

“They’re Taking My Stuff!”

What You Need to Know about Seizure and Forfeiture

By Dan Greenberg

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EXECUTIVE SUMMARY

Law enforcement officers in the United States seize billions of dollars in cash and other personal property from members of the public every year. Most of this seized property is eventually forfeited to state and federal governments. These seizures and forfeitures rarely require proof of criminal conduct; rather, they often rest merely on the suspicion that the property in question is related to a crime. As critics of these practices have noted, seizure and forfeiture sometimes result in confiscation of the property of innocent, law-abiding civilians. Furthermore, because the proceeds of forfeiture typically go straight to law enforcement budgets, this creates perverse incentives that make it more likely that law enforcement officers and prosecutors might devote disproportionate effort to this endeavor.

This paper explains how seizure and forfeiture work. More precisely, it contains an account of the relatively minimal legal protections that law-abiding civilians have against both seizure and forfeiture. The paper also provides strategies that the law-abiding civilian can use to reduce the chance of having property seized while traveling.

INTRODUCTION

Law enforcement officers in the United States take roughly \$3 to \$4 billion of property from civilians every year—property like cash, cars, homes, guns, boats, electronics, and jewelry. Hundreds of statutes empower state and federal governments to confiscate assets not only from convicted criminals, but also from individuals who have not been charged with a crime.¹ One study, based on data from 15 states, suggested that cash constituted almost 70 percent of such seizures.²

In some years, the value of property taken by the federal government alone has dwarfed the value of property stolen by burglars from the public.³ Most U.S. jurisdictions grant law enforcement officers the power to seize property that is alleged to be related to a crime—and grant prosecutors the power to litigate the transfer of title to property that is alleged to be crime-related. Law enforcement officers and prosecutors exercise these powers whether or not it is ever demonstrated that the property’s owners are connected to any crime. In fact, they exercise these powers whether or not any such crime is ever shown to exist.

Generally, when law enforcement officers seize assets—based on the low standard of probable cause—they take temporary possession of the assets. To distinguish: *Seizure* occurs when government takes temporary possession of property; *forfeiture* occurs when ownership of seized property is transferred to the government. The owners of property that is taken often do not enjoy the right to a speedy trial that is afforded to criminal defendants.⁴ Rather, sometime after the property is taken—perhaps months or even years—a decision maker in another branch or level of government—for instance, a judge or a hearing

The expense of legal representation to vindicate one's own rights to one's own property is, for many people, financially unfeasible.

officer—will eventually conduct a hearing to determine who should be assigned permanent ownership of that seized property. As discussed below, some forfeiture proceedings—in particular, those that fall into the category of administrative forfeiture—are administered by the seizing agencies themselves and lack the protections for litigants that a neutral and independent judiciary provides. Furthermore, as discussed at greater length below, owners of seized property do not enjoy the right to taxpayer-funded counsel that is afforded to criminal defendants. The expense of legal representation to vindicate one's own rights to one's own property is, for many people, financially unfeasible.

A forfeiture hearing might result in the assignment of the ownership of the property to the government, thus extinguishing any rights held by the previous property owner. On the other hand, the hearing might result in the complete restoration of property rights to the previous property owner. Notably, even this outcome—although a relatively happy prospect for the original owner—would likely still leave him or her shouldering significant costs. Those costs of victory for the original owner might include not only the time, inconvenience, and embarrassment that are entailed by government seizure of one's property, but also the attorneys' fees that are spent to vindicate the original owner's rights. Such expenses often cannot be recovered, even after a forfeiture outcome in which the original owner prevails. These expenses are borne by forfeiture litigants who lose as well.

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Advocates of asset seizure and forfeiture typically argue that these processes sap the strength of criminal enterprises. They argue that taking ill-gotten gains away from criminals makes current criminal conduct less lucrative and future criminal conduct less likely. As a top federal prosecutor has argued:

Prosecutors choose civil forfeiture not because of the standard of proof, but because it is often the only way to confiscate the instrumentalities of crime. The alternative, criminal forfeiture, requires a criminal trial and a conviction. Without civil forfeiture, we could not confiscate the assets of drug cartels whose leaders remain beyond the reach of United States extradition laws and who cannot be brought to trial. Moreover, criminal forfeiture reaches only a defendant's own property. Without civil forfeiture, an airplane used to smuggle drugs could not be seized, even if the pilot was arrested, because the pilot invariably is not the owner of the plane. Nor could law enforcement agencies confiscate cash carried by a drug courier who doesn't own it, or a building turned into a "crack house" by tenants with the knowing approval of the landlord.⁵

Furthermore, because the property that is seized and forfeited can be used to pump up law enforcement budgets, these budget enhancements—which presumably increase the power to fight crime—are often seen as an additional justification for seizure and forfeiture. Officials of the federal Department of Justice—during both the Obama and Trump administrations—have argued that, because claimants rarely succeed at winning back their money in court, this serves as

evidence that the system is working properly.⁶ (If this is so, the federal seizure system is working extremely well: A 2014 estimate found that only about 1 percent of federally seized property is returned to former owners.⁷) Rod J. Rosenstein, deputy attorney general in the Trump administration, took the position that “Most cases [involving seized assets] are indisputable. . . . In the majority of cases, seized cash is drug money.”⁸

Critics, however, have expressed more pessimistic views. Those critics argue that the status quo creates incentives for law enforcement officers that result in their paying less attention to fighting crime and more attention to maximizing the gains to their departments’ budgets. When seizures and forfeitures are encouraged, more of them will occur. If there is a danger that such government powers will be misused, critics of forfeiture and seizure argue that the use of these powers should be more regulated and tightly restricted. These critics underscore a central fact about the nature of seizure—that its speedy and largely unregulated nature appears to be in tension with a Constitution that protects the property of its citizens. A norm that allows for quick and extensive confiscation of property may be accompanied by moral, political, and constitutional dangers.

Furthermore, the available data on real-world forfeiture suggests that the size of the typical seizure is notably small. An Institute for Justice analysis of available data from 21 states suggests that the median cash forfeiture is, on average, \$1,276; in some states, the median cash forfeiture is just a few hundred dollars.⁹ If forfeiture is supposed to be targeting high-volume, large-scale criminal enterprises, these statistics suggest that, in practice, forfeiture typically misses the target; they also

suggest that the cost of legal representation will make it prohibitively expensive to contest a typical seizure in court. In many jurisdictions, property owners only have a few weeks to pursue their rights to their own property in court; property owners who miss the deadline to file—a task that is sometimes made more complex because of the cost of representation—have lost their property forever.¹⁰

Any discussion of seizure and forfeiture in the United States must take into account that these practices vary across states, districts, and territories. Our federalist system encompasses multiple and diverse legal structures—such as the laws of local jurisdictions, sets of

internally generated law enforcement guidelines, and court decisions that explain or occasionally modify them. However, there are constitutional limits to the powers held by law enforcement officers, and those limits to government power apply in all U.S. jurisdictions. Even though the details of seizure and forfeiture vary by jurisdiction, the nationwide protections of the Constitution shelter everyone in the United States from some improper or abusive seizure and forfeiture practices.

All of us have constitutional and moral rights to possess and use property; part of our government’s mission is to protect these rights. If government agents use their powers of seizure and forfeiture improperly, such actions do not protect our rights, but rather intrude on them. The danger that the government’s immense powers can be misused or abused is a concern at the heart of the American system of governance. Civilians are entitled to use the legal and constitutional protections they

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have in order to shield themselves from government misbehavior. This paper is written for those law-abiding civilians who wish to exercise their rights under the law to protect their ownership of their rightfully acquired and rightfully possessed property from the wrongful exercise of government officials' seizure and forfeiture powers.

This paper attempts to explain the legal issues of seizure and forfeiture as they might intersect with the typical experience of the law-abiding traveler inside the United States. However, *this paper is no substitute for legal advice*, which must necessarily take into account a level of detail unique to each case that this paper cannot explore. Whenever you encounter a situation where your rights may be in jeopardy, you are well-advised to seek legal counsel.

SEIZURE AS A STRATEGY GAME

Seizures typically arise from interactions between civilians and law enforcement officers. Sometimes these interactions lead to investigations; sometimes these investigations lead to searches; sometimes these searches lead to seizures. These two-party interactions are something like games of strategy—say, checkers or cards—that are played by two people. More particularly, such games contain a back-and-forth dynamic: One player makes a decision, then the second player makes a decision that takes into account the first player's decision, then the first player makes a decision that takes into account the second player's decision, and so on. The civilian-officer interaction is like a game in which the law enforcement officer wins if seizure ultimately takes place; on the other hand, the civilian wins if seizure never occurs. Those who want to win this game should try to understand the strategic alternatives available to both players.

A fundamental principle that governs police seizures is "If they can't find it, they can't seize it." There can be no seizure if police cannot discover anything to seize. This means that if the civilian manages to end the game before the police officer discovers any property, then the civilian wins the game. In contrast, the officer who wants to win the game will try to transform interactions into investigations, and investigations into searches—and, furthermore, to try to extend the scope of the search and the length of time allowed for any search to take place. The longer the search lasts, and the broader scope that the search encompasses, the more likely it is that the officer will discover

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something of interest—something of value that can be seized—and thus the more likely it is that the officer wins the game.

