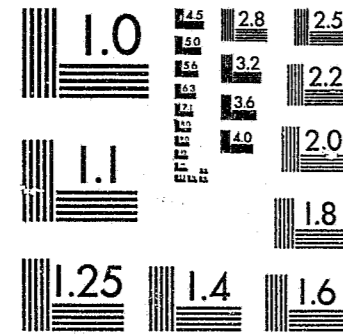


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Use of Forfeiture Sanctions in Drug Cases

Lindsey D. Stellwagen

Forfeiture, the ancient legal practice of government seizure of property used in criminal activity, may prove a particularly useful weapon against illicit narcotics trafficking.

Federal prosecutors have used forfeiture successfully in several major cases. In 1983, for example, more than

\$100 million in cash and property was forfeited to the Government by convicted criminals. The Comprehensive Crime Act of 1984 increased existing Federal forfeiture powers.

Although a National Institute of Justice survey showed that State and local prosecutors and police administrators

rank the drug traffic as their most serious law enforcement problem, use of forfeiture at the State and local levels is still relatively limited. Thus, the potential remains for greater State use of forfeiture to disrupt the illegal drug trade by denying traffickers their prof-

*Chart follows on next three pages.
Text continues on page 5.*

From the Director

We know that fighting drug abuse is fighting crime. Research has shown, as highlighted in two earlier publications in the *Research in Brief* series, that intensive drug abusers are heavily involved in crime, much of it violent.

Without a readily available supply of drugs, however, use of narcotics would dwindle. That is why this Administration has focused enforcement efforts so heavily against those sophisticated criminals who make up the drug trafficking networks. This *Brief* examines an often overlooked legal weapon that could help cripple many drug operations by depriving traffickers of the fruits of their criminal activity.

Federal authorities, as well as police and prosecutors in several States, are using an ancient legal procedure—*forfeiture*—against today's drug traffickers. Forfeiture enables the government to seize property used in the commission of a crime.

As a law enforcement strategy, forfeiture can be used under Federal law to break up a continuing criminal enterprise. Foreign and domestic bank accounts can be seized, together with planes, vessels, cars, and luxury items

like jewelry or resort homes purchased with proceeds from the illicit drug trade. Seizure of such assets disrupts the "working capital" of criminal organizations and perhaps diminishes the motivation to traffic in drugs.

Forfeiture is also a deterrent. For example, a recent Federal case employed forfeiture to confiscate land used to grow marijuana. While a drug seller might be willing to risk loss of his harvest and a conviction for producing marijuana, the danger of losing prime California real estate should give him second thoughts about choosing to grow an illegal crop.

At a time when criminal justice agencies are striving to stretch resources and avoid burdening the taxpayer, forfeiture is a practical option. Forfeiture can be used to recoup some of the money the public spends on pursuing drug traffickers. Not only law enforcement may gain; victim compensation funds, hospitals, and drug treatment centers may also benefit.

Among the States, Florida has been highly successful in its use of forfeiture. While Florida's success is widely known, other States, notably Maryland and Michigan, have also demonstrated

forfeiture can be an effective tool for local police and prosecutors.

In preparing this *Brief*, researchers for the National Institute of Justice constructed a detailed chart showing forfeiture provisions as they apply to drug cases in the laws of all 50 States. They also interviewed some 50 prosecutors nationwide on how they use the forfeiture provisions.

Police and prosecutors will be interested in comparing details of their own State's forfeiture laws with those of other States. Policymakers may wish to consider legislation that encompasses the best features of the Federal forfeiture statutes and the stringent provisions used by States such as Florida.

Many other felonies, particularly those committed by organized crime, can be successfully attacked through appropriate forfeiture provisions. Drug traffickers, however, are particularly appropriate targets for such laws. Effective use of forfeiture can help make a difference in the campaign against drug abuse.

