Written by **Jerome R. Corsi** on August 31, 2017

Ending Abuses in Law Enforcement Asset Forfeiture

WASHINGTON, D.C. — Property forfeiture has ancient roots in British admiralty law as a means of stopping piracy and the smuggling of goods. As governments realized that seizing crews did not prevent the owner of a ship from hiring a new crew to continue the illegal activity, they began seizing entire ships and their contraband.

In the 1970s and 1980s, property seizure was used as a technique for fighting organizations engaged in various types of criminal activity, such as drug dealing. Today, it is being applied as an effective technique of combating white collar crime. In each of these instances the goal is the same: not just to punish the perpetrators of these crimes, but to confiscate for the victims the financial proceeds derived from the crime.

The FBI boasts about several cases where asset forfeiture appears to have been an appropriate, if not necessary, measure to have taken to stop criminal activity.

Consider the following cases:

1. Midtown Manhattan building seized in Iran terrorism case

On June 29, 2017, Joon H. Kim, the acting U.S. attorney for the Southern District of New York, announced that a federal jury had found that the 36-story building at 650 Fifth Avenue in New York City, which was worth at least $500 million, and other real property and bank accounts were forfeitable to the United States as proceeds of various violations of the Iran sanctions and property involved in laundering the proceeds of those violations.

The jury's verdict represented the largest civil forfeiture jury verdict and the largest terrorism-related civil forfeiture in U.S. history.

The seized building was constructed in the 1970s by the non-profit Alavi Foundation created by the Shah of Iran. It was later confiscated by order of Ayatollah Khomeini through the Bonyard Mostazafan "Islamic charity" created in March 1979 and approved by the Revolutionary Council of the Republic of Iran.

The Alavi Foundation — ultimately controlled by the revolutionary government of Iran — was central to a complex scheme that involved not only the avoidance of paying millions of dollars in real estate taxes on the building at 650 Fifth Avenue, but also the laundering of millions of dollars in rental revenue and other proceeds of the foundation back to Iran to fund international terrorism.

The proceeds from the seized property were used to resolve various terrorism-related judgments

brought by private parties against the Alavi Foundation and the government of Iran.

"This verdict not only vindicates the exemplary work of all the career prosecutors and law enforcement partners who have doggedly pursued this case for almost a decade, but importantly, it also allows for substantial recovery for victims of Iran-sponsored terrorism," Kim said in announcing the federal jury's verdict in the case.

2. A Detroit-area physician forfeits $17.6 million in medical fraud case

In July 2015, Dr. Farid Fata, a Detroit-area hematologist and oncologist, was sentenced to 45 years in prison for his role in an extensive health care fraud scheme that included administering medically unnecessary chemotherapy by means of infusions or injections to 553 individual patients and submitting to Medicare and private insurance companies approximately $34 million in fraudulent claims.

"Rather than use his medical degree to save lives, Dr. Fata instead destroyed them in pursuit of profit," said Assistant Attorney General Leslie Caldwell. "Time and again, Dr. Fata callously violated his patients' trust as he used false cancer diagnoses and unwarranted and dangerous treatments as tools to steal millions of dollars from Medicare, even stooping to profit from the last days of some patients' lives. While no sentence can restore what was taken from his patients and their families, the sentence imposed ensures that never again will Dr. Fata lay hands on another patient."

"Health care fraud has been a serious problem in Michigan, but no case has been as egregious as the conduct of Dr. Farid Fata," said U.S. Attorney Barbara McQuade. "Dr. Fata did not care for patients; he exploited them as commodities. He over-treated, under-treated and outright lied to patients about whether they had cancer so that he could maximize his own profits."

According to the FBI, the case resulted in more than $40 million in seizures of real property, a vehicle, bank accounts, and business entities, as well as a monetary judgment of $17.6 million. Investigators seized approximately $13 million and established a team of specialists to assist victims and their family members in submitting claims for restitution.

