Crime and Forfeiture: In Short

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Summary

This is a sketch of the federal forfeiture, the confiscation that attends the commission of various crimes, of its origins and attributes, of the distribution through asset forfeiture funds of the hundreds of millions of dollars it generates, and of some of the constitutional issues it raises. It is an abridged version of CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle, a longer report from which citations, footnotes, and appendices have been stripped.

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Background

Present forfeiture law has its roots in early English law. It is reminiscent of three early English procedures: deodands, forfeiture of estate or common law forfeiture, and statutory or commercial forfeiture. At early common law, the object that caused the death of a human being—the ox that gored, the knife that stabbed, or the cart that crushed—was confiscated as a deodand. Coroners' inquests and grand juries, bound with the duty to determine the cause of death, were obligated to identify the offending object and determine its value as well. The Crown distributed the proceeds realized from the confiscation of the animal or deadly object for religious and charitable purposes in the name of the deceased. Although deodands were not unknown in the American colonies, they appear to have fallen into disuse or been abolished by the time of the American Revolution or shortly thereafter. In spite of their limited use in this country, deodands and the practice of treating the offending animal or object as the defendant have frequently been cited to illustrate the characteristics of modern civil forfeiture. Forfeiture of estate, or common law forfeiture, unlike deodands, focused solely on a human offender. At common law, anyone convicted and attained for treason or a felony forfeited all his lands and personal property. Attainder, the judicial declaration of civil death, occurred as a consequence of the pronouncement of final sentence for treason or felony. In colonial America, common law forfeitures were rare. After the Revolution, the Constitution restricted the use of common law forfeiture in cases of treason, and Congress restricted its use, by statute, in the case of other crimes. The third antecedent of modern forfeiture, statutory or commercial forfeiture, figured prominently in cases in admiralty and on the revenue side of the Exchequer in pre-colonial England. It was used fairly extensively against smuggling and other revenue evasion schemes in the American colonies, and has been used ever since. In most instances, the statutes have called for *in rem* confiscation proceedings in which, as with deodands, the offending object is the defendant; occasionally, they have established *in personam* procedures where confiscation occurs as the result of the conviction of the owner of the property. Although contemporary American forfeiture law owes much to the law of deodands and the law of forfeiture of estate, it is clearly a descendant of English statutory or commercial forfeiture.

Property and Trigger Crimes

Modern forfeiture is a creature of statute. While there are some common themes and general patterns concerning the crimes that trigger forfeiture, the property subject to confiscation, and the procedures associated with forfeiture, the federal forfeiture statutes are matters of legislative choice and can vary greatly. Virtually every kind of property, real or personal, tangible or intangible, may be subject to confiscation under the appropriate circumstances. The laws that call for the confiscation of contraband per se, property whose very possession has been outlawed, are the most prevalent. Property, particularly vehicles, used to facilitate the commission of a crime and without which violation would be less likely, is also frequently subject to confiscation. In some instances, Congress has authorized the confiscation of the direct and indirect proceeds of illegal activities, and of substitute assets when the property normally subject to confiscation under a particular statute has become unavailable. Traditionally, the crimes that triggered forfeiture were those which threatened the government's revenue interest, e.g., smuggling, tax evasion, hunting or fishing without a license, or those crimes which because of their perceived threat to public health or morals might historically have been considered public nuisances subject to abatement, e.g., gambling, or dealing in obscene material or illicit drug use. Beginning with the racketeering statutes, a number of jurisdictions have created a third category, adding some of the kinds of crimes which involve substantial economic gain for the defendant even if not at the expense of government revenues, but which may greatly enhance government revenues, e.g., racketeering and money laundering. The trend is most obvious in the Civil Asset Forfeiture Reform Act

(CAFRA), which made forfeitable the proceeds from any of the crimes upon which a money laundering or RICO prosecution might be based. Following the terrorist attacks on September 11, 2001, Congress authorized the confiscation of another type of crime-related property – property owned by certain terrorists regardless of whether property is traceable, used to facilitate, or connected in any other way to any practical crime.

Civil Forfeiture

Forfeiture follows one of three procedural routes. Although crime triggers all forfeitures, they are classified as civil forfeitures or criminal forfeitures according to the nature of the judicial procedure which ends in confiscation or administrative forfeitures if confiscation occurs without judicial proceedings. Civil forfeiture is ordinarily the product of a civil, in rem proceeding in which the property is treated as the offender. Within the confines of due process and the language of the applicable statutes, the guilt or innocence of the property owner is irrelevant; it is enough that the property was involved in a violation to which forfeiture attaches in the manner in which statute demands. Criminal forfeiture proceedings, on the other hand, are in personam proceedings, and confiscation is only possible upon the conviction of the owner of the property and only to the extent of defendant's interest in the property.