Those with experience in officer-civilian interactions know that the powers of the two players are not identical. The officer conducting a roadside stop and investigation has, by and large, three kinds of powers available:

1. ***Powers of the everyday civilian.*** Just like anyone else, the officer has the power to ask civilians what time it is, engage civilians in conversation,¹¹ draw reasonable conclusions about what is seen in plain view, and so forth.¹²
2. ***Powers related to officer safety.*** An officer who has reason to believe that a civilian might be carrying a weapon—or who has reason to believe that there is a weapon in the civilian's car that is close enough for the civilian to grab—is allowed to search the civilian, or the parts of the car that are near the civilian, in order to ensure officer safety.¹³
3. ***Powers of detention, search, and arrest.*** The officer's exercise of these powers is limited; police cannot just go around detaining and arresting people based on impulses or hunches. Rather, the officer who detains or arrests a civilian must, at a minimum, have knowledge of specific facts that suggest the likelihood of illegal conduct. An officer who detains or arrests a civilian without such knowledge is violating the law.¹⁴ These powers of detention, search, and arrest govern the power of officers to stop pedestrians and vehicles.¹⁵

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Note that the more information that the officer has about a civilian who seems suspicious—or, to put it another way, the more reasonable suspicion of criminal conduct that the officer has—the more that the officer's powers increase. That means that the civilian who wants to win the game described above will, to the extent possible, provide the officer with as little information as possible—especially if that information might generate suspicion. To sum up, if we understand this set of interactions as a game, the goal of the officer is to advance the series of interactions described above (from interaction to investigation to search to seizure). The goal of the civilian is to stop the interaction and end the encounter.

WHAT NOT TO DO WHEN PULLED OVER: TWO ANECDOTES

On a hot Saturday night about 20 years ago, I was driving home down a nearly empty street. The spring air, even the air inside my car, seemed full of pollen. Because I felt that I might sneeze, I took my foot off the accelerator. Then I actually did sneeze, so I tapped my brake to slow down a bit more. I blinked my eyes and sped back up—and then I saw blue lights in my rear-view mirror.

After the patrolman walked up to my window, asked me for my driver's license, and took it back to his police car, I sat and waited a few minutes. I was a little tired; I just wanted to go home and didn't think I had committed anything like a moving violation. The patrolman walked back up to the car, gave me back my license, and ordered me to get out of my car and stand beside it. Once I got out and stood up, he asked me why I hadn't tucked the button-down shirt I was wearing into my jeans.

In retrospect, I wish I hadn't said what I did: "What are you, the fashion police?" That quip probably transformed a brief detention into a much longer one. Perhaps my snappy comeback encouraged the patrolman to do what he did next: require me to submit to an extensive roadside sobriety test. Fortunately, I had had nothing to drink; at the patrolman's request, I proficiently walked a heel-to-toe straight line and then recited much of the alphabet backward. The patrolman then explained to me that he was issuing me a citation for weaving back and forth inside my lane, an offense that I remain unconvinced I committed.

I do not recount this anecdote to advise the reader to be polite to the police (although being polite, whether to police officers or to anyone

else, is often the prudent choice) so much as to illustrate a fact of life: The motorist who is detained, through considered choices and actions, can sometimes encourage deescalation of the detention or hasten its end. The alternative is also true: The motorist who is detained can sometimes, through ill-considered choices and actions, encourage the escalation and expansion of the detention.

My failure to keep my mouth in check was followed by a longer detention and a traffic ticket; those consequences had a microscopic impact on my life. Regrettably, similar flashes of temper from other civilians have been followed by harsher consequences.

...

On another summer day many years later, Texas state trooper Brian Encinia signaled motorist Sandra Bland to stop her car.¹⁶ Encinia's method of law enforcement relied heavily on traffic stops for rarely-enforced infractions; he often used such stops as excuses to perform car searches in order to look for contraband. Over the previous year, he had issued 1,600 citations—a ticket almost once per hour on average while on the job.¹⁷

Encinia had been following Bland; his car sped up and approached hers from behind. Encinia approached Bland so rapidly that she changed lanes to get out of his way; she thought he was responding to an emergency call. Encinia then signaled her to pull over, based on his view that she was at fault for failing to signal a lane change.

After Encinia checked Bland's driver's license, their encounter began to escalate beyond a typical roadside stop. Bland asked when she could go. Encinia responded that she seemed "really very irritated." The two

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began to argue. Encinia asked Bland to put out her cigarette. Bland asked why putting out her cigarette was necessary, and Encinia ordered Bland out of the car. After a long argument about whether Bland was required to follow Encinia's order, their encounter culminated in Encinia calling for backup, threatening to use his taser, and attempting to grab her from the car; ultimately Bland was handcuffed, arrested, and taken to jail.¹⁸

Three days later, Bland committed suicide in her jail cell; she was found hanging by a noose made from a plastic bag liner.

...

The two incidents described above are not included here to raise the issue of fault. Rather, they are meant to underscore that two parties who interact with each other necessarily face a series of decisions—and, in the context of civilian-officer interactions, either person (or both) can make choices that lead to undesirable or even terrible outcomes. Given that fact, even though it may sometimes be hard to be diplomatic during such interactions, diplomatic behavior can be beneficial—especially given the goal of deescalating and ending the encounter.

WHAT TO DO WHEN PULLED OVER

Some civilians interact with law enforcement officials on a routine or everyday basis. Others rarely or never interact with the police. For many people, the most typical kind of civilian-officer interaction begins when a law enforcement officer signals a civilian driver to pull over. This chapter focuses on what civilians should do to reduce the risk of seizure of their property during a roadside stop. A civilian who thinks strategically about deterring seizure by law enforcement officers will behave in certain ways and avoid behaving in other ways.

What follows are guidelines to the civilian who wants to behave strategically to avoid seizure (of course, these guidelines will be of no use to the civilian who is absolutely certain that there is nothing of interest to law enforcement in his or her car).¹⁹ Some of the guidelines below boil down to “obey the law”—often good advice inside or outside of the context of seizure avoidance. Think of the guidelines discussed below as something akin to an insurance policy: The more you follow the guidelines, the less likely you are to face the prospect of seizure and forfeiture.²⁰ Your first goal is to avoid the stop.

Part 1: Detering Detention

A sign on a homeowner’s lawn that advertises a security system is not an absolute deterrent to burglars. However, it is reasonably possible that a burglar will see the sign and then decide to pick a different target. Parts of this paper explain how to practice this kind of deterrence. This section provides some cosmetic recommendations that are intended to communicate to a law enforcement officer that an investigation will likely yield nothing of interest. Notably, the recommendations below are not intended to suggest that those who carry them out are morally

superior people. Rather, the point is that those who carry out the recommendations below are less likely to attract law enforcement scrutiny.

Have nothing in your car in plain view that could raise concerns about illegal conduct or officer safety. There are many items that you should not have inside your car if you wish to deter seizure. Empty beer cans or bottles sitting in the car's well are inadvisable; these suggest that someone may have been drinking inside the car. The same is true for empty or unsealed liquor bottles. (Even a sealed bottle in the passenger seat that contains an alcoholic beverage might lead to questions about the sobriety of the driver.) Similarly, it is inadvisable to have drug paraphernalia—whether legal or illegal—inside the car in plain view.²¹ This even extends to containers for perfectly legal drugs (for instance, prescription pill bottles or, in some jurisdictions, discarded packaging for commercially available marijuana). Of course, it is perfectly legal to have, for instance, empty beer cans lying around in your car. However, you do not want to give a law enforcement officer any grounds for investigation or suspicion of illegal conduct.

Furthermore, a civilian who wishes to deter seizure will find that it is generally inadvisable to have a weapon—or anything that can be used as a weapon—in the car, in plain view, in an area that allows for the weapon to be grabbed by the driver or a passenger. This concern is based on officer safety.²² That means that it is unwise to have a hunting knife, a perfectly legal firearm, ammunition, or a heavy flashlight or other large and blunt instrument sitting in the passenger seat. The reason that having such an object in plain view is inadvisable is that, if an officer pulls your car over and spots it, that provides an

invitation to search all of the areas of the car from which a driver or passenger could grab a weapon. All of this leads directly to a second guideline.

Keep your car clean and reasonably empty. The above suggests that a sufficiently imaginative law enforcement officer might decide that, for example, a pile of papers or trash in the passenger seat could conceal an easily accessible weapon. Indeed, there is some possibility that an officer might engage in “profiling” of certain kinds. Like all of us, law enforcement officers sometimes rely on pattern recognition. In particular, a law enforcement officer might behave as if a driver in a car that contains trash or junk deserves more scrutiny than a driver in a clean car. The more stuff that is in your car, the more likely it is that the officer will see something in it of possible investigatory interest. Relatedly, a car with an unusual smell—say, the kind of smell that is produced by an abundance of air fresheners²³—may encourage an officer to believe he has discovered something that deserves further investigation. Generally, the *absence* of things in your car—this includes empty ashtrays, the absence of a smell of smoke, and, to the extent possible, empty seats and glove compartments—is the safer bet. The bottom line: A car with a clean and reasonably empty interior provides no grounds for search or suspicion, which may not be true for a car with lots of stuff in it.

Keep your dress and grooming conventional—and, ideally, boring. As suggested above, there is some possibility that law enforcement officers will draw conclusions about you based on your appearance. Some people believe that choices in clothes and grooming imply messages about the kind of people they are, and sometimes law

enforcement officers will infer such messages. To the extent possible, your appearance should give the officer as little as possible to think about. For instance, you should ideally wear clothes that are not dirty, wrinkled, or shabby. It is perfectly legal to drive wearing nothing but a bathing suit. Nonetheless, the point is that you want to look normal enough so that the way you present yourself provides no avenue for the officer who pulls you over to get more curious about you.

