Written Statement of

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before the

United States Senate
Committee on the Judiciary

concerning

The Need to Reform Asset Forfeiture

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Chairman Grassley, Ranking Member Leahy, and Distinguished Members of the Committee:

Thank you for inviting me to testify about the urgent need to reform our nation's federal forfeiture laws. Specifically, I will address how federal laws financially incentivize forfeiture of property from innocent Americans without providing adequate procedural safeguards. As documented by recent media coverage, this toxic mix has led to widespread abuse.

The Committee is to be commended for making forfeiture reform a top priority[1] and working toward, what the Institute for Justice hopes, is a comprehensive legislative reform package. As law-enforcement agencies at all levels of government have increasingly relied on the tool of civil forfeiture, it is imperative that our elected officials pay close scrutiny to its use and the effect it has on American property owners, most of whom are never charged with any wrongdoing.

My name is Darpana Sheth and I am an attorney with the Institute for Justice, a nonprofit, public-interest law firm dedicated to protecting Americans' rights to private property, economic liberty, free speech, and educational freedom. As the national law firm for liberty, IJ engages in cutting-edge litigation and advocacy both in the court of law and in the court of public opinion.

To further its mission to protect property rights, IJ has launched a nationwide initiative to reform forfeiture laws through strategic litigation, advocacy, and original research. On the litigation front, IJ represents individuals whose property has been threatened with civil forfeiture in both state and federal courts across the country.[2] IJ has also filed friend-of-the-court briefs on issues related to forfeiture.[3]

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[1] *See* Jennifer Jacobs, *Grassley's Checklist of Priorities*, DES MOINES REGISTER, Jan. 7, 2015, *available at* http://www.desmoinesregister.com/story/news/politics/2015/01/07/grassley-checklist-priorities-judiciary-committee/21394233/.

[2] *See, e.g.*, *United States v. Thirty-Two Thousand Eight Hundred Twenty Dollars & Fifty-Six Cents*, No. C13-4102-LTS, 2015 WL 134046 (N.D. Iowa Jan. 9, 2015), *additional information available at* http://ij.org/iowa-forfeiture; *Sourovelis v. City of Philadelphia*, No. 2:14-cv-04687 (E.D. Pa. Aug. 11, 2014), *additional information available at* http://ij.org/philadelphia-forfeiture; *In the Matter of the Seizure of $446,651.11*, No. 2:14-mc-1288 (E.D.N.Y. dismissed Jan. 20, 2015), *additional information available at* http://ij.org/long-island-forfeiture; *Dehko v. Holder*, No. 13-14085, 2014 WL 2605433 (E.D. Mich. June 11, 2014), *additional information available at* http://ij.org/miforf; *United States v. 434 Main St., Tewksbury, Mass.*, 961 F. Supp. 2d 298 (D. Mass. 2013), *additional information available at* http://ij.org/massachusetts-civil-forfeiture; *United States v. 2601 W. Ball Rd.*, No. SACV 12-1345-AG (MLGx) (C.D. Cal. dismissed Oct. 10, 2013); *El-Ali v. State*, 428 S.W.3d 824 (Tex. 2014), *additional information available at* http://ij.org/state-of-texas-v-one-2004-chevrolet-silverado; *State ex rel. Cnty. of Cumberland v. One 1990 Ford Thunderbird*, 371 N.J. Super. 228 (App. Div. 2004), *additional information available at* http://ij.org/state-of-new-jersey-v-one-1990-ford-thunderbird.

[3] *See, e.g.*, *Henderson v. United States*, 2014 U.S. App. LEXIS 1680 (11th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3234 (U.S. Oct. 20, 2014) (No. 13-1487); *Kaley v. United States*, 134 S. Ct. 1090 (2014), *additional information available at* http://ij.org/images/pdf_folder/amicus_briefs/kaley-amicus-brief_final.pdf; *Florida v. Harris*, 133 S. Ct. 1050 (2013), *additional information available at* http://www.ij.org/images/pdf_folder/amicus_briefs/fl-v-harris-amicus.pdf; *Alvarez v. Smith*, 558 U.S. 87 (2009), *additional information available at* http://ij.org/alvarez-v-smith-amicus; *Garcia-Mendoza v. 2003 Chevy Tahoe, VIN No. 1GNEC13V23R143453, Plate No. 235JBM*, 852 N.W.2d 659 (Minn. 2014), *additional information available at* http://ij.org/images/pdf_folder/amicus_briefs/danielgarciamendoza_2003chevytahoe_amicus.pdf.

On the advocacy side, IJ has been involved in legislative efforts to reform civil-forfeiture laws across the nation.[4] In part, due to IJ's efforts, Minnesota,[5] New Mexico,[6] and Washington, D.C.[7] have passed comprehensive forfeiture reform, while Georgia[8] and Utah[9] have enacted reporting requirements aimed at increasing transparency on the use of forfeiture. IJ is also actively involved in ongoing forfeiture reform efforts in Florida, Maryland, Minnesota, and Texas. And IJ has been consulting with state legislators and advocates on forfeiture reform in Arizona, Arkansas, California, Colorado, Iowa, Michigan, Montana, Nevada, Oklahoma, Pennsylvania, Tennessee, and Virginia.

IJ has also produced original research documenting the problem of civil forfeiture. IJ published the first comprehensive nationwide study, titled *Policing for Profit*, which evaluates each jurisdiction's civil-forfeiture laws.[10] The federal government earned a grade of D- for its civil-forfeiture laws. (An updated report on the federal government's forfeiture program is attached as Appendix A.) Particularly relevant for this hearing, IJ also studied how a particular federal forfeiture program—the Equitable Sharing Program—encourages local police and prosecutors to evade state civil-forfeiture laws to pad their budgets.[11] IJ also commissioned a study using experimental economics to test the incentives of civil forfeiture.[12] The results demonstrated that the financial incentives of civil forfeiture create a strong temptation for law enforcement agencies to seize property to pad their own budgets.[13] Most recently, IJ published a report highlighting the Internal Revenue Service's aggressive use of civil forfeiture to seize funds from individuals and small-business owners making a series of cash deposits or withdrawals below $10,000, without any other evidence of wrongdoing.[14]

As these studies confirm, federal forfeiture programs must be reformed to end the distorted incentives for law enforcement and strengthen protections for property owners. After

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[4] *See Model Criminal Forfeiture Law* (Inst. for Justice 2013) & *Model Forfeiture Reporting Law* (Inst. for Justice 2013), *available at* http://ij.org/cases/legislation.

[5] 2014 Minn. Sess. Law Serv. Ch. 201 (S.F. 874) (West); *see also* Abby Simons, *Civil Forfeiture Reform Signed into Law*, STAR TRIB. (Minn.), May 6, 2014, *available at* http://www.startribune.com/politics/statelocal/258156241.html.

[6] Civil Asset Forfeiture Amendment Act of 2014, H.B. 560, 52nd Leg., Reg. Sess. (N.M. 2015).

[7] B20-48, 20th Council (D.C. 2014); *See also* Robert O'Harrow, Jr., *D.C. Council Votes to Overhaul Asset Forfeiture, Give Property Owners New Rights*, WASH. POST, Nov. 18, 2014, *available at* http://www.washingtonpost.com/investigations/dc-council-votes-to-overhaul-asset-forfeiture-give-property-owners-new-rights/2014/11/18/d6945400-6f72-11e4-8808-afaa1e3a33ef_story.html.

[8] Georgia Uniform Civil Forfeiture Procedure Act, H.B. 233, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015).

[9] Asset Forfeiture Amendment, S.B. 52, 61st Legis., Gen. Sess. (Utah 2015).

[10] Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic & Scott G. Bullock, INSTITUTE FOR JUSTICE, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2010), *available at* http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

[11] Dick M. Carpenter, Larry Salzman & Lisa Knepper, INSTITUTE FOR JUSTICE, *Inequitable Justice: How Federal Equitable Sharing Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain* (Oct. 2011), *available at* http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf.

[12] Bart J. Wilson & Michael Preciado, *Bad Apples or Bad Laws: Testing the Incentives of Civil Forfeiture* (Institute for Justice, 2014), *available at* http://ij.org/images/pdf_folder/private_property/bad-apples-bad-laws.pdf.

[13] *Id.*

[14] Dick M. Carpenter & Larry Salzman, INSTITUTE FOR JUSTICE, *Seize First, Question Later: The IRS and Civil Forfeiture* (2015), *available at* http://ij.org/images/pdf_folder/private_property/seize-first-question-later.pdf.

Section I explains the archaic origins of civil forfeiture, Section II discusses the ways in which modern federal civil-forfeiture laws have departed dramatically from their predecessors, causing an explosion in federal forfeiture activity. Next, Section III discusses the federal Equitable Sharing Program and the limited impact of the Justice Department's new policy change. Section IV explains how current federal law incentivizes forfeiture without providing adequate procedural safeguards to protect innocent property owners. Finally, Section V examines the federal government's aggressive use of forfeiture in the context of currency reporting regulations.

I. CIVIL FORFEITURE IS PREMISED ON AN ARCHAIC LEGAL FICTION.

Civil forfeiture is the power of law enforcement to seize and keep property suspected of being involved in criminal activity. With civil forfeiture—unlike criminal forfeiture—law enforcement can take cash, cars, homes, or other property without so much as charging the owners with a crime, let alone convicting them of one. Because these are civil proceedings, most of the constitutional protections afforded to criminal defendants do not apply to property owners in civil-forfeiture cases.

Civil forfeiture is based on the legal fiction that the property itself is "guilty" of a crime. Under this fiction, the proceeding is brought *in rem* ("against a thing"), or against the property itself, not *in personam*, or against the owner, as in criminal proceedings. This is why civil-forfeiture cases have unusual names like:

- *United States v. 434 Main Street, Tewskbury, Massachusetts*;
- *State of Texas v. One 2004 Chevrolet Silverado*; and
- *Commonwealth of Pennsylvania v. $520 in U.S. Currency*.

Of course, inanimate objects such as property, cars, and cash do not act or think, and therefore cannot possess the required criminal intent to be "guilty." The doctrine of *in rem* forfeiture originally arose from the medieval law of deodand under which chattel that caused death was forfeit to the King.[15] Deodand was premised on the superstitious belief that objects acted independently to cause death.[16]

In the United States, civil forfeiture traces its roots to the British Navigation Acts of the mid-17th century during England's vast expansion as a maritime power.[17] The Acts required imports and exports from England to be carried on British ships. If those Acts were violated, the ships and the cargo on board could be seized and forfeited to the Crown regardless of the guilt or innocence of the owner. Using these British statutes as a model, the first United States Congress passed forfeiture statutes to aid in the collection of customs duties, which provided 80 to 90

[15] Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 135 (1996).

[16] *Id*.

[17] *Id*.; Michael Schecter, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1150, 1151-1183 (1990); James R. Maxeiner, Note, *Bane of American Forfeiture Law: Banished at Last?*, 62 CORNELL L. REV. 768, 802 (1977).

percent of the finances for the federal government during that time.[18] Civil forfeiture was introduced in American law through these early customs statutes.

II. MODERN CIVIL FORFEITURE LAWS HAVE BECOME UNMOORED FROM THEIR ORIGINAL JUSTIFICATION ENVISIONED BY THE FOUNDING GENERATION, LEADING TO AN EXPLOSION OF FEDERAL FORFEITURE ACTIVITY.

Forfeiture at the time of our nation's founding was limited in justification and scope, in stark contrast to today's civil-forfeiture programs. For example, early laws authorizing forfeiture were based on the unquestioned ability of the government to seize contraband, in which no property rights existed. Contraband included not only *per se* illegal goods and stolen goods, but also goods that were concealed to avoid paying required customs duties.[19]

Forfeiture was justified only by the practical necessities of enforcing admiralty, piracy, and customs laws. As an *in rem* proceeding, civil forfeiture allowed courts to obtain jurisdiction over property when it was virtually impossible to seek justice against property owners guilty of admiralty or piracy violations because they were overseas or otherwise outside the court's jurisdiction.[20] With civil forfeiture, the government could ensure that customs and other laws were enforced even if the owner of the ship or the cargo was outside the court's jurisdiction.

Throughout most of the 20th century, civil forfeiture remained a relative backwater in American law, with one exception. During the Prohibition Era, the federal government expanded the scope of its forfeiture authority beyond contraband to cover automobiles or other vehicles transporting illegal liquor.[21] However, the forfeiture provision of the National Prohibition Act was considered "incidental" to the primary purpose of destroying the contraband itself—"the forbidden liquor in transportation."[22]

Even then, the Supreme Court observed that these "forfeiture acts are exceedingly drastic."[23] Consequently, the Court cautioned that "[f]orfeitures are not favored; they should be enforced only when within both the letter and spirit of the law."[24] As "drastic" as forfeiture laws may have appeared during Prohibition, they are quite limited in comparison to the forfeiture laws today, which trace their origins to the "War on Drugs."[25]

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[18] *See id.* at 782 n.86 (noting that customs provided much of the revenue for the federal government).

[19] *See* Act of July 31, 1789, 1 Stat. 29, 43 (providing that all "goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited").

[20] *See, e.g.*, *United States v. The Brig Malek Adhel*, 43 U.S. (2. How.) 210, 233 (1844) (justifying forfeiture of innocent owner's vessel under piracy and admiralty laws because of "the *necessity* of the case, as the *only* adequate means of suppressing the offence or wrong") (emphasis added); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) (revenue laws); *United States v. The Schooner Little Charles*, 1 Brock. 347, 354 (1819) (Marshall, C.J.) (embargo laws).

[21] Boudreaux & Pritchard, *supra* note 9, at 101.

[22] *Carroll v. United States*, 267 U.S. 132, 155 (1925).

[23] *United States v. One 1936 Model Ford V-8 De Luxe Coach, Commercial Credit Co.*, 307 U.S. 219, 236 (1939).

[24] *Id*. at 226.

[25] Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 42-45 (1998).

Today's federal forfeiture laws are much broader in scope, covering not only illegal drugs, contraband, and any conveyance used to transport them, but all manner of real and personal property involved in the alleged criminal activity. The Comprehensive Crime Control Act of 1984[26] authorized, for the first time, the forfeiture of property used (or intended to be used) to "facilitate" a drug offense.[27] While this expansion was intended to reach "instrumentalities" of crime, law-enforcement officials have interpreted this language broadly to include incidental use of the property. Congress also has expanded forfeiture beyond alleged instances of drug violations to include myriad crimes. Today, there are more than 400 federal forfeiture statutes relating to a number of federal crimes, from environmental crimes to the failure to report currency transactions.[28] Moreover, the creation of the federal "Equitable Sharing Program"[29] (discussed more fully in Section III) has expanded the use of civil forfeiture by state and local law enforcement by giving them the lion's share of forfeiture proceeds for simply referring forfeiture cases to federal authorities.[30]

Additionally, in contrast to most of American history, during which the proceeds from civil forfeitures went to a general fund to benefit the public at large, current federal forfeiture laws allow law-enforcement agencies responsible for seizing the property to keep proceeds from forfeiture. In 1984, Congress amended parts of the Comprehensive Drug Abuse and Prevention Act of 1970 to allow federal law-enforcement agencies to retain forfeiture proceeds in a newly created Assets Forfeiture Fund.[31] Initially, any forfeiture proceeds exceeding $5 million that remained in the Assets Forfeiture Fund at the end of the fiscal year were to be deposited in the Treasury's General Fund.[32] Moreover, the government's use of proceeds in the Assets Forfeiture Fund was restricted to a relatively limited number of purposes, such as paying for forfeiture expenses like storing the property or giving awards for information that led to forfeitures.[33] However, subsequent amendments eliminated both the $5-million cap and dramatically broadened the scope of expenses the government could pay for with the Assets Forfeiture Fund, including purchasing vehicles and paying overtime salaries.[34] In short, after the 1984 amendments, federal agencies were able to retain and spend forfeiture proceeds—subject only to very loose restrictions—giving them a direct financial stake in generating revenue from forfeiture.[35]

By allowing law-enforcement officials to retain forfeiture proceeds, federal forfeiture laws create a perverse financial incentive to maximize the seizure of forfeitable property. Consequently, unlike its early relatives in the Prohibition Era when forfeiture was merely

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[26] Pub. L. No. 98-473, 98 Stat. 1976.

