raising the standard of proof in civil forfeiture cases to "clear and convincing evidence," expanding the right to appointed counsel, reducing the incentives for law enforcement agencies to overreach by requiring forfeiture proceeds to be deposited into the General Fund of the Treasury of the United States, heightening proportionality review to prevent "excessive" takings, and increasing the transparency of federal asset forfeiture programs. Similar bills have been proposed in prior years and it is unclear whether or when these reforms will become law in an eventful year on the Hill. At the state level, however, more than 20 states have passed laws to provide greater protections for property rights, or at least transparency against the unjust taking of property.

The Judiciary has also demonstrated its concern for the potential abuses of asset forfeiture laws. In March, in *Leonard v. Texas*, 137 S. Ct. 847 (U.S. 3/6/17), Justice Clarence Thomas wrote a "statement" acknowledging that a petition for a writ of certiorari "asks an important question: whether modern civil-forfeiture can be squared with the Due Process Clause and our Nation's history." In so doing, Justice Thomas wrote that asset forfeiture "has led to egregious and well-chronicled abuses." He further pointed out that the Supreme Court had in the past justified asset forfeiture by its practice at the founding of our nation but questioned "(w)hether this Court's treatment of the broad modern forfeiture practice can be justified by the narrow historical one."

In two recent cases, the Supreme Court curtailed the reach of forfeiture laws to take or freeze innocent assets. In June, in *Honeycutt v. United States*, 198 L. Ed. 2D 73 (U.S. 6/5/17), the Supreme Court unanimously reversed holding a co-conspirator jointly and severally liable under 21 U.S.C. § 853 for a forfeiture judgment for proceeds of the conspiracy which the co-conspirator never received. In rejecting the extension of the asset forfeiture laws through joint and several liability, the Supreme Court reinforced that forfeiture "is limited to property the defendant himself acquired as the result of the crime." By way of example, Justice Sonia Sotomayor for the Court offered the hypothetical of a college student who assists a farmer in distributing marijuana on college campuses for a payment of $300 a month. Under the criminal forfeiture statute, 21 U.S.C. § 853, the college student can be held liable for the $300 payments received from the farmer but not for the millions of dollars obtained by the farmer from the conspiracy. *Honeycutt* forecloses the use of joint and several liability to extend the reach of forfeiture statutes to innocent assets.

Honeycutt follows last year's decision in *Luis v. United States*, 136 S. Ct. 1083 (U.S. 2016), where the Supreme Court held "that the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." In so holding, the Supreme Court rejected the government's reliance on a statute allowing for pretrial restraint of "innocent property" belonging to a criminal defendant in a health care fraud case as security for the potential post-conviction payment of fines, restitution and forfeiture of substitute assets.

In *Luis*, the defendant's right to use "innocent" property to retain counsel of choice trumped the government's contingent interest in the funds. In so holding, the Supreme Court drew a "constitutional line" between "innocent funds needed to pay for counsel" and "tainted assets" (assets traceable to a crime), which may be seized even prior to trial. Justice Thomas' concurrence forcefully argues for the longstanding "general rule against pretrial seizures of untainted property." While not a unanimous decision like *Honeycutt* – the Court split 5-3 – Luis is noteworthy for a plurality that transcends the stereotypical liberal and conservative divide.

If you go further back in history, the Supreme Court was less aligned in its concerns for asset forfeiture. In the controversial 1996 decision in *Bennis v. Michigan*, 516 U.S. 442 (U.S. 1996), the Court ruled constitutional the forfeiture of a car as a "public nuisance" under state law even though the car was co-owned by a wife who had no knowledge that her husband used it for sexual relations with a prostitute. In denying a constitutional right to an innocent owner defense, Chief Justice Rehnquist relied on the *in-rem* origins of asset forfeiture, which focus on "the guilt" of the property and not the innocence of the owner. (On this principle, *Bennis* can be harmonized to a degree with *Honeycutt*, which also emphasized the traditional in rem origins of asset forfeiture as an action against the tainted property itself.) But *Bennis* is a 5-4 decision relying upon two separate concurrences. In his concurrence, Justice Thomas expressed his concern that "forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused … than a component of a system of justice."

