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Legal Analysis

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Well Begun is (Only) Half Done

The Supreme Court's Excessive Fines Decision; Need for Further Reform

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The U.S. Supreme Court (SCOTUS) recently held that the Eighth Amendment's protection against Excessive Fines applies to the states, not just the federal government.[1] In light of prior precedents, they also held that this protection extends to penalties imposed through the process of Civil Asset Forfeiture (CAF).

CAF allows state officials to "prosecute" property which they suspect has been used in the commission of a crime. The standard protections that persons suspected of crimes receive (jury trial, public defender, and most critically, the presumption of innocence and need for prosecutors to prove their case "beyond reasonable doubt") do NOT apply in CAF cases. So while a criminal statute that imposes a fine cannot be used against a person without these due process protections, states can skirt these fundamental protections by formally putting the property on trial instead of the owner. This pretends that the property owner does not stand to lose "property, without due process of law...," even when the property is worth more than the fine imposed.

The Case:

Tyson Timbs was arrested for attempting to sell a small amount of heroin to an undercover police officer. He pled guilty, was fined approximately $1,200, and given one year of house arrest followed by five years' probation.[2] While the maximum penalties were considerably greater than what Timbs received, prosecutors chose to offer the deal, judging that the resources needed to achieve a harsher sentence were best spent elsewhere. A judge agreed, finding the sentence appropriate.

Civil Asset Forfeiture allows police to seize two classes of property: the proceeds of a crime, and property used in the commission of a crime. CAF has much lower procedural hurdles than pursuing criminal charges. Criminal charges have no bearing on action against property. Police can use CAF to seize property from innocent people: those acquitted of charges, as well as those *never* charged with a crime. It can cost more for the innocent to defend their rights than the confiscated property is worth.

The state claimed that Timbs' Land Rover was used in commission of the crime because he had driven it to the drug sting (Timbs proved the vehicle was not the proceeds of a crime). Though he had already been given just deserts through the criminal justice process, the state wanted more, his vehicle, which at $42,000, was worth more than four times the maximum criminal penalty he could have been assessed.

The case made its way to the Indiana Supreme Court, which held that the vehicle was forfeited to the state, in large part because the federal Constitution's ban on excessive fines did not apply to the states. At the country's founding, each state had its own constitutional protections, and the federal Constitution was thought only to apply to the federal government. But since the end of the civil war and the passage of the 14th Amendment, SCOTUS has gradually "incorporated" the protections enshrined in the Bill of Rights against the states, saying that states may not violate these important rights. Until last week, the Excessive Fines Clause of the Eighth Amendment was one of the last enumerated rights not incorporated.

In *Timbs*, SCOTUS held - unanimously - that this fundamental right does indeed apply to the states. It remanded the case to the Indiana courts to let them determine if seizure of the vehicle is indeed "excessive" given the small nature of the crime. Because of the way the case came to SCOTUS, and the way the opinion was written, it would be surprising if the Indiana courts find that this particular forfeiture was not an abuse of due process. They will likely order the state to return the vehicle to its rightful owner.

What the *Timbs* case does and does not do:

Timbs does not prevent states from engaging in civil asset forfeiture. It does not forbid cities from using abusive code violations as a revenue source. It does not even declare that the fine imposed in this particular case was excessive (to be determined by the Indiana courts). It does declare that the fine in this case is

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subject to the Excessive Fines Clause of the Eighth Amendment. It does put a judicial cap on how burdensome these practices can be. And while it is too early in the judicial day[3] to know exactly how unreasonable a fine will have to be to qualify as "excessive", there is now some limit. This might be enough to end the most blatant abuses, now that state agencies have the fear of federal courts keeping them in line.

The general rule is that federal Bill of Rights protections, once incorporated against the states, set a floor, not a ceiling, for the protection of rights. That is, states are free to offer more protection to individual rights, but they cannot offer less protection. This typically means that all prior federal decisions shaping the contours of what is or is not an "excessive" fine would bind state courts as well, the most likely scenario here.

It often takes a series of cases for the SCOTUS to get from announcing that courts must enforce protection of some right, to developing a framework to determine which actions violate the right and which ones are permissible. So far, guidance from federal case law is summarized in *United States v. Bajakajian*, the only case in which SCOTUS struck down a fine as excessive. It held that, "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense,"[4] and that a forfeiture must bear "articulable correlation to … injury suffered by the Government."[5]

In theory, the common law develops in part when the high court creates or adopts standards or tests to weigh one party's interests against another, and in part through a series of cases that hone in on where the line between excessive and not lies. Courts decide "This case is excessive," and "This case is not excessive," until the contours of propriety are sketched out, and lower courts are able to see where a given case should land.