[27] *See* 21 U.S.C. §§ 881(a)(6)-(7).

[28] *See* U.S. Dep't of Justice Criminal Div., SELECTED FEDERAL ASSET FORFEITURE STATUTES (2006), *available at* http://www.justice.gov/criminal/foia/docs/afstats06.pdf; *see also* Charles Doyle, CONG. RESEARCH SERV., CRIME AND FORFEITURE, (Jan. 22, 2015), *available at* http://fas.org/sgp/crs/misc/97-139.pdf.

[29] *See* 21 U.S.C. § 881(e)(1)(A) & 19 U.S.C. § 1616a(c).

[30] Blumenson & Nilsen, *supra* note 19, at 44-45.

[31] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[32] *Id*. § 310, 98 Stat. at 2053 (previously codified at 28 U.S.C. § 524(c)(7)).

[33] *Id*. § 310, 98 Stat. at 2052 (previously codified at 28 U.S.C. § 524(c)(1)).

[34] 28 U.S.C. §§ 524(c)(1)(F)(i), (c)(1)(I).

[35] Although Congress enacted the Civil Asset Forfeiture Reform Act in 2000, none of those reforms changed how forfeiture proceeds are distributed or otherwise mitigated the direct pecuniary interest law-enforcement agencies have in civil forfeitures. *See* Pub. L. No. 106-185, 114 Stat. 202 (2000).

incidental, with today's forfeiture laws, forfeiture of property is often the primary purpose of the seizure. As the former chief of the federal government's Asset Forfeiture and Money Laundering Offices observed, "We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws."[36] Indeed, according to a July 2012 report by the United States Government Accountability Office, one of the three primary goals of the Assets Forfeiture Fund is "to produce revenues in support of future law enforcement investigations and related forfeiture activities."[37]

These developments have caused forfeiture activity to increase exponentially. In 1986, the year after the Justice Department's Assets Forfeiture Fund was created, the Fund took in just $93.7 million in deposits.[38] Twenty years later, annual deposits of forfeited cash and property regularly topped $1 billion.[39] In 2014, that figure had swollen to $4.4 billion, the highest amount in the Fund's history.[40]

The amount of federal forfeiture activity can also be seen by a glimpse at the number of federal agencies participating in federal forfeiture programs. There are two main federal agencies that spearhead forfeiture activity at the federal level: the Justice Department and the Treasury Department. The Justice Department's Assets Forfeiture Program includes activity by:

- Asset Forfeiture and Money Laundering Section of the Criminal Division;
- Bureau of Alcohol, Tobacco, Firearms and Explosives;
- Drug Enforcement Administration;[41]
- Federal Bureau of Investigation;
- United States Marshals Service;
- United States Attorneys' Offices;
- Asset Forfeiture Management Staff;
- United States Postal Inspection Service;
- Food and Drug Administration's Office of Criminal Investigations;
- United States Department of Agriculture, Office of the Inspector General;
- Department of State, Bureau of Diplomatic Security; and

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[36] Richard Miniter, *Ill-Gotten Gains*, REASON, Aug. 1993, at 32, 34 (quoting Michael F. Zeldin, former director of the Justice Department's Asset Forfeiture & Money Laundering Office), *available at* http://reason.com/archives/1993/08/01/ill-gotten-gains.

[37] U.S. Gov't Accountability Office, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED 6 (2012), *available at* http://www.gao.gov/assets/600/592349.pdf.

[38] Marian R. Williams, et al., *supra* note 5, at 31.

[39] U.S. Dep't of Justice, *FY 2014 Asset Forfeiture Fund Reports: Total Net Deposits to the Fund by State of Deposit*, http://www.justice.gov/afp/reports-congress/fy-2014-total-net-deposits-fund-state-deposit; *see also* Rep. Tim Walberg, Op-Ed., *Stopping the Abuse of Civil Forfeiture*, WASH. POST, Sept. 4, 2014, http://www.washingtonpost.com/opinions/tim-walberg-an-end-to-the-abuse-of-civil-forfeiture/2014/09/04/e7b9d07a-3395-11e4-9e92-0899b306bbea_story.html.

[40] *Id.*

[41] The DEA's enforcement of federal drug laws has resulted in significant seizure and forfeiture activity. And a significant portion of DEA cases are adopted from state and local law enforcement agencies under the federal Equitable Sharing Program. U.S. Dep't of Justice, *Asset Forfeiture Program: Participants and Roles*, http://www.justice.gov/jmd/afp/05participants/ (last visited Feb. 8, 2015).

- Defense Criminal Investigative Service.[42]

The Treasury Department maintains its own robust forfeiture program,[43] which includes participation by the:

- Internal Revenue Service;
- U.S. Immigration and Customs Enforcement;
- U.S. Customs and Border Protection;
- U.S. Secret Service; and
- U.S. Coast Guard.[44]

As detailed in Section IV, subpart A, the ability of these Executive branch agencies to self-finance through forfeiture proceeds endangers the balance of powers in our constitutional system.

In sum, no longer is civil forfeiture tied to seizing contraband or the practical difficulties of obtaining personal jurisdiction over an individual. Unmoored from its historical limitation as a necessary means of enforcing admiralty and piracy laws, civil forfeiture has morphed into a revenue-generating enterprise for law enforcement.

III. THE FEDERAL EQUITABLE SHARING PROGRAM

The federal government engages in forfeiture in two main ways. First, federal authorities seize property under federal law and pursue forfeiture of the property without any involvement by state or local law enforcement. Second, under the federal Equitable Sharing Program, federal authorities work with state or local law-enforcement agencies to seize property for a federal forfeiture action, and then "share" the proceeds.[45]

There are two ways state and local law enforcement can participate in the Equitable Sharing Program. Federal authorities can work with state and local law enforcement through joint investigations. Joint investigations may originate from: (a) participation on a federal task force; (b) a formal task force composed of state and local agencies; or (c) state or local investigations that are developed into federal cases.[46] Equitable-sharing agreements can be used to process and divide the proceeds of property seized during joint operations involving multiple law-enforcement agencies. The federal government takes over the property, handles the

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[42] *Id.*

[43] The Treasury Department's Forfeiture Fund has also grown from more than $270 million in deposits in 2004 to more than $1.6 billion in 2013. *See* Appendix A.

[44] U.S. Dep't of the Treasury, *Treasury Executive Office for Asset Forfeiture*, http://www.treasury.gov/about/organizational-structure/offices/Pages/The-Executive-Office-for-Asset-Forfeiture.aspx (last visited April 13, 2015).

[45] For statutes authorizing equitable sharing, see 21 U.S.C. §§ 881(e)(1)(A) and (e)(3), 18 U.S.C. § 981(e)(2), and 19 U.S.C. § 1616a.

[46] U.S. Dep't of Justice, Criminal Div., Asset Forfeiture and Money Laundering Section, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 6 (April 2009), *available at* http://www.justice.gov/usao/ri/projects/esguidelines.pdf.

forfeiture case and then distributes the proceeds to each agency according to their role in the joint effort.

More controversially, the federal government can also "adopt" property seized by a state or local agency and then proceed with a federal forfeiture action. Federal agencies may "adopt" seized property for forfeiture where the conduct giving rise to the seizure is in violation of federal law and where federal law provides for forfeiture.[47] In adoptions, relatively lax federal standards apply and state and local agencies receive 80 percent of proceeds—even if state law is stricter and less generous. Thus, even if state law offers strong protections to property owners and bars law enforcement from keeping what they forfeit, state and local agencies can use equitable sharing to circumvent those rules, and take and keep property anyway.

Consequently, the Equitable Sharing Program poses a federalism problem by encouraging state and local law enforcement to evade state civil-forfeiture laws in favor of federal rules.[48] In a 2011 study published in the *Journal of Criminal Justice*, researchers Jefferson Holcomb, Tomislav Kovandzic, and Marian Williams examined the relationship between state civil-forfeiture laws and equitable-sharing receipts by state and local law enforcement.[49] They found that in states where civil forfeiture is more difficult and less rewarding, law-enforcement agencies take in more equitable-sharing payments. In other words, police and prosecutors use equitable sharing as an easier and more profitable way to secure forfeiture funds. The Justice Department's Office of Inspector General has issued several critical reports examining state and local authorities' abuse of this program.[50]

On January 16, Attorney General Holder announced a new policy prohibiting "certain" kinds of adoptive seizures under the federal Equitable Sharing Program.[51] Contrary to some exaggerated media reports,[52] the new policy does not end civil forfeiture. Federal and state government can still take property for civil forfeiture without even charging, much less convicting owners of a crime.

The policy also does not abolish the Equitable Sharing Program. According to the Justice Department, the policy does not apply to (1) seizures conducted by joint task force ("task-force seizures"); (2) seizures that are the result of joint federal-state investigations or that are

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[47] *Id*.

[48] *See generally* Carpenter, et al., *supra* note 6.

[49] Jefferson E. Holcomb, Tomislav V. Kovandzic & Marian R. Williams, *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 JOURNAL OF CRIMINAL JUSTICE 3, 273-285 (June 2011).

[50] *See, e.g.*, Audit of the City of Sunrise Police Department's Equitable Sharing Program Activities, Sunrise, Fla. (Nov. 2014), http://www.justice.gov/oig/reports/2014/g4015003.pdf; Audit of the Oklahoma Highway Patrol's Equitable Sharing Program Activities (Sept. 2013), http://www.justice.gov/oig/reports/2013/g6013014.pdf.

[51] U.S. Dep't of Justice, Office of the Attorney General, *Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies*, Order No. __, Jan. 16, 2015, *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf.

[52] *See, e.g.*, Charlotte Alter, *Feds Limit Law that Lets Cops Seize Your Stuff*, TIME (Jan. 16, 2015), http://time.com/3672140/civil-forfeiture-assets-holder/ (stating that under order "state and local officials would no longer be allowed to use federal law to seize private property such as cash or cars without evidence that a crime had occurred"); *see also* Jacob Sullum, *How the Press Exaggerated Holder's Forfeiture Reform*, REASON (Jan. 19, 2015), http://reason.com/blog/2015/01/19/how-the-press-exaggerated-holders-forfei.

coordinated with federal authorities as part of an ongoing federal investigation ("joint-investigation seizures"); or (3) seizures pursuant to a federal seizure warrant, obtained to take custody of assets originally seized under state law.[53]

These broad categories of seizures to which the new policy is inapplicable demonstrate the limited reach of the Justice Department's policy change. For example, many of the drug task forces conducting "highway interdictions" exposed by the *Washington Post* in its six-part investigative series would fall within the exceptions for task-force seizures.[54] Additionally, according to a 2012 GAO report, approximately 83 percent of equitable-sharing cases are from joint investigations, including task forces.[55] An Institute for Justice review of data obtained from the Justice Department reveals that from 2008 to 2013, only a quarter—25.6 percent—of properties seized under the federal Equitable Sharing Program were from adoptions. The rest were from task-force seizures or joint-investigation seizures.[56] In terms of value, of the roughly $6.8 billion in cash and property seized under equitable sharing from 2008 to 2013, adoptions accounted for just 8.7 percent. (A breakdown of the impact of the Justice Department's new policy is attached as Appendix B, *By the Numbers: What Does the Department of Justice's New Forfeiture Policy Really Mean*?).

Following widespread criticism of the limited reach of this policy change,[57] Attorney General Holder directed the Asset Forfeiture and Money Laundering Section of the Criminal Division to clarify when seizures qualify as task-force or joint-investigative seizures[58]. The resulting Policy Directive essentially requires attorneys for the federal agency and line prosecutors in the judicial district where the seizure took place to agree that there was "sufficient federal law enforcement oversight or participation" by considering three non-exhaustive factors.[59] The Policy Directive does not require any factor to be present or even rank those factors. Moreover, the ultimate decision rests with line prosecutors and agency attorneys who stand to benefit from any seizure. Consequently, this Policy Directive fails to provide any meaningful standards to limit the abuse of equitable sharing.

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[53] *See* U.S. Dep't of Justice, Criminal Division, Policy Directive 15-2, "Additional Guidance on the Attorney General's January 16, 2015 Order on Adoptions," (Feb. 10, 2015).

[54] Michael Sallah, Robert O'Harrow Jr. & Steven Rich, *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, WASH. POST, Sept. 6, 2014, *available at* http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/#.

[55] U.S. Gov't Accountability Office, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED 43 (2012), *available at* http://www.gao.gov/assets/600/592349.pdf.

[56] Subsequent Justice Department guidance, discussed *infra*, attempts to clarify what now qualifies as a task-force or joint-investigative seizure and requires agencies to track certain information about such seizures. But because this data has not been collected previously, it is impossible to determine how many past joint seizures would have been prevented by this policy or to predict the policy's future effects.

[57] *See, e.g.*, Radley Balko, *How Much Civil Asset Forfeiture Will Holder's New Policy Actually Prevent?* WASH. POST, Jan. 20, 2015, *available at* http://www.washingtonpost.com/news/the-watch/wp/2015/01/20/how-much-civil-asset-forfeiture-will-holders-new-policy-actually-prevent/.

[58] Mem. for Heads of Dep't of Justice Components and Participants in the Dep't of Justice Asset Forfeiture Program (Feb. 10, 2015).

[59] U.S. Dep't of Justice, Criminal Division, Policy Directive 15-2, *supra* n. 53.

Finally, neither the January 16 Order not the February 11 Policy Directive cover seizures if there is a federal seizure warrant or if the seized property falls under the public-safety exception for adoptive seizures. While it remains to be seen whether federal authorities will simply be able to adopt the seizure if they secure a federal seizure warrant, the February 11 Policy Directive essentially directs federal prosecutors to obtain a warrant if there was insufficient federal law enforcement oversight or participation at the time of the seizure.[60] Obtaining a federal seizure warrant is a relatively easy task as they are done *ex parte*—without notice or a hearing—and consist of a one-sided presentation of evidence. Supreme Court Justice Felix Frankfurter famously criticized the fairness of *ex parte* proceedings:

> [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss, notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.[61]

IJ has successfully defended four small-business owners who have had their bank accounts seized pursuant to *ex parte* federal seizure warrants for making a series of less-than-$10,000 deposits, even though there was no allegation of money laundering, or other criminal activity. Unfortunately, these clients are not alone. As detailed in Section V below, from 2005 to 2012, the Internal Revenue Service, in cooperation with U.S. Attorneys' Offices, seized more than $242 million in more than 2,500 cases.[62] In at least one third of these cases, the seizure is based on nothing more than a series of transactions under $10,000, with no other criminal activity, such as fraud, money laundering, or smuggling, alleged by the government.[63]

Moreover, even within adoptive seizures, the Justice Department's policy carves out an exception for public safety.[64] The order spells out four non-exhaustive categories: firearms, ammunitions, explosives, and property related to child pornography. Seizures not falling within these four categories may still be adopted at the sole discretion of the Assistant Attorney General for the Criminal Division. Indeed, the new *Request for Adoption of State or Local Seizure* form merely asks the state or local agency to "explain the compelling circumstances and public safety concerns justifying approval of adopting these assets."[65] Precisely how this public-safety exception will be enforced remains to be seen and should be the subject of Congressional oversight.

