

Civil Asset Recovery: The American Experience

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ABSTRACT

In the United States, federal prosecutors routinely employ asset recovery as a tool of law enforcement. The approach takes two forms. In criminal cases, the prosecutor may seek to recover or “forfeit” property as part of the defendant’s sentence, if the defendant is convicted. Alternatively, the prosecutor may commence a civil proceeding, naming the property as the defendant and seeking to forfeit the property independent of any criminal proceeding. This article discusses the American experience with civil, or non-conviction-based, asset recovery. It discusses the prosecutor’s motivations for seeking to forfeit assets, the types of property that may be forfeited, the procedures that govern civil asset forfeiture, the advantages of civil or non-conviction-based asset forfeiture over criminal forfeiture, and the ways in which the United States, through judicial decisions and legislation, has reconciled the non-conviction-based approach with the requirements of basic human rights and civil liberties.

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Terminology

In the United States, the term “civil forfeiture” refers to non-conviction-based forfeiture proceedings. It contrasts with “criminal forfeiture,” which requires a criminal conviction and is imposed as part of a criminal sentence. Experience shows, however, that the term “civil forfeiture” can be confusing when employed in the international context. To avoid the confusion and the unnecessary distraction created by the use of the term “civil forfeiture” when discussing asset recovery in the international context, I will use the term “non-conviction-based” forfeiture from this point forward.

Why Do Forfeiture?

The prosecutor may have multiple reasons for seeking to recover the assets involved in the commission of a criminal offense. Indeed, it would be the rare case if only one of the following motives were to apply. Frequently, they are overlapping and mutually reinforcing.

First, forfeiture serves the non-punitive purpose of taking the profit out of crime.¹ Whatever benefit the wrongdoer obtained or retained as a consequence of his offense is simply forfeited to the Government.

Second, forfeiture is seen as a form of punishment. Incarceration is a form of punishment but so is forcing the wrongdoer to disgorge the accouterments of the lavish lifestyle he acquired through his criminal acts. Indeed, many prosecutors relate that it was the loss of the luxury items acquired through a life of crime, not the period of time to be spent behind bars, that most distressed defendants.

Third, forfeiture serves as a deterrent. If one fraudster, child pornographer, corrupt politician, or drug dealer is not permitted to retain the fruits of his crime, perhaps the next person will be less likely to travel the same road.

Fourth, forfeiture is used as a form of prevention; it allows the Government to deprive wrongdoers of the tools of their trade and the economic resources they would employ to commit similar or more serious crimes in the future.² In drug trafficking cases, for example, the prosecutor does not want the drug dealer to keep the airplane that might be used again to smuggle drugs or the land where he could produce another load of marijuana. The benefit of using the forfeiture laws to intercept the flow of guns to Mexico or the export of a flight simulator to a government that sponsors terrorism is obvious.

Fifth, another form of prevention is the disruption of criminal organizations.³ Money is the glue that holds organized criminal enterprises together; they have to recycle the money in order to keep the scheme going to lull more victims into the fraud scheme, to buy more drugs, to finance acts of terrorism, or to pay bribes to corrupt officials. Moreover, it is often noted that it is harder for a drug organization to replace the money seized by law enforcement after the drugs have been distributed than it is to replace the drugs if they are seized beforehand. Thus, taking the money does more to interrupt the cycle of drug distribution than any number of buy/bust arrests of street dealers or seizures of drugs as they are being imported.

Sixth, forfeiture is used in the United States as a means of recovering property that has been taken from victims and of restoring it through processes known as “restitution” and “restoration.” The United States has a robust set of restitution laws, but for procedural reasons, forfeiture is a more effective way of recovering money for victims than ordering the defendant to pay restitution.

Seventh, forfeiture is used to protect the community and to demonstrate to the community that law enforcement is working in its interest. If the police are able to use the forfeiture laws to shut down a crackhouse and

turn it into a shelter for battered women, they have at once removed a hazard to public health and safety, provided a much-needed resource to a community, and created a visible demonstration of the effectiveness of the local law enforcement agency's efforts.