Sometimes the process of developing common law happens quickly - the high court will consider two cases that are near the center, and decide in opposite ways, such that only those few cases falling between them are questionable. More often the high court lets lower courts fumble around in the dark for years, developing competing definitions and standards for what is or is not excessive. Eventually two or more circuit courts will disagree, and SCOTUS will finally weigh in, offering clarity through the experience of seeing how the case falls and, sometimes, through more definite judicial standards. Given the lack of case law at the Supreme Court level (*United States v. Bajakajian* being the only SCOTUS ruling to declare a fine excessive) it seems likely that lower courts will wander in the wilderness.

End Notes

Oklahoma Implications:

Oklahoma is a known bad actor regarding Civil Asset Forfeiture.[6] In 2016, Oklahoma police seized assets of a traveling band touring to raise money for charities, including an orphanage in Thailand.[7] When the band's manager was pulled over, the police took the band's money in spite of there being no evidence upon which to base even a reasonable suspicion, much less probable cause (the requisite standard for arrest). If not for the intervention of the non-profit law firm now representing Timbs, it is probable the money would have padded the police department's budget instead of going to an orphanage in desperate need.

The *Timbs* case allows individuals to sue in federal court to challenge forfeiture of their property as excessive. These proceedings could be separate from the initial state court hearing that would grant or deny the forfeiture, or they could be direct appeals of those cases, giving state courts alternative grounds for overturning the forfeiture. Hopefully the threat of these suits, and the embarrassment to overzealous law enforcement agencies, will reduce the frequency of CAF. More likely, state agencies will continue the practice until it is outlawed by statute, struck down by courts, or the legal expense becomes too much to bear.

What can Oklahoma do?

The best step for Oklahoma is to outlaw civil asset forfeiture. A few states have already outlawed the abusive practice, and several more have added some protection for innocent owners and increased the transparency of the process.[8] If law enforcement agencies in these latter states are convinced the property was used in a crime, they are still free to pursue criminal charges, which often allow forfeiture of the property, but with protections of the innocent inherent in our criminal justice system. These states allow the full prosecution of the guilty, but protect the innocent. Oklahoma should follow their lead. We must also prohibit law enforcement agencies from partaking in any "equitable sharing" with federal agencies. In some states, this has proven to be a loophole so wide you could drive a $42,000 SUV through it.

Oklahoma should also examine the incentives its law enforcement agencies have with respect to fines. All fines, whether civil or criminal, should be put into a state general fund. Agencies should never have a financial stake in the fines they dole out. Fines should be a deterrent to unacceptable behavior, not a way to fund staff. This holds true for speeding tickets, court fees, property code violations, and any other such law enforcement actions. Incentives of state employees should always be to prevent unacceptable behavior; they should never be to line the pockets of a government agency or, in effect, the people who work for it.

1 *Timbs v. Indiana*, 586 U. S. ____ (2019). https://supreme.justia.com/cases/federal/us/586/17-1091/

2 Ibid.

3 The first federal case striking down a fine as excessive was only decided in 1998.

4 *United States v. Bajakajian*, 524 U.S. 321 (1998). https://supreme.justia.com/cases/federal/us/524/321/

5 Ibid.

6 Dick M. Carpenter II, Ph.D., Lisa Knepper, Angela C. Erickson and Jennifer McDonald, with Wesley Hottot and Keith Diggs, *Policing for Profit, The Abuse of Civil Asset Forfeiture: 2nd Edition*, Institute for Justice, 2015, https://www.ij.org/pfp-state-pages/pfp-Oklahoma/.

7 Abby Broyles, *$53,000 Meant for Charities Returned to Man After Seizure; DA Drops Charges*, Oklahoma News 4, April 25, 2016, https://kfor.com/2016/04/25/man-claims-deputies-seized-50000-meant-for-orphanage-church-and-christian-band/.

8 *Civil Forfeiture Reforms on the State Level*, Institute for Justice, 2018 https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/. See also: George Leef, "Four States Advance Against The Evils Of Civil Asset Forfeiture, But The Feds Do Nothing," *Forbes*, June 26, 2017, https://www.forbes.com/sites/georgeleef/2017/06/26/four-states-advance-against-the-evils-of-civil-asset-forfeiture-but-the-feds-do-nothing/#378cf5bfa4bb; Carimah Townes, "How to End Civil Forfeiture," *Slate*, July 27, 2017, https://slate.com/news-and-politics/2017/07/how-nebraska-and-new-mexico-banned-civil-forfeiture.html.