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ASSET FORFEITURE

CIVIL FORFEITURE FOR THE NON-LAWYER

Citizens frequently ask, "How can the Government forfeit a person's property without convicting him of a crime?" The answer, of course, is civil forfeiture. The basic rationale for civil forfeiture is simple: Federal law provides that the profits and proceeds of designated crimes, as well as property used to facilitate listed crimes, is subject to forfeiture to the Government. Most Americans agree that criminals should not be allowed to benefit financially from their illegal acts.

Anglo-American law has traditionally provided two basic forms of legal procedure: a criminal procedure for determining liberty rights and a civil procedure for determining property rights. Thus, before a person can be deprived of his liberty or stigmatized as a criminal, he is entitled to a criminal trial where the Government's burden of proof is "beyond a reasonable doubt." Criminal defendants also have a right to counsel and an attorney will be provided for defendants who cannot afford one.

Before a person can be deprived of his property, he is entitled to a civil trial where the burden of proof is "preponderance of the evidence," civil litigants may be represented by counsel, but generally must hire their own attorneys.

Civil forfeiture, of course, involves property rights and is, therefore, entirely consistent with centuries of Anglo-American legal practice.

HISTORY AND PURPOSE OF FORFEITURE

Governments long ago recognized the need to protect their citizens against persons outside their borders who smuggle contraband into their territory. For example, simply arresting the captain and crew of a foreign smuggling ship was ineffective if the ship was returned to its foreign owner. The owner would merely hire a new crew and send the ship back on another smuggling run. There is an obvious parallel between age-old smuggling and modern drug-trafficking; they require methods to protect our citizens from criminals both inside and outside our borders.

The legal theory of civil forfeiture is that property which violates the law can be "prosecuted" and forfeited to the Government. In the smuggling ship example, therefore, the forfeiture action might be styled "*The Government vs. One Sailing Ship, SMUGGLER'S DELIGHT*." If the Government can show in a civil trial that the ship was involved in a viola-

tion of American laws, it can be forfeited. Of course, the owner can always recover the vessel if he comes forward to show that the ship was not used in violation of the law.

Our civil forfeiture laws also provide an "innocent owner" defense whereby the owner of seized property can recover the property upon a showing that the criminal use of the property was not the result of any act or omission by the owner.

The First Congress of the United States authorized civil forfeiture for vessels violating U.S. customs laws. This was the same First Congress that drafted the Bill of Rights! Since then, more than 200 federal forfeiture statutes have been enacted for items ranging from contaminated food and drugs to pelts of endangered species to proceeds of drug trafficking.

PROTECTIONS AGAINST ABUSE OF THE FORFEITURE POWER

No property may even be seized or "arrested" for purposes of forfeiture unless the Government has probable cause to believe it is subject to forfeiture. Probable cause is the same level of proof which the U.S. Constitution requires for the arrest and jailing of a person pending trial, the search of a home, the indictment (formal charge of criminal conduct) of a person by a grand jury, or the seizure of evidence or contraband.

Although the law does not require it, U.S. Department of Justice (DOJ) policy requires that seizures should not be executed until a neutral and detached magistrate has made an independent finding of probable cause and issued a federal seizure warrant. Exceptions are allowed, of course, for exigent circumstances where the property might be removed, hidden, or destroyed before a warrant can be obtained. DOJ policy permits no exception to the warrant requirement for the seizure of any parcel of real estate.

The Government must mail written notices of the seizure to any owner or lienholder of the property and must publish a notice of the seizure for three consecutive weeks in a newspaper of general distribution. Anyone with a legal interest in seized property may claim it upon the posting of a bond of \$5,000 or 10 percent of the value of the property, whichever is less.

(over, please)

The posting of a bond requires the Government to file a civil forfeiture complaint in a United States District Court to continue a forfeiture action. The civil judicial forfeiture process is like other civil trials (e.g., for breach of contract or a personal injury claim).

Procedures exist by which each side can discover the other side's case and compel attendance of needed witnesses. As noted above, the standard of proof is "preponderance of the evidence." Claimants may demand a trial by jury except where the property was seized on the high seas, in which case admiralty laws apply.