Finally, forfeiture is used as a way of encouraging cooperation between state and federal law enforcement agencies and of focusing their resources on the economic aspects of crime. Through a program called "equitable sharing," state and local law enforcement agencies that assist federal law enforcement in investigating and prosecuting federal offenses leading to the forfeiture of assets are allowed to use a portion of those assets to supplement their budgets. They are not, however, allowed to pay the salaries of the agents or officers who handle the cases and thereby are given an incentive to dedicate resources to matters that have the highest federal priority.

Non-Conviction-Based Forfeiture

All of these motives apply equally to criminal and non-conviction-based forfeiture. The difference between the two approaches is procedural.

In a criminal case, forfeiture is part of the defendant's sentence.⁴ After the defendant is found guilty beyond a reasonable doubt, the court determines on a balance of the probabilities whether the property the Government is seeking to forfeit was derived from, used to commit, or was otherwise connected to the crime in a way that would allow it to be forfeited to the Government. If the property is unavailable, the Government may obtain a personal money judgment against the defendant and may satisfy that judgment out of any assets of equal value that the defendant may own – property known as "substitute assets."⁵ Finally, the Government must give notice of the forfeiture order to any third parties with an interest in the forfeited property and afford them an opportunity to contest the forfeiture on the ground that it belongs to the third party and not to the defendant.

In a non-conviction-based forfeiture proceeding, there is no requirement of a criminal conviction or even of a criminal investigation.⁶ The Government brings the action against the property as the defendant *in rem*, and any person seeking to oppose the forfeiture action must intervene to do so. This is why, in the United States at least, non-conviction-based forfeiture cases have such unusual names, such as *United States v. \$65,000 in U.S. Currency* or *United States v. 2005 Mercedes Benz E500*. The forfeiture process is straightforward and is described in detail in statutes and rules.⁷ Basically, the Government seizes the property and must provide notice to the owner and any other interested party of the forfeiture action and the right to intervene. If the property owner, universally referred to at this stage as the "claimant," chooses to intervene by filing a proper claim, the case proceeds through various stages in which the parties can conduct discovery to obtain evidence, the claimant may move to suppress evidence or to dismiss the Government's case, and the Government may move to strike the claim for lack of standing (i.e., the lack of a sufficient interest in the property). Finally, if the case goes to trial, the Government has the burden of establishing on a balance of the probabilities that a crime occurred and that the property was derived from, used to commit, or was otherwise involved in the offense in terms of the particular statute authorizing forfeiture. If the Government meets that burden, the claimant then has the burden of establishing that he or she was an "innocent owner," or that the forfeiture of the property would be "grossly disproportionate to the gravity of the offense" on which the forfeiture is based.

What Can Be Forfeited

Forfeiture actions in the United States may be brought against contraband, the proceeds of crime, and any property that is used to commit or facilitate the commission of a criminal offense. There are, however,

statutes that sweep more broadly. In money laundering cases, for example, the Government may forfeit all property involved in a money laundering offense, including untainted property that was commingled with the criminal proceeds at the time the money laundering offense took place.

Advantages of Non-Conviction-Based Forfeiture⁸

We now turn to some examples in which asset recovery would not be possible were it not for the availability of non-conviction-based forfeiture proceedings or in which non-conviction-based forfeiture is at least the superior option.

a) Where the Forfeiture is Uncontested

If the Government files a forfeiture action directly against the property, and no one files a disputing claim, the property may be forfeited to the Government directly without any judicial forfeiture proceeding. In the United States, 80 percent of forfeiture cases – involving as much as \$600 million in a recent year – are resolved in this fashion.

