



INSTITUTE FOR JUSTICE

January 27, 2015

United States House of Representatives
Washington, D.C. 20515

RE: Letter in Support of the Fifth Amendment Integrity Restoration Act of 2015

Dear Representative:

The Institute for Justice (IJ) supports the passage of Rep. Tim Walberg's (R-MI) Fifth Amendment Integrity Restoration Act of 2015 (FAIR Act of 2015), which addresses defects in current civil-forfeiture law and procedures that have become serious threats to the rights of innocent property owners. IJ is a public interest, civil liberties law firm dedicated to protecting private property rights, and the nation's leading legal advocate against forfeiture abuse. IJ represents the rights of innocent property owners in courts across the country in matters involving homes,¹ small businesses,² automobiles,³ and cash.⁴ For years, IJ has documented the growing danger of civil-forfeiture.⁵

Under federal civil-forfeiture laws, law-enforcement agencies can seize and keep property suspected of involvement in criminal activity. Unlike *criminal* forfeiture, however, with *civil* forfeiture, the government can permanently seize and keep property without charging, let alone convicting, anyone of a crime. Because these are civil proceedings, property owners are not guaranteed counsel like criminal defendants and must often fight to keep their property without the assistance of counsel. This can lead to a dangerous cost-benefit analysis when the value of the property is so much lower than the cost of retaining counsel that it does not make

¹ See, e.g., *Souvelis v. City of Philadelphia*, No. 14-4687 (E.D. Pa. filed Aug. 11, 2014) (class-action lawsuit challenging Philadelphia's system of civil forfeiture, including its profit incentive that distributes forfeiture proceeds to law enforcement), <https://www.ij.org/philadelphia-forfeiture>.

² See, e.g., *United States v. 2601 West Ball Road*, No. 12-CV-01345 (C.D. Cal. filed Aug. 21, 2012) (representing commercial building owner in forfeiture action based on legal activities of tenants), <http://www.ij.org/caforfeiture>.

³ See, e.g., *El-Ali v. State*, 388 S.W.3d 890 (Tex. App. 2012) (representing owner of truck seized when non-owner driver stopped for drunk driving), <http://www.ij.org/state-of-texas-v-one-2004-chevrolet-silverado>.

⁴ See, e.g., *In the Matter of the Seizure of \$446,651.11*, No. 14-1288 (E.D.N.Y. filed Nov. 16, 2014) (representing candy distributor when federal government seized its bank account because of supposed cash "structuring"), <https://www.ij.org/long-island-forfeiture>.

⁵ See Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic & Scott Bullock, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, Inst. for Justice (2010), available at http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf (discussing the history of federal and state civil forfeiture and grading jurisdictions according to how protective their forfeiture laws are of property and due process rights); see also Dick M. Carpenter, Larry Salzman & Lisa Knepper, *Inequitable Justice: How "Equitable Sharing" Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain*, Inst. for Justice (2011), available at <http://www.ij.org/inequitablejustice> (explaining how the federal equitable-sharing program encourages local and state law enforcement to stricter state laws).

economic sense for property owners to hire a lawyer. Indeed, in some cases, property owners may decide not to defend against the forfeiture at all.

Current civil-forfeiture procedures are stacked against property owners. The government must prove by a preponderance of the evidence—or “more likely than not”—that property is subject to forfeiture. This is a much lower standard than the “beyond a reasonable doubt” standard the government must meet in criminal matters. If the government satisfies this undemanding test, federal law requires property owners to prove their own innocence to get their property back. This flips the American principle of “innocent until proven guilty” on its head.

Moreover, law-enforcement agencies have a strong financial incentive to pursue civil forfeitures. Before 1984, proceeds from civil forfeiture went to the general revenue fund of the United States, and forfeiture revenue was modest. But in 1984, the law was changed to allow law enforcement to keep forfeiture proceeds, creating a strong pecuniary incentive for law enforcement to engage in civil forfeiture while undermining Congress’s ability to oversee and control appropriations to law-enforcement agencies. With the introduction of this profit incentive, the number of civil forfeitures has skyrocketed. The result has been disastrous. As demonstrated in IJ’s groundbreaking report, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, when the law makes forfeiture more profitable, law enforcement engages in more of it.⁶ The property rights of the innocent suffer as a result.

