Civil Forfeiture and the Constitution: Are Individual Rights Really Less Important Than the War on Drugs?‡

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Democracy creates an often precarious balance between the needs of the individual and the needs of the whole. To shelter individuals from the passions of the day, the Founding Fathers enumerated certain rights and established constitutional protections. As the ultimate interpreter of the Constitution, the Supreme Court of the United States uses these rights and protections as tools to weigh the needs of the individual against the needs of the whole. In the last two decades, however, a war on drugs in the United States has been used to justify infringements upon traditional property rights and due process. The antiquated concept of forfeiture has become one of the primary weapons in this drug war and, as such, is often the device by which individual rights are sacrificed.

With origins dating back to the Old Testament, the concept of forfeiture is not new.[1] Its modern application in the United States developed from the English common law tradition which allowed for three types of forfeiture, all of which were understood to impose punishment. First, under English common law, the word "deodand" was used to describe an object deemed responsible for a death. A cart under which someone was crushed, for example, might have been forfeited as a deodand. The legal term *in rem* was applied to deodand proceedings because the subject of forfeiture in these cases was insentient. The second type of forfeiture allowed under English common law was *in personam*. This meant that the act of forfeiture was taken against a person rather than an insentient object. Under this concept, those convicted of a felony or treason were deprived of their estates. The third and final form of forfeiture allowed

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[1]Exodus 21:28.

under English common law was statutory forfeiture. As in the case of deodands, such proceedings were *in rem* and were allowed as a penalty for violations of customs and revenue laws.[2]

England introduced forfeiture to the New World as a tool to enforce the Navigation Acts in the American colonies. The Navigation Act of 1660, for example, required that English vessels be used to transport most commodities. Violation of these acts resulted in the forfeiture not only of goods, but also the ships in which they were carried. Colonists opposed this use of forfeiture because they resented sending profit to the Crown. They also opposed the law because it allowed the British to try maritime cases without a jury. In one such case involving two now-famous colonists, attorney John Adams defended merchant John Hancock against a charge of evading customs duties. Adams argued that the action against Hancock should be dropped because the forfeiture proceeding denied Hancock his right to a trial by jury.[3]

After the Revolutionary War, forfeiture law was incorporated into the American legal system. Based on the English concept of statutory forfeiture, the early American version allowed for the seizure of ships and cargos when import duties were not paid and for the seizure of vessels used to deliver slaves.[4] Lawgivers, believing that property was a natural right and a cornerstone of liberty, drafted the law so as to limit government authority over personal property. For example, *in personam* estate forfeiture was not embraced because it deprived not only convicted felons, but also their families, of property.[5] The concept of deodands, in which insentient objects were the subject of forfeiture, was

[2]Alan Nicgorski, "The Continuing Saga of Civil Forfeiture, the 'War on Drugs,' and the Constitution: Determining the Constitutional Excessiveness of Civil Forfeitures," *Northwestern University Law Review* 91 (fall 1996), 379-80; Donald J. Boudreaux and A.C. Pritchard, "Innocence Lost: *Bennis* v. *Michigan* and the Forfeiture Tradition," *Missouri Law Review* 61 (summer 1996), 600-08; *Austin* v. *United States*, 113 S.Ct. 2801, 2806-2808, 2815 (1993); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974).

[3]*Austin* v. *United States*, 2807; Boudreaux and Pritchard, "Innocence Lost," 605-08; Nicgorski, "Continuing Saga," 380.

[4]Nicgorski, "Continuing Saga," 381; *Calero-Toledo* v. *Pearson Yacht*, 683; R. Todd Ingram, "The Crime of Property: *Bennis* v. *Michigan* and the Excessive Fines Clause," *Denver University Law Review* 74 (1996), 295.

[5]Boudreaux and Pritchard, "Innocence Lost," 604-05.

also never formally incorporated into American jurisprudence. In fact, it was eliminated from English law in 1846 when accidental deaths due to industrialization and urbanization made it increasingly difficult to view forfeiture as a deterrent to negligence.[6] Well into the nineteenth century, forfeiture proceedings in the United States were generally limited to Admiralty cases. In the early twentieth century, forfeiture was also used for a short time to enforce Prohibition.[7]