The Justice Department itself has acknowledged the limited reach of its policy change, noting that "[o]ver the last six years, adoptions accounted for roughly three percent of the value of forfeitures in the Department of Justice Asset Forfeiture Program" which includes both

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[60] *Id*.

[61] *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring).

[62] Dick M. Carpenter & Larry Salzman, INSTITUTE FOR JUSTICE, *Seize First, Question Later: The IRS and Civil Forfeiture* 4, *available at* http://ij.org/images/pdf_folder/private_property/seize-first-question-later.pdf.

[63] *Id*.

[64] *Supra* note 45.

[65] Dep't of Justice & Dep't of the Treasury, *Request for Adoption of State or Local Seizure*, http://www.justice.gov/criminal/afmls/forms/pdf/request-for-adoption-form.pdf.

criminal and civil forfeitures.[66] And according to Justice Department data reviewed by IJ, adoptions only accounted for about 10 percent of overall Justice Department seizures from 2008 to 2013.[67]

While this policy change is certainly a step in the right direction to reforming federal forfeiture laws, much more needs to be done, as explained in the following section.

IV. THE FEDERAL GOVERNMENT EARNS AN ALMOST FAILING GRADE FOR ITS CURRENT FORFEITURE LAWS.

Under the metrics used by IJ's *Policing for Profit* study, the federal government earns a grade of D- for its forfeiture laws.[68] Like the worst jurisdictions in IJ's study, the federal government incentivizes forfeiture by returning 100 percent of the proceeds to law enforcement while also failing to provide adequate procedural safeguards to protect innocent property owners.

A. Federal Forfeiture Law Perversely Incentivizes Seizing Forfeitable Property, While Circumventing Legislative Oversight and Violating the Constitution.

Perhaps the most troubling aspect of federal forfeiture law is that it gives police and prosecutors a budgetary stake in forfeiture, while short-circuiting legislative oversight by directing all proceeds from forfeited property back to law-enforcement agencies that seize the property. As the author of a seminal treatise on forfeiture notes, forfeitures are a "windfall for law enforcement."[69] While the influx of this money may sound beneficial, law enforcement's retention of forfeiture proceeds violates two key constitutional principles: separation of powers and the impartiality requirement of due process.

First, funding agencies outside the legislative appropriations process violates the separation of powers. The Appropriations Clause of the Constitution assigns to Congress the role of final arbiter of the use of public funds.[70] In his *Commentaries on the Constitution of the United States*, Joseph Story famously explained the vital role the Appropriations Clause plays in preserving the separation of powers and our system of checks and balances:

> [T]o preserve in full vigor the constitutional barrier between each department . . . that each should possess equally . . . the means of self protection. And the [legislature] has, and must have, a controlling influence over executive power, since it holds at its own command all the resources by which a chief magistrate could make himself formidable. ***It possesses the power over the purse of the nation and the property of the people.*** It

[66] U.S. Dep't of Justice Press Release, Office of Public Affairs, *Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety*, (Jan. 16, 2015), *available at* http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law.

[67] *See* Appendix B.

[68] *See* Appendix A.

[69] Steven Kessler, CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE, §1.1 page 1-2.

[70] U.S. Const. art. I, § 9, cl. 7.

> can grant or withhold supplies; it can levy or withdraw taxes; it can unnerve the power of the sword by striking down the arm that wields it.[71]

And James Madison characterized this "power over the purse" as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[72] However, current federal forfeiture law disarms the legislative branch. With forfeiture funds, police departments and prosecutors' offices—members of the executive branch—become self-financing agencies, unaccountable to members of Congress or the public at large.[73]

Second, giving law enforcement a direct financial stake in the seizures violates the basic due-process requirement of impartiality. Impartiality in the administration of justice is a bedrock principle of the American legal system, enshrined in the Due Process Clauses of the Constitution. By allowing law enforcement to retain forfeiture proceeds, federal forfeiture law dangerously shifts law-enforcement priorities from fairly and impartially administering justice to generating revenue.

Indeed, the judiciary has sounded the alarm about the government's aggressive use of forfeiture particularly in light of its "direct pecuniary interest in the outcome of the proceeding."[74] Courts "continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil-forfeiture statutes and the disregard for due process that is buried in those statutes."[75]

More broadly, the Supreme Court has closely scrutinized the actions of public officials and agencies when they have a direct financial stake in the outcome of proceedings and has repeatedly struck down regulatory schemes that create an impermissible conflict of interest. For example, in *Tumey v. Ohio*, the Supreme Court overturned a fine where the mayor also sat as a judge and personally received a share of the fines.[76] However, it is not just the prospect of personal gain that merits vigilance; institutional gain also runs afoul of due process. In *Ward v. Village of Monroeville*, the Supreme Court found a due-process violation where a substantial portion of the town's revenues came from fines imposed by the mayor sitting as a judge.[77]

Direct and substantial financial incentives for police and prosecutors are also impermissible under the Due Process Clause. For instance, in *Young v. United States ex rel. Vuitton et Fils S.A.*, a judge appointed the lawyers for the Vuitton Company as special prosecutors in a contempt action against other companies for violating a court order against

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[71] Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 530 (Boston & Cambridge 1833) (emphasis added).

[72] THE FEDERALIST NO. 58 (James Madison).

[73] Holcomb, *supra* n. 49, at 39 ("The dependency of police on public resources for their operations is an important check on police power. Self-generating revenues by the police through forfeiture potentially threatens the ability of popularly elected officials to constrain police activities.").

[74] *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993).

[75] *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992).

[76] 273 U.S. 510 (1927).

[77] 409 U.S. 57 (1972).

trademark infringement.[78] If the companies were found guilty of contempt, the Vuitton Company stood to recover liquidated damages in the underlying action. The Court held that, despite judicial supervision of the prosecution, the financial incentives for prosecution were too direct and created an improper conflict of interest.[79] And in *Marshall v. Jerrico, Inc.*, the Supreme Court cautioned about the "possibility that [the official's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts."[80] In discussing due-process constraints on prosecutors, the Court noted:

> Prosecutors are also public officials; they too must serve the public interest. . . . Moreover, the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.[81]

Direct profit incentives for officials charged with enforcing the law can lead to improper conflicts of interest or the appearance of improper conflicts, and are therefore unconstitutional.

In sum, incentivizing forfeiture by creating a direct financial incentive is not only bad public policy, but also unconstitutional. The weak procedural safeguards in current federal law exacerbate this problem.

B. Federal Forfeiture Laws Provide Inadequate Procedural Safeguards to Protect Innocent Property Owners.

In addition to incentivizing forfeiture, federal law makes forfeiture all too easy for law enforcement by providing few procedural safeguards. As an initial matter, most federal forfeitures are accomplished through administrative proceedings by the seizing agency itself, without any judicial involvement. Based on an IJ review of data from the Justice Department, from 2008 to 2013, 64 percent of all forfeitures were administrative, while only 14 percent were civil, with the remaining 22 percent criminal. In an administrative proceeding, the agency that stands to gain directly from the forfeiture acts as investigator, prosecutor, judge, and jury. Moreover, the rules and deadlines governing these opaque proceedings are complex, a minefield of technical traps for an unwary (and usually unrepresented) property owner.

But even civil-forfeiture judicial proceedings fail to provide adequate process. Because it is a civil proceeding, civil forfeiture does not provide all the legal rights guaranteed to individuals charged with a crime, such as the right to counsel. This difference can best be seen in the different burdens of proof. The individual charged with a crime enjoys the presumption of innocence and the government must prove the crime beyond a reasonable doubt. Property owners enjoy no such procedural protections in civil-forfeiture proceedings. Under federal law,

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[78] 481 U.S. 787 (1987).
[79] *Id.* at 805-07.
[80] 446 U.S. 238, 250 (1980).
[81] *Id*. at 249-50 (internal citations omitted).

the government must prove that property is subject to forfeiture only by a preponderance of the evidence, or more likely than not.

Once the government meets this low hurdle, the burden shifts to the property owner to either rebut this showing or prove that the owner did not know of the illegal conduct. In this upside-down world of forfeiture, property is presumed "guilty" and owners must prove a negative—the absence of knowledge—to recover what is rightfully theirs. This turns the presumption of innocence—a hallmark of the American justice system—on its head.

Moreover, property owners who have had their money seized have no opportunity to contest the seizure until the forfeiture trial itself, which can be months or even years away. Failing to provide a prompt hearing at which property owners can contest the validity of the seizure can prevent innocent individuals from securing counsel for the forfeiture trial. It can also deprive an individual "of the very means by which to live while he waits" for the forfeiture trial.[82] Holding onto seized funds until final adjudication without a preliminary hearing can harm the ability of those of more modest means "to obtain essential food, clothing, housing, and medical care";[83] to make mortgage[84] or car payments; or pay utility[85] and other bills. Moreover, the restraint can damage a person's credit rating, reducing the ability to obtain a loan to pay for these necessities.[86] The Supreme Court has repeatedly recognized that the Due Process Clause requires a hearing before the government can deprive individuals of property needed to pay for living expenses.[87]

Even if the property owner ultimately prevails at the civil-forfeiture trial and the property is returned, the interim deprivation works an irreparable injury. The Supreme Court has repeatedly cautioned that a final determination, "coming months after the seizure, would not cure the temporary deprivation that an earlier hearing might have prevented."[88] The availability of an eventual trial "is no recompense for losses caused by erroneous seizure." *Id*.

> This Court has . . . repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-

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[82] *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) ("[The] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress. . . .").

[83] *Id*.

[84] *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) ("[A]ttachments, liens, and similar encumbrances" can "place an existing mortgage in technical default where there is an insecurity clause.")

[85] *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) ("Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of times may threaten health and safety.").

[86] *Doehr*, 501 U.S. at 11.

[87] *See, e.g.*, *Craft*, 436 U.S. at 22 (holding that due process requires notice of availability of procedures for disputing utility bill and administrative procedure for customer complaints prior to termination of services); *Goldberg*, 397 U.S. at 266 (holding that New York's termination of welfare benefits without prior evidentiary hearing denied due process).

[88] *James Daniel Good*, 510 U.S. at 56; *see also Doehr*, 501 U.S. at 15 ("It is true that a later hearing might negate the presence of probable cause, but this would not cure the temporary deprivation that an earlier hearing might have prevented."); *Craft*, 436 U.S. at 20 ("Although utility services may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation.").

> deprivation hearing at which some showing of the probable validity of the deprivation must be made.[89]

Just as in these cases, retaining property during the pendency of a forfeiture proceeding without affording the owner an opportunity to be heard inflicts an irreparable injury in violation of the Due Process Clause.[90]

In sum, both the individual's right to property and the irreparable injury caused by the length of the deprivation before trial necessitates a prompt preliminary hearing not only for some kinds of property, but all property, including cash.

V. THE FEDERAL GOVERNMENT'S AGGRESSIVE USE OF CIVIL FORFEITURE FOR "STRUCTURING" HARMS INNOCENT SMALL-BUSINESS OWNERS.

The toxic mix of the financial incentive to seize and forfeit property combined with inadequate procedural safeguards is perhaps best seen in the context of the federal government's aggressive use of forfeiture to seize bank accounts from individuals and small-business owners who are guilty of nothing more than depositing cash in the bank in amounts under $10,000.

Federal laws require banks to file a currency transaction report with the U.S. Department of the Treasury for any transaction exceeding $10,000.[91] It is a felony under federal law to break up currency transactions into amounts below the $10,000 threshold "for the purpose of evading" the currency reporting requirements.[92] A person who has violated this prohibition is said to have impermissibly "structured" his financial transactions. Significantly, federal structuring laws do not criminalize every cash transaction below $10,000. Structuring is only a crime if a person engages in less-than-$10,000 transactions with an impermissible purpose to evade the currency reporting requirements. Under a correct interpretation of the structuring laws, a person who instead makes under $10,000 deposits for a legitimate business purpose is not guilty of anything illegal. These laws were intended to target drug dealers and other hardened criminals engaged in money laundering or other criminal activity.

Yet, in practice, the IRS enforces the structuring laws against innocent Americans who have no idea that depositing less than $10,000 in the bank could possibly get them in trouble with the law. For instance:

- In August 2013, Carole Hinders, the proprietor of Mrs. Lady's Mexican Food, a small-town restaurant in Spirit Lake, Iowa, had more than $32,000 seized by

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[89] *Comm'r of Internal Revenue v. Shapiro*, 424 U.S. 614, 629 (1976).

[90] *See, e.g.*, *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008); *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002); *Simms v. District of Columbia*, 872 F. Supp. 2d 90 (D.D.C. 2012); *Krimstock v. Safir*, No. 99 Civ. 12041 MBM, 2000 WL 1702035 (S.D.N.Y. Nov. 13, 2000).

[91] *See* 31 U.S.C. § 5313.

[92] *See* 31 U.S.C. § 5324.

the IRS—the restaurant's entire bank account.[93] Years ago, Carole's mother told her that depositing more than $10,000 created a hassle for the bank. Carole had no idea that trying to make life easier for the bank might be a federal crime. The IRS finally agreed to return Carole's money sixteen months after the seizure.

- In March 2013, Mark Zaniewski, the proprietor of Metro Marathon service station, in Sterling Heights, Michigan, had his business's entire bank account—over $33,000—seized by the IRS.[94] An IRS agent advised Mark that he should go ahead and deposit any additional funds belonging to Metro Marathon into the account to avoid bouncing checks to his vendors. Mark borrowed $10,000 from his sister-in-law and also made additional deposits of credit card receipts into the account. Then, in April 2013, the IRS seized all this newly deposited money (over $37,000) from the account. Although Mark often deposits cash in amounts under $10,000, he also sometimes deposits more than $10,000; this pattern reflects the fact that he goes to the bank every few days to deposit cash to cover vendor bills and to safeguard surplus cash. Eight months after the seizure, the IRS finally agreed to return all the money.

- In January 2013, Terry Dekho, the proprietor of Schott's Supermarket, located in Fraser, Michigan, had his entire bank account cleaned out by the IRS—totaling more than $35,000.[95] Nine months before the seizure, the IRS visited Schott's Market to perform a "Bank Secrecy Act" examination and informed Dekho that "no violations were identified." Terry made a practice of depositing cash from the store when the amount on hand approached $10,000, as the insurance policy for Schott's Supermarket covered theft or other loss of cash up to $10,000. Eleven months after the seizure, the government agreed to return the money.

- In May 2012, Jeffrey, Richard, and Mitchell Hirsch, the proprietors of Bi-County Distributors, Inc., had over $446,000 seized by the IRS—once again, the entire contents of their business's bank account.[96] After a series of banks closed their accounts, the Hirsch brothers were advised by their own accountant to keep cash deposits under $10,000 to reduce paperwork burdens for their banks that otherwise are associated with frequent cash deposits. The IRS held the money for thirty-two months, over two-and-a-half years, before finally agreeing to return it to the Hirsch brothers.

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[93] *See United States v. Thirty-Two Thousand Eight Hundred Twenty Dollars and Fifty-Six Cents in U.S. Currency*, No. 13-CV-4102 (N.D. Iowa).

[94] *See United States v. Thirty-Three Thousand Two Hundred Forty-Four Dollars and Eighty-Six Cents in U.S. Currency*, No. 13-cv-13990 (E.D. Mich.).

[95] *See United States v. Thirty Five Thousand Six Hundred Fifty-One Dollars and Eleven Cents in U.S. Currency*, No. 4:13-cv-13118 (S.D. Mich.).