Two years later, in *United States v. Bajakajian*, 524 U.S. 321 (1998), it was Justice Thomas who broke from conservatives and confirmed an Eighth Amendment limitation on what the government can take in asset forfeiture. In *Bajakajian*, customs inspectors caught the defendant leaving the United States with $357,144 in currency that was unreported. He was convicted federally of a failure to report the cash and the government sought forfeiture of the full amount of money because it was "an instrumentality" of the reporting violation. Thus, unlike Tina Bennis, who lacked all knowledge of the offense, Bajakajian was found guilty of a crime. However, in a 5-4 decision, the Supreme Court rejected the forfeiture as a violation of the Eighth Amendment because "it would be grossly disproportional to the charged offense." The decision emphasized that the criminal forfeiture was punishment only for the reporting violation and that the currency itself had no other unlawful origin or use. In other words, the funds themselves were "innocent."

Today, only one of the dissenting Justices in *Bajakajian* – Justice Kennedy – remains on the Supreme Court. But it was Justice Kennedy (often the Court's swing vote) who dissented on due process grounds against the forfeiture in *Bennis* and joined the unanimous decision in *Honeycutt*. Justice Thomas remains as perhaps the Justice most wary of the potential abuses of asset forfeiture. His writing from the troubled concurrence in *Bennis*, to the decision in *Bajakajian*,

and to the recent blunt statement in *Leonard*, demonstrates a willingness to consider whether forfeiture has gone too far. The recent decisions suggest that Justice Thomas is not alone. Rather, the Supreme Court as a whole appears aligned and motivated to review critically federal and state asset forfeiture procedures.

Looking Ahead

So what asset forfeiture issues may arise before the courts? Currently pending before the Supreme Court is a petition for a writ of certiorari in *United States v. Batato*. In that case, a divided panel of the U.S. Court of Appeals for the Fourth Circuit affirmed the *in-rem* forfeiture of property owned by well-known entrepreneur and alleged criminal copyright infringer Kim Dotcom, his company Mega Upload, and other related parties. One of the issues raised in the petition is whether a district court may constitutionally exercise in-rem jurisdiction over foreign property that is within the custody and control of foreign courts. The outcome of this case is thus of significance to the government's extraterritorial reach to forfeit property abroad.

Batato also raises issues of interpretation with the fugitive disentitlement statute, 28 U.S.C. § 2466. This statute is of significance in civil forfeiture cases because it gives a district court the discretion to strike the claims to property of a defendant who, in order to avoid prosecution, leaves or refuses to enter the jurisdiction where the criminal indictment is pending. Dotcom has argued that the disentitlement statute unfairly forces defendants to choose between abandoning their rights to challenge extradition and abandoning their property. At least one other case pending in the federal courts of appeals squarely challenges the constitutionality of the fugitive disentitlement statute.

The Supreme Court has never accepted fugitive disentitlement outside of the narrow context of the waiver of appellate rights, and a number of its opinions have strongly rejected on due process grounds the notion that a person – even a fugitive – may be denied the right to defend his or her property. The U.S. Court of Appeals for the Second Circuit, and the Fourth Circuit have drawn distinctions with this prior Supreme Court authority in upholding the constitutionality of the fugitive disentitlement statute. This constitutional issue seems likely to return to the Supreme Court.

Finally, recall the denial of certiorari in *Leonard*, discussed above. At least for Justice Thomas, the denial was required because Mrs. Leonard raised her "important" due process arguments for the first time in the Supreme Court. A number of state cases – particularly in states that have not reformed their asset-forfeiture laws … may offer the Supreme Court the opportunity to revisit minimum due process requirements and the constitutionality of taking property from innocent owners.

Conclusion

Reading the current distrust for asset forfeiture, private attorneys will press challenges to forfeiture even where those arguments may have failed in the past. For the government, now may be a time to demonstrate restraint, particularly in cases where the guilt of the owner and the "guilt" of the property are not both clear. In 2015, then Attorney General Eric Holder responded to criticism by limiting the use of federal asset forfeiture laws for state and local seizures. Current Attorney General Sessions' public comments suggest that he will seek to restore asset forfeiture's full traditional use as a weapon against crime. Indeed, on July 19, 2017, AG Sessions revoked former AG Holder's Order and restored the federal forfeiture of property seized by state and local law enforcement ("federal adoptions"), but with certain additional safeguards.

Restoring public confidence may prove more difficult. The future of asset forfeiture will depend on whether the government uses it judiciously as a focused weapon against serious provable criminal activity and not indiscriminately like Justice Thomas' roulette wheel to raise revenue.

Edmund W. Searby is a partner with the Cleveland office of Baker Hostetler, and a member of Baker's White Collar Defense and Corporate Investigations Team. He is a former federal prosecutor with the Department of Justice and the Office of the Independent Counsel.