Obey the law. Do not speed. Do not violate traffic laws generally. Make sure your headlights and taillights are working. Your windshield should not be cracked. Your muffler should not be especially loud. (Perhaps it is unnecessary to add: Do not drink and drive.) Those who violate these rules may find themselves pulled over by a traffic officer, and the civilian who is responsible for the violation may find that the violation invites further investigation. Most importantly, your driver's license and registration should be current. Do not carry any contraband with you, such as illegal drugs. Furthermore, civilians with outstanding warrants are likely to discover that an encounter with a sufficiently curious law enforcement officer will shortly bloom into a full-blown arrest.

Separate valuables from the driver and passengers. This paper focuses on how to avoid seizure; it presumes that you sometimes carry items of value that are legal to acquire and possess and that you are concerned might be seized. When in a car, such valuables should ideally not be carried on your person; they also should not be carried close enough to you that you could immediately grab them. Remember, the officer who has detained a civilian in a car has the power to search the area on or near the civilian for weapons. Instead, if you are traveling

with valuables in a car, you should ideally put them in a location where no one can have immediate access to them, such as in the trunk of a car or in a locked case—or both. If you have receipts or other records of transactions that are relevant to the valuables, it may be prudent to store both the records and the valuables in the same container. Under no circumstances should you put any kind of contraband near or around your valuable goods.

People regularly carry cash in order to make purchases in circumstances where exact prices are unpredictable. For instance, potential buyers who travel to auctions must plan for situations in which a personal check may be insufficient to close a deal. Perhaps you are carrying cash for multiple purposes. You might want some cash on hand for a snack or a meal, but you do not need immediate access to most of your cash until later. In that circumstance, take the cash you do not need to carry until later and put it in the aforementioned trunk or locked case. Suppose that you are carrying a substantial amount of cash that you plan to use for a relatively expensive purchase, and that the seller is a long drive away from you. Nothing is stopping you from storing the cash in your trunk, pulling into a parking lot a few blocks away from your ultimate destination, and then putting the cash in your pocket or purse at that point. This inconvenience is minor; it is certainly a smaller inconvenience than having the cash seized and forfeited.

Part 2: Soft Detention

You see the blue lights in the rear-view mirror. Now what?

Generally, an officer may detain a motorist briefly for a number of related reasons. A roadside detention typically begins immediately after

the officer observes either a traffic law violation (speeding or making an illegal turn) or actions that might suggest impaired driving (slow driving or drifting from lane to lane). Such a detention is allowed, under the law, to continue long enough for the officer to issue a warning or citation. Law enforcement officers may detain motorists whenever they spot violations, even if the officer's interest in the motorist is unrelated to the violation.²⁴ An officer may become empowered to detain civilians when he or she makes a "reasonable mistake" and thus mistakenly concludes that he or she has observed illegal conduct.²⁵ This paper calls warning- or citation-related detention—a relatively ordinary experience that many motorists have experienced—"soft detention." Such detention allows the officer to carry out related tasks—to look into whether the motorist is licensed and free of outstanding warrants, whether there is contraband in the car in plain view of the officer, and so forth. Notably, the motorist in soft detention lacks the protections that suspects in custody have under the Constitution.²⁶ Depending on what the officer discovers, however, a roadside interaction can morph into a more extended investigation, which may change the nature of the detention.²⁷

As noted above, the way that the civilian wins this stage of the game is to provide nothing of interest that can trigger further investigation, so that the encounter ends. Conversely, the way that the officer wins the game is to discover something that leads to reasonable suspicion of further wrongdoing. That can lead to further detention, investigation, search, or arrest. Generally, there are a variety of ways for the officer to escalate the detention, just as there are a variety of ways for the civilian to deescalate it. Below are guidelines for the motorist that, if followed, are likely to deter this kind of escalation.

Focus primarily on obeying lawful orders that relate to officer safety. If an officer orders you out of the car, you must get out of the car.²⁸ If an officer wants to frisk you because of his or her reasonable suspicion that you are carrying a weapon, you must submit to the frisk.²⁹ (There are limits, though. Just because there is suspicion that you are carrying a weapon, the officer is not allowed to reach inside your pockets, unless and until he or she feels something like weapons or contraband via the frisk.) When you are carrying out any order, it is best to do it slowly and deliberately. If you are ordered out of a car, that does not give the officer license to go into the car and begin to root about. If there is nobody in the car and that the officer sees nothing suspicious about you and nothing suspicious inside the car, there is no lawful way for him to search the car. (In the unlikely event that the officer begins to search the car illegally, you are perfectly entitled to ask him or her to stop.)

Obey lawful orders that relate to proof of driving privileges. By and large, if you are driving a car you are required to provide documents like your license, registration, and proof of insurance. But reach for them and hand them over slowly and deliberately, and perform these acts with full consciousness of the officer's safety concerns. The officer's blood pressure may spike in the course of observing a civilian reaching into a pocket or opening up a glove compartment; do not be surprised if you see the officer watching you intently if, for instance, you move your hand so that it becomes briefly obscured or concealed. It couldn't hurt to preface your actions with statements like, "Officer, you've asked me for my license. I'm sitting on it; it's in my wallet in my back pocket. I'm going to reach under myself and take my wallet out as soon

as you give the word, okay?" Finally, if you receive a citation, you will likely be ordered to sign it; this signifies that you actually received the ticket, not that you admit wrongdoing. Sign that when ordered to do so—but do not sign any other documents presented to you. Under no circumstances sign anything that might indicate admission of fault, the transfer of any property, consent to search, or a surrender of any of your rights.

Demonstrate compliance immediately through your physical actions. As soon as you realize that the officer wants you to pull over, begin taking steps to do so. Slow down, turn on your hazard lights or turn signal, and pull over to the side of the road or into a parking lot as soon as reasonably possible. (Sometimes officers judge that motorists who have been directed to pull over to the side of the road have not complied quickly enough; occasionally, these judgments have been accompanied by a disproportionate response.³⁰) Unless your car is well-illuminated by daylight or artificial light, turn on your car's internal lights when you are parked. Keep your hands in view; as much as possible, keep them planted on the steering wheel. Avoid making sudden gestures (do not hit the ceiling of the car in frustration at being pulled over; avoid gestures that might be confused with throwing contraband under the seat). You have nothing in or near your hands that might be brandished or used as a weapon. (Lighting up a cigarette and/or gesturing with a lit cigarette might be understood either as holding onto a weapon or as conveying some degree of disrespect; smoking is therefore best avoided.)

Appreciate officer psychology. Imagine, for a moment, yourself in the officer's shoes. Many have argued that traffic stops place law

enforcement officers in significant danger.³¹ Whether or not this is true, there are plenty of officers who believe it. It is *crucial* that you create no justifications or pretexts for the use of force through your own actions; rather, your goal is to deescalate the encounter by keeping yourself and the officer as calm as possible, and ultimately to end the encounter by providing no grounds for suspicion that might cause a traffic stop to morph into a search or arrest. Do whatever you can to make the encounter as boring and undramatic as possible.

In addition to safety concerns, focus throughout the encounter on deescalating and ending it. As a general matter, you will be better off if you can be the most drab and colorless version of yourself possible. Many options available to the civilian are more likely to prolong and intensify the encounter than to end it; avoid such choices. The encounter is not a contest to see who can be more verbally proficient, nor is it a contest to see who can stare and glower more. You should be as cool as an ice cube, although, as the encounter continues, you may betray faint puzzlement or irritation at the length of the encounter. After all, you, being the solid citizen that you are, have never faced something like this before. (Of course, if the officer checks your record and discovers a history that implies many previous police encounters, this may be ineffective.)

Embody quiet civility. Ideally, when forced into a roadside encounter, you will present yourself as cool, unflappable, relatively quiet, and extremely civil. *This isn’t personal*; don’t get emotionally involved. Do not argue, debate what happened, or discuss the fine points of the law. Do not state that you know your rights; demonstrating that you know your rights—by following the guidelines herein—is much more

eloquent. (Many officers know the law better than many civilians, and there may even be a few officers who believe they know the law better than all civilians; getting into a roadside argument with an officer is almost always pointless.) It is likely that, in a variety of ways, the officer will invite you to engage in a conversation or dialogue. To the extent possible, do not accept this invitation. It may be impossible both to be civil and to say nothing at all, but it is always possible not to be chatty.

With one exception, you are not required to answer any questions from the officer. In some circumstances, you are required to provide your name to an officer when asked for it. With that exception, however, there is no general duty to hold up your side of a conversation with an officer during a roadside stop or to answer his or her questions. Nonetheless, it is important to keep your goal in mind: to deescalate and end the encounter. Unfortunately, the more you talk, the more likely it is that you could say something that could create reasonable suspicion in the mind of the officer. However, raw silence in some contexts might also create reasonable suspicion (perhaps the officer might believe that silence suggests the kind of diminished mental capacity associated with the use of intoxicants). Moreover, the kind of silence that appears to convey an impolite or insolent attitude toward the officer carries its own dangers. Although (in the author's judgment) it is probably true that a traffic-stop detainee has the absolute right to remain mute in the face of questioning during soft detention, the law is not entirely clear on this question.

Because of procedural hurdles involving the law of government immunity, whether a detained motorist has the absolute right to silence here may never be definitively resolved.³² This is an area in which the detained motorist walks a tightrope. To repeat: Your goal is to deescalate and

end the encounter, so to the extent that you feel you must say anything, your statements should provide nothing whatsoever in the way of information that could generate suspicion on the part of the officer or otherwise escalate the encounter. (See below: "Conversation During Soft Detention.")