[96] *See In the Matter of the Seizure of Four Hundred Forty Six Thousand Six Hundred Fifty One Dollars an Eleven Cents in U.S. Currency*, No. 14-mc-1288 (E.D.N.Y.).

In all these cases, the individuals targeted by the IRS had no interest in concealing their activities from the government; each had a legitimate purpose for their banking practices. None of these individuals was ever charged with any crime other than depositing less than $10,000 in the bank. Yet the government seized their money without warning and without asking any questions prior to the seizure. Then, the government forced the property owners to fight for months or years to get their money back.

In an effort to quantify the scope of the problem, the Institute for Justice requested data on structuring seizures and forfeitures from the IRS under the Freedom of Information Act. The resulting data has been released in a report, *Seize First, Question Later*. (A copy of this report is attached as Exhibit D to this testimony.)

The report shows that the IRS is stepping up its enforcement of the structuring laws, and also shows that the IRS seizes millions of dollars every year that it ultimately cannot justify keeping. Key findings include:

- From 2005 to 2012, the IRS seized almost a quarter of a billion dollars for suspected structuring violations in more than 2,500 cases, and annual seizures increased fivefold over those eight years.

- At least a third of those cases arose from nothing more than a series of cash transactions under $10,000, with no other criminal activity alleged.

- Four out of five IRS structuring-related forfeitures were civil, not criminal, meaning the IRS faced a lower evidentiary standard and did not need to secure a conviction to forfeit the cash, and owners had fewer rights in fighting to win it back.

- IRS data do not indicate how long property owners who get all or some their money back are deprived of their funds, but it is likely a long time: Forfeitures that the IRS won took nearly a year to complete.

- Nearly half of the money seized by the IRS was not forfeited, raising concerns that the IRS seized more than it could later justify keeping. Indeed, in almost a third of cases, the IRS failed to forfeit any of the funds seized.

These findings suggest that the stories conveyed above are not isolated incidents, but rather part of a more systemic practice.

In response to significant media attention, including a front-page article in the *New York Times*, the IRS announced in October 2014 that it was adopting a new policy under which it would only pursue structuring cases where the money came from an illegal source.[97] The new IRS policy, however, did not apply to pending cases, and also

[97] *See* Statement of Richard Weber, Chief of IRS Criminal Investigation, at http://www.nytimes.com/2014/10/26/us/statement-of-richard-weber-chief-of-irs-criminal-investigation.html (Oct. 25, 2014).

included a vague and undefined loophole for "exceptional" circumstances. At this point, it remains to be seen whether that policy change will have a significant effect on IRS enforcement of the structuring laws.

Early indications are not entirely promising. In December 2014, the IRS filed a civil forfeiture complaint against the proprietors of L&M Convenience Mart, Inc. in Robeson County, North Carolina, alleging that the money was subject to forfeiture because the proprietors deposited cash in amounts under $10,000—with deposits ranging from $952 to $3,856 to $9,988.[98] The government does not allege in its complaint that the money came from an illegal source. Because this action post-dates the IRS policy change, it raises serious questions regarding how meaningfully these policy changes will bind the IRS and Justice Department.

On March 31, 2015, Attorney General Holder followed the IRS's lead, announcing a similar policy change for the Justice Department.[99] But as with the IRS announcement, the policy leaves federal officials with significant discretion. While these Executive Branch policy changes are a step in the right direction, the ultimate solution must come from Congress by statute to both ensure that innocent small-business owners do not have their lawfully obtained funds taken.

CONCLUSION

It is beyond dispute that federal forfeiture laws have been systematically abused and require comprehensive reform now. Investigative reporters have highlighted this forfeiture abuse in major outlets like the *New Yorker*, the *New York Times*, and the *Washington Post*. In the last ten months, 45 different editorial boards have criticized the heavy hand of civil forfeiture. (A list of these editorials is attached as Appendix C). Civil-liberties groups on both sides of the political spectrum have uniformly criticized federal forfeiture programs.

But the call for reform is not merely coming from outsiders. The Defense Bar and members of the judiciary have also joined the clarion call. Even former Justice Department officials, involved in creating the current federal forfeiture regime have called for civil forfeiture to be abolished, opining that forfeiture "has turned into an evil itself, with the corruption it engendered among government and law enforcement coming to clearly outweigh any benefits."[100] The Justice Department, itself, has conceded as much by changing its policy and commencing an "internal, top-to-bottom review of its entire asset forfeiture program."[101]

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[98] *See United States v. $107,702.66 in United States Currency*, No. 7:14-cv-295 (E.D.N.C.).

[99] U.S. Dep't of Justice, Criminal Division, Policy Directive 15-3,"Guidance Regarding the Use of Asset Forfeiture Authorities in Connection with Structuring Offenses" (Mar. 31, 2015), *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/31/ag-memo-structuring-policy-directive.pdf.

[100] John Yoder and Brad Cates, *Op-Ed: Government Self-Interest Corrupted a Crime-Fighting Tool Into An Evil*, WASH. POST, Sept. 19, 2014, http://www.washingtonpost.com/opinions/abolish-the-civil-asset-forfeiture-program-we-helped-create/2014/09/18/72f089ac-3d02-11e4-b0ea-8141703bbf6f_story.html.

[101] Robert O'Harrow Jr., *Lawmakers Urge End to Program Sharing Forfeited Assets With State and Local Police*, WASH. POST, Jan. 9, 2015, http://www.washingtonpost.com/investigations/lawmakers-urge-end-to-program-

Legitimate law-enforcement objectives can be satisfied through criminal forfeiture. However, short of abolishing civil forfeiture, the following measures must be part of any comprehensive effort to reform federal forfeiture:

- Eliminate the profit incentive by requiring forfeiture proceeds be deposited into the Treasury's General Fund or another neutral fund, not the Justice Department's Assets Forfeiture Fund or the Treasury Forfeiture Fund;

- Abolish the Equitable Sharing Program;

- Increase the burden of proof on the government to prove that property is subject to forfeiture to at least clear and convincing evidence;

- Restore the presumption of innocence by placing the burden to prove actual knowledge of the criminal activity on the government;

- Provide counsel for the indigent;

- Provide for prompt post-seizure hearing for seizures of currency; and

- Include a *mens rea*, or criminal intent, requirement to make clear that it is only willfully structuring financial transactions in order to evade currency reporting that is a crime.

These commonsense reforms will go a long way toward restoring our public trust in law enforcement, and the belief—so vital to our republic—that we are a nation ruled by laws and not by men.

sharing-forfeited-assets-with-state-and-local-police/2015/01/09/8843a43c-982f-11e4-8005-1924ede3e54a_story.html.

Appendix A

FEDERAL GOVERNMENT

FORFEITURE[1] LAW GRADE

FORFEITURE LAW

As the numbers below indicate, the federal government has a very aggressive civil forfeiture program. Federal law enforcement forfeits a substantial amount of property for its own use while also teaming up with local and state governments to prosecute forfeiture actions, whereby all of the agencies share in the bounty at the end of the day.

Outrage over abuse of civil forfeiture laws led to the passage of the Civil Asset Forfeiture Reform Act (CAFRA) in 2000. Under these changes, the government now must show by a preponderance of the evidence why the property should be forfeited. The Act also created an innocent owner defense that lets individuals keep their property if they can show either that they did not know that it was being used illegally or that they took reasonable steps to stop it.

But while CAFRA heightened some procedural protections, it failed to address the largest problem in the federal civil forfeiture system: the strong pecuniary interest that federal law enforcement agencies have in the outcome of the forfeiture proceeding. For the past 25 years, federal agencies have been able to keep all of the property that they seize and forfeit. And that has led to explosive growth in the amount of forfeiture activity at the federal level.

U.S. DEPARTMENT *of* JUSTICE ASSETS FORFEITURE FUND[2]

		Deposits to Fund		
	Net Assets in Fund	Cash and Cash Equivalents	Property	Total Deposits
FY 2005	$448,000,000	$514,900,000	$80,600,000	$595,500,000
FY 2006	$651,100,000	$1,009,200,000	$115,700,000	$1,124,900,000
FY 2007	$734,200,000	$1,409,000,000	$106,700,000	$1,515,700,000
FY 2008	$1,000,700,000	$1,222,600,000	$63,400,000	$1,286,000,000
FY 2009	$1,425,883,000	$1,376,423,000	$68,145,000	$1,444,568,000
FY 2010	$1,687,400,000	$1,502,466,000	$70,864,000	$1,573,330,000
FY 2011	$1,760,544,000	$1,580,584,000	$157,381,000	$1,737,965,000
FY 2012	$1,620,387,000	$4,194,465,000	$120,245,000	$4,314,710,000
FY 2013	$1,855,767,000	$1,826,480,000	$185,769,000	$2,012,249,000
Total		$14,636,118,000	$968,804,000	$15,604,922,000
Average per Year		$1,626,235,333	$107,644,889	$1,733,880,222

1 Following the grading methodology for states from Marian R. Williams, Ph.D., Jefferson E. Holcomb, Ph.D., Tomislav V. Kovandzic, Ph.D., & Scott G. Bullock, Policing For Profit: The Abuse Of Civil Asset Forfeiture (Institute for Justice, 2010), *available at* http://www.ij.org/policingforprofit.

2 Data retrieved from Assets Forfeiture Fund Annual Financial Statements: http://www.usdoj.gov/jmd/afp/01programaudit/index.htm.

U.S. DEPARTMENT *of* TREASURY FORFEITURE FUND[3]

		Deposits to Fund		
	Net Assets in Fund	Cash and Cash Equivalents	Property	Total Deposits
FY 2004	$194,100,000	$228,905,000	$42,660,000	$271,565,000
FY 2005	$255,300,000	$209,139,000	$49,497,000	$258,636,000
FY 2006	$236,800,000	$167,919,000	$46,732,000	$214,651,000
FY 2007	$361,400,000	$207,956,000	$52,611,000	$252,192,000
FY 2008	$426,800,000	$412,151,000	$44,236,000	$464,762,000
FY 2009	$594,513,000	$479,494,000	$37,242,000	$516,736,000
FY 2010	$986,071,000	$914,227,000	$45,540,000	$959,767,000
FY 2011	$1,452,922,000	$763,378,000	$53,776,000	$817,154,000
FY 2012	$1,555,895,000	$344,789,000	$52,213,000	$397,002,000
FY 2013	$2,486,628,000	$1,560,460,000	$51,901,000	$1,612,361,000
Total		$5,288,418,000	$476,408,000	$5,764,826,000
Average per Year		$528,841,800	$47,640,800	$576,482,600

3 Data retrieved from Treasury Forfeiture Fund Annual Accountability Reports: http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Pages/annual-reports.aspx

Appendix B

By the Numbers:
What Does the Department of Justice's New Forfeiture Policy Really Mean?

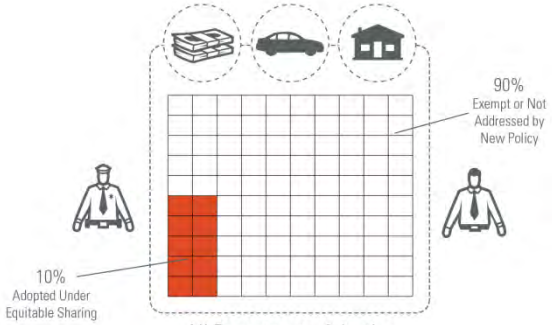
On January 16, U.S. Attorney General Eric Holder issued an order curtailing some Department of Justice forfeiture practices. The order suspended most "adoptive" forfeitures, where property seized by state and local law enforcement is turned over to ("adopted" by) the federal government for forfeiture. Under the DOJ's equitable sharing program, the state or local agencies that seized the property can receive up to 80 percent of the proceeds, even if state law bars agencies from keeping forfeiture proceeds or limits how much they may keep. But adoption is only part of the equitable sharing program. The new policy exempts equitable sharing seizures made by state and local law enforcement working with federal agents on joint task forces or as part of joint investigations. It also does not address seizures by federal agents outside the equitable sharing program.

The Institute for Justice reviewed six years of DOJ forfeiture data, from 2008 through 2013, to estimate how much forfeiture activity could be affected by the new policy.

Most Equitable Sharing Seizures Continue

Only about a quarter—25.6 percent—of properties seized under equitable sharing were adoptions. The rest resulted from joint task forces or joint investigations exempt from the new rules. In terms of value, of the roughly $6.8 billion in cash and property seized under equitable sharing from 2008 to 2013, adoptions accounted for just 8.7 percent.

$6.8 Billion Seized Under Equitable Sharing, 2008-2013



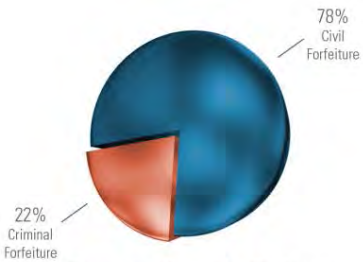
All Department of Justice Seizures, 2008-2013

Most DOJ Seizures Continue

Adoption for equitable sharing also made up a small share of overall DOJ seizures, about 10 percent. And as the DOJ acknowledged, adoptive seizures accounted for just three percent of the value of all seized properties in the DOJ system.

Forfeitures Without Convictions Continue

The new policy also does not address the lax legal standards in federal civil forfeiture law. Civil forfeiture allows law enforcement to take property without convicting or even charging the owner with a crime, and it sets a low evidentiary bar for forfeiture. Most properties in the DOJ system—78 percent—were seized for civil forfeiture. Only 22 percent were seized for criminal forfeiture, which requires a conviction. And the new policy does not change state forfeiture laws, most of which permit forfeitures without convictions or charges and allow law enforcement to keep some or all of the proceeds.



Properties Seized for Civil vs. Criminal Forfeiture, 2008-2013

Source: Institute for Justice analysis of DOJ forfeiture data obtained from a Freedom of Information Act request. Equitable sharing seizures are those where a share of a property's proceeds was requested by a state or local agency.

Appendix C

Since the Institute for Justice launched its “End Forfeiture” initiative in July 2014, there have been at least 60 editorials calling for civil forfeiture reform in 45 newspapers in 22 states and Washington, D.C.

The Washington Times

“Stopping police asset-forfeiture predators,” *The Washington Times*, (July 25, 2014), http://www.washingtontimes.com/news/2014/jul/25/editorial-stopping-police-predators/ (last visited Apr. 13, 2015).

Investor's Business Daily

“Civil Asset Forfeiture Looks Like A Criminal Enterprise,” *Investor’s Business Daily*, (Aug. 13, 2014), http://news.investors.com/ibd-editorials/081314-713180-policing-for-profit-needs-to-be-ended.htm (last visited Apr. 13, 2015)

Philadelphia Daily News

“Not-very-civil forfeiture,” *Philadelphia Daily News*, (Aug. 15, 2014), http://articles.philly.com/2014-08-15/news/52850730_1_forfeiture-personal-property-personal-property (last visited Apr. 13, 2015).

The Philadelphia Inquirer

“Presumed innocent,” *Philadelphia Inquirer*, (Aug. 18, 2014), http://www.philly.com/philly/opinion/inquirer/20140818_Presumed_innocent.html (last visited Feb. 6, 2015).

THE WALL STREET JOURNAL.

"What's Yours Is Theirs," *The Wall Street Journal*, (Sept. 4, 2014), http://www.wsj.com/articles/whats-yours-is-theirs-1409702898 (last visited Apr. 13, 2015).

Deseret News

"A cause for concern if civil forfeiture goes unchecked," *Deseret News*, (Sept. 9, 2014), http://www.deseretnews.com/article/865610518/A-cause-for-concern-if-civil-forfeiture-goes-unchecked.html (last visited Apr. 13, 2015).