As a general rule, since the proceedings are in rem, actual or constructive possession of the property by the court is a necessary first step in any civil confiscation proceeding. Because realty cannot ordinarily be seized until after the property owner has been given an opportunity for a hearing, the procedure differs slightly in the case of real property. Where the seizure of the property causes an undue hardship, CAFRA affords an owner the opportunity to petition the court for release of the property pending the completion of forfeiture proceedings; and it affords the government the opportunity to petition for a restraining or protective order to preserve the property pending the completion of forfeiture proceedings.

In the interests of expediency and judicial economy, Congress has sometimes authorized the use of administrative forfeiture as the first step after seizure in uncontested cases. The procedure requires that those with an interest in the property be notified and given an opportunity to request judicial forfeiture proceedings. When administrative forfeiture is unavailable, or when a claimant has successfully sought judicial proceedings, or when the government has elected not to proceed administratively, the government may seek to secure a declaration of forfeiture by filing either a complaint or a libel against the property.

In money laundering and other civil forfeitures governed by the CAFRA, the government must establish that the property is subject to confiscation by a preponderance of the evidence. In cases such as those arising under the customs laws and cases filed before the effective date of the CAFRA amendments, the government must establish probable cause to believe that the property is subject to forfeiture; if the government overcomes this initial obstacle, the burden shifts to the claimant who must establish standing and, by a preponderance of the evidence, that his or her interest in the property is not subject to a declaration of forfeiture. A claimant may successfully challenge confiscation on several grounds. He or she may be able to show that the predicate criminal offense did not occur or that his or her property lacks the statutorily required nexus to the crime. A claimant's innocence or even acquittal only bars civil forfeiture to the extent that a statute permits or due process requires. For most civil forfeitures, other than those arising under the tax or customs laws, CAFRA established two "innocent owner" defenses—one for claimants with an interest in the property at the time the forfeiture-triggering offense occurred and the other for claimants with an interest acquired after the forfeiture-triggering offense occurred. The first is

available to claimants either who were unaware that their property was being criminally used or who did all that could be reasonably expected of them to prevent criminal use of their property. The second is for good faith purchasers who did not know of the taint on the property at the time they acquired their interest.

Where the court determines that the property is not subject to forfeiture, it must be released to its owner, assuming the property can be lawfully possessed by its owner. Regardless of the statutory procedure initially invoked, prevailing claimants may be entitled to compensation for damages to the property incurred while in federal custody, attorneys' fees, post-judgment interest, and in some instances pre-judgment interest. Where the property is declared forfeited, its disposal is a matter of statute.

The Attorney General and the Secretary of the Treasury enjoy wide latitude to transfer confiscated property to state, local, and foreign law enforcement agencies to the extent of their participation of in the case, although both must be assured that the transfers will encourage law enforcement cooperation. At one time, this "equitable sharing" transfer authority could not be used unless the Attorney General was convinced that confiscated property "[was] not so transferred to circumvent any requirement of State law that prohibits forfeiture or limits use or disposition of property forfeited to State or local agencies." The restriction addressed sometimes controversial adoptive forfeitures. Adoptive forfeiture occurs when property is forfeitable under federal law and the Department of Justice "adopts," for processing under federal law, a forfeiture case brought to it by state or local law enforcement officials and in which the United States is not otherwise involved. Federal adoption is sometimes attractive because of the speed afforded by federal administrative forfeiture. It may also be attractive because forfeiture would be impossible or more difficult under state law or because law enforcement agencies would not share as extensively in the bounty of a successful forfeiture under state law. The circumvention restriction is no longer in effect, but the Treasury and Justice Departments insist that state and local law enforcement agencies indicate the law enforcement purposes to which the transferred property is to be devoted and that the transfer will increase and not supplant law enforcement resources.

Criminal Forfeiture

Once less frequently invoked than civil forfeiture, criminal forfeiture appears to have become the procedure of choice when judicial proceedings are required. This is particular true, since there now exists a bridge statute, 28 U.S.C. 2461(c), which permits confiscation using its criminal forfeiture procedure as an alternative whenever a civil forfeiture is authorized. Criminal forfeiture is a consequence of conviction. The indictment or information upon which the conviction is based must list the property which the government asserts is subject to confiscation, and the defendant is entitled to a jury finding of the necessary connection between the crime of conviction and the property to be confiscated. Since the court's jurisdiction does not depend upon initial control of the res, it need not be seized before forfeiture is declared. The court, however, in some instances may restrain the use or transfer of property the government contends is subject to confiscation.

The defenses to criminal forfeiture differ somewhat from those available in cases of civil forfeiture. For example, since conviction is a prerequisite to confiscation, acquittal will bar forfeiture. Third-party interests are less likely to be cut off by virtue of the property's proximity to criminal conduct simply because only the defendant's interest in the property is subject to confiscation and because bona fide purchaser exceptions are more common. Bona fide purchaser exceptions protect a good faith purchaser who acquired the property after commission of the offense – at which time title to the property vested in the United States – but before the

declaration of forfeiture. After conviction of the defendant, the court usually declares forfeited property described in the indictment and found subject to confiscation by the jury or the trier of fact. Those with claims to the property, other than the defendant, are then entitled to notice and a judicial hearing on their claims.