Forfeiture as a deterrent against illegal activity resurfaced in the United States in the late twentieth century, shortly after President Richard Nixon's successful law and order campaign of 1968. The Comprehensive Drug Abuse Prevention and Control Act, passed in 1970 as part of the Controlled Substances Act, included forfeiture provisions. The Organized Crime Control Act of 1970 also allowed for forfeiture proceedings. While this use of forfeiture was intended to provide law enforcement with a weapon against illegal drug activity, these new laws fell far short of expectations. In 1980, a Senate judiciary subcommittee on criminal justice conducted hearings on the effectiveness of the 1970 laws and acknowledged that forfeiture was failing in the nation's war on drugs.[8]

By the early 1980s, Congress responded to public concern over the illegal drug trade and focused its efforts on anti-drug legislation. It targeted the traffickers' financial incentive by including civil forfeiture provisions in the Comprehensive Crime Control Act of 1984.[9] Measured only by the value of seized assets, this law appears to have been effective. In 1985, the government seized $27.2 million in forfeiture proceedings; by 1994, this amount increased to $649.7 million. The total value of assets seized by federal agencies since 1990 is estimated to

[6]Ibid., 602; Leonard W. Levy, *A License to Steal: The Forfeiture of Property* (Chapel Hill: University of North Carolina Press, 1996), 17-19.

[7]Nicgorski, "Continuing Saga," 381.

[8]Robert E. Blacher, "Clearing the Smoke from the Battlefield: Understanding Congressional Intent Regarding the Innocent Owner Provision of 21 U.S.C. at 881 (a) (7)," *Journal of Criminal Law and Criminology* 85 (fall 1995), 506; Eric L. Jensen and Jurg Gerber, "The Civil Forfeiture of Assets and the War on Drugs: Expanding Criminal Sanctions While Reducing Due Process Protections," *Crime & Delinquency* 42 (July, 1996), 422; Levy, *License to Steal*, 91.

[9]Blacher, "Clearing the Smoke," 506-08; Jensen and Gerber, "Civil Forfeiture of Assets," 423.

have been approximately $2.7 billion.[10] The proliferation of forfeiture laws and the value of seized assets, however, are inadequate tools in measuring the success of America's war on drugs. Even statistics on drug trafficking are of little use, since it is impossible to know what impact forfeiture has had on such statistics. More importantly, the value of seized assets and other statistics offer an incomplete picture. A thorough analysis of forfeiture also requires consideration of less tangible issues, such as the possible infringement of individual liberties.

While there is the chance for error in the application of any law, the statistically insignificant potential for such an error is generally deemed less compelling than the potential benefit of the law to society. Civil forfeiture, however, creates the potential for an innocent person to be victimized by allowing the seizure of property without an arrest or conviction. In recent years, media reports have brought the plight of innocent owners victimized by forfeiture to the attention of the American public. Such reports include the case of a Colombian businessman whose $400,000 Cessna plane was seized in Miami by the Drug Enforcement Agency. Although the owner later proved to be a legitimate businessman who was planning to use the plane in his emerald mining business, it took two years and $75,000 in legal fees for the plane to be returned.[11] In 1992, a sixty-one-year-old California millionaire was shot to death during a raid which had been prompted by a false tip that marijuana was being grown on his ranch. The local district attorney determined that the raid was prompted, at least in part, by a desire to acquire the property for resale.[12] Opponents of forfeiture argue that the law increases the danger for such victimization of innocent persons by providing a financial incentive for law enforcement agencies to be overly aggressive in their application of the law.

Potential revenue streams, which are built into many forfeiture laws, may thus serve as unintentional incentives for abuse by law enforcement agencies. Under federal law, forfeited assets are placed into a fund from

[10]Susan Adams, "Forfeiting Rights," *Forbes*, May 20, 1996, 96; Jensen and Gerber, "Civil Forfeiture of Assets," 424; Don Van Natta, Jr., "Make Crime Pay: Get the Goods," *New York Times*, June 30, 1996, sec. 4, p. 16.

[11]Adams, "Forfeiting Rights," 96.

[12]Robert E. Bauman, "Take it Away," *National Review* XLVII (February 20, 1995), 34; Peter Cassidy, "Without Due Process: In the War on Drugs, You Don't Have To Be Guilty To Pay The Price," *The Progressive* (August, 1994), 32.

which disbursements are made to the Federal Bureau of Prisons and for drug enforcement activities that are part of the national drug control strategy. In addition, any law enforcement agency that participates in the seizure of assets may also request a part of the proceeds. At the state level, forfeited assets may be kept locally or even be put into the state's general fund.[13] With millions of dollars at stake, this revenue provides a powerful temptation for law enforcement agencies to be overly aggressive in their application of forfeiture law.[14] Because the forfeiture activities of law enforcement personnel are relatively unregulated, it is difficult to identify the extent to which forfeiture may be abused.[15] Given this background it is not surprising that civil forfeiture has become a frequent target of constitutional attacks.

