



March 15, 2021

Chairman Jerrold Nadler
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Rep. Jim Jordan, Ranking Member
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Chairman Richard Durbin
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Charles Grassley, Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Urgent Need for Civil Forfeiture Reform

Dear Chairman Nadler, Chairman Durbin, Ranking Member Jordan, and Ranking Member Grassley,

On behalf of the undersigned organizations dedicated to the protection of civil liberties and property rights, we urge Congress to curb law enforcement’s power to use and abuse the practice of civil forfeiture by enacting strong reforms this Congress.

By way of background, civil forfeiture laws allow the government to seize—and keep—cash, cars, homes, and other property that is merely *suspected* of being involved in criminal activity. This is not criminal forfeiture, where property is forfeited to the government after its owner is convicted of a crime. With civil forfeiture, law enforcement can seize property from innocent property owners, and those innocent owners can permanently lose it to the government, without the government ever charging, much less convicting, them of a crime. The very weak procedural

protections for property owners and accompanying high risk of civil liberties violations have been recognized in numerous reports issued in recent years by the Inspectors General of both the Department of Justice and the Department of Homeland Security.¹

The simple truth is that civil forfeiture continues throughout the United States because law enforcement has a very specific financial incentive to use it: *it gets to keep the money*. In the federal system and most states, the property that is seized and forfeited is not delivered to the federal or state treasuries, but instead is kept by the law enforcement agencies themselves.² The proceeds are then spent *not* by Congress or state legislatures, but by the same law enforcement agencies that have sent their agents into the streets to collect it.

Congress can, and should, address this improper financial incentive in several ways. First, and most important, it can direct all federal forfeiture proceeds to be returned directly to the General Fund of the U.S. Treasury so that Congress can appropriate those monies as it sees fit, rather than enabling federal law enforcement agencies to shield it from congressional control.

Second, Congress can abolish the “equitable sharing” program that enables state and local law enforcement to evade any restrictions their state legislatures have imposed on civil forfeiture—including, for example, higher burdens of proof under state law or requirements sending all forfeiture proceeds to the state treasury, as is the practice in several states—by “partnering” with federal law enforcement on forfeitures in exchange for a “cut” of the proceeds. The federal government has no business running a program that is designed to help state and local police evade state laws.

Third, Congress can abolish administrative forfeiture, which typically permits government agencies to decide forfeiture cases themselves without any judicial oversight—not even from an administrative law judge. About 80-90% of federal forfeitures are finalized through an administrative process where the same agency that seized the property acts as judge and jury.³ American citizens and property owners deserve their day in court before a neutral Article III judge and should not lose their property because the office of forfeiture counsel for the seizing agency makes a self-serving determination that the agency was right to seize and forfeit their property.

In significant part due to the improper financial incentives and conflicts of interest described above, a solid majority of the American public opposes the use of civil forfeiture. In a September 2020 national survey, respondents opposed any use of civil forfeiture as currently practiced, by a margin of 59% to 25%.⁴ Moreover, 63% of respondents oppose allowing law enforcement agencies

¹ See, generally, DHS Office of Inspector General (“OIG”), *DHS inconsistently implemented administrative forfeiture authorities under CAFRA*, available at <https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-66-Aug20.pdf> (Aug. 2020); DOJ OIG, *Review of the Department’s Oversight of Cash Seizure Case and Forfeiture Activities*, (Mar. 2017), available at <https://www.oversight.gov/sites/default/files/oig-reports/e1702.pdf>; DOJ OIG, *Audit of the Drug Enforcement Administration’s Management and Oversight of Its Confidential Source Program*, (Sept. 2016), available at <https://oig.justice.gov/reports/2016/a1633.pdf>; DOJ OIG, *Investigative Summary of Findings Concerning the DEA’s Use of a TSA Airport Security Screener as a Paid Confidential Source* (Jan. 2016), available at <https://www.oversight.gov/sites/default/files/oig-reports/f160107b.pdf>; DOJ OIG, *Review of the Drug Enforcement Administration’s Use of Cold Consent Encounters at Mass Transportation Facilities*, (Jan. 2015), available at <https://www.oversight.gov/sites/default/files/oig-reports/e153.pdf>.

² For a state-by-state analysis of civil forfeiture laws, see *Policing for Profit: The Abuse of Civil Asset Forfeiture (3rd Edition)* (Dec. 2020), available at <https://ij.org/report/policing-for-profit-3/>.

³ See *Policing for Profit*, supra n. 2, at pp. 24-26.

⁴ The question in this Institute for Justice/YouGov poll was, “As you may or may not know, ‘civil forfeiture’ allows law enforcement officials to seize cash, cars, or other property if they suspect it is involved in a crime, even if the property

to keep forfeiture proceeds for their own use, and 69% oppose allowing state law enforcement to use the equitable sharing program to evade state restrictions.⁵ This is an issue where the public sees the problem, and it wants it fixed.

