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Holder assails policing for profit

Attorney general's initiative curbs but does not eliminate controversial asset seizure policies

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by [Lauren Carasik](#) [@LCarasik](#)

On Jan. 16, outgoing U.S. Attorney General Eric Holder announced sweeping revisions to the federal civil asset forfeiture policy, barring state and local police from using federal law to confiscate cash and other property. Under the oft-criticized [equitable sharing](#) program, the federal government “adopts” assets seized by state and local law enforcement and then funnels up to 80 percent of the value back to the agencies.

The program invited malfeasance by giving cash-strapped police departments incentive to confiscate property believed to be involved in illicit activities even when the owners were not accused — much less convicted — of any crime. The program’s abuses have garnered [bipartisan support](#) for reform, and critics are praising Holder’s changes.

While the improvements are laudable, they will not end the abuse for a number of reasons. First, local agencies may continue the programs under state laws. Second, Holder did not ban forfeiture for state and federal joint operations. And finally, the changes fall short of addressing the how civil forfeiture tramples due process rights.

Perverse incentives

Initially crafted as a tool for use in admiralty, customs and confiscation of pirate bounty, civil forfeiture has been around for centuries. It is distinct from its criminal analog, in which assets are seized only after a defendant has been convicted of wrongdoing. The practice was reinvigorated in 1985 for use in the drug war, intended to deplete illegal profits amassed by gangs and cartels and provide funds for law enforcement efforts. Instead, civil forfeiture has evolved into a

program that often targets the innocent and is driven by profiteering instead of justice.

It has provided a windfall to police departments. Last year [a Washington Post](#) investigation revealed disturbing statistics: More than \$2.5 billion in cash was confiscated since 9/11 in nearly 62,000 seizures. State and local law enforcement agencies kept \$1.7 billion. None of the owners from whom the property was confiscated were convicted of a crime. Although civil seizures are authorized under state and federal law, in some cases the federal reimbursement allowance exceeded the amount agencies were permitted to retain under state restrictions.

[The standards for confiscating property](#) were often lower under federal law than what states were required to prove. As a result, participation in the program enabled local law enforcement agencies to circumvent state safeguards against overzealous policing and protections for property owners.

Allowing law enforcement agencies to profit directly from the seizure of assets has encouraged aggressive, self-interested policing and caused irreparable harm to many innocent people.

The federal law prohibits the use of funds for salaries, but limitations on the use of confiscated assets are often lax and poorly monitored under state law. Some departments have [used the confiscated funds](#) to pay for salaries, bonuses, equipment and other items deemed useful for their units, including a Zamboni, luxury cars, military grade equipment and a margarita machine. Hundreds of police departments relied on forfeitures to fund at least 20 percent of their operating budgets, according to the Washington Post.

Illustrating officers' compromised motives, a leaked [training seminar tape](#) for law enforcement agencies showed instructors disclosing tips about how to maximize the profitability and ease of the seizures. And the focus on confiscation played out in the field. For example, aggrieved motorists in presumed drug corridors

are [often pulled over for minor infractions and subjected](#) to shakedowns. The “probable cause” justifying the seizure of cash was often flimsy and manufactured, such as presuming that anyone carrying large amounts of cash is inherently suspect while [ignoring the owners’ verifiable explanations](#).

The forfeiture process is premised on a quirky legal fiction in which suit is filed against the property itself. Those seeking the return of their property can assert their innocence, but in most cases they bear the burden of proof. In the Post’s investigation, property owners challenged the seizures in fewer than 20 percent of cases, though states agreed to return the money in more than 40 percent of those challenges. Property owners abandon their assets for a variety of reasons. The cost of recovery may exceed the value of the items seized, litigating in a state they were merely traveling may be too difficult, and they may fear further involvement with law enforcement. Because the matter is not criminal, owners are not entitled to free legal assistance and must often pay substantial fees just to initiate claims. It can take months or even years for cases to be processed. And even for owners who succeed in obtaining the full or partial return of their assets, the temporary unavailability of their money can cause irreparable damage.

It is hardly surprising that civil forfeiture has a disproportionate effect on minorities. In the 400 court cases the Post examined in which at least some money was returned to owners, the majority were black, Latino or from another minority group. A 2014 [ProPublica](#) report echoed a similar racial bias, documenting that the majority of owners seeking the return of their homes confiscated in Philadelphia were from poor and minority communities. In some cases, those [dispossessed of their property were never even suspects](#). Some of the homes were seized because the owners’ children or grandchildren committed minor drug offenses, often without their elders’ knowledge.

To be fair, civil forfeiture has positive aspects: It has provided hundreds of millions of dollars for restitution to crime victims and funneled illicit funds away from organized crime (though large enterprises are rarely the target of state and

local efforts). And few would disagree that convicted criminals should not be able to keep ill-gotten gains.

But allowing law enforcement agencies to profit directly from the seizure of assets has encouraged aggressive, self-interested policing and caused irreparable harm to many innocent people. Holder's new policy must be bolstered by additional safeguards at the state level, including closer oversight, greater protections for owners and eliminating incentives by channeling seized funds into the state's general coffers or other departments. But even those reforms fail to remedy the concern about the fundamental fairness of confiscating property in the absence of a criminal conviction, especially given civil forfeiture's disparate effect on minorities and the poor.

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