One such constitutional challenge is the claim that forfeiture denies property owners procedural due process. To understand this argument, a distinction must be made between civil and criminal forfeiture. In criminal forfeiture proceedings, a person convicted of a crime may be compelled to forfeit property if it can be linked to the crime for which the property owner is convicted. Because it is a criminal proceeding, the individual is guaranteed procedural due process, meaning that he is guaranteed both notice and an opportunity to be heard. As with any criminal charge, proof beyond a reasonable doubt is required. By contrast, the government need only show probable cause in order to seize property as part of a civil forfeiture proceeding. Hearsay, circumstantial evidence, or facts obtained after the seizure may all be used to demonstrate probable cause; neither an arrest nor a conviction is required. Once property has been seized, the burden of proof shifts to the owner. In order to reclaim the property, the owner must prove by a preponderance of evidence that his seized property was not connected to the illegal activity.[16] The constitutionality of the government's right to take property in civil forfeiture proceedings without the same procedural due process afforded in criminal proceedings was challenged before the

[13]Jensen and Gerber, "Civil Forfeiture of Assets," 424-25.

[14]Cassidy, "Without Due Process," 33-34; Bauman, "Take It Away," 34-35.

[15]Jensen and Gerber, "Civil Forfeiture of Assets," 425; Bauman, "Take It Away," 34.

[16]Jensen and Gerber, "Civil Forfeiture of Assets, "425-27; Nicgorski, "Continuing Saga," 383-84; Blacher, "Clearing the Smoke," 508-09.

Supreme Court of the United States in *Van Oster* v. *Kansas* (1926).[17] Speaking for the Court, Justice Harlan F. Stone said that "[i]t has long been settled that statutory forfeitures of property intrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment." The Rehnquist Court agreed in *Bennis* v. *Michigan* (1996), when it ruled that the forfeiture of a car which had been used in the commission of a crime did not violate the owner's right to procedural due process.[18]

Opponents of civil forfeiture have fared somewhat better in Constitutional challenges based upon the Excessive Fines Clause of the Eighth Amendment. Identifying punishment as a determinant for when limits are constitutionally guaranteed by the Excessive Fines Clause, the Court found in *Austin* v. *United States* (1993) that forfeiture served both a remedial and a punitive function. Speaking for the Court, Justice Harry Blackmun said that since forfeiture represents payment to a sovereign as punishment, it is subject to the Excessive Fines Clause of the Eighth Amendment.[19] The Court thus acknowledged that there is a limit to what may be seized from an individual in a civil forfeiture proceeding.

For the *Austin* ruling to extend any real protection to property owners, a standard must exist with which to measure forfeiture. In *Austin*, however, the Court specifically declined to establish such a test and deferred the question to the lower courts. In a concurring opinion in *Austin*, Justice Antonin Scalia suggested a proportionality test when he said that "the relevant inquiry for an excessive forfeiture . . . is the relationship of the property to the offense: was it close enough to render the property under traditional standards, 'guilty' and hence forfeitable?"[20]

[17]*Van Oster* v. *Kansas*, 272 U.S. 465 (1926).

[18]*Bennis* v. *Michigan*, 116 S.Ct. 994 (1996). For analysis of the *Bennis* decision, see Ingram, "The Crime of Property," 293-310; Boudreaux and Pritchard, "Innocence Lost," 593-632; Melissa N. Cupp, "*Bennis* v. *Michigan*: The Great Forfeiture Debate," *University of Tulsa Law Journal* 32 (spring 1997), 583-604; Lois Malin; "Too Firmly Fixed to Be Now Displaced: More Than a Century of Forfeiture Law Outweighs Even a Truly Innocent Owner [*Bennis* v. *Michigan*, 116 S.Ct. 994 (1996)]," *Washburn Law Journal* 36 (fall 1996), 131-51.

[19]*Austin* v. *United States*, 2812.

[20]Ibid, 2815.