If you can, make a record of the time of the encounter. This probably will not do you much good, but there are circumstances in which it is good to know how long the encounter has lasted. Take note of what time you were pulled over. Most smartphones have a stopwatch-like function. To repeat, do not make sudden moves or furtive gestures that might generate suspicion while detained.

End the encounter politely as soon as you are told the detention is over. Once you receive the warning or citation, the rationale for the detention has been extinguished. Unless there is reasonable suspicion of further misconduct, the traffic stop must end when there is no more reason for the officer to investigate issues of vehicle and driver safety.³³ If the officer tells you that you are free to go, politely express your thanks, roll up the window, and drive off. If the officer tells you that you are free to go but that he has a few more questions for you, respond politely in an almost identical way: "Thank you. You said I could go, so I'm leaving," roll up the window, and drive off. (The goal of telling you that there are a few more questions remaining is to make you feel obliged to stay; if you are free to go, there is no such obligation.) If you receive a warning or citation, but the officer keeps you in the dark about whether the detention is continuing, you are well within your rights to ask the officer if the reason for the detention has ended and if you are free to go.

*Be a
motorist of
few words.*

Part 3: Conversation During Soft Detention

A law enforcement officer is not required to read *Miranda* rights to the motorist in soft detention, and there is nothing to prevent the law enforcement officer from posing questions to the detained motorist.³⁴

However, the motorist has a great deal of discretion in whether or how to participate in the conversation. Lying to a law enforcement officer is inadvisable and imprudent in all sorts of ways. Sometimes lying to a law enforcement officer is flatly illegal.³⁵ In an ideal world, you would not need to say anything at all during a roadside stop, but complete silence can be interpreted as either suspicious or rude and provocative.³⁶

Furthermore, in some jurisdictions, a motorist, or even a passenger, can be required to provide his or her name, so long as an officer has reasonable suspicion of illegal conduct by that person.³⁷ In the author's opinion, the motorist who stays completely mute during a stop is *theoretically* entitled to do so; in practice, a charge of obstruction of law enforcement might follow, but such a charge is highly unlikely to stand up in court.³⁸ However, a citation or arrest based on this charge could lead to seizure or forfeiture, and that seizure or forfeiture certainly could stand up in court.

Ultimately, the goal is to deter law enforcement interest and investigation, so staying completely mute is probably not the best strategy. A better method—to say as little of substance as possible and then mostly shut

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up—is described below. The questions that the officer asks during a roadside stop are typically intended to elicit information that can be used against a detainee. As noted above, be a motorist of few words. Do not smirk; do not joke around; maintain your behavior civil, somewhat formal, and dead serious. The longer your conversation lasts, the longer the roadside stop lasts—and your goal is to make both of these as short as reasonably possible.

The nature of a conversation between an officer and a detainee is unusual. Many people who are detained understand every statement that the detaining officer makes to be accompanied by a silent subtext:

I have the power to make your life unhappy. Right now, I'm just detaining you. Unless you cooperate with me by acceding to my every wish and answering my every question completely and exhaustively, I will exercise that power by prolonging the detention—or maybe doing something even worse, like arresting you.

Some civilians hear this message and obey its every word. If you hear this message, you must do your best to ignore it. To the extent that you decide that you must respond to any questions, your response, whenever possible, should serve as a kind of blind alley that ends any further inquiry in the area that the question explores. Here are a few questions that you might be asked, with some suggested answers that seem likely to divert or end any further inquiries.

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Officer: Do you know why I pulled you over?

Civilian: I'm sorry, officer, but I'm not sure I do know why.

Officer: How fast do you think you were going?

Civilian: Respectfully, officer, how fast would *you* say?

Officer: I pulled you over because you just committed a traffic violation.

Civilian: I see. Thank you for telling me. I apologize for taking up your time with this.

Officer: Would you mind if I searched your car?

Civilian: Thank you, but I do not want you to search my car. I'm not consenting to any searches.

You're not required to incriminate yourself (which is the aim of the officer's question), nor are you required to speculate about what the officer was thinking.

This is another trick question. You are supposed to have some idea of the speed you were traveling. But since you don't want to incriminate yourself, you may not want to answer the question.

This is an invitation to incriminate yourself by agreeing with the officer's accusation. Thanking the officer for telling you why you are pulled over doesn't concede any wrongdoing.

Note the remarkable ambiguity of this question. If you say "yes," perhaps it could be interpreted as "Yes, go ahead and search my car." If you say "no," perhaps it could be interpreted as "No, I don't mind if you search my car." That is why a broad, express denial of consent to this search—and any other searches—is the best option.

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Officer: Why don't you want me to search your car?

Civilian: Because it's my right as an American; I don't want to consent to any searches.

Any invitation for you to discuss your inner thoughts and motives should be rejected as politely as possible. "Because I said so" would serve the same function as the recommended answer, but such a response might be viewed as more provocative.

Officer: Do you have something in your car that I should know about?

Civilian: No, I don't have anything in my car that you would be concerned with.

If you are asked for an opinion, you are free to provide the opinion that won't get you into trouble. It is your opinion that you are not carrying any contraband.

Officer: Are you carrying a large amount of cash?

Civilian: (Raises eyebrow.)
Nope.

Now you are being asked to provide an opinion about whether the amount of money you are being asked about is "large." In your opinion, it is not.

It is possible that the officer will continue to pose a series of interrogatives. ("Where are you coming from? Where are you going to? Have you been drinking tonight? Are you driving under the influence of any controlled substances? What's in that briefcase? Have you got any drugs in the car?") You must use your own judgment as to whether or how to answer these questions. Bear in mind that the officer who encounters a motorist who appears not to know anything about his or

her origin or destination may find such ignorance suspicious. If at any time you feel that your interrogator has said anything that you cannot comfortably respond to, you may choose to end the interrogation by responding: *“Look, officer, I appreciate that you’re just doing your job. But—I say this respectfully—I have things to do, and I’d like to be on my way. May I go, please?”* An alternative (and less diplomatic) way to end the interrogation is to respond *“I don’t think your question has anything to do with the reason you pulled me over. I don’t have anything else to say, and I’m finished answering questions. May I leave, please?”* A poker player might say that such responses raise the ante; if the officer is considering the prospect of writing up a ticket but has not yet decided whether or not to do so, asking to leave may force the officer to come to a decision. What is certain is that ending the conversation in this way forces the officer to clarify the legal status of the detainment, even though it may also force him or her to make an uncomfortable choice.

Note that the italicized responses above are a workable response to almost any question you are asked. Nonetheless, the response may need to be repeated, because you may receive additional questions after you politely ask for clarification about the nature of your detention. Indeed, it is possible that the officer will largely ignore what you have said, and respond to your request for permission to leave with yet another question. (Or perhaps he will state that you did not answer his question, and then repeat his original question more loudly.) He is allowed to ask you questions, but you are also allowed to ask him questions.

Notably, invoking your rights is sometimes provocative, but after a certain point, standing on your rights should not be understood to

increase suspicion. You are allowed to *repeat the same request to leave until you get an answer*. You may even have to repeat your question more slowly, but at some point the officer will tell you either that you are free to go or that your detention is continuing. You are entitled to ask why the detention is continuing; you can even ask the officer to explain the reason for the continuing detention, but make sure to balance the risk of irritating the officer further against the likelihood of the reward of the officer thinking that this detainee knows what he or she is doing and that it is time to end the detention.³⁹

It is possible that the officer will answer your question by telling you that you are not free to leave. The upside of asking the clarifying question above is that it forces the officer either to end the detention or provide a rationale for further detention. (A second upside is that, once you have received an answer to your question, there is really nothing more you need to say to further questions beyond "As I said, officer, I'd like to leave.") The downside of asking the clarifying question is that it may encourage the officer to produce a rationale for continuing detention.

Part 4: Hard Detention

This paper labels a detention that a motorist faces that appears unrelated to the reason for the original stop as "hard detention." The motorist faces hard detention if he or she is not free to leave after receiving a warning or citation or if it appears that the continued detention rests on something besides the moving violation that prompted the original stop.

A central goal of the motorist in soft detention is to avoid turning it into hard detention; the motorist in hard detention has failed to achieve that goal. If you find yourself in hard detention, the only thing to do—

if you have not done it already—is to ask if you are free to go. (Again, if you are told that you are free to leave, *leave*.) There are no other things to do, but there are several things to avoid:

- **Do not say anything at all when possible.** If you feel you must respond to a question verbally, you can say “I don’t have anything to say about that.”
- **Do not agree to any requests for searches.** When you decline consent to search, it is generally a good idea to state your denial loudly and clearly (although politely). It may be helpful to keep this in mind: An officer who asks for consent to search almost certainly wouldn’t be requesting it if he or she could legally perform the search without it.
- **Do not sign anything at all.** In particular, don’t sign anything dealing with transfer or ownership of any property you have. (Again, this prohibition does not include a citation or warning; the instruction not to sign anything assumes that the officer’s duty of enforcement of moving violations is already completed.)
- **Do not respond to threats of criminal charges or other methods of manipulation.**
 - Suppose an officer suggests to you that you can avoid criminal charges by voluntarily consenting to a search of your car. This is never an offer you should accept; it is almost certainly a bluff. Again, decline consent.
 - Suppose an officer suggests that you can avoid delay in exchange for your consent to search. Again, do not accept

the offer, do not waive your rights, and do not agree to a search. Suppose an officer tells you that he or she is sending for a drug dog to sniff your car, that the drug dog will arrive in a few hours, and you will have to wait around until then. The officer almost certainly knows that there are limits to how long you can be detained, and that a motorist cannot be ordered to wait around indefinitely for a dog sniff without reasonable suspicion.⁴⁰ In short, the officer is bluffing; very shortly, the officer will tell you that you can leave.