In addition to the "innocent owner defense," federal forfeiture statutes expressly authorize the Attorney General to "remit" or "mitigate" a forfeiture if it would be unduly harsh. DOJ policy is to liberally grant such petitions as a means of avoiding harsh results.

This exercise of administrative grace (similar to a "pardon") also affords innocent claimants a means of recovering property without the necessity of incurring attorney's fees.

OTHER INDICATIONS OF THE PROPRIETY OF CIVIL FORFEITURE

The Supreme Court of the United States has upheld civil forfeiture in numerous cases from the earliest days of our nation to the 1980's. To say that the Government should not be able to forfeit property without a criminal conviction equates to the parents of a child hit by a drunk driver not being able to sue for damages unless the driver is convicted of driving while intoxicated—American law has never imposed such a requirement.

Civil judicial proceedings determine the fate of billions of dollars each year. In one civil case, a corporation won a \$10 billion judgment against another corporation in a civil trial based on an anti-competition claim. The losing corporation had never been convicted of a criminal violation. Civil proceedings are the age-old method of determining property rights; civil forfeiture proceedings are an appropriate part of the overall civil law system.

Although any person may file a civil lawsuit against another person, only the Government may file a civil forfeiture action. This is another significant safeguard against abuse.

THE IMPORTANCE OF CIVIL FORFEITURE

Civil forfeiture is an absolutely vital weapon against drug trafficking, money laundering, and other forms of organized criminal activity, particularly international crime. While criminal forfeiture is an available sanction in many cases, it requires that the Government be able to take custody of the criminal whose property is being forfeited. Of course, many drug lords and other international criminals reside outside the jurisdiction of the U.S. Although many non-lawyers are more comfortable with the concept of criminal forfeiture than with civil forfeiture, it is criminal forfeiture that is new and novel (Federal criminal forfeiture statutes date back only to 1970).

Even when criminals are within our borders, they are often able to elude law enforcement and remain fugitives

from justice. Civil forfeiture is an invaluable weapon in stripping fugitives of their ill gotten gains.

In sum, without civil forfeiture, we would be virtually powerless to act when the criminal profits and other property of foreign criminals are found within our own borders and when criminal operatives are able to evade arrest. Without civil forfeiture, the ability of the United States to fight international crime would be pitifully weak.

CONCLUSION

Civil forfeiture is an ancient legal procedure which is proving to be dramatically effective in attacking modern crime. While convicted drug kingpins are quickly replaced by their subordinates, the seizure and forfeiture of their airplanes, vessels, automobiles, stash houses, and cash hoards can cripple a drug syndicate.

Moreover, prison costs limit incarceration as a remedy for crime. It now costs over \$60,000 to build prison space for a single federal prisoner and over \$18,000 a year to keep a prisoner incarcerated. The potential of asset forfeiture, however, is virtually unlimited. Additionally, forfeiture hurts criminals in the same place it helps taxpayers—in the pocket-book. Over the past seven years, more than \$2 billion in criminal assets have been forfeited by DOJ and reinvested in law enforcement at the Federal, State and local levels.

Law enforcement officials at all levels of government must help get the message out to our citizens: civil forfeiture is a procedure that has stood the test of time, its use in the war on crime is still in its infancy, it is proving highly effective in attacking crimes committed for profit, and it is one of our most promising alternatives to costly incarceration. Moreover, civil forfeiture is a tried and true legal process that affords citizens their full range of Due Process rights.

— Cary Copeland

Cary Copeland was appointed the first Director of the Executive Office for Asset Forfeiture by the Attorney General of the United States in 1989. He came to that position from the post of Deputy Associate Attorney General in the Department. Prior to that assignment, Cary served as the lead Department attorney on issues involving the Comprehensive Crime Control Act of 1984. He received B.S. and M.A. degrees from Stephen F. Austin State University in Nacogdoches, Texas, and a law degree from the Georgetown University Law Center in Washington, D.C..

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