In addition, a federal program known as “equitable sharing” allows federal agencies to pay a bounty to state and local law-enforcement agencies for participating in civil forfeitures pursued under federal law.⁷ This policy enables state and local law enforcement to do an end-run around their own state laws in order to receive substantial funding that they could not get under state law. This has undermined state-level reforms that provide more protections for innocent property owners than federal law. On January 16, 2015, Attorney General Holder sharply curtailed a form of equitable sharing that allows federal agencies to “adopt” property subject to forfeiture under both state and federal law.⁸

Though this policy change is a step in the right direction, it does not go far enough to remedy the constitutional problems inherent in the equitable-sharing program. The Justice Department’s new policy does not apply to two broad categories of seizures. First, the policy does not apply to seizures by joint task forces or those that are the result of coordinated federal-state investigations. Consequently, many of the “highway interdictions” exposed in the

⁶ See *Williams*, *supra* note 5.

⁷ See *Carpenter*, *supra* note 5.

⁸ See Office of the U.S. Att’y Gen., Order, *Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies* (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. The Attorney General’s office also announced that the U.S. Department of the Treasury, which has its own forfeiture program, will issue a policy consistent with the Attorney General’s order. See Press Release, U.S. Dept. of Justice, 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), <http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law>.

Washington Post's six-part investigative series would not be addressed.⁹ Second, the policy does not apply to seizures made after obtaining a federal seizure warrant. These warrants are easily obtained before the property owner is provided with any notice or opportunity to be heard.

Finally, civil-forfeiture allows the government to seize innocent individual and small businesses' bank accounts—without any showing of criminal intent—by accusing them of “structuring,” or frequently making small cash deposits. Federal law requires banks to report cash transactions in excess of \$10,000.¹⁰ In addition, it is illegal to break up one's cash deposits or withdrawals—or “structure” them—“for the purpose of evading” those currency reporting requirements.¹¹ Under federal forfeiture laws, the government may seize bank accounts engaged in receiving small deposits without any indication of criminal activity. Small business owners have had their bank accounts seized based on the allegation that they illegally “structured” their deposits, even though they had simply made less than \$10,000 deposits for legitimate business reasons. The law has ensnared a diverse array of small businesses that deal primarily in cash transactions, including a Michigan grocery store and gas station,¹² a Mexican restaurant in Iowa,¹³ and a family-owned candy distributor on Long Island.¹⁴

In keeping with the Fifth Amendment's guarantee that no person “be deprived of life, liberty, or property, without due process of law,” the FAIR Act of 2015 reforms current law in several vital and commonsense ways:

- The FAIR Act curbs the profit incentive by prohibiting the Justice Department from retaining assets seized through civil forfeiture for their own use.
- It respects principles of federalism by abolishing the equitable-sharing program.
- It requires the government to prove property is subject to forfeiture by clear and convincing evidence—a standard higher than current law, which requires a mere “preponderance of the evidence.”
- The bill restores the principle of “innocent until proven guilty” by putting the burden on the government—instead of the property owner—to show that the owner had knowledge that his property was used in criminal activity.
- The bill provides indigent property owners with appointed counsel.

⁹ See Michael Sallah, Robert O'Harrow Jr., & Steven Rich, *Stop and Seize*, Wash. Post, Sept.-Nov. 2014, available at <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>.

¹⁰ See 31 U.S.C. § 5313.

¹¹ See 31 U.S.C. § 5324; 31 U.S.C. § 5317 (subjecting structured funds to civil or criminal forfeiture).

¹² See *Dehko et al. v. Holder*, No. 13-cv-14085 (E.D. Mich. filed Dec. 10, 2013), <http://www.ij.org/miforf>.

¹³ See *United States v. \$32,820.56*, No. 13-cv-4102 (N.D. Iowa filed Oct. 24, 2013), <http://www.ij.org/iowa-forfeiture>.

¹⁴ See *In the Matter of the Seizure of \$446,651.11*, No. 14-mc-1288 (E.D.N.Y. filed Nov. 16, 2014), <http://www.ij.org/long-island-forfeiture>.

- It protects innocent small business owners by codifying the new I.R.S. policy limiting prosecutions of “structuring” to those involving funds not derived from a legitimate source.
- It inserts a commonsense criminal intent requirement for alleged “structuring violations;” *i.e.*, the government must prove that a person *knowingly* “structured” financial transactions for the purpose of evading currency reporting requirements.
- It includes a hearing requirement to allow individuals and small business owners a prompt opportunity to contest the seizure of their funds.

The FAIR Act of 2015 will still allow law enforcement to pursue criminals’ ill-gotten gains. It would enact simple, commonsense but vitally needed changes in civil forfeiture law and procedures to protect innocent property owners from being unjustly deprived of their property.

We urge you to support the Fifth Amendment Integrity Restoration Act of 2015.

Sincerely,

A handwritten signature in black ink that reads "Scott Bullock". The signature is written in a cursive, slightly slanted style.

Scott Bullock
Senior Attorney