You are not required to consent to searches.

- **If you do not consent to a search, there is some possibility that the officer will begin searching inside the car anyway. Do not assist with the search in any way; you must passively resist.** Be like Gandhi. The officer conducting a search cannot draft you into assistance. If told to, for example, to "open the trunk" or "unlock that briefcase," you should respond by stating (or restating) that you do not consent to any searches. (If given such an order, you are also allowed to stare at the officer in a theatrically confused manner.) Let the officer take the key from you if necessary; under no circumstance actively resist. To repeat, you are required to comply with lawful orders, such as the order to get out of the car and to present your license and insurance. However, you are not required to consent to searches.

Even an illegal search that produces nothing in the way of courtroom-usable evidence can still result in the discovery and seizure of property.

Part 5: Search Happens

Inevitably, searches by law enforcement officers sometimes happen, and in such cases, officers sometimes seize things of value. A seizure can result from either a legal or an illegal search. It is important to avoid misunderstanding the doctrine that lawyers call “the fruit of the poisonous tree”—the idea if law enforcement officers conduct an illegal search, the information that they find sometimes cannot be used in court. Do not confuse the law of evidence with the law of seizure: *Even an illegal search that produces nothing in the way of courtroom-usable evidence can still result in the discovery and seizure of property.* That is why this paper focuses on lawful deterrence of law enforcement searches generally. Note that there are only a few ways

in which the motorist’s car can be lawfully subject to a full-blown search. The officer may search your car if:

- Contraband is in plain view;
- There is probable cause to believe in the occurrence of criminal conduct unrelated to the initial detention;
- You have consented to a search;
- You are placed under arrest; or
- The officer has a warrant to do so.

Moreover, the officer may use certain kinds of technology—in particular, drug dogs—to generate probable cause to search. However, the officer may not use the assistance of a drug dog indiscriminately or solely

based on a hunch of illegal conduct; furthermore, the officer may not prolong the traffic stop to wait for a drug dog to arrive at the scene of the detention.⁴²

In the event that a search occurs, the law-abiding motorist who is carrying something of value and has taken appropriate precautions still has a few cards to play. If you have taken the precautions described above, your property is in a locked bag or a locked briefcase—or perhaps a locked bag inside a locked briefcase—in a place that is out of the immediate reach of everyone in the car. If you are informed that your property is seized, demand a receipt; tell the officer that you will need to follow him or her to a station to get it. Do not assist with the search (do not, for instance, offer keys to locked items) or participate in a conversation about what is in the car that the officer cannot see. Again, *this isn’t personal*, and to the extent that you can remain emotionally uninvolved and keep the officer emotionally uninvolved, it is for the best. You are allowed to get emotionally involved during the phone call that you make to a lawyer as soon as the encounter ends. As a technical matter, the law enforcement officer has the authority to seize a locked bag or briefcase if there is probable cause to believe that it contains contraband; as a practical matter, an officer who does not want to look foolish in front of his colleagues may decide to avoid seizing a locked bag that may only contain mundane everyday items.

To repeat: In the event of seizure, you will probably have to follow the officer to the station to get a receipt for the seized property. As soon as reasonably possible, get a lawyer on the phone. Ideally, things never reach this point. Rather, the goal of this chapter is to help the reader who carries valuable, legal property and who might face this situation

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to break the chain of seizure. The links of the chain typically include investigation, interrogation, suspicion, probable cause, search, and seizure itself. Despite their best efforts, some motorists will be unable to break this chain and will face the looming prospect of forfeiture. The next chapter, which describes the nature of forfeiture in detail, is meant for them.

TRAVELING: OTHER ISSUES

In addition to roadside stops, you may encounter other situations when traveling that raise the possibility of law enforcement searches—which in turn raise the possibility of seizure and forfeiture.

The Border Patrol

What to do to keep your property safe from seizure and forfeiture, if traveling outside the United States, is outside the scope of this paper. Nonetheless, travelers’ interactions with Border Patrol sometimes occur within the nation’s borders. Federal regulations allow the Border Patrol to exercise its powers up to 100 miles within U.S. borders. Like any other law enforcement officer, Border Patrol officers must have reasonable suspicion of illegal conduct before requiring vehicles to pull over. The traveling motorist may encounter border checkpoints—again, up to 100 miles inland from the border—and may face visual scrutiny of the car as well as a few questions intended to verify citizenship. A law-abiding citizen with a clean car is very unlikely to face any problems from the Border Patrol related to seizure or forfeiture. Simply answer a few questions about your citizenship and legal residence status and be on your way.

The Transportation Security Administration

Those who travel by plane will inevitably encounter representatives of the Transportation Security Administration (TSA), which screens air passengers and cargo to assess possible threats to transportation security.⁴³ TSA’s screening function is confined to inspection for “weapons, explosives, and incendiaries.”⁴⁴ TSA’s own rules contain a 65-item list of prohibited items that further explain the scope of prohibited items.

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Each of the 65 entries falls within one or more categories of “weapons, explosives, or incendiaries.”⁴⁵ It is perfectly legal to fly inside the U.S. while carrying cash, although the traveler who enters or exits the U.S. while carrying cash can face disclosure obligations in some circumstances.

Last year, the Institute for Justice filed a class action lawsuit against the TSA, alleging that the agency has a general policy or practice of briefly seizing luggage, based solely on luggage containing cash, and then turning the property over to other agencies, such as the Drug Enforcement Administration. The suit seeks a declaration that this alleged policy or practice is unlawful. (A law enforcement agency could lawfully execute that policy or practice, but the TSA is not a law enforcement agency. It is a part of the Department of Homeland Security.) Earlier this year, the government’s motion to dismiss the suit failed, so the action has surmounted a significant hurdle on its way to trial. It is unclear how pervasive TSA-related seizures of the valuables of travelers are; perhaps the forthcoming trial will provide some answers to this question.

To the extent that the TSA successfully uses X-ray-like devices to peer inside passenger luggage for valuables—and to the extent it acts like a law enforcement agency that is constitutionally empowered to carry out seizures—travelers should consider the possibility that air travel can endanger their personal property far more than other modes of transportation. Although the TSA also monitors other modes of mass transportation, such as buses and trains, its surveillance of passenger cargo outside of airline flights is much less comprehensive.

UNDERSTANDING FORFEITURE

Seizure has been described above; this chapter describes forfeiture. When property is seized, this marks a change in *possession*. In such a case, typically, a private party possessed the property before the seizure, but an agent of the government possesses the property after the seizure. When property is forfeited, that marks a change in *ownership*. If the transfer of title through forfeiture is contested, then a formal procedure—for instance, a hearing before a judge—is typically used to determine who has title to the property. The property owner who faces the prospect of forfeiture should seek legal representation immediately.

The civil forfeiture proceeding is not technically a dispute between the government and the property owner. Rather, the law treats it as a dispute between the government and the property itself. That is why seizure and forfeiture cases are not captioned with the names of property owners, but instead with the name of the property—for example, *United States v. \$124,700 in U.S. Currency*,⁴⁶ *United States v. Forty-Three Gallons of Whiskey*,⁴⁷ *United States v. Approximately 64,695 Pounds of Shark Fins*,⁴⁸ or *United States v. One Pearl Necklace*.⁴⁹ These captions describe property that is either illegal to possess or alleged to be associated with illegal conduct.

As Justice Clarence Thomas has noted, this reflects the legal fiction that the property itself, not the owner or possessor, is the wrongdoer. In

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a statement in reference to a 2017 case, he explained the relatively tiny historical scope of seizure and forfeiture powers: Originally, these practices were confined to narrow matters such as customs and piracy—in which U.S. courts could not easily attain personal jurisdiction—and narrow types of property—the instruments, not the proceeds, of crime. Thomas suggested that whether “the broad modern forfeiture practice can be justified by the narrow historical one” is “certainly worthy of consideration.”⁵⁰

THE UNUSUAL BURDENS OF FORFEITURE LITIGATION

As a general matter, litigation creates duties for all parties involved in it. However, forfeiture litigation sometimes places additional and unusual duties on property owners.

The burden of proof and the weight of evidence. In many jurisdictions, the property owner bears an unusual burden of proof. Sometimes the property owner, in order to retake possession of the property, must prove his or her innocence.⁵¹ More precisely, the “innocent owner” whose property is seized— for example, the alleged wrongdoer’s spouse, parent, or rent-a-car company— bears the burden of demonstrating innocence through an affirmative defense. This is one of several unfortunate dynamics of forfeiture cases.

Another one is that the current jurisprudence of civil forfeiture makes it difficult to identify a limiting principle that would immunize or screen out conduct as *non-suspicious* in this context. To make matters worse, courts sometimes give great weight to certain facts in forfeiture cases that seem probative of little or nothing. For instance, some courts have found that “nervousness” of the possessor of the property can be a factor providing grounds for a search,⁵² while other courts have found that “appearing unusually calm” can also be a factor that provides grounds for a search.⁵³ (It should go without saying that the prospect of losing possession of one’s property might legitimately create nervousness.)