The Washington Post

"Police rake in bonanzas from people who have committed no crime," *The Washington Post*, (Sept. 10, 2014), http://www.washingtonpost.com/opinions/police-rake-in-bonanzas-from-people-who-have-committed-no-crime/2014/09/10/d9d5a51a-386d-11e4-8601-97ba88884ffd_story.html (last visited Apr. 13, 2015).

"State has a solid start on 'policing for profit' reform," *Minneapolis Star Tribune*, (Sept. 12, 2014), http://www.startribune.com/opinion/editorials/274964171.html (last visited Apr. 13, 2015).

The Des Moines Register

"Lawmakers need to fix 'forfeiture' law in 2015," *The Des Moines Register*, (Oct. 19, 2014), http://www.desmoinesregister.com/story/opinion/editorials/2014/10/18/lawmakers-must-fix-forfeiture-law/17522001/ (last visited Apr. 13, 2015).

Richmond Times-Dispatch

"Thieves in Suits," *Richmond Times-Dispatch*, (Oct. 29, 2014), http://www.richmond.com/opinion/our-opinion/editorial-thieves-in-suits/article_aaac41c4-8e8c-5db5-9a8f-c1e67790b7fd.html (last visited Apr. 13, 2015).

The Des Moines Register

"Congress must end abuses of seizures by feds," *The Des Moines Register*, (Nov. 8, 2014), http://www.desmoinesregister.com/story/opinion/editorials/2014/11/08/congress-must-stop-seizures/18728827/ (last visited Apr. 13, 2015).

LNP
Always Lancaster

"Civil forfeitures need more oversight," *LNP*, (Nov. 9, 2014) http://lancasteronline.com/opinion/editorials/civil-forfeitures-need-oversight/article_67d97ed8-66de-11e4-9587-0017a43b2370.html (last visited Apr. 13, 2015).

ORANGE COUNTY REGISTER

"Time is now to fix asset forfeiture," *Orange County Register*, (Nov. 13, 2014), http://www.ocregister.com/articles/law-642041-forfeiture-asset.html (last visited Apr. 13, 2015).

LAS CRUCES SUN-NEWS

"Comments draw scrutiny to city seizure ordinance," *Las Cruces Sun-News*, (Nov. 16, 2014), http://www.lcsun-news.com/las_cruces-opinion/ci_26944825/editorial-comments-draw-scrutiny-city-seizure-ordinance (last visited Apr. 13, 2015).

The Times-Tribune

"Rein in asset forfeitures," *Scranton Times-Tribune*, (Nov. 17, 2014), http://thetimes-tribune.com/opinion/rein-in-asset-forfeitures-1.1789042 (last visited Apr. 13, 2015).

The Washington Times

"Time for civil-forfeiture reform," *The Washington Times*, (Nov. 17, 2014) http://www.washingtontimes.com/news/2014/nov/17/editorial-time-for-civil-forfeiture-reform/ (last visited Apr. 13, 2015).

"When police play bounty hunter," *USA Today*, (Nov. 20, 2014), http://www.usatoday.com/story/opinion/2014/11/19/police-civil-asset-forfeiture-profit-drug-trafficking-editorials-debates/19299879/ (last visited Apr. 13, 2015).

THE WALL STREET JOURNAL.

"Loretta Lynch's Money Pot," *The Wall Street Journal*, (Nov. 21, 2014), http://www.wsj.com/articles/loretta-lynchs-money-pot-1416615114 (last visited Apr. 13, 2015).

"No conviction? Give back assets seized by agencies," *Albuquerque Journal*, (Dec. 3, 2014), http://www.abqjournal.com/504543/opinion/no-conviction-give-back-assets-seized-by-agencies.html (last visited Apr. 13, 2015).

The Times

"Broad use of civil forfeiture law by N.J. law enforcement needs scrutiny," *Times of Trenton*, (Dec. 9, 2014), http://www.nj.com/opinion/index.ssf/2014/12/editorial_broad_use_of_civil_forfeiture_law_by_nj_law_enforcement_needs_scrutiny.html (last visited Apr. 13, 2015).

The Des Moines Register

"IRS to give back cash, but it's not enough," *The Des Moines Register*, (Dec. 21, 2014), http://www.desmoinesregister.com/story/opinion/editorials/2014/12/21/register-editorial-irs-give-back-cash-enough/20747663/ (last visited Apr. 13, 2015).

San Francisco Chronicle

"Go to the bank, go to jail," *San Francisco Chronicle* (Dec. 26, 2014) http://www.sfgate.com/opinion/editorials/article/Go-to-the-bank-go-to-jail-5980457.php (last visited Apr. 13, 2015).

The Dallas Morning News

"Texas' asset forfeiture laws require changes," *The Dallas Morning News*, (Dec. 30, 2014), http://www.dallasnews.com/opinion/editorials/20141230-editorial-texas-asset-forfeiture-laws-require-changes.ece (last visited Apr. 13, 2015).

The Patriot-News

"Pa. needs to protect innocent owners from civil forfeiture abuses," *The Patriot-News*, (Dec. 31, 2014) http://www.pennlive.com/opinion/2014/12/pennsylvania_needs_to_reform_c.html (last visited Apr. 13, 2015)

The Philadelphia Inquirer

"Forfeiting their rights," *Philadelphia Inquirer*, (Jan. 3, 2015), http://articles.philly.com/2015-01-03/news/57615181_1_forfeiture-property-federal-suit (last visited Apr. 13, 2015).

The Press OF ATLANTIC CITY

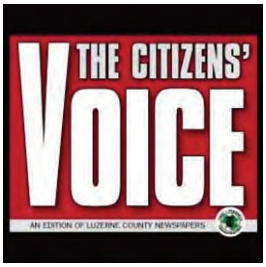
"Asset forfeiture / Legal robbery," *Press of Atlantic City*, (Jan. 13, 2015), http://www.pressofatlanticcity.com/opinion/editorials/asset-forfeiture-legal-robbery/article_76f7c0de-bf74-5635-90da-74d670fd9a55.html (last visited Apr. 13, 2015).

"Shutting down civil forfeiture," *MetroWest Daily News*, (Jan. 18, 2015) http://www.metrowestdailynews.com/article/20150118/OPINION/150116881/11608/OPINION (last visited Apr. 13, 2015)

"Eric Holder's Good Deed," *The Wall Street Journal*, (Jan. 19, 2015), http://www.wsj.com/articles/eric-holders-good-deed-1421680450 (last visited Apr. 13, 2015).

"Legal stealing," *Gainesville Sun*, (Jan. 20, 2015), http://www.gainesville.com/article/20150122/OPINION01/150129966?p=2&tc=pg (last visited Apr. 13, 2015).

"First step toward reining in 'policing for profit,' *U-T San Diego*, (Jan. 21, 2015), http://www.utsandiego.com/news/2015/jan/21/first-step-toward-reining-in-policing-for-profit/ (last visited Apr. 13, 2015).



"Civil forfeiture reform is long overdue," *The Citizen's Voice*, (Jan. 22, 2015), http://citizensvoice.com/opinion/civil-forfeiture-reform-is-long-overdue-1.1820693 (last visited Apr. 13, 2015).

LAS VEGAS REVIEW-JOURNAL

"State's asset forfeiture law needs makeover," *Las Vegas Review-Journal*, (Jan. 23, 2015), http://www.reviewjournal.com/opinion/editorial-state-s-asset-forfeiture-law-needs-makeover (last visited Apr. 13, 2015).

The Augusta Chronicle

"Highway robbery," *Augusta Chronicle*, (Jan. 25, 2015), http://chronicle.augusta.com/opinion/editorials/2015-01-25/highway-robbery#gsc.tab=0 (last visited Apr. 13, 2015).

VALLEY NEWS

"Stop Seizing Assets Without Charges," *Valley News*, (Jan. 25, 2015) http://www.vnews.com/home/15332152-95/editorial-stop-seizing-assets-without-charges (last visited Apr.13, 2015)

The Star-Ledger

"Holder taps the brakes on civil forfeiture," *Star-Ledger*, (Jan. 26, 2015), http://www.nj.com/opinion/index.ssf/2015/01/holder_puts_the_breaks_on_civil_forfeiture_editori.html (last visited Apr. 13, 2015).

The Philadelphia Inquirer

"Seize the moment," *Philadelphia Inquirer*, (Jan. 28, 2015), http://articles.philly.com/2015-01-28/news/58513069_1_forfeiture-property-williams (last visited Apr. 13, 2015).

The Detroit News

"Reform civil forfeiture laws," *Detroit News*, (Jan. 29, 2015), http://www.detroitnews.com/story/opinion/editorials/2015/01/28/edit-reform-civil-forfeiture-michigan/22487387/ (last visited Apr. 13, 2015).

"State must limit 'policing for profit,' *Daytona Beach News-Journal*, (Jan. 31, 2015), http://www.news-journalonline.com/article/20150131/OPINION/150209980/1040?p=1&tc=pg (last visited Apr. 13, 2015).

"Forfeiture revision is a good start," *The Daily Progress*, (Feb. 2, 2015) http://www.dailyprogress.com/opinion/opinion-editorial-senate-wrong-to-kill-forfeiture-reform-bill/article_4ad4ddfc-b7bd-11e4-8a4d-b7d7d5dca3de.html (last visited Apr. 13, 2015).

"Raise threshold for confiscation of assets," *Casper Star-Tribune*, (Feb. 5, 2015), http://trib.com/opinion/editorial/editorial-board-raise-threshold-for-confiscation-of-assets/article_59e70f95-386b-5f3f-8bbf-5df-254d66c7b.html (last visited Apr. 13, 2015).

"Right, left unite to curtail abuse of 'asset forfeiture,'" *Holland Sentinel*, (Feb. 5, 2015), http://www.holland-sentinel.com/article/20150205/Opinion/150209530 (last visited Apr.13, 2015).

"Tighten laws on seizures," *Lincoln Journal Star*, (Feb. 4, 2015) http://journalstar.com/news/opinion/editorial/editorial-tighten-laws-on-seizures/article_20850567-2f60-549e-9244-279c5f82ada3.html (last visited Apr.13, 2015).

The Gazette

"Forfeiture laws need to be strengthened to promote transparency, protect accused," *The Gazette*, (Feb. 8, 2015) http://thegazette.com/subject/opinion/staff-editorial/forfeiture-laws-need-to-be-strengthened-to-promote-transparency-protect-accused-20150208 (last visited Apr.13, 2015).

WINSTON-SALEM JOURNAL

"Seizing cash without criminal charges is dead wrong," *Winston Salem-Journal*, (Feb. 12, 2015) http://www.journalnow.com/opinion/editorials/editorial-seizing-cash-without-criminal-charges-is-dead-wrong/article_3f127644-b2d8-11e4-9353-bb5a9574414f.html (last visited Apr.13, 2015).

The Daily Progress

"Senate wrong to kill forfeiture reform bill," *The Daily Progress*, (Feb. 19, 2015) http://www.dailyprogress.com/opinion/opinion-editorial-senate-wrong-to-kill-forfeiture-reform-bill/article_4ad4ddfc-b7bd-11e4-8a4d-b7d7d5dca3de.html (last visited Apr.13, 2015).

The Virginian-Pilot

"Forfeiture laws should be amended," *The Virginian-Pilot*, (Feb. 20, 2015) http://hamptonroads.com/2015/02/forfeiture-laws-should-be-amended (last visited Apr. 13, 2015).

THE DENVER POST

"Tighten Colorado forfeiture law," *The Denver Post*, (Feb. 22, 2015) http://www.denverpost.com/editorials/ci_27566181/tighten-colorado-forfeiture-law (last visited Apr. 13, 2015).

"Civil forfeiture laws needs an overhaul," *The Keene Sentinel*, (Feb. 25, 2015) http://www.sentinelsource.com/opinion/editorial/civil-forfeiture-laws-needs-an-overhaul/article_c9a16652-0fce-5734-bb23-6395ec5aa1ae.html (last visited Apr. 13, 2015).

"A big upgrade over a bad law," *The Nashua Telegraph* (Feb. 26, 2015) http://www.nashuatelegraph.com/opinion/editorials/1058135-465/a-big-upgrade-over-a-bad-law.html (last visited: Apr. 13, 2015).

"Prosecutors shouldn't tie guilty pleas to forfeitures," *The Des Moines Register*, (Feb. 26, 2015) http://www.desmoinesregister.com/story/opinion/editorials/2015/02/27/registers-editorial-prosecutors-guilty-pleas-forfeitures/24099843/ (last visited Apr. 13, 2015).

"Legislators should override Mead's forfeiture veto," *Casper Star-Tribune* (Feb. 26, 2015) http://trib.com/opinion/editorial/editorial-board-legislators-should-override-mead-s-forfeiture-veto/article_caf2dafb-f6a9-56bf-a368-bd4e51569470.html (last visited Apr. 13, 2015).

"Guilty until proven innocent," *The Herald-Palladium*, (Feb. 27, 2015) http://www.heraldpalladium.com/opinion/editorials/in-our-opinion-guilty-until-proven-innocent/article_842b8632-fdc5-55ea-acd7-56d1b0d1b2f5.html (last visited Apr. 13, 2015)

"Limits needed on police property seizures," *Capital Gazette*, (Mar. 17, 2015) http://www.capitalgazette.com/opinion/our_say/ph-ac-ce-our-say-20150317,0,114994.story (last visited Apr. 13, 2015)

"Good news in New Mexico," *The Washington Times*, (Mar. 23, 2015) http://www.washingtontimes.com/news/2015/mar/23/editorial-new-mexico-legislature-ends-police-seizu/ (last visited Apr. 13, 2015).

"Stop policing for profit in New Mexico," *The Santa Fe New Mexican*, (Mar. 28, 2015) http://www.santafenewmexican.com/opinion/editorials/our-view-stop-policing-for-profit-in-new-mexico/article_0b-4b475a-a512-5f24-a105-66cb58c1ad4e.html (last visited Apr. 13, 2015)

"Property forfeiture should apply to those found guilty," *Albuquerque Journal*, (Mar. 31, 2015), http://www.abqjournal.com/562526/opinion/property-forfeiture-should-apply-to-those-found-guilty.html (last visited Apr. 13, 2015).

"Legislature should support asset forfeiture reform bill," *Las Vegas Review-Journal* (Apr. 1, 2015) http://www.reviewjournal.com/opinion/editorial-legislature-should-support-asset-forfeiture-reform-bill (last visited Apr. 13, 2015).

"Forfeiture bill should be signed," *Las Cruces Sun-News*, (Apr. 4, 2015), http://www.lcsun-news.com/las_cruces-opinion/ci_27843989/editorial-forfeiture-bill-should-be-signed (last visited Apr. 13, 2015).

"Remove the profit motive," *The Des Moines Register*, (Apr. 4, 2015) http://www.desmoinesregister.com/story/opinion/editorials/2015/04/05/registers-editorial-remove-profit-motive/25295385/ (last visited Apr. 13, 2015).

"Separating outlaws from their stuff," *The Anniston Star*, (Apr. 9, 2015) http://www.annistonstar.com/opinion/editorial-separating-outlaws-from-their-stuff/article_9b43aaa0-df0b-11e4-8b04-1faf82f2d4d1.html (last visited Apr. 13, 2015)

Appendix D

SEIZE FIRST, QUESTION LATER:

THE IRS AND CIVIL FORFEITURE

By Dick M. Carpenter II, Ph.D., and Larry Salzman

INSTITUTE for JUSTICE

February 2015

SEIZE FIRST, QUESTION LATER:

THE IRS AND CIVIL FORFEITURE

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

Federal civil forfeiture laws give the Internal Revenue Service the power to clean out bank accounts without charging their owners with any crime. Making matters worse, the IRS considers a series of cash deposits or withdrawals below $10,000 enough evidence of "structuring" to take the money, without any other evidence of wrongdoing. Structuring—depositing or withdrawing smaller amounts to evade a federal law that requires banks to report transactions larger than $10,000 to the federal government—is illegal, but more importantly, structured funds are also subject to civil forfeiture.