James K. Stewart
Director
National Institute of Justice

Footnotes

1. Firearms.
2. Must be a felony offense for conveyance forfeiture.
3. Rebuttable presumption: person in possession of seized property is owner thereof.
4. Less than 28.5 grams of a controlled substance, 10 pounds dry weight marijuana, peyote, or psilocybin.
5. Fifty percent to Department of Mental Health for prevention programs. Rest covers costs of law enforcement and prosecution of case, any balance to Narcotics Assistance and Relinquishment by Criminal Offender Fund (to finance State and local activities, particularly financial investigator positions).
6. Authorized for Class I public nuisances: trafficking, manufacturing, cultivation of drugs; gambling, prostitution, fencing, child pornography, felonies.
7. Proceeds to the State except court may give property proceeds to seizing agency or victim of the public nuisance.
8. Presumption that conveyance in which contraband is found was used to facilitate illegal act.
9. Court may order 25 percent of proceeds to be paid to an informant or allow any government agency to keep the property.
10. "Narcotics Profit Forfeiture Act" permits forfeiture of profits, proceeds, property interest, security, claims against, and contractual rights. Proceeds are distributed: 50 percent for local narcotics law enforcement (for a State seizure to the Drug Traffic Prevention Fund); 12.5 percent to narcotic prosecution; 12.5 percent to appeals; and 25 percent to the State Drug Traffic Prevention Fund.
11. Under contraband provision for conveyances, law enforcement may keep or sell property; proceeds go to the county government. Under Drug Paraphernalia Act, law enforcement may keep the property. Chart shows distribution for Illinois' Controlled Substances Act and Cannabis Control Act.
12. The motor vehicle forfeiture law authorizes forfeiture for transport of drugs, stolen property, and hazardous waste.
13. Law enforcement may keep motor vehicles for one year.
14. Law enforcement agencies may ask the court for motor vehicles.
15. "Drug Racketeering and Related Organizations" law permits forfeiture of all property. Distribution: 50 percent to the State; 25 percent to the seizing law enforcement agency for narcotics enforcement; 25 percent to the district attorney's office or 6 percent fund.
16. Distribution of sale proceeds: 40 percent to local criminal court; 60 percent to law enforcement for narcotics investigation. For State-level seizures, 60 percent to the Bond Security and Redemption Fund and any excess to the Drug Enforcement Seizures and Forfeitures Fund for State law enforcement equipment for drug investigations.
17. No sequestration or attachment available.
18. Presumption: owner of a conveyance used for three or more illegal drug incidences knew or should have known of its illegal use.
19. Possession of LSD, peyote, mescaline, DMT, psilocyn, psilocybin, marijuana, or an offense limited to use of any controlled substances.
20. Until 10/1/85: 25 percent to the State and 75 percent to the seizing law enforcement budget. After 10/1/85: 50 percent to the State and 50 percent to law enforcement.
21. Must be a felony drug offense.
22. Distribution of sale proceeds: 50 percent to licensed hospitals and drug treatment facilities for drug-related physical/psychological disorders and licensed drug analysis centers; 50 percent returned to the appropriate State agency.
23. Deadly weapons.
24. Presumption that a conveyance is the property of the defendant from whom it was seized.
25. Where person arrested for certain drug violations is in possession of \$300 or more in cash, presumption arises that the cash is traceable to the drug transaction.
26. Conviction raises a rebuttable presumption of illegal use.
27. Law enforcement may keep a motor vehicle for one year.
28. The motor vehicle forfeiture law authorizes forfeiture for unlawful transport, possession, or trafficking of controlled substances.
29. Proceeds from forfeited motor vehicles to State or local government. Other property proceeds distributed: 1. restitution to victim of crime that is the basis of the forfeiture; 2. restitution to any victim of defendant's crimes; 3. any unpaid criminal fines of the defendant; 4. 75 percent to the substance abuse service fund if the crime was a drug felony; 5. 25 percent to the government of seizing agency.
30. Possession of counterfeit drugs.
31. Forfeiture is authorized for permitting a "felony drug abuse offense," which is a first degree misdemeanor.
32. Transportation or possession of a controlled substance in any conveyance.
33. No conveyance forfeiture for creating or delivering counterfeit drugs.
34. Any property.
35. Forfeited cash and sale proceeds: 1. State law enforcement may keep \$1,500 of each forfeiture up to a maximum of \$10,000 per calendar year (CY); 2. law enforcement in cities with population over 20,000 gets \$1,000 per forfeiture and maximum of \$7,500 per CY; 3. all other law enforcement agencies get \$500 per sale and maximum of \$5,000 per CY; 4. excess goes into a State account for law enforcement and, if the balance is over \$25,000, any department may request funds.
36. Exceptions for forfeiture include amounts less than or equal to: one pound of marijuana or hashish; four grains of opium or morphine; two grains of heroin; ten grains of cocaine; or fifty micrograms of lysergic acid diethylamide (LSD).
37. Forfeiture moneys going to the State are to be used for treatment and rehabilitation of drug addicts. Forfeited property goes to the Commissioner on Alcohol and Drug Abuse. However, forfeited conveyances may be given by the Attorney General to: 1. law enforcement, but if item is sold, proceeds are split 50:50 between State and local government; 2. specified State agencies, but if sold, proceeds go to the State; 3. State treasury.
38. Forfeited cash and sale proceeds go to the Drug Control Fund.
39. Not more than 10 percent goes to drug prevention and treatment.
40. Any government agency may apply for forfeited property.
41. Law enforcement may keep motor vehicle.
42. When owner of a conveyance is arrested, conveyance must be seized within 10 days of arrest.
43. Proceeds distributed: 50 percent to Criminal Justice Training Fund and 50 percent to government treasury of seizing agency.
44. Forfeiture of conveyances used to transport property or weapons used or received in the commission of a felony.
45. Buildings.