b) Where the Defendant has Died

The Government can only obtain a forfeiture order as part of the sentence in a criminal case if the defendant lives long enough to be tried, convicted, and sentenced. If the defendant dies before his conviction is final, as in the case of Kenneth Lay, head of the Enron Corporation, non-conviction-based forfeiture becomes the principal means of recovering property traceable to the underlying crime.

c) Where the Wrongdoer is Unknown

In the United States, law enforcement agents commonly find criminal proceeds in the hands of a courier – a person who was not himself involved in the commission of the crime. It is often clear from the circumstances that the money at issue is criminal proceeds, but neither the Government nor (in most cases) the courier knows who the money belongs to or who committed the underlying criminal offense. In such cases, there is no chance of bringing a criminal prosecution, yet it is still desirable for the Government to recover the money. Thus it is not unusual in the United States to file a forfeiture case against a very large sum of currency that was seized from a courier. Many of these are drug cases, but the scenario appears in other contexts as well (the financing of terrorism being one prominent example).

d) Where the Property Belongs to a Third Party

It is quite common for a person to commit an offense using property that belongs to a third party. For example, a robber may carry out a robbery using someone else's gun. In a criminal case, the Government cannot forfeit property that belongs to a third party if the third party has been excluded from the proceeding, as this would violate the third party's right to due process. In fact, criminal forfeiture laws have a procedure specifically designed to *exclude* the property of third parties from a criminal forfeiture order, even if the third party knew about or was even complicit in the commission of the crime. Yet if the third party was aware that his property was being used for a criminal purpose – or was willfully blind to that fact – he should be made to forfeit the property. The procedural device for forfeiting property held by a non-innocent third party is non-conviction based forfeiture.

e) Where the Interests of Justice Do Not Require a Criminal Conviction

There are many cases where the interests of justice do not require a criminal conviction on the offense giving rise to the forfeiture. Some of them involve relatively minor crimes, while others involve property owned by a person who played a minor role in the offense. In such cases, the forfeiture of the property in a separate non-conviction-based forfeiture action – and not criminal prosecution – is probably the best way to recover the property. Finally, there are very serious cases in which the criminal defendant will admit to committing a particular offense but will not admit to other conduct that gave rise to the lion's share of his criminal proceeds. In such a case, non-conviction-based forfeiture is needed to recover the much larger body of assets involved in the scheme.

In all of these instances, the point is the same: because criminal forfeiture is imposed as part of the defendant's sentence, there can be no forfeiture if no one is convicted or if the property belongs to a person who was not convicted. So, where the interests of justice do not require a conviction, non-conviction-based forfeiture provides a means of imposing a punishment that fits the crime.

f) Where the Wrongdoer is a Fugitive

Criminal forfeiture is available only when there is a conviction, but there can be no conviction as long as the accused is a fugitive from justice. Non-conviction-based forfeiture, however, allows the Government to file an action against the assets that the fugitive left behind. The fugitive retains the right to contest the forfeiture, but only if he is willing to surrender to face the criminal charges; he cannot ignore the process of the court in the criminal case and ask the court to protect his property interests in the civil one.

g) Where the Criminal Case is Prosecuted by Another Sovereign

Finally, federal prosecutors use non-conviction-based forfeiture when the defendant has already been prosecuted elsewhere (in one of the 50 states or in a foreign country) and thus will not be prosecuted federally, but there are assets related to the crime that may be recovered under federal law. For example, if someone commits an offense in Norway or Nigeria and conceals the proceeds of the crime in the United States, a federal prosecutor can use the non-conviction-based forfeiture laws to recover that property, even though the defendant has already been convicted of the criminal offense in a Norwegian or Nigerian court. This can often be a more efficient way of recovering the property than trying to register and enforce a foreign confiscation order.