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Similarly, courts have found not only that traveling between certain cities associated with drugs can help create probable cause, but also that traveling outside drug-courier routes, which might suggest an attempt to avoid detection, can be a factor that helps create probable cause.⁵⁴ Even saying or doing nothing at all can be viewed as suspicious; a court may sometimes draw an adverse inference when a party tries to rest on his or her right to remain silent.

The bottom line here is that the civil forfeiture litigant faces a profound disadvantage compared to a defendant accused of criminal conduct. As a technical matter, the property owner must demonstrate by a preponderance of the evidence that he or she is the rightful possessor of the property. The burden is on the property owner to demonstrate that it is more likely than not that he or she is the rightful possessor. As a practical matter, the institutional weight that is granted to the law enforcement perspective and the institutional weight that is often assigned to innocuous facts often magnify this burden considerably.

The relative absence of procedural protections. The property owner faced with a civil forfeiture proceeding lacks some procedural protections held by the garden-variety criminal defendant. The civil forfeiture litigant may take no refuge in silence, unlike the criminal defendant who cannot be forced to testify against him- or herself under the protections of the Fifth Amendment. Relatedly, the civil forfeiture litigant has no Sixth Amendment right to counsel. Moreover, the civil forfeiture litigant

may in fact refuse to answer particular questions that may tend to be incriminating, but the presiding judge or jury is entitled to draw an adverse inference from that refusal and to consider the failure to answer questions in the course of making its decisions.⁵⁵

Practical implications of burden-shifting. When the property owner bears the burden of proving his or her own innocence, that has broader and more practical implications that may not be obvious. In many contexts, the party who faces the government in court can, at least, force the government to do the work of making its initial case.

Consider the typical prosecutorial legal action against an alleged wrongdoer. If the government wants to punish someone, it has the burden of proving in court that the defendant did something wrong (or otherwise extracting a guilty plea). This is very different from the legal procedure that is often associated with civil forfeiture, in which the property owner who wants his or her property back will likely have to demonstrate that he or she legitimately owns the property.

Shifting the burden of proof also shifts the burden of taking the initiative. Typically, it is the property owner who must bring a claim, sue, initiate the action, and so forth. The owner who fails to take this initiative will ultimately lose ownership of the property. Of course, a weaker version of the duty to engage is usually a part of any adversarial legal proceeding. If you are given notice that your legal rights are going to be determined in court, and you do nothing or ignore the notice, you will almost certainly lose rights through inaction. But the civil forfeiture procedure is

Once the property is seized, and assuming that neither the property owner nor the government takes further action, the seizure can turn into forfeiture more or less automatically.

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especially hard on the property owner. Once the property is seized, and assuming that neither the property owner nor the government takes further action, the seizure can turn into forfeiture more or less automatically.

THE PRACTICALITIES OF FORFEITURE LITIGATION

Participating in litigation is generally unpleasant, and not solely because of its costs in time and money. Litigation involving civil forfeiture, however, is especially unpleasant for property owners, in part because of the unique costs it creates for private-party litigants.

Direct cost of representation. Somebody always has to pay the cost of legal representation, but the expenses stand out with respect to representation in civil forfeiture cases. There is no right similar to that of *Gideon*, in which the Supreme Court famously required states to provide a criminal defense attorney to the accused party who cannot afford one.⁵⁶ Furthermore, the public defender who represents a criminal defendant is not required to vindicate the defendant's rights to his or her own property in the civil arena.

Efficiency of pursuing a claim. Attorneys do not typically work for free; legal representation, notoriously, is not cheap. The number of judgments that transfer property from its original owners to the government will, in part, be a function of the cost of legal services. More precisely, a litigant will be deterred from pursuing the recovery of his or her property if the cost of legal fees is higher than the value of the property. Furthermore, a rational litigant will account for the likelihood of prevailing, and will not pursue recovery in many cases in which the value of the property is greater than the cost of litigation. No rational person will pursue a claim in court to recover \$2,000 if the cost of his or her legal expenses is greater than \$2,000. As noted, the

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There appears to be no penalty when government bodies that have seized property disregard statutory procedures or their own internal policies.

median cash forfeiture is likely well under \$2,000, and the typical fee for legal representation likely dwarfs that figure.⁵⁷ Furthermore, as alluded to above, some jurisdictions impose a demanding schedule of deadlines for civil actions, which makes default more likely and vindication of property owners' rights more difficult. All of this suggests that the vast majority of those whose property is seized will likely find it pointless to pursue its recovery.⁵⁸

The tilted playing field of forfeiture litigation. The adversary system of American law, in which two battling parties face each other and the one with the best argument on the merits wins, is not always fully realized in the real world of forfeiture litigation. As noted, property owners often must bear the expense of their own litigation, but that is far from the only structural disadvantage they face in this arena. When property is seized, the original owner of that property who decides to fund his or her own action may find it increasingly difficult. The original owner might be forced, in effect, to pay for litigation expenses by supplying a share of the property at issue to his or her own counsel. It would be impossible to imagine all the ways that, for instance, a small business would be hamstrung in the event of a cash seizure, which could potentially sound the death knell for a capital-intensive business. Time is not on the side of the property owner with skin in the game; he or she may bear disproportionate costs whenever resolution of the action is extended or delayed.

Property owners regularly face rapid-response requirements not borne by government bodies. In fact, there appears to be no penalty when government bodies that have seized property disregard statutory procedures or their own internal policies in ways that increase delay and make resolution more costly for property owners.⁵⁹

More broadly, the incentives for tribunals to develop a pro-seizure, pro-government bias are discussed below. Such departures from normal process strengthen the hand of the government and weaken that of the property owner in the context of settlement negotiations, as explained below.

The “you keep some, I’ll keep the rest” compromise offer. Owners who take initial steps to pursue the recovery of their property may find that they are confronted with the civil equivalent of plea-bargaining offers. For instance, prosecutors might agree to return part or all of the contested property in exchange for an agreement to drop the suit and all related suits. The persuasive power of the government’s offer rests on the old proverb that a bird in the hand is worth two in the bush. (Notably, these offers to return a share of the property do not always take into account the share of the property that the owner’s attorney will take; in such cases, the property owner is left with only a fraction of a fraction of the original property.) Such agreements appear more controversial than conventional plea-bargain arrangements. The conventional moral justification of plea bargaining is that the criminal defendant who accepts a lesser charge in exchange for jettisoning any liability for the greater one is, at least, getting punished in *some* way; it is less clear what the conventional moral justification of partial or fractional

return of seized property could be. The fact that plea bargain-like offers are made—sometimes combined with special conditions, such as the inclusion of an agreement not to sue the government in exchange for a partial return of the property—raises serious questions about the fairness and internal equality of the bargaining process.

An unusually motivated adversary. The prosecutor has a special job in the American system of justice. The prosecutor's professional responsibility is not so much to win his case, but to ensure that justice is done. The prosecutor is supposed to pursue each case with vigor and to strike hard blows, but is never at liberty to strike foul ones.⁶⁰ The perverse financial incentives of forfeiture—in which, for instance, prosecutors sometimes partially fund their own offices' budgets through forfeited currency⁶¹—present government agents pursuing forfeiture with something that appears similar to a conflict of interest. Occasionally, law enforcement representatives make statements in public that suggest a casual attitude toward conflict-of-interest concerns. As the leader of the South Carolina Sheriff's Association once asked, if government agencies are disallowed from padding their budgets with the forfeited assets they pursue, "what is the incentive to go out and make a special effort?"⁶²

Government agencies typically must appeal to legislative bodies for their funding, a process that typically requires those agencies to make the case that their budgets are cost-effective and are aimed at achieving worthwhile goals. The machinery of seizure and forfeiture presents opportunities for an end run around those constraints—perhaps that is why U.S. Senator Charles Grassley once referred to the federal forfeiture system as "a slush fund for the federal government."⁶³ Worse, courts

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occasionally have displayed an unseemly eagerness in forfeiture cases to rule against the interests of the property owner. In one notorious incident, an Arkansas court insisted on perfecting a forfeiture over the objections of the prosecutor who had both originally brought the action and asked the court to dismiss the case.⁶⁴

THE MULTIPLE FORUMS OF FORFEITURE LITIGATION

An extensive account of the similarities and differences between the multiple forums in which seizure is transformed into forfeiture is beyond the scope of this paper, but it may be helpful to outline some of the distinctions between those forums in broad strokes.

Criminal forfeiture. Under a criminal forfeiture regime, the government pursues both a criminal defendant and the property at issue at the same time and in the same procedure. Notably, the standard protections that criminal defendants are accorded under the Constitution apply. One important implication of this dual-purpose procedure is that property cannot be forfeited until several questions are settled. Specifically, the accused must be found guilty beyond a reasonable doubt and the property at issue must be proven to be associated both with the crime and with the accused party. Because of its more exacting demands, a criminal forfeiture procedure appears far less likely to confiscate property from innocent owners. (Furthermore, the problem of default judgments from low-asset litigants described above does not occur, because there are no civil procedures attached to the criminal procedure context in which property ownership is adjudicated.) For the same reason, prosecutors are generally unlikely to opt for criminal forfeiture when the avenue of civil forfeiture is available.

Civil forfeiture. Under a civil forfeiture regime, the government need only focus on the property, rather than the wrongdoer. Typically, the only matter at issue is whether the property at issue is the proceeds or the instrument of a crime. The relatively weak protections that civil forfeiture safeguards offer to owners make this option a relatively attractive method for forfeiture-minded prosecutors. Some jurisdictions allow property

owners the choice between either a courtroom proceeding on civil forfeiture or an administrative forfeiture; the latter is described below.