Disposition of Forfeited Assets

Disposal of forfeited property is a matter of statute. As noted earlier, the Attorney General and the Secretary of the Treasury enjoy considerable discretion to transfer confiscated property to state, local and foreign law enforcement agencies. In most instances, federal law requires that confiscated cash or the proceeds from the sale of confiscated property which remain after any transfers or other statutorily authorized disposition be deposited in a special fund. The Department of Justice Asset Forfeiture Fund and the Department of the Treasury Forfeiture Fund, first created in 1984, constitute such statutory depositories. Together they receive close to three quarters of a billion dollars per year, and are available to pay: forfeiture related expenses; rewards to informants in illicit drug cases; rewards to informants in forfeiture cases; liens and mortgages against forfeited property; remission and mitigation in forfeiture cases; to equip cars, boats and planes for law enforcement purposes; to purchase evidence of money laundering or of federal drug crimes; to pay state and local real estate taxes on forfeited property; to pay overtime, travel, training and the like.

Constitutional Considerations

The Eighth Amendment states in its entirety that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." A "punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportionate to the gravity of a defendant's offense." Forfeitures that Congress has designated as remedial civil sanctions do not implicate double jeopardy concerns unless "the statutory scheme [is] so punitive either in purpose or effect as to negate Congress' intention to establish a civil remedial mechanism."

The Sixth Amendment assures the accused in criminal proceedings the right to a jury trial and to the assistance of counsel. The right to the assistance of counsel in criminal cases, however, does not prevent the government from confiscating fees paid to counsel, or, upon a probable cause showing, from obtaining a restraining order to freeze assets preventing the payment of attorneys' fees. The Amendment is by its terms only applicable "in all criminal prosecutions," and consequently there is no constitutionally required right to assistance of counsel in civil forfeiture cases.

The Supreme Court's opinion to the effect that there is no right to a jury trial on disputed factual issues in criminal forfeiture, rests on a somewhat battered foundation. The fact that criminal forfeiture is a penalty within "the prescribed statutory maximum" for the triggering offense and that Rule 32.2 of the Federal Rules of Criminal Procedure affords an expanded jury determination right, however, would seem to shield federal criminal forfeiture procedures from Sixth Amendment challenge. Although the implications for the preponderance standard of proof might appear slightly more ominous, the federal appellate courts have either explicitly or implicitly accepted the standard in criminal forfeiture cases thus far.

Due process objections can come in such a multitude of variations that general statements are hazardous. More specifically, due process demands that those with an interest in the property the

government seeks to confiscate be given notice and opportunity for a hearing to contest. In some instances, due process permits the initiation of forfeiture proceedings by seizing the personal property in question without first giving the property owner either notice or the prior opportunity of a hearing to contest the seizure and confiscation. But absent exigent circumstances, the owner is entitled to the opportunity for a preseizure hearing in the case of real property where there is no real danger that the property will be spirited away in order to frustrate efforts to secure in rem jurisdiction over it. Due process at some point will also require a pretrial hearing on the forfeitability of property made subject to a postseizure, pretrial restraining order to designed to prevent dissipation.

While due process clearly limits at some point the circumstances under which the property of an innocent owner may be confiscated, the Court has declined the opportunity to broadly assert that due process uniformly precludes confiscation of the property of an innocent owner. Any delay between seizure and hearing offends due process only when it fails to meet the test applied in speedy trial cases: is the delay unreasonable given the length of delay, the reasons for the delay, the claimant's assertion of his or her rights, and prejudice to the claimant. In other challenges, the lower federal courts have found that due process permits: the procedure of shifting the burden of proof to a forfeiture claimant after the government has shown probable cause and allows use of a probable cause standard in civil forfeitures; postponement of the determination of third party interests in criminal forfeiture cases until after trial in the main; and fugitive disentitlement under 28 U.S.C. 2466.

Section 3 of Article III of the United States Constitution does not appear to threaten most contemporary forfeiture statutes. It provides in part that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." The section on its face seems to restrict forfeiture only in treason cases, but at least one court has suggested a broader scope. Even if Article III when read in conjunction with the due process clause reaches not only treason but all crimes, its prohibitions run only to forfeiture of estate. They do not address statutory forfeitures of the type generally found in state and federal law. The critical distinction between forfeiture of estate and statutory forfeiture is that in the first all of the defendant's property, related or unrelated to the offense and acquired before, during or after the crime, is confiscated. In the second, confiscation is only possible if the property is related to the criminal conduct in the manner defined by the statute.

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