Civil liberties and Due Process Concerns

In most instances, the protection afforded to property owners' civil liberties in non-conviction-based forfeiture cases is the same as it is in criminal cases. In both proceedings, for example, the property owner can seek to suppress evidence obtained in violation of the Fourth Amendment protection against unreasonable searches and seizures; is entitled to fair notice and an opportunity to be heard as guaranteed by the Fifth Amendment Due Process Clause; is entitled to cross-examine witnesses and insist on the application of the Rules of Evidence; and is protected from the imposition of a forfeiture that is grossly disproportionate to the gravity of the offense under the Excessive Fines Clause of the Eighth Amendment. There is also a right to a trial by jury, which is actually more robust under the Seventh Amendment in the non-conviction-based context than it is in the criminal context. In neither case is the defendant or the property owner entitled to use property subject to forfeiture to finance his defense.⁹

For other purposes, however, the non-conviction-based proceeding does not contain the same constitutional protections for basic human rights that are available in a criminal proceeding. In non-conviction-based proceedings, the Government's burden is to establish the forfeitability of the property by a balance of the probabilities (not beyond a reasonable doubt); there is no right to remain silent and there is no right to the provision of counsel at Government expense if the claimant is unable to afford counsel of his or her own choosing. As the Supreme Court has held, non-conviction-based forfeiture proceedings are not criminal proceedings for purposes of invoking the provisions of the Bill of Rights that are reserved for the protection of criminal defendants whose liberty is placed in jeopardy by the filing of criminal charges. The process of determining which constitutional protections would apply in non-conviction-based forfeiture proceedings and which would not has evolved piecemeal over many years. The procedures governing civil forfeiture practice were borrowed from 18th Century admiralty practice and needed to be modified to fit modern usage and the concept of due process. Many of the constitutional issues were addressed by the Supreme Court in the decade from 1992-2002; others were addressed legislatively in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). The following is a brief discussion of how some of the most prominent issues were resolved.

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a) Presumption of Innocence and the Burden of Proof

The practice in admiralty included a reverse burden of proof: once the Government showed that it had a reasonable basis to believe the property was subject to forfeiture (what the courts in the United States call "probable cause"), the burden was on the property owner to prove that it was not. The Supreme Court repeatedly held that this was constitutional: the presumption of innocence embodied in the Bill of Rights applies only in criminal cases. But the presumption of innocence is so ingrained in American practice and culture, and in the expectations of the jurors who will decide civil cases if they go to trial, that it made sense to modernize the procedure by placing the burden on the Government to establish the connection between the property and a criminal offense in the first instance. This was accomplished with CAFRA.

In practice, placing the burden of proof on the Government has made very little difference in the outcome of cases. Generally, the Government's evidence is fairly strong, and the number of cases in which the evidence was evenly divided, such that the allocation of the burden of proof mattered, were few. Indeed, the amount of property forfeited has more than tripled since CAFRA was enacted.

b) The Innocent Owner Defense (*Bennis*)

Finding a way to deal with innocent third parties who have an interest in the property subject to forfeiture was more controversial. In *Bennis v. Michigan*,¹¹ the Supreme Court affirmed two centuries of precedent and held that imposing strict liability on third parties does not violate their due process rights. But in CAFRA, the Justice Department proposed, and Congress enacted, a uniform innocent owner defense. By statute, the defense gives third parties the opportunity to protect their property from forfeiture, even if it was derived from or used to commit a crime, if (1) they did not know of, or took all reasonable steps to prevent, the illegal use of the property; or (2) they acquired the property interest as a bona fide purchaser for value without reason to know that it was subject to forfeiture.¹²

c) Due Process and Notice (*Dusenbery*)

There was also a great deal of litigation over the steps the Government must take to provide notice of the forfeiture action to interested parties. In an *in rem* action, it is not always immediately apparent that the property owner is aware that a forfeiture action has been commenced. The rule that emerged, and was eventually codified, is that the Government must send written notice to any person who appears to have an

interest in the property within 60 days of its seizure and must also publish notice on the Internet on an official Government website.¹³

d) The Eighth Amendment and the Excessive Fines Clause (*Bajakajian*)