Continued from page 1.

its, working capital, and means of doing business.

This *Research in Brief* analyzes major provisions of State forfeiture laws as they apply specifically to narcotics problems. It also reports on a survey of 50 prosecutors nationwide and recommends practical steps for expanding use of this legal tool. Included is a chart showing a State-by-State breakdown of drug-related forfeiture provisions. Typically, however, forfeiture provisions applying to crimes other than drug offenses are scattered through a State's criminal code; the chart does not cover these statutes.

Criminal activities targeted

Virtually all States authorize forfeiture in connection with drug trafficking and manufacture; four States also mention cultivation of drugs. Other States group drug crimes, for purposes of forfeiture, with other offenses such as gambling and hazardous waste violations.

In addition, Illinois and Louisiana have enacted, and other States are considering, special drug racketeering statutes to address large criminal enterprises engaged in organized narcotics traffic. This new direction suggests a State strategy of focusing on a few large cases. This approach holds the potential for a greater impact on public safety than pursuit of many "street level" cases.

Types of property seized

Once a State defines the type of criminal activity for which forfeiture may be invoked, it must define what property can be seized. All States authorize forfeiture of drugs themselves. Statutes also define properties that may not be illegal per se but may be seized because they were used to commit the crime.

Common provisions permit seizure of these types of property:

- **Conveyances** (aircraft, vessels, vehicles) used to transport, conceal, or facilitate the crime (47 States).
- **Raw materials, products, and equipment** used in manufacturing, trafficking, or cultivation (42 States) and the **containers** used to store or transport drugs (38 States).

- **Drug paraphernalia** used to consume or administer the controlled substance (19 States).

- **Criminal research and records**, including formulas, microfilm, tapes, and data that can be used to violate drug laws (38 States).

In practice, vehicles and cash are the most frequent forfeiture targets; a few States also authorize pursuit of real and personal property. A growing number of States are adding "traceable assets" (purchased with drug profits) such as jewelry and houses. A financial investigation is often required to link such assets to drug profits. The investigative expense may be cost effective, however, because the property is valuable and the potential for disrupting the criminal organization is high.

A number of prosecutors surveyed pointed out that a *broad* definition of property subject to forfeiture increases the effectiveness of the sanction by reducing the offenders' opportunity to convert profits into nonforfeitable assets.

Disposition of forfeited property

An important and controversial aspect of a forfeiture law involves the disposition of forfeited property. Most State statutes provide that outstanding liens be paid first. Next come the administrative costs of forfeiture, such as storing, maintaining, and selling the property. Some States require that, after administrative costs are reimbursed, the costs of law enforcement and prosecution must be paid.

More than half the States provide that confiscated property goes to the State or local treasury, or part to each. In some States, however, law enforcement agencies may keep the property for official use. If the property is sold or if it is cash, then the money goes to the State or local treasury. In eight States, law enforcement agencies can keep all property, cash, and sales proceeds.

The legislative rationale for allowing law enforcement agencies to benefit from forfeiture seems clear. It is the belief that police departments will be more likely to commit resources to pursue forfeiture of criminal property if the department can gain an automo-

bile for undercover work or cash to supplement the drug "buy fund." Indeed, a few statutes not only allow the police department to keep all forfeited property but explicitly state that forfeited moneys and property cannot be used to reduce appropriations for the police budget.

In addition to allocating forfeiture proceeds to government treasuries and to law enforcement agencies, legislatures have provided for other interests to benefit. A few States earmark a percentage of forfeitures for drug rehabilitation and prevention programs. New York's law provides funds for restitution to victims, while Washington State allocates 50 percent of proceeds to its Criminal Justice Training Fund.

Limitations to forfeiture provisions

Because it involves surrender of property rights, forfeiture is a severe penalty. For this reason, legislatures often include exceptions to forfeiture laws, most of them designed explicitly to prevent innocent people from losing their property.

The most common of such provisions concern forfeiture of conveyances; they protect innocent owners, lienholders, and common carriers. Exceptions are invoked for a person with interest in the property who neither knew of nor consented to its illegal use.