The financial expenses that property owners must bear in order to pursue the recovery of their own property are often significant. These expenses are most likely to include costs like filing fees and attorney representation, but they may also include the possibility, in the event they lose the case, of having to pay the government's costs or funding a bond in that event.

There are also some jurisdictions in which the property owner who is victorious at trial may have the right to collect attorneys' fees from the government. Nonetheless, there are instances in which the government has evaded those fee awards by returning the property at issue before a possible loss in court, and then arguing that the property's owner technically did not prevail at trial.⁶⁵

Administrative forfeiture. Administrative forfeiture, a subset of civil forfeiture, carries with it a certain degree of informality that may make it appear relatively attractive, but it may not be so.⁶⁶ Under an administrative forfeiture regime, the government is not required to initiate forfeiture proceedings by explaining its case in court. Rather, an agent of the government must only send a letter to the property owner explaining its intent to begin forfeiture proceedings. If the government receives no response after a given period, the forfeiture is completed and the case is closed.

Although one presumed advantage of an administrative forfeiture system is that property owners do not require a lawyer to navigate it, a significant portion of claims that are filed by property owners in

Sometimes state-federal teamwork on forfeiture can allow state authorities to partially evade the protections enacted by their own state's legal framework, given sufficient federal involvement.

response to notification letters they receive are deemed deficient. Such a deficiency in effect ends the case and results in transfer of property to the government. Many such claims are apparently found unsatisfactory for technical reasons, which casts doubt on whether legal representation is unnecessary in such cases and that the property owner can reliably represent him- or herself. In fact, some jurisdictions categorize as "uncontested forfeitures" those associated with claims that have been rejected for technical reasons; labeling such forfeitures as "uncontested" is highly misleading. Furthermore, those under an administrative forfeiture regime may not have their case heard by a judge who is constrained by institutional norms to be impartial and neutral.

State and federal forfeiture. The federalist system of government in the United States has relevant features here: Sometimes state governments handle forfeiture, sometimes the federal government handles forfeiture, and sometimes both levels of government work together.

This can create loopholes in the disposition of forfeiture cases. Sometimes state-federal teamwork on forfeiture can allow state authorities to partially evade the protections enacted by their own state's legal framework, given sufficient federal involvement. In particular, the practice known as "equitable sharing" allows state and federal government actors to work as a team to seize and forfeit property. Federal law substitutes for state law in equitable sharing, and the state typically receives the majority of the proceeds from forfeiture. Because

federal forfeiture rules often give the government more power than state forfeiture rules, and because the federal government has greater strength and more resources, this kind of government collaboration is often viewed as a win-win for both state and federal governments. Property owners whose assets are seized may have a different view.

During the Obama administration, the federal Departments of Justice and of the Treasury adopted new methods to further regulate one kind of equitable sharing—called adoptions, more strictly. Adoptions are best thought of as a kind of handoff—they occur when state governments handle the initial work of seizure, but then hand off forfeiture duties to the federal government, typically because the federal government’s relative power and expertise appears greater. The Obama administration’s limits on adoptions appeared to be motivated by the idea that state-level agencies were relying on the federal machinery of forfeiture to evade the strictures of state laws that were more protective of property owners. By and large, however, the Trump administration, reversed the Obama administration policies and returned to the status quo ante. Notably, however, the Obama administration’s forfeiture reforms left the majority of equitable sharing forfeitures untouched. Unlike adoptions, federal joint operations procedures, which involve more extensive teamwork between state and federal governments, remained untouched; the shape of these operations continued more or less unchanged through the Obama, Trump, and Biden administrations.

CONCLUSION

Imagine a country where police officers regularly take property from civilians, based on the officers’ allegations of criminal conduct. Not only are those allegations of criminal conduct never discussed in court, but criminal charges are never filed. Imagine a country where the protections against seizure and forfeiture are so fragile that they encourage the police to treat every roadside encounter as an interaction with a career criminal—and, in turn, they encourage civilians to view the police not as protectors, but as predators. Imagine the wedge that such laws and such incentives would drive between law enforcement officers and honest, law-abiding citizens.

Of course, you do not have to imagine anything; that is the country we live in.

A NOTE ON THE NOTES

Any extensive discussion of the law of forfeiture inevitably includes some discussion of the constitutional rights of property owners and the holdings of judicial opinions that explain those rights; this paper provides signposts to some opinions at the center of the dynamics of seizure and forfeiture. Although this paper provides rudimentary explanations of some aspects of these opinions, those who seek a sophisticated understanding of our rights under the law will find that there is no substitute for extensive examination of the decisions referenced here, as well as examination of subsequent decisions, regulations, and statutes that explain or modify their impact.

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NOTES

- 1 John R. Emshwiller and Gary Fields, “Federal Asset Seizures Rise, Netting Innocent with Guilty,” *Wall Street Journal*, August 22, 2011, <https://www.wsj.com/articles/SB10001424053111903480904576512253265073870>.
- 2 Lisa Knepper, Jennifer McDonald, Kathy Sanchez, and Elyse Smith Pohl, *Policing for Profit, 3rd Edition*, Institute for Justice, December 2020, p. 20, <https://ij.org/wp-content/themes/ijorg/images/pfp3/policing-for-profit-3-web.pdf>.
- 3 Christopher Ingraham, “Law enforcement took more stuff from people than burglars did last year,” *Washington Post*, November 23, 2015, <https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/>.
- 4 U.S. Constitution, Amendment VI.
- 5 Gerald E. McDowell, “Why Prosecutors Choose Civil Forfeiture,” *New York Times*, July 5, 1996 (letter to editor), <https://www.nytimes.com/1996/07/05/opinion/1-why-prosecutors-choose-civil-forfeiture-063487.html>.
- 6 Rod J. Rosenstein, “Bernie Madoff and the Case for Civil Asset Forfeiture,” *Wall Street Journal*, November 9, 2017, <https://www.wsj.com/articles/bernie-madoff-and-the-case-for-civil-asset-forfeiture-1510237360>. Emshwiller and Fields.
- 7 Stewart M. Powell, “Asset forfeiture both an effective tool, civil liberties nightmare,” *Houston Chronicle*, May 24, 2013, <https://www.chron.com/news/nation-world/article/Asset-forfeiture-both-an-effective-tool-4546043.php>.
- 8 Rosenstein.
- 9 Knepper, McDonald, Sanchez, and Smith Pohl, *Policing for Profit*.
- 10 Ark. ST § 5-64-505; Ark. Dist. Ct. R. 6 (30 days); M.C.L.A. 333.7523 (20 days).
- 11 A comprehensive analysis of the powers of law enforcement officers and the correlative rights of citizens under the Constitution is beyond the scope of this paper, but the cases cited illustrate some general principles that courts rely on. *Florida v. Royer*, 460 U.S. 491, 497 (1993) (“law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some question, by putting questions to him if the person is willing to listen”). *Florida v. Bostick*, 501 U.S. 429, 434 (2015) (citing *Royer*).
- 12 *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987), <https://supreme.justia.com/cases/federal/us/480/321/> (highlighting the distinction between plain-view observation and information acquired via search).
- 13 *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983), <https://supreme.justia.com/cases/federal/us/463/1032/> (explaining the justification for automobile search based on officer safety).

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- 14 Readers who want to understand the path of the law in this area are well advised to begin by reading *Terry v. Ohio*, 392 U.S. 1 (1968), <https://supreme.justia.com/cases/federal/us/392/1/>. It has been followed by a cascade of cases that delineate the authority of government agents (and the limits of that authority) to search and detain citizens.
- 15 *U.S. v. Arvizu*, 534 U.S. 266, 273 (2002), <https://supreme.justia.com/cases/federal/us/534/266/> (alluding to the extension of *Terry* stops to vehicles).
- 16 This paper’s account of the interactions between Encinia and Bland relies chiefly on the account in Malcolm Gladwell, *Talking to Strangers* (2019), especially chapter 12, video records from Encinia’s car (<https://www.youtube.com/watch?v=2kI7mzowxus>), and Ryan Grim, “The Transcript of Sandra Bland’s Arrest Is As Revealing As the Video,” *Huffington Post*, July 22, 2015, https://www.huffpost.com/entry/sandra-bland-arrest-transcript_n_55b03a88e4b0a9b94853b1f1.
- 17 This calculation assumes a 50-week work year and a 40-hour work week. A 2,000-hour work year in which 1,600 tickets are issued implies that, on average, one ticket is issued every 75 minutes.
- 18 As a technical matter, Bland was incorrect when she argued that Encinia could not order her out of her car. Perhaps Encinia’s order was motivated more by Bland’s evident disrespect of Encinia’s authority than anything else; nonetheless, Encinia’s motive was irrelevant to the legality of his order.
- 19 There are surely many people who believe that there is nothing in their cars that would be of any interest to law enforcement personnel, but are nonetheless mistaken. For instance, a family member who jointly owns or uses a car might use it to store property without anyone else’s knowledge. Indeed, even though many people might think of the possession of certain kinds of property as perfectly innocent conduct, such possession might create criminal liability: consider the District of Columbia’s firearm control regulations, which appear to criminalize the possession of a spent (and therefore unusable) cartridge or shotgun shell. DC ST §§ 7-2501.01, 7-2506.01.
- 20 By and large, this paper explains the limits of government power that are entailed by the U.S. Constitution and the judicial decisions that interpret it. In some jurisdictions, the scope of government power is further limited by state constitutions and related court decisions, but because those constraints are limited to particular jurisdictions, this paper does not analyze them.
- 21 *Arizona v. Hicks*, at 324-325. Items in plain view are generally vulnerable to seizure by government agents, so long as the officer has lawful access to the item and there is probable cause to seize the item.
- 22 *Michigan v. Long*, at 1049-50.
- 23 *U.S. v. Palmer*, 820 F. 3d 640 (Fourth Circuit 2016), <https://supreme.justia.com/cases/federal/us/16/610/> (“liberal use of air fresheners” strengthened officer’s suspicion of criminal conduct).
- 24 *Whren v. U.S.*, 517 U.S. 806, 813 (1996), <https://supreme.justia.com/cases/federal/us/517/806/> (“constitutional reasonableness of traffic stops” is not based on “actual motivations of the individual officers involved”).

