

January 27, 2015

Re: NACDL Supports the Fifth Amendment Integrity Restoration (FAIR) Act of 2015

Dear Member of Congress:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I write to urge your support for the Fifth Amendment Integrity Restoration (FAIR) Act of 2015. Introduced by Rep. Tim Walberg (R-MI) and Sen. Rand Paul (R-KY), this legislation would bring much-needed improvements to federal civil asset forfeiture laws.

Under current law, the government can confiscate money and property of individuals and businesses without convicting, or even charging, that person or entity with committing a crime. As one victim of forfeiture abuse has observed, "It's like they are at war with innocent people."^[1]

One significant problem with the current statutory framework is the burden of proof provision at 18 U.S.C. § 983(c). Currently, federal law allows the government to merely meet a "preponderance of the evidence" showing when taking someone's money or property—a very low standard of proof. The FAIR Act would raise the level of proof required to seize property to the more reasonable standard of "clear and convincing evidence," which would help protect property owners. The FAIR Act would also require the government to prove that an owner was aware that property was being used in criminal activity—an important legal requirement that would help ensure that money and property is not mistakenly or unfairly seized. Currently, forfeiture laws are being used to confiscate property of persons who have no responsibility for its criminal misuse; many innocent people lose valuable property rights because of something someone else has done that was beyond their control. Importantly, the bill also provides indigent property owners with appointed counsel.

Federal law enforcement agencies have a very strong incentive to seek forfeitures as they have "a direct pecuniary interest in the outcome of the [forfeiture] proceeding[s]." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1993). As a matter of fundamental due process, the Supreme Court has recognized the need for special scrutiny where the government stands to benefit financially from the imposition of sanctions as a result of criminal laws. *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.). The FAIR Act would eliminate this profit incentive by prohibiting the Justice Department from retaining assets seized through civil forfeiture for their own use and instead would mandate that the proceeds of forfeiture go to the Treasury's General Fund, where Congress can appropriate the money for any purpose.

In addition, a federal program known as "equitable sharing" allows state and local law enforcement to do an end-run around state laws and allows them to profit from civil forfeitures in situations where normally they could not. The proceeds from federal forfeitures are deposited into the Department of Justice's Asset Forfeiture Fund. After the Department takes its share, "equitable sharing" gives the local police up to 80 percent of the proceeds. This program thwarts any existing state laws that protect property owners better or require forfeited assets to be deposited into the state's general treasury. To be clear, the financial incentive is staggering: in

fiscal year 2012, our federal government paid out almost \$700 million in "equitable sharing" proceeds to local and state law enforcement agencies.[2] On January 16, 2015, Attorney General Holder restrained one type of equitable sharing that allows federal agencies to "adopt" property that is subject to forfeiture under both federal and state law.[3] Although this announcement in a policy shift is welcome news, it unfortunately does not cure the many problems with the equitable sharing program. Specifically, the new policy does not apply to the overwhelming number of seizures that result from coordinated state-federal investigations. The new policy also does nothing to curtail seizures that take place in the wake of a federal seizure warrant. Therefore, most types of seizures actually do not benefit from the Attorney General's order. The FAIR Act addresses these inequities by abolishing the equitable-sharing program.

We can no longer ignore the conflicts of interest and policy problems that arise when law enforcement and prosecutorial agencies reap financial bounty from the forfeiture decisions they make. Decisions regarding whose property to seize, and how to deal with citizens whose property has been seized, are too often dictated by the profit the agencies stand to realize from the seizures. State and local law enforcement agencies frequently work with federal agencies on forfeiture cases and share the proceeds of the forfeiture. This procedure thwarts state laws and violates federalism principles. The federal government's participation in this preemption of state priorities should be eliminated by Congress. NACDL urges you to support the commonsense improvements contained in the FAIR Act.

Sincerely,
Theodore Simon
President

[1] The *Washington Post* published a 6-part investigative series highlighting systemic abuses of power in the use of civil asset forfeiture laws by federal, state, and local law enforcement agencies. See Michael Sallah, Robert O'Harrow Jr., Steven Rich, Wash. Post, Stop and Seize (2014), <http://www.washingtonpost.com/sf/investigative/collection/stop-and-seize-2/>.

[2] Memorandum from Michael E. Horowitz, Inspector General, U.S. Dept. of Justice, Top Management and Performance Challenges Facing the Department of Justice (Dec. 11, 2013), available at www.justice.gov/oig/challenges/2013.htm.

[3] U.S. Dept. of Justice, Att'y Gen. Order, *Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies*, (Jan. 16, 2015). The Attorney General's office also announced that the U.S. Department of the Treasury will issue a policy consistent with the Attorney General's order for its own forfeiture program. 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).