Following Justice Scalia's example, some lower courts use such a proportionality test. In doing so, they often rely on *Solem* v. *Helm* (1983), in which the Court established a principle of proportionality in applying the Eighth Amendment's Cruel and Unusual Punishments Clause. Writing the opinion for a split Court in *Solem*, Justice Lewis Powell concluded that requirement of proportionality between punishment and crime is well-established in American jurisprudence.[21] However, this reliance on *Solem* is questionable in light of the Court's subsequent decision in *Harmelin* v. *Michigan* (1991), in which a majority of the Court appeared to either repudiate or limit *Solem*. In *Harmelin*, Justice Scalia, joined by Chief Justice William Rehnquist, found that proportionality of sentence to crime is not a determinant of cruel or unusual punishment. Acknowledging that there were differences between the circumstances of the *Solem* and *Harmelin* cases, Justices Anthony Kennedy, Sandra Day O'Connor, and David Souter said that proportionality is applicable to Eighth Amendment protections only in extreme cases.[22] The Supreme Court's inconsistency and its unwillingness to provide a measurement for what constitutes excessive forfeiture allow for confusion in the lower courts and provide the opportunity for further limitations on individual rights.

The distinction between civil and criminal forfeiture proceedings is especially unclear when a person facing the civil forfeiture of property has also been convicted of a crime. In such a case, the issue of double jeopardy must be considered. According to the Fifth Amendment, no person shall "be subject for the same offence to be twice put in jeopardy."[23] This means that a person cannot be tried twice in the same legal jurisdiction or punished twice for the same crime. When forfeiture was incorporated into the American legal system, English common law forfeiture statues were narrowed to include only *in rem* proceedings. In other words, this treatment of forfeiture allowed for legal action to be taken against property, not person. Although opponents claim that civil forfeiture and criminal sentencing represent double punishment for the same crime and are thus in violation of the Fifth Amendment, the Supreme Court has consistently rejected this contention by relying on the

[21] *Solem* v. *Helm*, 463 U.S. 277 (1983).

[22] *Harmelin* v. *Michigan*, 501 U.S. 957 (1991).

[23] United States Constitution, amendment 5.

antiquated principle that forfeiture is a legal action against property rather than person. As early as 1827, the Court found that the forfeiture proceeding in question was taken against the property and not the owner. In *The Palmyra*, the Court considered the forfeiture of a sailing vessel which had been captured by the United States for privateering and determined that the ship rather than its owner was the offender.[24]

In recent years, the Court has consistently agreed with nineteenth century rulings in holding that civil forfeiture does not represent double jeopardy. In *United States* v. *One Assortment of 89 Firearms* (1984), the Court found that the Double Jeopardy Clause does not prohibit forfeiture proceedings against the property of an individual who has been acquitted of a crime to which the property was linked.[25] In *United States* v. *Ursery* (1996), the Court found that civil *in rem* forfeiture did not represent punishment for purposes of the Double Jeopardy Clause. Because the Court's finding in *Ursery* appears to be in direct conflict with its holding in *Austin*, the Court distinguished the way in which punishment is viewed for purposes of the Excessive Fines Clause versus the Double Jeopardy Clause. In fact, the Court specifically said in *Ursery* that nothing in several earlier cases, including *Austin*, modified the long-standing rule that civil forfeiture does not constitute punishment subject to the Double Jeopardy Clause.[26]

Perhaps the person to whom the most grievous constitutional injury is done is the property owner completely innocent of any crime. Because an arrest and conviction are not required in a civil forfeiture proceeding, there are times in which the owner whose property has been seized is innocent of any wrongdoing. However, the Court has consistently found that the innocence of the owner is not a protection from forfeiture. In *Calero-Toledo* v. *Pearson Yacht Leasing Co.* (1974), for example, the Court specifically rejected the innocent owner defense.[27] The Court subsequently found in *Bennis* v. *Michigan* (1996) that the Due Process Clause of the Fourteenth Amendment does not offer protection to innocent owners. Speaking for the Court, Chief Justice Rehnquist stated that

[24] *The Palmyra*, 25 U.S. (12 Wheat) 1 (1827).

[25] *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

[26] *United States* v. *Ursery*, 116 S.Ct. 2135 (1996).

[27] *Calero-Toledo* v. *Pearson*, 663.

property could be forfeited even if the owner did not know that it was being used for illegal purposes.[28] Because of the Court's unyielding position on this issue, individuals may be subject to the loss of their property through civil forfeiture even though they are unaware of specific criminal activity.