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- 25 *Heien v North Carolina*, 574 U.S. 54, 57 (2014),
https://www.supremecourt.gov/opinions/14pdf/13-604_ec8f.pdf (reasonable mistake of law
enforcement may give rise to reasonable suspicion). For a more general discussion of the
nature of a “reasonable mistake,” see, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990).
- 26 *Berkemer v. McCarty*, 468 U.S. 420, 437-440 (1984),
<https://supreme.justia.com/cases/federal/us/468/420/> (motorist questioned by officer during
a traffic stop is under “custodial interrogation” and therefore not entitled to a recital of
Miranda rights).
- 27 *U.S. v. Palmer*, 644-45, for an example of this.
- 28 *Maryland v. Wilson*, 519 U.S. 408, 410 (1997),
<https://supreme.justia.com/cases/federal/us/519/408/> (“a police officer may as a matter of
course order the driver of a lawfully stopped car to exit his vehicle;” this power extends to
passengers as well).
- 29 *Terry v. Ohio*, at 25-26, <https://www.law.cornell.edu/supremecourt/text/392/1>.
- 30 Mike Ives and Maria Cramer, “Black Army Officer Pepper-Sprayed in Traffic Stop Accuses
Officers of Assault,” *New York Times*, April 10, 2021,
<https://www.nytimes.com/2021/04/10/us/car-on-nazario-windsor-police-virginia.html>.
Jorge Fitz-Gibbon, “Video shows state trooper flipping pregnant woman’s car during
chase,” *New York Post*, June 10, 2021,
<https://nypost.com/2021/06/10/video-shows-arkansas-trooper-flipping-pregnant-womans-car/>.
- 31 *Michigan v. Long*, at 1047.
- 32 Sam Kamin and Zachary Shiffler, “Obvious but Not Clear: The Right to Refuse to Cooper-
ate with the Police During a *Terry* Stop,” *American University Law Review*, Vol. 69, Issue 3,
Article 4, pp. 915-966 (2020),
<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2117&context=aulr>.
- 33 *Rodriguez v U.S.*, 575 U.S. 348, 354-55 (2015),
<https://www.law.cornell.edu/supremecourt/text/13-9972> (authority for the seizure “ends
when tasks tied to the traffic infraction are—or reasonably should have been—completed”).
- 34 *Berkemer v. McCarty*, at 435-40.
- 35 18 U.S.C § 1001, which criminalizes any knowing, materially false statement that is
connected to a federal matter and made to (inter alia) a federal law enforcement officer.
- 36 Kamin and Shiffler.
- 37 *Hibel v. Sixth Judicial Court of Nevada*, 542 U.S. 177, 187-189 (2004),
<https://www.law.cornell.edu/supct/html/03-5554.ZO.html> (operation of state law requiring
a person detained under suspicious circumstances to self-identify does not contravene
constitutional rights).
- 38 Kamin and Shiffler, pp. 17-19.
- 39 As discussed above, law enforcement officers are disallowed from making decisions about
detention based on impulses or hunches. Rather, detention must be based on “specific and
articulable facts.” *Terry v. Ohio* at 21.
- 40 *Rodriguez v. U.S.*, at 348.

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41 This doctrine’s origins can be found in *Silverthorne Lumber Company v. United States*, 251
U.S. 385 (1920), <https://supreme.justia.com/cases/federal/us/251/385/>. The metaphor of the
fruit of the poisonous tree is first seen in *Nardone v. U.S.*, 308 U.S. 338, 341 (1939),
<https://supreme.justia.com/cases/federal/us/308/338/>.
42 *Rodriguez v. U.S.*, at 357.
43 49 U.S.C.A. § 44901 (g)(4).
44 49 CFR § 1540.5.
45 *Federal Register*, Vol. 70, No. 39, March 1, 2005, pp. 9877-9879,
<https://www.govinfo.gov/content/pkg/FR-2005-03-01/pdf/05-3977.pdf>.
46 458 F.3d 822 (8th Cir. 2006).
47 108 U.S. 491 (1883).
48 520 F. 3d 976 (9th Cir. 2008).
49 105 F. 357 (1900).
50 *Leonard v. Texas*, 137 S. Ct. 847 (Mem. 2017),
<https://www.law.cornell.edu/supremecourt/text/16-122> (Thomas’s statement respecting
the denial of certiorari).
51 Knepper et al, p. 168.
52 *Cortes v. State*, 260 P.3d 184, 189 (Nev. 2011),
<https://law.justia.com/cases/nevada/supreme-court/2011/127nevadvopno44.html>.
53 *U.S. v. Himmelwright*, 551 F. 2d 991, 992 (Fifth Circuit 1977),
<https://law.justia.com/cases/federal/district-courts/FSupp/406/889/2143401/>.
54 Compare *U.S. v. \$189,925 in U.S. Currency*, 8 F. Supp. 2d 1300, 1310 (N.D. Okla. 1998)
aff’d sub nom. U.S. v. \$189,925, 216 F.3d 1089 (10th Cir. 2000) (traveling on known
drug-courier route was a factor supporting probable cause) with *State v. Damask*,
936 S.W.2d 565, 569 (Mo. 1996),
<https://law.justia.com/cases/missouri/supreme-court/1996/78826-0.html> (avoiding
drug-courier routes provided a basis for law enforcement investigation).
55 *Baxter v. Palmigiano*, 425 U.S. 308, 318-319 (1976),
<https://supreme.justia.com/cases/federal/us/425/308/> (holding of case is “consistent
with the prevailing rule that the Fifth Amendment does not forbid adverse inferences
against parties to civil actions when they refuse to testify in response to probative
evidence offered against them”).
56 *Gideon v. Wainwright*, 372 U.S. 335 (1963),
<https://supreme.justia.com/cases/federal/us/372/335/>.
57 Knepper et al, p. 20.
58 The author’s estimate of a typical attorney fee for this service rests largely on informal
inquiries to several attorneys; in the author’s opinion, a requested fee of several thousand
dollars for this service would be typical. Many attorneys rely solely on contingency fees;
sometimes those contingency fees imply a fee structure of payment for services that would
result in a flat refusal by the attorney to take a case that would, if it prevailed, result in an
attorney payoff in the triple digits.

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- 59 Office of the Inspector General, Department of Homeland Security, “DHS Inconsistently Implemented Administrative Forfeiture Authorities under CAFRA,” August 27, 2020, <https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-66-Aug20.pdf>.
- 60 Paraphrase of *Berger v. United States*, 295 U.S. 78, 88 (1935), <https://supreme.justia.com/cases/federal/us/295/78/>.
- 61 The federal government and some state governments prohibit the use of equitable sharing funds to pay for salaries. However, it is difficult to see how these paper barriers serve as effective prohibitions. Money is fungible; if a government budget provides for salaries, and if equitable sharing funds can be distributed to that budget, then in practice those funds may indirectly subsidize those salaries.
- 62 Anna Lee, Nathaniel Cary, and Mike Ellis, “SC Cops Defend Keeping Cash They Seize: ‘What’s the Incentive’ Otherwise?” *Greenville News*, February 3, 2019, <https://www.greenvilleonline.com/story/news/taken/2019/02/03/sc-civil-forfeiture-police-defend-practice-say-funds-essential-law-enforcement/2746412002/>.
- 63 Powell.
- 64 Jacob Sullum, “Arkansas Trooper Steals \$20,000, Because Nobody Innocent Carries That Much Cash,” May 11, 2016, *Reason*, <https://reason.com/2016/05/11/arkansas-trooper-steals-20000-because-no/>.
- 65 For an overview of the issue, see, Petition for Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit, *Salgado v. United States*, No. 19-659, 2019 WL 6245392 (November 19, 2019), <https://ij.org/wp-content/uploads/2019/11/Salgado-v.-United-States-of-America-Petition-for-a-Writ-of-Certiorari.pdf>, cert denied, 2020 WL 1668293 (Apr. 6, 2020).
- 66 “Administrative forfeiture” is used here to label one broad category of adjudicative procedure. However, the phrase is sometimes used to mean something quite different: the result of a default-judgment forfeiture proceeding—a forfeiture proceeding in which the owner fails to appear in court to argue for his or her side of the case.

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About the Author

Dan Greenberg is an attorney and former state legislator. He was senior policy advisor at the U.S. Department of Labor from 2017 to 2021, where he served in the Office of the Assistant Secretary for Policy, the Employment and Training Administration, and the Veterans’ Employment and Training Service. He holds degrees from Brown University, Bowling Green State University, and the University of Arkansas-Little Rock. This is his first paper for the Competitive Enterprise Institute.



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