Civil forfeiture is the government's power to take property suspected of involvement in a crime. Unlike criminal forfeiture, no one needs to be convicted of—or even a charged with—a crime for the government to take the property. Lax civil forfeiture standards enable the IRS to "seize first and ask questions later," taking money without serious investigation and forcing owners into a long and difficult legal battle to try to stop the forfeiture. Any money forfeited is then used to fund further law enforcement efforts, giving agencies like the IRS an incentive to seize.

Data provided by the IRS indicate that its civil forfeiture activities for suspected structuring are large and growing:

- From 2005 to 2012, the IRS seized more than $242 million for suspected structuring violations, in more than 2,500 cases.
- Structuring-related seizures are becoming more frequent: In 2012, the IRS initiated more than five times as many such seizures as it did in 2005, yielding a 166 percent increase in forfeiture revenue.
- The IRS overwhelmingly favors civil forfeiture procedures over criminal. From 2006 to 2013, nearly four out of five forfeitures for suspected structuring were civil.
- At least a third of the IRS's structuring-related seizures arose out of nothing more than a series of transactions under $10,000, with no other criminal activity, such as fraud, money laundering or smuggling, alleged by the government.
- People whose money is seized likely face a long legal battle to win it back. The average forfeiture for suspected structuring took nearly a year to complete.
- A sizable and growing gap between what the IRS seizes for suspected structuring and what it forfeits raises concerns that the agency is seizing more than it can later justify. Altogether, of the $242 million seized, nearly half—$116 million—was not forfeited.

The surest way to prevent innocent people from losing money unjustly would be to end civil forfeiture and replace it with criminal forfeiture. Short of that, removing the financial incentive to seize, raising the standard of proof to forfeit and enacting other procedural reforms would help protect people from losing their bank accounts when the government has little or no proof of criminal wrongdoing.

 IJ CLIENTS TERRY DEHKO AND SANDY THOMAS

INTRODUCTION

Sandy Thomas remembers the day in stomach-turning detail. "[The Internal Revenue Service] just walked into [our] store and announced that they had emptied the store's bank account."[1]

Sandy and her father Terry Dehko run Schott's Supermarket, in Fraser, Mich., a suburb north of Detroit. Terry came to America for a better life from Iraq in 1970. He started a family, and in 1978 he bought Schott's Supermarket, which has put food on his family's table for more than 30 years by providing delicious food and great service. The store is especially well known for its deli and meat department, with dozens of varieties of custom sausages. As Schott's has grown, its prosperity has rippled across the community, providing jobs for more than 30 people, even during bad economic times. Terry is proud of his store—the fulfillment of his American Dream.

That dream turned into a nightmare when the government grabbed $35,651 from his store's bank account without warning. Schott's Supermarket manages to turn a modest profit and keep people employed, but it doesn't have money to spare. Terry needed that $35,000 to pay vendors and employees. To keep their business afloat, Terry and Sandy had to negotiate with creditors—possible only thanks to trust they had built up through years of honest dealings—and dip into their personal savings.

The IRS snatched Terry and Sandy's money without charging them with any crime. Thanks to federal civil forfeiture laws, it didn't have to.

Civil forfeiture is the government's power to take property suspected of involvement in a crime. Unlike criminal forfeiture, in which the government takes the ill-gotten gains of criminal activity after an individual is convicted of a crime, civil forfeiture allows police and prosecutors to take property without charging people with, let alone convicting them of, any crime. Civil forfeiture is based on the fiction that the property itself is "guilty." Under federal law and in most states, the proceeds of forfeited property pad the budgets of the very agencies that seize it, giving law enforcement a financial stake in forfeiture proceedings.[2]

The civil forfeiture power plus federal laws against so-called "structuring" of bank deposits and withdrawals enables an IRS approach of "seize first, ask questions later."

The IRS used civil forfeiture to clean out Terry and Sandy's store bank account, claiming the funds had been illegally "structured." Federal law requires banks to report cash transactions in excess of $10,000 to the IRS,[3] and it is illegal to "structure" deposits or withdrawals to avoid those reporting requirements by, for example, depositing or withdrawing $9,000 at a time.[4] The federal reporting requirements are supposed to help detect and deter financial crimes, such as money laundering and

fraud. But, importantly, it is not illegal to make deposits or withdrawals of less than $10,000 if there is a legitimate purpose for doing so—as Terry and Sandy had.

Had the government simply asked, it would have learned that Terry and Sandy were not trying to avoid banking regulations; they were trying to avoid letting large amounts of cash accumulate on the store's premises, where it would be vulnerable to theft. The store's insurance policy limits coverage for theft or other loss of cash to $10,000—a common provision for small-business policies.

But the IRS did not learn any of this because civil forfeiture gives it the power to seize the money on the mere suspicion of criminal activity—no charges or conviction for "structuring" or any other crime required. For the IRS, a string of sub-$10,000 deposits was justification enough—despite Schott's Supermarket previously earning a clean bill of health in a routine IRS audit.

After money is seized for civil forfeiture, the government must initiate forfeiture proceedings to permanently keep, or "forfeit," it. Civil forfeiture proceedings require property owners like Terry and Sandy to engage in a lengthy and expensive court battle to try to get their money back. Terry and Sandy were fortunate that the Institute for Justice took their case pro bono; many property owners cannot afford to hire counsel. And because it is a civil, not criminal, process, the government need only prove the money is connected to a crime by a "preponderance of the evidence," a standard well below the "beyond a reasonable doubt" threshold required for convictions.[5]

Neither the IRS nor the Treasury Department publicly reports how much it seizes or forfeits for suspected structuring violations, so the Institute for Justice sought data through a freedom-of-information request to the IRS. The IRS is likely the most active agency pursuing structuring cases in the Treasury Department, but it is not the only one,[6] so data reported here may undercount forfeiture actions for suspected structuring.


TERRY "BOSS"

THE IRS'S GROWING USE OF FORFEITURE FOR SUSPECTED STRUCTURING

From 2005 to 2012, the IRS seized more than $242 million for suspected structuring violations, originating from more than 2,500 cases.[7] From 2006 to 2013 the agency forfeited, or kept, $123 million from 1,745 cases. As shown in Table 1, half of these seizures were for less than $34,000, almost identical to the amount seized from Schott's Supermarket. Half of forfeitures were for less than $27,000.[8] Such modest amounts call into question whether people losing their assets are the terrorist money launderers or headline-grabbing financial fraudsters that laws against structuring are meant to target.

TABLE 1: TOTAL IRS SEIZURES AND FORFEITURES FOR SUSPECTED STRUCTURING[9]

	Number of Actions	Total Value	Mean Value	Median Value
Seizures (2005-2012)	2,501	$242,627,129	$97,012	$34,089
Forfeitures (2006-2013)	1,745	$123,433,274	$70,735	$27,309

As with forfeiture generally (see sidebar on the next page), IRS seizures and forfeitures for suspected structuring have grown substantially over time, as shown in Table 2 (page 12). In 2012, the IRS initiated more than five times as many structuring-related seizures than it did in 2005, and funds seized jumped 96 percent. Forfeitures increased three-fold from 2006 to 2013, yielding a 166 percent increase in revenue.[10]

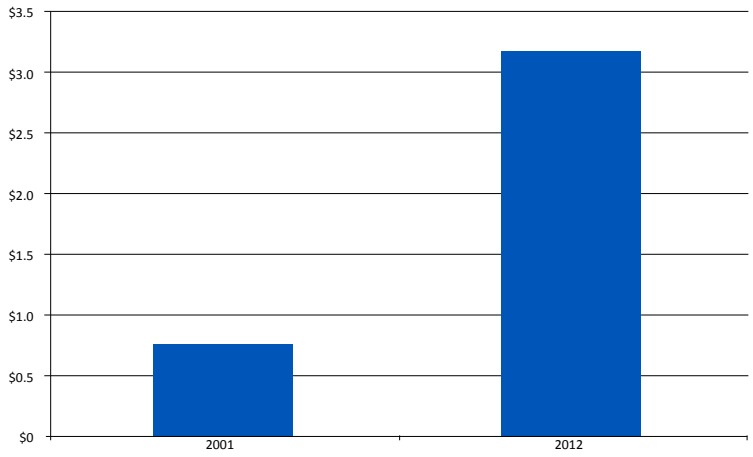
BEYOND SUSPECTED STRUCTURING, FORFEITURE ON THE RISE

The IRS is not the only law enforcement agency using forfeiture to seize more and more assets. Agencies across the federal government have enlarged their forfeiture coffers substantially in recent years. Two funds—the Department of Justice's Assets Forfeiture Fund (AFF) and the Treasury Forfeiture Fund (TFF)—process forfeiture deposits from and make money available to departments within their agencies. In 2001, these two funds held $763 million—already a significant sum—in net assets, but by 2012, the combined holdings exploded to almost $3.2 billion, a 316 percent increase in a little more than a decade.[1]

But federal agencies are not alone in the forfeiture take. Both the Department of Justice and the Treasury Department run "equitable sharing" programs that allow state and local law enforcement to collaborate on forfeitures and split the proceeds, with state and local agencies receiving as much as 80 percent—even in states that bar agencies from receiving forfeiture proceeds or that set higher standards for forfeiting property. Equitable sharing has likewise grown: State and local agencies took in $558 million in 2012, an increase of more than two-and-a-half times since 2002.[2]

Research indicates that giving law enforcement agencies a financial stake in forfeiture proceeds encourages seizures.[3] A recent study found that state and local agencies were more likely to forfeit property through the federal equitable sharing program than under their own state systems when doing so boosted their chances of securing forfeiture revenue, suggesting that pursuit of forfeiture dollars was a motivation.[4] And a recent experiment concluded that the profit motive in civil forfeiture laws creates a strong temptation for law enforcement to seize property to pad their own budgets.[5]

JUSTICE AND TREASURY DEPARTMENT FORFEITURE FUNDS' NET ASSETS, 2001 AND 2012 (IN BILLIONS)



1 http://www.justice.gov/jmd/afp/01programaudit/index.htm; http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Pages/annual-reports.aspx

2 Equitable sharing data available at http://www.justice.gov/jmd/afp/02fundreport/ and http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Pages/annual-reports.aspx

3 Baicker, K., & Jacobson, M. (2007). Finders keepers: Forfeiture laws, policing incentives, and local budgets. *Journal of Public Economics, 91*, 2113-2136; Benson, B. L., Rasmussen, D. W., & Sollars, D. L. (1995). Police bureaucrats, their incentives, and the new war on drugs. *Public Choice, 83*, 21-45; Gabbidon, S. L., Higgins, G. E., Martin, F., Nelson, M., & Brown, J. (2011). An exploratory analysis of federal litigation in the United States challenging asset forfeiture. *Criminal Justice Policy Review, 22*(1), 50-64; Mast, B. D., Benson, B. L., & Rasmussen, D. W. (2000). Entrepreneurial police and drug enforcement policy. *Public Choice, 104*, 285–308; Worrall, J. L. (2001). Addicted to the drug war: The role of civil asset forfeiture as a budgetary necessity in contemporary law enforcement. *Journal of Criminal Justice, 29*, 171-187; Worrall, J. L., & Kovandzic, T. V. (2008). Is policing for profit? Answers from asset forfeiture. *Criminology and Public Policy, 7*(2), 219–244.

4 Holcomb, J. E., Kovandzic, T. V., & Williams, M. R. (2011). Civil asset forfeiture, equitable sharing, and policing for profit in the United States. *Journal of Criminal Justice, 39*, 273-285.

5 Wilson, B. J., & Preciado, M. (2014). Bad apples or bad laws? Testing the incentives of civil forfeiture. Arlington, VA: Institute for Justice.

TABLE 2: ANNUAL GROWTH OF IRS SEIZURES AND FORFEITURES FOR SUSPECTED STRUCTURING, 2005 TO 2013

Seizures			Forfeitures		
	Actions	**Total Value**		**Actions**	**Total Value**
2005	114	$24,765,672	**2006**	89	$7,974,908
2006	168	$19,447,782	**2007**	128	$12,363,630
2007	279	$22,776,270	**2008**	194	$14,077,055
2008	243	$20,940,702	**2009**	189	$12,452,249
2009	228	$16,414,697	**2010**	232	$13,039,933
2010	433	$48,548,698	**2011**	261	$20,306,098
2011	397	$41,153,812	**2012**	363	$21,996,502
2012	639	$48,579,495	**2013**	289	$21,222,900

As Figures 1 and 2 illustrate, IRS structuring-related forfeitures and forfeiture revenues grew basically steadily year to year, but seizures and funds seized spiked from 2009 to 2010. The data do not provide any guidance on why this might be, but it could be a consequence of a series of high-profile and substantial financial frauds that came to light in 2008 and 2009. These included cases against Bernie Madoff,[11] the Stanford Bank and Stanford Industries,[12] Joseph Forte,[13] Mark Drier,[14] Tom Petters[15] and Scott Rothstein.[16] Though they did not involve structuring violations, these cases may have raised awareness of or concern about financial misdealings and led agents to step up efforts to identify suspected banking-law violations by looking for suspicious patterns of deposits and withdrawals. Such heightened scrutiny of financial transactions may have swept up more than just potential fraud cases, resulting in a significant spike in 2010.

FIGURE 1: ANNUAL IRS SEIZURES AND FORFEITURES FOR SUSPECTED STRUCTURING, 2005 TO 2013

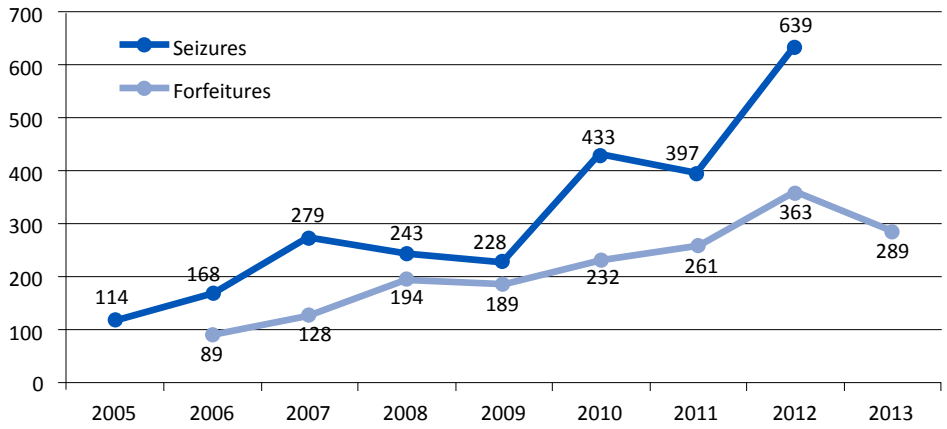
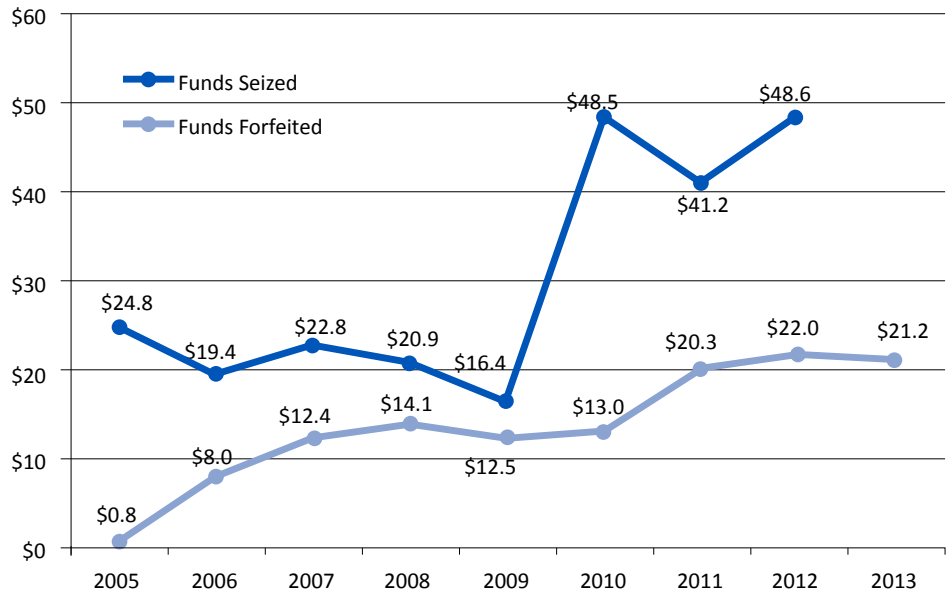


FIGURE 2: FUNDS SEIZED AND FORFEITED ANNUALLY BY IRS FOR SUSPECTED STRUCTURING, 2005 TO 2013, IN MILLIONS



CIVIL VERSUS CRIMINAL FORFEITURE FOR SUSPECTED STRUCTURING

When the IRS seizes money for suspected structuring, law enforcement agents can seize under criminal forfeiture statutes, which require criminal charges and a conviction for a forfeiture, or civil forfeiture statutes, which require neither. Civil forfeiture is considerably easier for the government and harder for property owners to fight.[17] As Table 3 indicates, the IRS overwhelmingly chooses the civil route: From 2005 to 2012, 86 percent of IRS seizures for suspected structuring were civil actions.