A number of States explicitly limit application of forfeiture to serious drug offenses. Nine States exclude the offense—usually only a misdemeanor—of possessing a controlled or counterfeit drug without a valid prescription. (A counterfeit drug is a substance falsely portrayed as a drug or as a different drug.)

A number of States exclude drug offenses involving a specified minimum amount of drugs, although the minimum varies. For example, Kentucky states that conveyances are not subject to forfeiture for "any offense relating to marijuana"; Pennsylvania provides that a conveyance shall not be confiscated for possession or distribution of a small amount of marijuana (as opposed to sales); California sets minimum amounts for possession of drugs ranging from marijuana to heroin.

Administrative issues

A number of administrative issues must be addressed when a State passes or revises forfeiture legislation.* Most of them fall under five broad categories:

- **Who initiates proceedings.** Most States provide that the prosecutor shall file forfeiture proceedings. In Florida, however, a broad new law allows police to hire an attorney to expedite proceedings. This approach avoids overburdening prosecutors busy with criminal cases and inexperienced in civil forfeiture proceedings. A few States authorize the city solicitor to initiate forfeiture proceedings for similar reasons.

- **Time of filing.** Many States provide that forfeiture proceedings are to be filed "promptly," while some specify a given amount of time. Filing periods range from 15 to 90 days, with the median about 30 days from time of seizure.

- **Provisions for notice and hearing.** Most States establish procedures for notifying people who may have an interest in the property and who may want to contest the forfeiture at the court hearing. Constitutional considerations for due process require provisions for notice and a hearing; indeed, a few forfeiture laws lacking these provisions have been struck down as unconstitutional and have had to be amended.

- **Filing an answer.** Some States provide that, after the government has filed a forfeiture proceeding, anyone with an interest who wants to contest the confiscation must file an answer

* One important issue related to the forfeiture process is not discussed: the issue of whether civil or criminal procedures should be used for forfeiture cases. The question of which approach is more appropriate, and under what circumstances, involves a number of complex legal questions that are summarized in the full report from which this *Brief* is drawn.

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within a certain period of time. If no one files an answer within the stated period, the property can be forfeited—automatically, or sometimes after a hearing. Some States do not specify a time to answer; presumably, the period is 20 days, as in the Rules of Civil Procedure.

- **Actions in replevin.** Most State laws prohibit an action in replevin—a suit by the owner claiming that the property was wrongfully taken. Without such a prohibition, multiple lawsuits might result, perhaps even with the replevin action and the forfeiture petition going before different judges. Barring replevin concentrates the entire matter at the forfeiture hearing.

Policy recommendations

Successful use of forfeiture is likely to grow as States and localities gain greater experience in using such sanctions. Most of the 50 prosecutors who were interviewed for this study expressed general satisfaction with the use of the forfeiture sanction for narcotics cases in their jurisdictions. The interviews, however, revealed areas where the process can be improved. The changes most often recommended included:

- Revision of existing statutes to establish clear procedures for condemning property.

- Revision of statutes to specify whether forfeiture is a civil or criminal procedure—or both—and whether a jury trial can be demanded.

- Consideration of expanding the types of property subject to forfeiture by adopting a provision for real property used in the cultivation of drugs or purchased with drug-sale profits.

- Consideration of adding "traceable assets" (property purchased with drug profits) to the types of property subject to forfeiture.

In addition, State and local governments may wish to consider incorporating the forfeiture process into their standard law enforcement procedures.

This is not as easy as it might sound. Development of a more systematic means of using forfeiture would involve an additional effort by States and localities. It could require hiring additional staff or funding of special training for officers in financial investigation and asset management. It might also require adaptation of case-screening mechanisms, procurement of property storage facilities, and development of procedures for seizing property.

However, for jurisdictions burdened with serious drug trafficking, the potential of forfeiture for disrupting the drug trade may outweigh the costs of establishing such a systematic approach.

Information in this Brief was collected for the National Institute of Justice by Abt Associates, Inc., a research firm in Cambridge, Massachusetts. The research team, headed by attorney Lindsey Stellwagen, examined forfeiture statutes relating to drug cases for each of the 50 States. The researchers also interviewed more than 50 prosecutors nationwide on their use of the forfeiture sanctions.

The full text of this report is available on loan from the National Institute of Justice/NCJRS (Use of Forfeiture Sanction in Drug Cases, NCJ 98122). For details, call 800-851-3420 (in Maryland and the Washington, D.C., Metropolitan Area, call 301-251-5500). Other information appears in the National Institute of Justice report Strategies for Supplementing the Police Budget, NCJ 97682, to be available later this year. Call NCJRS for availability information.

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