

# Civil Asset Forfeiture

Civil asset forfeiture is a controversial tool used by federal, state, and local law enforcement agencies to seize cash, vehicles, houses, or other property that is believed to be connected to a crime. Law enforcement agencies can seize property even when the property's owner has no knowledge of, or has not been charged with, any crime. Under state and federal forfeiture laws, law enforcement agencies can then sell seized assets—or, in the case of cash, directly absorb the money—and use the proceeds to fund and expand agency budgets.

The civil forfeiture regime is in dire need of reform. Because civil forfeitures are not criminal actions, owners of seized assets are not afforded fundamental protections, including the right to legal representation, which makes it more likely that the owners will be permanently deprived of their property without ever having their day in court.

**Congress should:**

- ◆ Pass the Fifth Amendment Integrity Restoration (FAIR) Act (H.R. 2857, 117th Congress) to reform the forfeiture system to make it more equitable.
- ◆ Work to curtail civil asset forfeiture at the federal level, ideally by ending the federal two-track process by which civil forfeitures procedures place a lower burden of proof on the government before it is allowed to seize property.

Civil forfeiture proceedings create significant disadvantages for owners who attempt to challenge the seizure and recover their property. Unlike criminal defendants, they must pay for their own litigation expenses, including attorneys' fees. In court, property owners lack the protections that criminal defendants customarily have. In criminal proceedings, guilt is determined by the demanding constitutional standard of "beyond a reasonable doubt." In civil forfeiture proceedings, the government merely needs to show that the property is connected to a crime by a "preponderance of evidence"—that is, the majority of the weight of the evidence. In some states, law enforcement officials need only to satisfy an even lower standard—probable cause—in order for government agencies to keep the property.

Although some jurisdictions have passed reforms that protect property owners from the overuse or misuse of civil forfeiture, federal equitable sharing programs allow state and local law enforcement to circumvent state-level reforms that limit their ability to seize assets from people who have not been charged with crimes. The institution of civil forfeiture encourages law enforcement officials to pursue revenue that can increase their own office budgets, thus diverting them from efforts to advance public safety and control crime. Furthermore, civil forfeiture often creates a perverse dynamic in which property owners who are subjected to it may be forced into acquiescing to the seizure of their property without any remedy, essentially because attorneys' fees outweigh the expected value of the property they seek to recover.

In the near term, Congress should pass the Fifth Amendment Integrity Restoration Act. Previous versions of the Act have contained provisions to accomplish the following:

- ◆ **End the federal equitable sharing program.** This program allows state law and local enforcement officials to seize property and transfer the title to the government in a manner that resists state-created property protections. Under equitable sharing, state and local police typically can turn over seized property to federal officials in exchange for 80 percent of the proceeds. This both circumvents state-level reforms and creates perverse incentives for law enforcement to seize as much property as possible.
- ◆ **Create a more demanding burden of proof for owner liability.** The FAIR Act would require the government to prove its case for civil forfeiture by meeting a higher standard of "clear and convincing" proof rather than the current preponderance of evidence standard. The test of "clear and convincing" proof

requires significantly weightier evidence than the current “preponderance of evidence” test; “clear and convincing” is best understood as a middle ground between “preponderance of evidence” and “proof beyond a reasonable doubt.”

- ◆ **Restore the principle of innocent until proven guilty.** Under current law, innocent property owners face the prospect of seizure even if they have not been charged with wrongdoing. In the event of seizure, the FAIR Act places a burden on the government to show, by clear and convincing evidence, that a property owner either had knowledge of the property’s relation to wrongdoing or was willfully blind to the property’s use.
- ◆ **Protect the right to counsel.** Under current law, property owners can receive appointed counsel due to indigency only if (a) they request it and (b) their home has been seized. The FAIR Act would ensure that owners have the opportunity to receive representation in all civil forfeiture proceedings.
- ◆ **Remove the profit incentive for law enforcement.** Law enforcement should be motivated by public safety, not financial rewards. The FAIR Act would restore the rule in which the proceeds of forfeiture go to the Treasury’s General Fund, where Congress could exercise its constitutional authority to assign those proceeds as it sees fit.
- ◆ **Enact transparency requirements.** Under the FAIR Act, the Department of Justice (DOJ) would be required to compile and report the percentage of its seizures that were subjected to civil and criminal asset forfeiture.
- ◆ **Award multiple damages to successful plaintiffs.** Currently, the prospect of recovery of forfeited property is often not worth the cost of litigation. The FAIR Act’s proposal of treble damages in the event of a courtroom victory would discourage weakly supported seizures and encourage victims of forfeiture to pursue their rights.

The current version of the FAIR Act has bipartisan support, with 36 sponsors or cosponsors.

In the long term, Congress should curtail civil asset forfeiture at the federal level more generally, ideally by ending the federal two-track process of separate criminal prosecutions of individuals and civil forfeitures of their property. A streamlined process that encompasses one single court action covering both prosecution and forfeiture would be more equitable to the parties involved.

Expert: Dan Greenberg

***For Further Reading***

Dan Greenberg, “They’re Taking My Stuff: What You Need to Know about Seizure and Forfeiture,” *Issue Analysis* No. 1, Competitive Enterprise Institute, September 2021, <https://cei.org/studies/theyre-taking-my-stuff/>.

Dan Greenberg, “Five Myths of Civil Forfeiture,” *Issue Analysis* No. 4, Competitive Enterprise Institute, April 2022, <https://cei.org/studies/five-myths-of-civil-forfeiture/>.