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The Perils of Policing for Profit

Why Tennessee should reform its civil asset forfeiture laws

by Trey Moore & Scott Sumner

Introduction

Imagine living in a society in which you are guilty until proven innocent. The notion turns the concept of American justice on its head. Yet, this scenario plays out daily across Tennessee because of the state's civil asset forfeiture laws; and, too often, innocent people bear the cost.

Under the state's civil asset forfeiture statutes, law enforcement officials may seize personal property, including cash, based upon a mere suspicion that the property is related to a crime. Under current Tennessee law, no standard of probable cause is required to seize and hold private property—a hunch is all it takes.

Even worse, this practice shifts the burden of proof to property owners. Often, innocent property owners find it more economical to settle for a fraction of the seized property's value instead of fighting the seizure in court. Because civil asset forfeiture laws allow local law enforcement to retain seizures to pay for their unit's operating expenses—including payroll—these laws inherently create perverse incentives in law enforcement.

"Policing For Profit"

Under Tennessee's civil asset forfeiture statutes, owners who have had property seized have the burden of proof. This is contrary to the public policy underlying our criminal code and is often a considerable expense to property owners. If the owner fails to prove the property was not used in a crime, the property is permanently lost to the law enforcement agency that made seizure. The hearings to decide whether to return private property are *ex parte*, meaning only the officer's side of the story is heard by a judge, and sometimes a property owner is never even given notice of the hearing.

With the deck stacked against property owners, these forfeitures become a common occurrence and a dubious source of revenue for law enforcement. When it comes to the seizure of property, cash is a favorite target, and out-of-state drivers are often pegged simply by virtue of their license plate.

The burden of retrieving private property is compounded for out-of-state drivers, as it is difficult, inconvenient, and sometimes cost prohibitive for travelers to return to the state and reclaim their property.

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Because the money seized goes directly into the operation of the law enforcement unit and pays for equipment, vehicles, and salaries, officers are given a direct and obvious incentive to seize as much property as possible or as necessary to make their unit profitable.

Tennessee's Profit Motive

In the state of Tennessee, this profit motive could not be any clearer. One has to look no further than the policies and practices of drug interdiction units that patrol the 50-mile stretch of Interstate 40 west of Nashville.

On December 21, 2012, NewsChannel 5 aired a story marking the conclusion of a two-year investigation into civil asset forfeiture practices. The investigation exposed a considerable disparity in the number of stops based on the direction cars were travelling. Conventional wisdom in law enforcement circles holds that the majority of illicit drug trafficking along Interstate 40 west of Nashville travels into the city on eastbound lanes while the proceeds return on westbound lanes. Notably, a review of daily activity logs revealed that officers of the 23rd Judicial District made 10 times more stops on the westbound or “money” side than on the eastbound “drug” side. Officers were also documented on video stopping drivers without cause and then coercing drivers into a vehicle search.

Deals have even been struck in which law enforcement officers patrol stretches of highway outside their jurisdiction under an agreement that a share of any cash or liquidated value of property seized will go

to the agency that has jurisdiction. For example, NewsChannel 5 documented Williamson County officers making a stop and seizure in Smith County, more than 70 miles outside their judicial district.

Abuse Abounds Absent Accountability

Numerous cases highlight the absurdity occurring by virtue of civil asset forfeiture laws. In one instance, \$20,000 was taken from an African American man who had just won the Georgia Lottery. In another, \$27,500 was taken from a Hispanic man who was helping his mother move with her life savings in tow. The prevalence of such cases reveals a focus by law enforcement that is less concerned with enforcing the criminal laws on the books and more concerned with profiting under this harmful civil statute.

It remains unclear exactly how much private property has been seized from innocent Tennesseans or others passing through the state, since current law imposes no disclosure requirements on the part of law enforcement.

Unfortunately, entire programs and many positions depend on the ability to seize property. For example, officers working for agencies such as the Dickson Interdiction Criminal Enforcement (DICE) Unit must seize cash to stay employed. “Everything is paid through seizures and fines,” Dickson Police Chief Ricky Chandler said when questioned by NewsChannel 5’s Phil Williams. District Attorney General Kim Helper of the 21st Judicial District also stated that the money seized is used to fund agency operations.¹

The abuse and perverse incentives on display expose the need for immediate reform. Government should never play the role of thief.

Lack of Due Process: A Brief History of Modern Civil Asset Forfeiture

Under both the Fifth Amendment to the United States Constitution and Article 1, Section 8 of the Tennessee Constitution, citizens are entitled to due process of law before their property is seized without just compensation. Tennessee's civil asset forfeiture laws, in their current form, raise real constitutional concerns.

The Institute for Justice, a national nonprofit law firm, concluded that nationwide, "civil asset forfeiture is one of the worst abuses of property rights in our nation today," with more than \$1.6 billion dollars confiscated thus far.²

In 1984, Congress, through amendments to the Comprehensive Drug Abuse and Prevention Act of 1970, created the U.S. Department of Justice's Assets Forfeiture Fund. Further amendments dramatically expanded what law enforcement could do with these funds, permitting their use for expenses such as vehicles and overtime pay. These loose-ended amendments, giving federal agencies the ability to retain and spend forfeiture proceeds, secured to them a direct financial stake in generating forfeiture funds. Many states subsequently followed the federal government's profit-making example by amending their own civil forfeiture laws to give law enforcement agencies within their borders a direct share of forfeited proceeds.