TABLE 3: IRS SEIZURES FOR SUSPECTED STRUCTURING, CIVIL VS. CRIMINAL, 2005 TO 2012[18]

	Seizures	Percentage of Total	Total Value
Civil	2,139	86%	$199,901,775
Criminal	362	14%	$42,725,354

For money that was ultimately forfeited, the IRS data also indicate whether it was forfeited through a civil or criminal process. Sometimes property seized under criminal statutes will be processed under civil procedures, or vice versa; this was the case for a small number of seizures in the IRS data.[19] Civil forfeitures are actions brought against the money itself and can be either "civil judicial" or "administrative."[20] In either case, the government must notify the owner of intent to forfeit the property. If the property owner fails to meet the strict, short deadlines required to contest the seizure, the IRS may unilaterally declare the property forfeited—known as an administrative forfeiture—and keep it without any hearing before a judge. If the property owner makes a timely claim, the government must file a formal "civil judicial" forfeiture action in federal court to continue the forfeiture.[21]

Criminal forfeiture is brought as a part of the criminal prosecution of a defendant property owner. If the defendant is convicted and the property is deemed forfeitable, the court issues an order of forfeiture.[22] As shown in Table 4, nearly 80 percent of IRS structuring-related forfeitures from 2006 to 2013 followed civil processes, while only 21 percent were criminal.

TABLE 4: IRS FORFEITURES FOR SUSPECTED STRUCTURING, CIVIL VS. CRIMINAL, 2006 TO 2013

	Forfeitures	Percentage of Total	Total Value
Administrative	614	35%	$27,352,525
Civil Judicial	757	43%	$58,326,540
Criminal Judicial	374	21%	$37,754,209

IJ CLIENTS TERRY DEHKO AND SANDY THOMAS

NOTHING BUT STRUCTURING SUSPECTED

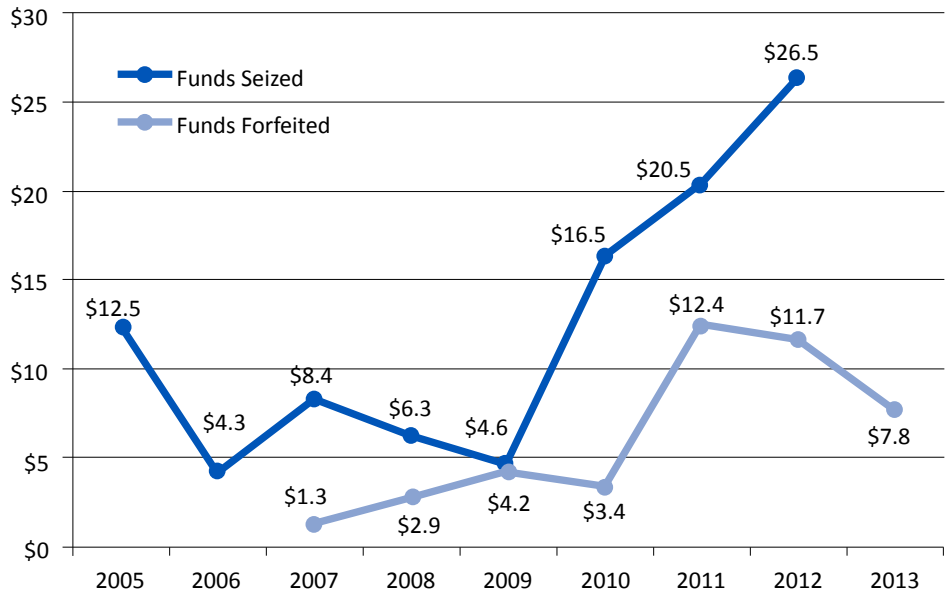
For seizures, the IRS data specify which part of federal anti-structuring law the agency suspected was violated. The government can seize assets because it suspects someone is structuring to hide criminal activity, such as money laundering, fraud or smuggling.[23] (Even when criminal activity is suspected, the government can pursue civil or criminal forfeiture.) But under a different part of federal law, the government can seize money because someone appears to be structuring transactions for the sole purpose of avoiding reports to the federal government, with no further criminal activity alleged.[24]

This part of anti-structuring law is particularly likely to trap the unwary. Like the Dehkos, Carole Hinders of Spirit Lake, Iowa, had no idea what "structuring" was or that it was illegal. For almost 40 years, Carole owned and operated Mrs. Lady's Mexican Café in Spirit Lake, a rural vacation spot

90 miles outside of Sioux City. Because she operated a cash-only restaurant, she made frequent cash deposits at her bank. In August 2013, the IRS cleaned out her restaurant's $32,821 bank account without charging her with any crime. The IRS did not accuse Carole of money laundering or fraud; it claimed only that her deposits were structured to evade reporting requirements. Only after the Institute for Justice took her case did the IRS agree to return her money—more than a year-and-a-half after it was seized.

From 2005 to 2012, more than one third of the IRS's structuring-related seizures were civil actions like Carole's—civil actions where only structuring was implicated. Another 48 percent of seizures were also civil, but data indicate that the IRS suspected that structuring was intended to hide some other criminal activity, though it is not clear whether the IRS ever proved any criminal activity happened: Civil forfeiture laws do not require it, and the data do not indicate whether related criminal charges were in fact filed or convictions obtained. A minority of seizures, a little more than 14 percent, were criminal. Like IRS structuring-related forfeitures generally, funds taken through structuring-only civil forfeiture actions have increased substantially (see Figure 3). From 2005 to 2012, seizure amounts rose 111 percent, and from 2007 to 2013 forfeiture amounts jumped 490 percent.[25]

FIGURE 3: FUNDS SEIZED AND FORFEITED BY IRS FOR SUSPECTED STRUCTURING ONLY, 2005 TO 2013, IN MILLIONS



IJ CLIENTS MITCH HIRSCH, RICH HIRSCH AND JEFF HIRSCH

HOW LONG FORFEITURES TAKE

For property owners, the forfeiture process, whether civil or criminal, is byzantine in its complexities,[26] requiring not only legal counsel to navigate but also the patience and resources necessary to endure a prolonged fight for the return of property. As Table 5 indicates, from 2005 to 2012, IRS structuring-related forfeitures took, on average, nearly a year—356 days—to complete from seizure to forfeiture. Civil forfeitures for structuring only took even longer—375 days. Not surprisingly, judicial forfeitures took considerably longer than administrative forfeitures; civil judicial forfeitures, in fact, took more than twice as long as those completed administratively.

Unfortunately, the IRS data do not indicate how long it takes property owners who get their property back to see the return of their funds; the data only provide dates for forfeitures, not for the return of seized property that does not result in a forfeiture. But the forfeiture dates suggest that property owners may wait a long time. It takes an average of 460 days for the IRS to forfeit currency through a civil judicial process. It likely could take a property owner caught up in the same process as long to get her money back, even when the civil judicial case is dropped. For their part, Terry Dehko and Sandy Thomas waited almost a year to receive their funds back.[27]

The Hirsch brothers, owners of the Bi-County Distributors in New York, waited even longer. In May 2012, the IRS seized more than $446,000, everything in their company's bank account, and it took until January 2015 for the IRS to agree to give the money back. In all that time, the Hirsches were unable to contest the seizure before a judge because the government never formally moved to forfeit the property.[28]

In October 2014, IJ challenged the IRS's delay tactics as an unconstitutional violation of the Hirsches' due process rights and a violation of the Civil Asset Forfeiture Reform Act and demanded the government return the funds. Had the government filed a civil forfeiture complaint, the Hirsch brothers would have had the opportunity to show that their frequent sub-$10,000 cash deposits were for a legitimate business purpose, not to avoid banking regulations. Bi-County Distributors is a family-owned company that distributes candy and cigarettes to convenience stores on Long Island, and its customers often pay in cash. Bi-County has had several banks close its accounts in recent years because, the Hirsches were told, the banks did not want the hassle of dealing with a cash-intensive business. To avoid burdening banks and in hopes of keeping their accounts open, the brothers began making smaller deposits.

Before taking the Hirsches' money, the IRS made no serious attempt to investigate their business or understand why they made frequent cash deposits. After the seizure, the IRS turned a blind eye to evidence showing the money was legitimately earned and denied the brothers an opportunity to make their case in court. What the Hirsches experienced was not "seize first and ask questions later," but "seize first and ignore questions later." While the IRS held onto the cash, the brothers struggled to keep their business afloat. Their ordeal illustrates the hardships faced by those deprived of funds for months or even years.

At two years and nine months, Bi-County's wait was more than double the average wait indicated in the data for this report, but some cases have taken considerably longer. As shown in Table 5, the longest forfeiture, which was disposed of through a civil judicial process, took more than 6.5 years (2,390 days).

TABLE 5: DAYS BETWEEN SEIZURE AND FORFEITURE, IRS STRUCTURING-RELATED SEIZURES, 2005 TO 2012

	Average days between seizure and forfeiture	Maximum days between seizure and forfeiture
Administrative	209	1,233
Civil Judicial	460	2,390
Criminal Judicial	393	2,079
All Properties	356	
Civil Structuring Only	375	2,026

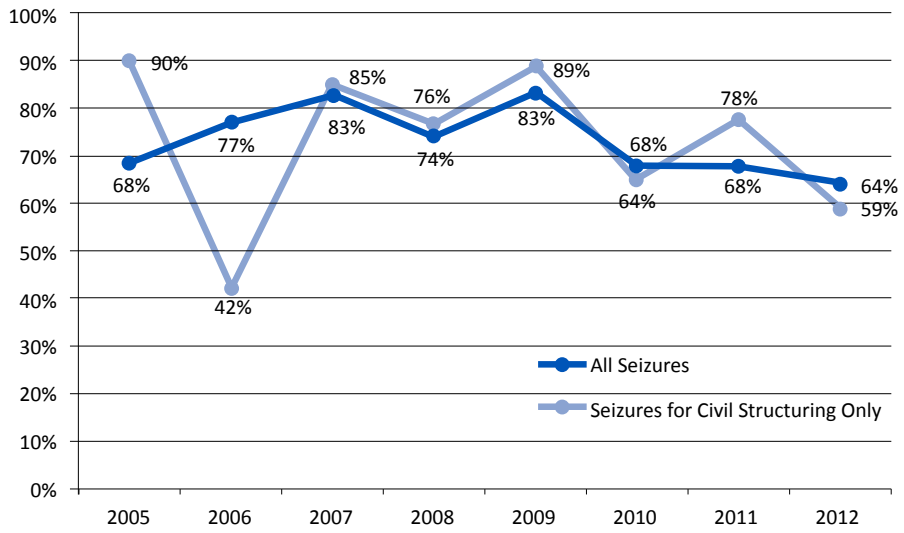
IS THE IRS SEIZING MORE THAN JUSTIFIED?

Figures 1 and 2 (page 13) show sizable and apparently growing gaps between the IRS's structuring-related seizures and its forfeitures, both in the number of cases and in the amount of money taken. The gaps raise concerns that the IRS is seizing more than it can later justify.

Altogether, of the $242 million the IRS seized for suspected structuring from 2005 to 2012, nearly half—$116 million—was not forfeited.[29] In half of seizures, the IRS forfeited less than it seized; in another 31 percent, the IRS did not forfeit *any* of the funds seized.[30]

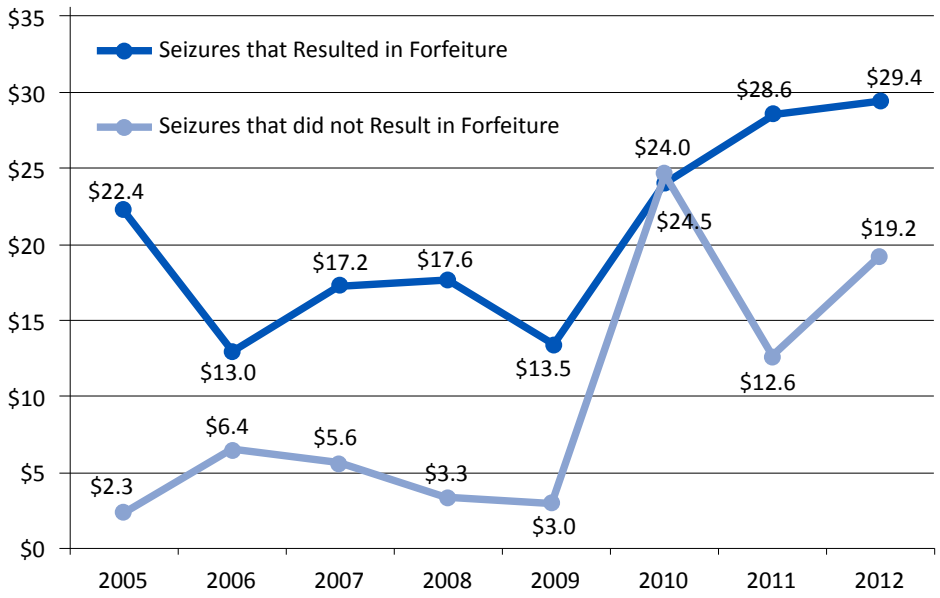
Seizures that failed to yield a forfeiture are on the rise, as illustrated by Figure 4. In 2007 and 2009, 83 percent of IRS structuring-related seizures resulted in the forfeiture of at least some funds, but by 2012, just 64 percent of seizures led to a forfeiture. Successful civil forfeitures for suspected structuring alone showed a similar drop.

