



## Recommendation 94-2

### **Reforming the Government's Procedure for Civil Forfeiture**

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(Adopted June 16, 1994)

The United States Government has in recent years made increasing use of its power to confiscate the property or assets of persons involved in illegal activities through the civil forfeiture process.

The law classifies forfeitures as criminal or civil according to the procedure by which the government perfects its title in the confiscated property. Criminal forfeiture follows as a consequence of criminal *conviction* of the property owner. The government cannot obtain clear title until a post-trial proceeding is held. Civil forfeiture is accomplished by civil proceedings, *in rem*, against the property itself. Civil forfeiture has numerous advantages over criminal forfeiture in that the property itself is the “defendant” in the suit, and the property may be forfeited even if the owner is dead or has fled the United States.

Over a hundred statutes authorize civil forfeiture, with most involving drug, racketeering, money laundering, or immigration violation.

A civil forfeiture begins with a “seizure” of a privately-owned property by the investigative/prosecutorial government agency. Constitutionally, the agency must meet the probable cause test showing that there are reasonable grounds for belief that the property has been used in the commission, or constitutes proceeds, of the crime.

Civil forfeiture proceedings are of two types. Congress has provided for *administrative* forfeiture in cases where the property is cash, the value of the property is under \$500,000 or is a boat, plane or car used to carry or store drugs, or if the seizure goes uncontested. Notice of an impending administrative forfeiture is sent to the last known address of the owner and is published in newspapers.

A *Judicial* forfeiture proceeding is required when a claimant contests the seizure, when the property seized is real estate, and when the value of the seized property (other than cash) is over \$500,000. If the case proceeds, it does so in federal district court where there is a right to a jury trial.



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This recommendation addresses a few procedural issues regarding civil forfeiture.<sup>1</sup> Many other issues, both procedural and substantive, have been raised by courts and by critics of the forfeiture process.<sup>2</sup> There is a fundamental issue about the fairness and effectiveness of the entire administrative civil seizure/forfeiture process. It currently involves an extremely informal administrative process and, for the small proportion of judicial forfeiture cases that are taken that far, a trial in the federal district court.

After forfeiture, an owner may petition for remission (return) or mitigation (partial return) of the property. Of course, in many instances, especially those involving cash, no one claims ownership. According to federal common law, the authority to grant remission or mitigation is totally at the discretion of the seizing agency. A decision on the merits for remission or mitigation is non-reviewable by the judiciary.<sup>3</sup>

**Notice.** The current system of using newspaper notices of the proposed forfeiture action along with a letter to the last known address of the owner has been criticized as unduly expensive<sup>4</sup> and ineffective. The establishment of a centrally maintained Civil Forfeiture Registry, which would be published and made widely available, would not only provide better and more

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<sup>1</sup> This recommendation only applies to seizures by agencies acting under the authority of statutory administrative forfeiture provisions. It does not apply to agency seizures of property under the authority of regulatory statutes that do not have administrative forfeiture provisions, or to seizures of property that by its nature is violative of the law, such as seizures under the Federal Food, Drug, and Cosmetic Act

<sup>2</sup> Federal adoption of state forfeiture actions is one issue which has received recent scrutiny. Under the Comprehensive Crime Control Act of 1984, forfeited assets (property, or money derived from its sale) are allocated exclusively for law enforcement purposes rather than to the general Treasury. Additionally, the Department of Justice and the Customs Bureau gained authority to transfer forfeited property and cash to state and local agencies that directly participate in law enforcement efforts leading to seizures and forfeitures. This has led some officials in six states which require forfeited property to revert to the general state treasury, to ask federal officials to adopt state cases and convert them into federal forfeitures. The Department of Justice asset sharing program shared over \$736 million in cash and \$90 million in property with state and local agencies from the state of the program in fiscal year 1986 through fiscal year 1991. In *Harmelin v. Michigan*, the Supreme Court noted:

There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.

501 U.S. 957, 111 S. Ct. 2680, 2693, n.9 (1991).

<sup>3</sup> Historically, the federal government has provided for administrative relief from forfeiture in cases where the party's conduct was undertaken "without willful negligence" or an intent to commit the offense. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 n.27 (1974), quoting 19 U.S.C. § 1618.

<sup>4</sup> The Department of Justice estimates that the government spends over \$55 million annually on newspaper notices.



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reliable notice, it would provide a better overview of the entire forfeiture process, thus improving public and congressional oversight.

**Time Limits.** At present, federal statutes provide no time limit on the agency to provide notice to the owner of the seized property. Unlike the requirements imposed on a person contesting the seizure to file a claim to the property, deadlines have not been similarly imposed on the agency within which it must commence a forfeiture action in district court. Current Department of Justice policy is to send a notice of seizure to each person known to have an ownership or possessory interest in the seized article within 60 days of the seizure. The notice triggers the running of the time specified by the enabling statute (usually 30 days) within which a person may file a claim to the property (thus converting an administrative forfeiture into a judicial one).

Congress should provide a statutory 60-day time limit on the agency to provide notice in the Civil Forfeiture Registry and to send written notice of a seizure to the last known address of the owner or interest holder in the property. Granting extensions or waivers of the 60-day notice requirement should be within the discretion of a federal judge or magistrate, upon a showing by the government of good cause. Failure to meet the filing time limit (absent a waiver or extension) should result in a return of the property pending further forfeiture proceeding.

### Recommendation

1. Congress should provide for the establishment of a Civil Forfeiture Registry, centrally maintained, kept current, and made widely available by the Department of Justice, in lieu of the current requirements to publish notices in specific locations or specific media. The Department of Justice should then maintain the Civil Forfeiture Registry to provide a well-known and continuing place for notifying owners of seized property about proposed forfeitures.

2. Congress should modify the forfeiture laws to require the government to publish notice in the Civil Forfeiture Registry and mail specific notice to the last known address of each person known to have an ownership or possessory interest in the seized article within 60-days following seizure, recognizing that extensions or waivers are available with appropriate safeguards against abuse. If the seizing agency fails to provide notice in the Civil Forfeiture Registry (absent good cause) or to the last known address of the party from whom the property was seized within the time limits, and no waiver or extension was granted, the seized article should be returned to the party pending further forfeiture proceedings.



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### **Citations:**

59 FR 44703 (August 30, 1994)

\_\_\_ FR \_\_\_\_\_ (2011)

1994-1995 ACUS 5