While modest reforms of federal forfeiture laws did in fact take place in 2000 through the Civil Asset Forfeiture Reform Act, they did not change how forfeiture proceeds are distributed or curb the profit incentive. Still today, law enforcement agencies in 42 states receive some or all of the civil forfeiture proceeds they seize.

Astoundingly, the Institute for Justice also found that 80 percent of those whose property was seized by the federal government were never charged with a crime.³

When Did Carrying Cash Become Illegal?

When questioned about why victims of civil asset forfeiture were never prosecuted, District Attorney Kim Helper responded that, "the transportation of illegal drug proceeds through the state of Tennessee is not a crime."⁴ This response is misleading, but raises a good point: carrying U.S. currency is not a crime, regardless of the amount.

What the statement also reveals is that officers in this situation have no evidence—not even the required "probable cause" to charge, much less convict—to show that the currency amounts to proceeds of illegal drugs. If such proof existed, the prosecutors would be able to charge such defendants with a crime in addition to seizing the cash.

This type of response is typical of law enforcement with regard to civil asset forfeiture, and it shines light on the incredible, and dangerous, amount of

discretion provided to officers under Tennessee's civil asset forfeiture laws.

Few States on the Right Track

In its report, the Institute for Justice graded Tennessee a D-minus for its civil forfeiture laws. Only three states—Maine, North Dakota, and Vermont—received grades of B or higher. These states provide their property owners with some of the better protections against civil forfeiture abuse in the country.⁵

In Maine, the government must show through an abundance of evidence that the property is actually related to a crime. Unfortunately, this standard remains less than the “reasonable doubt” standard that is required for a criminal conviction. More importantly, by mandating that all forfeiture funds go directly into the state's general fund, Maine's forfeiture laws have eliminated the perverse incentives created by Tennessee's asset forfeiture statutes.⁶

North Dakota's forfeiture law states that residences and other real estate shall not be subject to forfeiture if they are co-owned by someone who has not been convicted of the underlying criminal offense. Also, no proceeds from civil forfeiture become allocated to law enforcement in North Dakota.⁷

Vermont's forfeiture laws include similar measures, as the state must show by clear and convincing evidence that the property is related to a crime before it can be forfeited. Property seized through civil forfeiture goes to the state treasury and not to law enforcement.⁸

While these three have better laws in place than most states, their laws are far from perfect. All three states still allow a presumption of guilt antithetical to the American concept of criminal justice.⁹

Solutions for Tennessee

Private property rights are the foundation of the U.S. and Tennessee Constitutions. As such, Tennessee would do well to repeal its current civil asset forfeiture statutes, as they allow for untold assaults on private property rights. In order to seize private property, law enforcement should be compelled to meet the criminal standards applied to arrests. After all, an arrest is indeed itself a seizure of property—the person. And it is from this notion that flow all the rights enumerated in the first 10 amendments to the U.S. Constitution. As such, law enforcement should be held to the same standard when seizing other forms of private property, and property should be promptly returned upon failure to meet such standards.¹⁰

Short of abolition, measures should be employed to at least curb abuse, such as:

- Civil asset forfeiture revenues should be placed into a neutral fund, preferably in the general revenue fund of the local or state government.
- Law enforcement should be held to a higher standard, transferring the burden of proof from property owners to the government, where it belongs.
- State law should require that all seizures of cash or property be

recorded and reported to the state for the sake of transparency. Such data should be readily accessible by the public.

- *Ex parte* hearings should be prohibited when forfeiture issues appear before a judge.
- If a judge determines that the property should be returned because it was improperly seized, the law enforcement agency should be responsible for any associated costs. This should include any lost income or interest resulting from the property being tied up for a period of time, as well as all court costs and attorneys fees necessarily incurred to reclaim the property.

Conclusion

The right to private property is a bedrock of our nation's founding. But Tennessee's civil asset forfeiture laws have created a climate ripe for corruption. These laws, by allowing and incentivizing law enforcement agencies to profit directly from property seizures, have caused an unsavory shift in agency priorities.

The priority of all law enforcement officials should be the fair and impartial administration of justice, yet abuses abound when statutory arrangements directly affect the ability of law

enforcement to carry out their jobs duly and responsibly.

It is beyond time for Tennessee to enact reforms on the issue of civil asset forfeiture. The problem is clear. The solution is obvious. The state of Tennessee should act to protect its citizens' private property rights.

¹ Phil Williams, "NewsChannel 5 Investigates: Policing For Profit." December 21, 2012.

<http://www.newschannel5.com/story/20342745/nc5-documentary-examines-policing-for-profit>.

² *Ibid.*

³ Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic, and Scott Bullock, "Policing for Profit: The Abuse of Civil Asset Forfeiture." Institute for Justice. March 2010. http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

⁴ Williams, "NewsChannel 5 Investigates."

⁵ Williams, et al, "Policing for Profit."

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ "Legislators' Guide to the Issues: 108th Tennessee General Assembly." Beacon Center of Tennessee. p. 59.

<http://www.beacontn.org/wp-content/uploads/108th-Legislators-Guide-to-the-Issues.pdf>.

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