FIGURE 4: PERCENTAGE OF IRS STRUCTURING-RELATED SEIZURES THAT RESULTED IN FORFEITURE, 2005 TO 2012



The amount of money taken in seizures that failed to yield a forfeiture likewise grew, as shown in Figure 5, particularly between 2009 and 2010, when the value of such seizures jumped from nearly $3 million to $24.5 million—a 715 percent increase. As with the spike in funds seized shown in Figure 2, this increase could be the result of greater attention paid to financial fraud in the wake of high-profile scandals. Yet, as the IRS was seizing more cash, its forfeiture success rate was declining. If heightened concern about financial fraud was behind the seizure increase, it appears not to have led to more seizures that were justified, but perhaps instead to overzealous seizing by the IRS.

FIGURE 5: TOTAL VALUE OF SEIZURES THAT DID AND DID NOT RESULT IN FORFEITURES, 2005 TO 2012, IN MILLIONS



Unfortunately, the IRS data do not explain why the IRS might forfeit substantially less than it seizes, but there are a few possible reasons. In some cases, the IRS might have reached a settlement with the property owner. The IRS might settle for a smaller amount to avoid protracted litigation, even if it has a strong case that the funds were intentionally structured, either to evade reporting requirements or to hide other criminal activity. Conversely, a property owner, even an innocent one, might agree to take some

percentage of the seized amount back and allow the rest to be forfeited to avoid costly litigation and risk losing the full amount. The IRS offered Terry and Sandy such a deal, proposing to return 20 percent of their money,[31] an offer that was refused.

But others elect to cut their losses and accept a settlement. In 2011, the IRS seized $62,936 from the South Mountain Creamery, owned by Maryland farmers Randy and Karen Sowers. The money was generated from cash sales at farmers markets, and a bank teller advised Randy and Karen that deposits in excess of $10,000 required the bank to complete a special form. To avoid creating unnecessary paperwork, they began making deposits of less than $10,000. The Sowers committed no crime other than systematically depositing less than $10,000 to avoid paperwork. Randy and Karen challenged the seizure of their funds, but facing steep litigation costs, they later accepted the government's offer to return about half of their money.[32]

Another possible reason that seized money may not all be forfeited is that a prosecutor determined that the IRS had seized more than it had authority to seize and returned some of the seized funds while moving to forfeit the rest. For instance, the IRS

can typically only forfeit funds for suspected structuring going back one year.[33] If the agency or the prosecutor determines some seized funds were deposited earlier, it might return them. Or the agency or prosecutor might decide after a seizure that it has too little evidence to substantiate an alleged structuring violation for part or all of the funds and return them.

This happened with another Michigan business owner and IJ client, Mark Zaniewski. In 2013, the IRS cleaned out his gas station's account, alleging the funds were structured. To avoid bouncing checks to vendors, he replenished the account with borrowed funds and earnings from his business—after the IRS told him he could do so without fear of a second seizure. But the IRS then seized the newly deposited funds.[34] After Zaniewski provided proof that these funds could not have been structured cash deposits, the agency offered to return the money from the second seizure if he would give up the funds from the first seizure. He refused, and the IRS finally returned the money from the second seizure after holding it for six months.[35]

A final explanation for a gap between seizures and forfeitures would be an IRS loss in civil or criminal court, or a judge's determination that only a portion of the seized funds were eligible for forfeiture.

Whatever the explanation, substantial gaps between seizures and forfeitures are troubling. They suggest the IRS might be seizing more than can ultimately be justified to a prosecutor or court, depriving people of rightfully earned funds perhaps for months or years while the forfeiture process plays out and requiring them to hire legal counsel to win their money back. Seizure-forfeiture gaps are particularly worrisome given the "seize first, ask questions later" approach to law enforcement made possible by civil forfeiture laws in combination with laws against structuring. Because civil forfeiture sets such a low bar to seize funds—and gives the government a financial stake in doing so—it should not be surprising to see seizures that cannot survive scrutiny.

POLICY RECOMMENDATIONS

On October 26, 2014, *The New York Times* exposed the IRS's structuring-related forfeiture activities, reporting some of the numbers we secured through the freedom-of-information request and featuring Carole Hinders and the Hirsch brothers.[36] In response to scrutiny by the *Times*, the IRS announced it would adjust its policy to focus on "cases where the money is believed to have been acquired illegally or seizure is deemed justified by 'exceptional circumstances.'" However, any change in practice will not apply to seizures and forfeitures already underway[37] and does not change the law. As long as the law remains as is, individuals remain at risk for the loss of their property.

The surest way to stop structuring-related seizures once and for all is to end civil forfeiture entirely and replace it with criminal forfeiture. People who have never been convicted, or never even charged, in criminal court should not lose their property in civil court. Ending civil forfeiture would not change the practice of seizing properties suspected of involvement in a crime, but since agents would have to be prepared to win in a criminal proceeding, which includes proving guilt beyond a reasonable doubt, it would reduce the number of seizures considerably, particularly those perpetrated with the flimsiest of evidence. Moreover, property owners would be afforded the greater protections that come with criminal proceedings, not least of which includes the presumption of innocence.

Short of eliminating civil forfeiture, lawmakers should remove the perverse financial incentive law enforcement agencies have to pursue civil forfeiture by requiring that forfeited funds be deposited in a neutral account, such as a general fund, and increase the standard of proof required for forfeiting property. Currently, law enforcement agencies forfeit funds under a simple preponderance of the evidence standard. Increasing this to a standard of clear and convincing evidence would introduce greater protections for property owners like Terry Dehko and Carole Hinders whose financial transactions were entirely explainable.

PEOPLE WHO HAVE NEVER BEEN CONVICTED, OR NEVER EVEN CHARGED, IN CRIMINAL COURT SHOULD NOT LOSE THEIR PROPERTY IN CIVIL COURT.

Reforming forfeiture procedures to require a prompt post-seizure hearing after the seizure of currency would also extend greater due process protections to property owners. Federal civil forfeiture law does not allow for a prompt post-sei-

zure hearing when currency is seized.[38] This means cases can languish months and even years before property owners have an opportunity to contest the seizure before a neutral magistrate—among the most fundamental requirements of due process. Federal law does, however, prescribe a post-seizure hearing for non-monetary property, although only after the property owner files a hardship petition.[39] Federal forfeiture law should be changed to consistently require a prompt post-seizure hearing for all property types, and no hardship petition should be required to trigger that hearing.

Finally, the basic due process principle of fair notice should be applied to the prosecution of civil forfeiture for structuring. Structuring laws were aimed at combating serious criminals. But the government has prosecuted structuring cases against people completely unaware of what structuring is or that it is illegal. Sometimes people engage in transactions on the poor advice of bank tellers or accountants in an attempt to maintain their financial privacy. People who are not structuring to conceal any underlying criminal activity have little reason to consider or know that it is illegal to deposit their own lawfully earned money in their own bank accounts to avoid what they perceive as unnecessary or intrusive government reporting. Seizing and forfeiting money for nothing more than this violates the basic due process principle of fair notice and deprives people of an opportunity to conform their behavior to the law.

CONCLUSION

Upon learning of the IRS's money grab from his store's bank account, Terry Dehko exclaimed, "Aren't we in the United States? We did nothing wrong."[40] Unfortunately, there is an upside-down world within the United States in which people who do nothing wrong, like Terry and Sandy, are presumed guilty, face a Kafkaesque process in an attempt to get their money back and wait months or years for resolution of their cases.

Seizures for suspected structuring are becoming more frequent, and the amount of money seized is substantial and growing. The amount ultimately forfeited, however, diverges significantly from what was seized, suggesting overzealous seizures and prosecution by the government. Moreover, the vast majority of structuring-related seizures are initiated and eventually processed through civil procedures, meaning property owners are not convicted of, let alone charged with, any crime.[41] And at least a third of seizures originated not out of suspicion of activities normally thought of as crimes, such as fraud, money laundering or smuggling, but from the mere act of making transactions under $10,000, a common practice among cash-intensive businesses.

What makes structuring-related civil forfeiture even more pernicious is the financial stake the IRS and prosecutors have in the process. Forfeited money is used to fund further law enforcement efforts, creating a perverse incentive to pursue monetary gain rather than the impartial application of the law, which may explain the "seize first, ask questions later" approach and the decreasing rate of seizures converted to forfeitures.

The U.S. Supreme Court has declared that "individual freedom finds tangible expression in property rights"[42] and that property rights cannot be "relegated to the status of a poor relation" in comparison to other constitutional rights.[43] Citizens losing property absent a conviction, let alone an indictment, for any crime and waiting months and even years for the fulfillment of their due process rights epitomizes "the status of a poor relation." In a 2014 civil forfeiture case, the presiding judge noted that the absence of an underlying criminal indictment of the property owners "create[d] some pause":

> Even the most ardent law and order advocate would likely recognize the legitimate civil liberty concerns that arise from the federal government's taking of personal property as the fruit of a crime when neither the federal government nor any state has chosen to indict the alleged perpetrators for the underlying criminal activity.[44]

The data presented in this report demonstrate why concerns about civil forfeiture are growing and why forfeiture laws require serious reform to return property rights to their central role in the expression of individual freedom.

ENDNOTES

1 Americans have good reason to not trust the government. (2014, May 4). *Topeka Capital-Journal*, p. A4.

2 Williams, M. R., Holcomb, J. E., Kovandzic, T. V., Bullock, S. 2010. Policing for profit: The abuse of civil asset forfeiture. Arlington, VA: Institute for Justice.

3 31 U.S.C. § 5313(a).

4 31 U.S.C. § 5324(a).

5 Williams, Holcomb, Kovandzic, and Bullock, 2010.

6 Our request for structuring data began with the Treasury Department. That yielded no useful data and an admonition that data we sought would have to be obtained from each agency individually. Since the IRS is likely the most active agency in structuring, we began there first.

7 The data provided by the IRS refer to fiscal years, not calendar years, so all years in this report should be understood as fiscal years.

8 In analyses like this, the median (i.e., the middle) is the better measure of averages, as the mean is influenced by extreme figures at one end or another of a distribution of numbers.

9 The first complete year for which seizure data were made available by the IRS was 2005. We chose 2012 as the final year of seizures in the analyses to allow for sufficient time to pass for those seizures to turn into forfeitures, if, in fact, they were to do so. We used 2013 as the final year of forfeiture data, as it represented the final full year of these data available from the IRS. Since, as Table 5 indicates, seizures take, on average, approximately a year to turn into forfeitures, many if not most seizures from 2012 would be captured in the 2013 forfeitures (if they turn into such). However, some successful seizures do take longer than a year, so there may be a small number of seizures in 2012 that eventually turned into successful forfeitures sometime after 2013 but would not be captured as such here.

10 This comparison used 2006 since 2005 likely was not a complete year of forfeitures.

11 http://abcnews.go.com/Blotter/story?id=6444781&page=1

12 Goldfarb, Z. A. (2009, February 18). SEC alleges $8 billion savings fraud, *Washington Post*, p. D1.

13 http://www.sec.gov/news/press/2009/2009-5.htm

14 Weiser, B. (2009, July 14). Lawyer sentenced to 20 years for $700 million fraud, *New York Times*, p. A20.

15 http://www.reuters.com/article/2009/12/02/petters-verdict-idUSN024978920091202

16 Koppel, N. (2009, December 2). Rothstein charged in Ponzi scheme, *Wall Street Journal*, p. B3.

17 Cassella, S. D. (2008). The case for civil forfeiture: Why in rem proceedings are an essential tool for recovering the proceeds of crime. *Journal of Money Laundering Control*, *11*(1), 8-14.

18 For a small percentage of cases, the coding appears inconsistent between, for example, the statute under which a property was seized and how it was processed. For instance, some properties may have been seized under the civil structuring statute (31 U.S.C. § 5317 (c)(2)) but processed as a criminal judicial forfeiture. In other examples, properties were seized under criminal statutes (i.e., 18 U.S.C. § 982) but processed administratively or civil judicially. These inconsistencies likely reflect a change in the status of a case or a decision made by a prosecutor to change the status of a case as it proceeded through its life cycle. This means numbers or percentages compared between tables and figures may differ slightly.

19 In almost 10 percent of cases, property was seized under one type of procedure and processed under another. A little more than seven percent were seized under civil statutes and processed as criminal. A little more than two percent were seized under criminal statutes and processed as civil.

20 http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Pages/Forfeiture-Overview.aspx

21 Administrative forfeiture is less costly and less time-consuming to the government than civil judicial forfeitures. Moreover, in 1984 and again in 1990, Congress made administrative forfeitures simpler for the government. Prior to 1984, administrative forfeitures could only be commenced for property valued at less than $10,000; after 1984, as a result of the Comprehensive Crime Control Act, the threshold increased to $100,000, but only violations of customs law could be processed as administrative forfeitures. In 1990, as part of the Customs Trade Act, the threshold increased again to $500,000, and the scope broadened to include monetary instruments under other laws.

22 http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Pages/Forfeiture-Overview.aspx

23 31 U.S.C. § 5332 (c)(1), 18 U.S.C. § 981.

24 31 U.S.C. § 5317 (c)(2).

25 The first year in which forfeitures for structuring only appeared in the data was 2007.

26 Ross, D. B. (2000/2001). Civil forfeiture: A fiction that offends due process. *Regent University Law Review, 13*(1), 259-277.

27 The seizure at Schott's Supermarket was processed as a civil judicial forfeiture. The money was returned only after the government missed a procedural deadline. Presumably, had that not happened the forfeiture would have been decided by a judge.

28 http://www.ij.org/long-island-forfeiture-backgrounder

29 This includes seizures that did not result in forfeitures and forfeiture amounts that were less than seized. There may also be a small amount of seizures that took longer than one year to complete and turned into forfeitures after 2013.

30 This includes seizures that did not result in forfeitures and forfeitures of zero dollars. There may also be a small amount of seizures that took longer than one year to complete and turned into forfeitures after 2013.

31 Americans have good reason to not trust the government, 2014.

32 Specifically the government returned $33,436 and kept $29,500. *United States v. $62,936.04 in U.S. Currency* (D. Md. May 30, 2012).

33 18 U.S.C. § 984(a)-(b).

34 Motion for Prompt Post-Seizure Hearing at 3-7 (ECF #12), *United States v. $33,244.76 in U.S. Currency*, No. 13-13990 (E.D. Mich. *filed* Nov. 14, 2013).

35 Emails and letters between Zaniewski's counsel and the U.S. Attorney's office for the Eastern District of Michigan on file with the Institute for Justice.

36 Dewan, S. (2014, October 26). Law lets I.R.S. seize accounts on suspicion, no crime required, *New York Times*, p. A1.

37 *The New York Times* reported that the new policy will not apply to past seizures.

38 18 U.S.C. § 983(f)(8).

39 18 U.S.C. § 938(f)(1).

40 Americans have good reason to not trust the government, 2014.

41 In addition, because the cases are processed civilly, property owners who cannot afford counsel are disadvantaged compared to criminal cases, where the Sixth Amendment guarantees owners the right to an attorney

42 *United States v. James Daniel Good Real Property,* 510 U.S. 43 (1993).

43 *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

44 *United States v. $54,440.00 in U.S. Funds*, 4:11-CV-143 CDL, 2014 WL 5306502, at *6 (M.D. Ga. Oct. 15, 2014). The judge upheld the forfeiture, however, because "the forfeiture statutes enacted by Congress permit such aggressive pursuit of the fruit of theoretically indictable, yet not actually indicted, crimes. Perhaps more importantly, any judge should know that the same Constitution that protects those civil liberties also constrains the Court from rewriting those forfeiture laws or purposely misconstruing the evidence to reach a particular result." *Id.* Such logic ignores an essential role of the judiciary—determining the constitutionality of laws passed by legislative bodies. The fact that judges allow these laws to stand and approve the "aggressive pursuit" of forfeiture further emphasizes why reform of these laws is so important.

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ABOUT IJ

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