Another controversial issue – and the subject of three separate Supreme Court cases in the 1990s – involved the proportionality of the forfeiture to the seriousness of the crime. A forfeiture may potentially be large enough to implicate the Excessive Fines Clause of the Eighth Amendment, making the forfeiture unconstitutional. Thus, in *United States v. Bajakajian*,¹⁴ when a traveler leaving the Los Angeles airport with \$347,000 concealed in his luggage committed the relatively minor offense of not reporting the currency on his Customs form, the Supreme Court held that the forfeiture of the entire \$347,000 was unconstitutional because it was “grossly disproportional to the gravity of the offense.” However, the Court did not say how much could be forfeited without being unconstitutional; lower courts have been wrestling with this question ever since.

Generally, the forfeiture of the actual proceeds of a crime is never problematic – it is difficult to envision how the forfeiture of a crime’s proceeds could be disproportional, let alone grossly disproportional, to the gravity of the offense. But the situation may be different when valuable property, such as a person’s home, is used to facilitate the commission of an offense. At what point, for example, does the forfeiture of the home become disproportional to the offense of collecting or producing child pornography, or subjecting children to sexual abuse?¹⁵

e) Self-incrimination, the Right to a Stay, and Adverse Inferences

Another set of issues arises when there is a non-conviction-based forfeiture action and a parallel criminal investigation or trial. Under the Fifth Amendment to the Bill of Rights, a criminal defendant has the right to remain silent and put the Government to its proof. When the Government files a parallel civil forfeiture action, however, the defendant is presented with a Hobson’s choice: does he invoke his right to remain silent so that what he says cannot be used against him in his criminal case but in doing so foregoes his opportunity to defend his property, or does he give evidence in the forfeiture case? There are various ways to deal with this problem, but the choice that was made in CAFRA was to allow the defendant who is subject to criminal liability in a related case to ask that a related non-criminal case be stayed until the criminal case is over, thus making it unnecessary for him to make the choice between his property and his right to remain silent.

f) The Sixth Amendment Right to Counsel

A criminal defendant has the right to court-appointed counsel in a criminal case under the Sixth Amendment but, as mentioned earlier, that right does not extend to civil cases. In CAFRA, however, Congress created a limited right to court-appointed counsel if the property subject to forfeiture is the claimant’s primary residence. The view was that no one should be at risk of losing his home without having counsel to defend him.

The right to counsel also arises when the defendant in a criminal case claims that he needs property that the Government has seized or restrained under the forfeiture laws to pay for counsel of his choice in the criminal case. The Supreme Court has held that there is no constitutional right to exempt criminally derived property from forfeiture so that a defendant may use it to hire counsel;¹⁶ but criminal defendants who first demonstrate that they lack other funds with which to retain counsel do have a right to a pre-trial hearing at which the Government must establish probable cause to believe that the property is likely to be forfeited.

Conclusion

The American experience with civil, or non-conviction-based, asset forfeiture spans more than two centuries. In that time, it has become an essential tool of law enforcement, resulting annually in the recovery of over \$2 billion in assets derived from or used to commit federal crimes. As the use of non-conviction-based forfeiture has expanded, enormous attention has been given to the protection of individual rights and civil liberties by the courts and the national legislature, with the result that litigants now have a high level of confidence that their rights will be protected regardless of what form the Government's forfeiture action may take.

The process of refining the forfeiture laws and procedures is not yet complete. Matters of significance are litigated daily, and new cases are pouring in from the trial and appellate courts. But the major issues having been resolved, it is certain that non-conviction-based forfeiture will continue to play a significant role in efforts to deprive criminals of the fruits of their crimes and to take the instruments of crime out of the hands of those who would use them to violate the law. Indeed, with the globalization of the financial system and the resulting ease with which criminals of all persuasions are able to move criminal proceeds across international borders, it is highly likely that non-conviction-based forfeiture will assume an even greater role in recovering the proceeds of crime that are generated in one nation and transferred to another, particularly where the Government has little likelihood of bringing the wrongdoer to justice through a traditional criminal trial.