The problems with civil forfeiture begin with the financial incentive, but they do not end there. In the federal system, any innocent person whose property is unjustly seized through this system faces a profoundly difficult, time-consuming, and often prohibitively expensive process to get it back, one in which the property is presumed guilty, the innocent owner has no right to legal representation, and the government has no obligation to meet criminal standards of proof. These procedural deficiencies, where the deck is structurally stacked against the citizen, in favor of the seizing entity, only add insult to injury.

The widespread use of civil forfeiture also promotes negative interactions between police and the public, which places communities of color at risk. Evidence also shows that civil forfeiture disproportionately affects Black men, and a *Washington Post* investigation found that the majority of those who challenged a seizure for forfeiture in 400 federal court cases were Black, Hispanic or another minority. In 2012, the American Civil Liberties Union settled a lawsuit on behalf of Black and Latino drivers in two East Texas counties where police seized \$3 million dollars between 2006 and 2008; none were ever arrested or charged with a crime. Recent research also finds increases in arrest rates for Blacks and Hispanics during times of fiscal stress for law enforcement agencies, and when law enforcement can benefit financially from forfeiture under state law.⁶

The most common public defense of civil forfeiture is the vague claim that its use helps crimefighting, *but the evidence is to the contrary*. The Department of Justice's own Inspector General has found that the agency does not even track how forfeitures might be linked to criminal prosecutions.⁷ At the state level, recent research demonstrates that crime rates did not increase and arrest rates did not drop in New Mexico after the state abolished civil forfeiture in 2015.⁸ In addition, Prof. Brian D. Kelly conducted the first-ever multistate study of the impact of civil forfeiture and found that there is no data supporting the argument that its use decreases crime, and ample evidence that its primary purpose is to generate revenue.⁹

Congress should not allow this unjust civil forfeiture regime to continue any longer. The most optimal solution is to eliminate civil forfeiture altogether and rely instead on criminal forfeiture after a crime is proven. Congress alternatively could eliminate the financial incentive rot

owner has not been convicted or charged with a crime. Given this, to what extent do you support or oppose 'civil forfeiture?'" <https://ij.org/wp-content/uploads/2020/11/Results-for-Institute-for-Justice-Civil-Forfeiture-245-9.30.2020-1-Civil-Forfeiture-2.pdf>.

⁵ Id. A 2018 IJ-YouGov poll showed similar results. See <https://ij.org/press-release/new-poll-76-of-americans-more-likely-to-vote-for-candidates-who-back-forfeiture-reform/>.

⁶ See Nathaniel Cary & Mike Ellis, "65% of cash seized by S.C. police comes from black men," *Greenville News* (Jan. 27, 2019); Michael Sallah, Robert O'Harrow Jr., Steven Rich & Gabe Silverman, "Stop and Seize," *The Washington Post* (Sept. 6, 2014) (6-part series); Press Release, "ACLU announces settlement in 'highway robbery' cases in Texas," (Aug. 3, 2012), available at <https://www.aclu.org/press-releases/aclu-announces-settlement-highway-robbery-cases-texas>; Michael D. Makowsky, Thomas Stratmann & Alex Tabarrok, "To serve and collect: The fiscal and racial determinants of law enforcement," *Journal of Legal Studies* (2019), at pp. 189-216; Sean Nicholson-Crotty, Jill Nicholson-Crotty, Danyao Li & Sian Mughan, "Race, representation, and assets forfeiture," *International Public Management Journal* (2020), at pp. 1-20.

⁷ See DOJ OIG (Mar. 2017), *supra* n. 1, at p. 16.

⁸ See *Policing for Profit*, *supra* n. 2, at pp. 32-33.

⁹ Prof. Brian D. Kelly, *Does Forfeiture Work: Evidence from the States* (Feb. 2021), available at <https://ij.org/wp-content/uploads/2021/02/does-forfeiture-work-web.pdf>.

at the core of civil forfeiture by sending all federal forfeiture funds directly to the Treasury and eliminating the “equitable sharing” program that distorts local law enforcement decision making and undermines state laws. And at a bare minimum, Congress should address the procedural deficiencies that undermine the due process rights of property owners, including by eliminating the inherently biased administrative forfeiture system.

We are united in our desire to see significant forfeiture reform become law this Congress and stand ready to help in any way we can. We are aware of several legislative options that have been offered in past Congresses, each of which address some of the issues above. It is our hope that, whether through standalone legislation, provisions included in broader criminal justice reform, or the appropriations process, this Congress will finally solve this longstanding problem.

For further information from any of our organizations, including legal briefs, economic studies, state-by-state analysis, and constituent contacts, please direct your questions through Dan Alban, Senior Attorney at the Institute for Justice, at dalban@ij.org. He will ensure that you reach the appropriate advocate in each of our organizations.

Sincerely,

Institute for Justice
American Civil Liberties Union
American Commitment
Americans for Prosperity
Campaign for Liberty
DKT Liberty Project
Drug Policy Alliance
Due Process Institute
FreedomWorks

Goldwater Institute
Law Enforcement Action Partnership
The Leadership Conference on Civil and
Human Rights
National Association of Criminal Defense
Lawyers
National Motorists Association
National Taxpayers Union
R Street Institute

cc: Members of the House Judiciary Committee
Members of the Senate Judiciary Committee