

September 29, 2014

Re: H.R. 5212, the Civil Asset Forfeiture Reform Act of 2014

Dear Member of Congress,

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I write to urge your support for H.R. 5212, the Civil Asset Forfeiture Reform Act of 2014. Introduced by Rep. Tim Walberg (R-MI), Rep. Renee Ellmers (R-NC), and Rep. Mike Coffman (R-CO), 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. On September 6-8, the *Washington Post* published a 3-part investigative series highlighting systemic abuses of power in the use of civil asset forfeiture laws by federal, state, and local law enforcement agencies. As one victim of forfeiture abuse observed, "It's like they are at war with innocent people."

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. H.R. 5212 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. H.R. 5212 would also strengthen the existing "innocent owner defense" by requiring 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.

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.).

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.[1] H.R. 5212 takes a step in the right

direction by requiring that any "equitable sharing" payments to local and state law enforcement agencies not be initiated for the purpose of circumventing any state laws that prohibit civil forfeiture or limit the use or disposition of forfeited property.

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 is 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 H.R. 5212.

Sincerely,

Theodore Simon
President

[1] 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.