Historical precedent provides many other situations in which individual rights were suppressed because of perceived threats to society. The Confiscation Act of 1862, for example, allowed *in rem* forfeiture as a punishment for rebels who owned property in the North. In 1871, a seven to two majority of the Supreme Court upheld the act, ruling that it was an exercise of war powers. Justice Stephen Field argued in dissent that the act should not have been sustained because it allowed punitive action against persons guilty of treason rather than the enemy, thus making it something other than an exercise of the government's war powers.[29] The Court's handling of the Confiscation Act was a situation in which the crisis of war was used to justify the infringement of individual rights. In the same way, Japanese nationals and American citizens of Japanese ancestry were relocated to military camps during the war years of the early 1940s. The Supreme Court allowed this relocation because of a perceived threat to American society. Called "the most serious invasion of individual rights by the federal government in the history of the country," the relocation program was another example of individual rights being sacrificed because of a perceived threat.[30] A decade later, the United States found itself in the panic of Cold War and used this threat to again limit individual rights. The fear of Communism gave rise to the House Un-American Activities Committee as well as to Senator Joseph McCarthy's hunt for communists in the government. At issue was a citizen's right to speak out in favor of communist ideology in light of the preferred position of First Amendment rights. In the early 1950s, when anti-communist sentiment was at its apex, the Supreme Court justified limits to free speech because of the perceived threat posed by subversive rhetoric. In *Dennis* v. *United States* (1951), the Court upheld

[28]*Bennis* v. *Michigan*, 994.

[29]Levy, *A License to Steal*, 51-56 [referring to Page, excr. of *Samuel Miller*, v. *United States*, 78 U.S. 268 (1871)].

[30]Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States* (New York: McGraw-Hill, 1988), 724-26.

the government's right to restrict citizens from advocating not only the overthrow of the government but also the advocacy of a conspiracy to do so.[31] Justice William O. Douglas acknowledged the impact of public opinion on the Court. Referring to the Court's refusal in 1953 to hear the appeal of Ethel and Julius Rosenberg, who were charged with conspiracy to commit treason, Justice Douglas acknowledged that "perhaps the Justices did not feel any immediate threat of Communism, but they certainly were aware of the hysteria that beset our people, and that hysteria touched off the Justices also. I have no other way of explaining why they ran pell-mell with the mob in the Rosenberg case."[32]

In their interpretation of the Constitution, justices of the Supreme Court of the United States must strike a balance between the needs of society and the needs of individuals so that both may be best served. While this requires flexibility in interpretation, it can also result in the scales being tipped so far in favor of public needs and passions that individual rights can be crushed. While there are certainly situations in which individual liberties must give way to the greater public good, it is unclear whether the war on drugs appropriately justifies the constitutional infringements caused by forfeiture. This is particularly true when the effectiveness of forfeiture in combating illegal drug activity is a virtual unknown. Although the United States was not at war or threatened by a foreign power when forfeiture laws were revitalized in the 1980s, a domestic war on illegal drug activity was being waged. This was the conservative era of the Reagan administration, during which public sentiment supported an aggressive attack on illegal drug activity. By enacting forfeiture legislation, Congress heeded cries from the administration as well as the public and offered what it felt was a deterrent to crime and drug trafficking. In the 1990s, the conservative Rehnquist Court has been obliged to weigh the potential benefit of this deterrent against the risk to individual liberties and has generally broadened the scope of forfeiture while limiting individual rights.

With considerable justification, public passions are now inflamed by the perceived prevalence of street crime and its relation to drug use. As the historical accounts discussed above demonstrate, the Supreme Court is never totally unaffected by the passions of the day. While

[31] *Dennis* v. *United States*, 71 S. Ct. 857 (1951).

[32] William O. Douglas, *The Court Years, 1939-1975* (New York: Random House, 1980), 83.

constitutional jurisprudence must be flexible enough to permit an effective response in times of crisis, it must not allow the tradition of procedural due process to be worn down by public passions. One of the primary motivations behind the Bill of Rights was to protect the individual from just such influence. According to James Madison, author of the Bill of Rights:

> the prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority. It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention; . . . yet as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might be otherwise inclined.[33]

In times of perceived national crisis the Supreme Court should thus be more vigilant, not less, in ensuring that all citizens receive the benefits of the protections contained in the Bill of Rights.

[33]Quoted in Ralph Ketcham, *James Madison: A Biography* (Charlottesville: University Press of Virginia, 1990), 290.