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1. See *United States v. Ursery*, 518 U.S. 267, 291 (1996) ("[Forfeiture] serves the additional non-punitive goal of ensuring that persons do not profit from their illegal acts").↵
 2. See *von Hofe v. United States*, 492 F.3d 175, 184 (2d Cir. 2007) ("Like imprisonment, which incapacitates convicted criminals, forfeiture may be said to incapacitate contraband").↵
 3. See *Caplin & Drysdale v. United States*, 491 U.S. 617, 630 (1989) ("[A] major purpose motivating congressional adoption and continued refinement of the racketeer influenced and corrupt organizations (RICO) and [continuing criminal enterprise] forfeiture provisions has been the desire to lessen the economic power of organized crime and drug enterprises").↵
 4. See *Libretti v. United States*, 516 U.S. 29, 39 (1995) ("[C]riminal forfeiture is an aspect of punishment imposed following conviction of a substantive criminal offense").↵
 5. See, e.g., *United States v. Vampire Nation*, 451 F.3d 189, 201–03 (3d Cir. 2006) (rejecting the argument that a forfeiture order must order the forfeiture of specific property; as an *in personam* order, it may take the form of a judgment for a sum of money equal to the proceeds the defendant obtained from the offense, even if he no longer has those proceeds, or any other assets, at the time he is sentenced).↵
 6. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361–62 (1984) (holding that acquittal on gun violation under 18 U.S.C. § 922 does not bar civil forfeiture under 18 U.S.C. § 924(d); *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 234–35 (1972) (*per curiam*) (determining that acquittal on criminal smuggling charge does not bar later civil forfeiture).↵
 7. See 18 U.S.C. § 983 (2009); Fed. R. Civ. P. Rule G (Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions). The process is also described in detail in Chapters 3–14 of Stefan D. Cassella, *Asset Forfeiture Law In The United States*, Second Edition, Juris Publishing (New York 2013).↵
 8. The advantages and disadvantages of criminal and non-conviction-based forfeitures under U.S. federal law are discussed in more detail in Chapter 1 of *Asset Forfeiture Law*, *supra* note 7. See also Stefan D. Cassella, *The case for civil forfeiture: Why in Rem proceedings are an essential tool for recovering the proceeds of crime*, 11 J. of Money Laundering Control 8 (2008).↵
 9. See *Caplin & Drysdale*, 491 U.S. at 630.↵
 10. For a complete discussion of the development of asset forfeiture law in the United States, including the application of constitutional protections embodied in the Bill of Rights to non-conviction-based proceedings, see Chapter 2 of *Asset Forfeiture Law*, *supra* note 7.↵
 11. 516 U.S. 442, 446 (1996).↵
 12. See *United States v. One 1990 Beechcraft*, 619 F.3d 1275, 1278 (11th Cir. 2010) (explaining that § 983(d) was enacted in response to the Supreme Court's decision in *Bennis*, holding that an innocent owner defense is not constitutionally required, and to bring uniformity to federal forfeiture law which contained a variety of inconsistent innocent owner provisions prior to CAFRA). The uniform innocent owner defense, codified at 18 U.S.C. § 983(d), is discussed in detail in Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture*, 89 Ky. L.J. 653 (2001).↵
 13. See *United States v. Dusenbery*, 534 U.S. 161, 167, 172–73 (2002).↵
 14. 524 U.S. 321, 322–23 (1998).↵
 15. The case law on the application of the Excessive Fines Clause to civil and criminal forfeiture is discussed in detail in Chapter 28 of *Asset Forfeiture Law*, *supra* note 7.↵
 16. See *United States v. Monsanto*, 491 U.S. 600 (1989).↵
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