

Civil asset forfeiture



14

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.

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—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.

To begin addressing this injustice, Congress should:

- Pass the Fifth Amendment Integrity Restoration (FAIR) Act; and
- Work to curtail civil asset forfeiture at the federal level.

Pass the FAIR Act: Versions of the Act have contained provisions to:

- End the federal equitable sharing program;
- Create a more demanding burden of proof for owner liability;
- Restore the principle of innocent until proven guilty;
- Protect the right to counsel;
- Remove the profit incentive for law enforcement;
- Enact transparency requirements; and
- Award multiple damages to successful plaintiffs.

The current version of the FAIR Act passed unanimously (26-0) out of the House Judiciary Committee in 2023. Its 18 House cosponsors are divided evenly among Republicans and Democrats.

Curtail federal civil asset forfeiture: Ideally, this would be accomplished 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, Second Edition," Issue Analysis No. 3, Competitive Enterprise Institute, April 2023, <https://cei.org/wp-content/uploads/2023/05/Five-Forfeiture-Myths-2ndEd-v2.pdf>