3. Assets in Bernie Madoff Ponzi scheme sold to repay victims

On March 13, 2009, Wall Street guru Bernard Madoff — then 70 years old and the former NASDAQ chairman, as well as the founder of the Wall Street firm Bernard L. Madoff Investment Securities LLC — confessed in criminal court in Manhattan he had been running an investment Ponzi scheme that prosecutors estimated amounted to a $64.8 billion fraud, figured at that time to involve some 4,800 clients, including many who were well-known figures and celebrities who lost fortunes in retirement savings and inheritances.

To make reparations and to pay off the 6,700 victims who filed lawsuits against Madoff, the Securities and Exchange Commission (working with federal and international law enforcement authorities) seized $11 billion in assets, including a Manhattan penthouse valued at $7 million; an 89-foot Leopard yacht valued at $7 million; a 24-foot Rybovich boat valued at $2.2 million; a $9.3 million, five-bedroom, 8,753 square-foot mansion in Palm Beach; a $1 million French getaway home in Cap d'Antibes, France; and a $3 million luxury Montauk property on New York's Long Island.

Ultimately, federal authorities seized and auctioned off Madoff's personal items of private property, and his wife, Ruth Madoff, ended up evicted from the Manhattan penthouse apartment and was forced to give up all her possessions in return for a promise that federal prosecutors would not pursue her last remaining holdings of $2.5 million not tied to the fraud.

Abuses in property seizures related to the Bank Secrecy Act of 1970

Unfortunately, there are many documented instances of law enforcement agencies abusing property forfeiture laws.

U.S. Senator Mike Crapo (R-Idaho)has written extensively about legislative efforts to stop the abuse of asset seizure laws to take Americans' property without proof of a crime, or even an arrest or warrant.

Crapo has focused on the Bank Secrecy Act of 1970 which was passed to prevent money laundering and requires financial institutions to report daily cash transactions that exceed $10,000. As Crapo points out, small businesses with legal earnings have been accused of "structuring" cash deposits to fall below the reporting threshold and have been subjected to costly, drawn out processes to try to get their money returned.

In October 2014, the *New York Times* published a blockbuster article documenting that the Internal Revenue Service (IRS) had been seizing the assets of legitimate small businesses simply because of technical violations of the $10,000 cash deposit limits in the Bank Secrecy Act of 1970.

"Using a law designed to catch drug traffickers, racketeers and terrorists by tracking their cash, the government has gone after run-of-the-mill business owners and wage earners without so much as an allegation that they have committed serious crimes," the Times reported. "The government can take the money without ever filing a criminal complaint, and the owners are left to prove they are innocent. Many give up."

This article prompted a study from the Treasury Inspector General for Tax Administration. On March 30, 2017, they issued a scathing report documenting the abuses the IRS had committed under the Bank Secrecy Act of 1970:

• "Most of the seizures for structuring violations involved legal source funds from businesses."

• "$17.1 million was seized and forfeited to the Government in 231 legal source cases."

• "Structuring seizures primarily involved legal source funds from businesses, and tax crimes were rarely established."

• "Interviews with property owners did not meet all criminal investigation requirements, and advice of rights was not provided."

• "There was a lack of evidence that property owners' reasonable explanations were considered."

• "Property owners were not adequately informed of pertinent information."

• "Noncustodial advice of rights was generally not provided."

"Federal agencies must not ignore the limits on their powers to swipe the earnings of America's small businesses," Sen. Crapo wrote. "Property seizure abuses not only are unjust and run counter to our system of government, but also suppress innovation and growth. I will continue to press for adherence to and enactment of commonsense restraints to end these abuses."

Supreme Court begins limiting government asset seizure rights

The Supreme Court has begun entering the debate to limit the government's ability to seize assets — a practice that has expanded from the criminal area to include civil and administrative asset forfeiture.

In the June 2017 case of *Honeycutt v. United States*, two brothers were indicted for distribution of a product used in methamphetamine production.

Terry Honeycutt managed sales and inventory for a Tennessee hardware store owned by his brother, Tony Honeycutt. After several "edgy looking folks" purchased an iodine-based water-purification product known as Polar Pure, Tony Honeycutt contacted the Chattanooga Police Department to see if the iodine crystals in the product could be used to manufacture methamphetamine. Despite the police confirming that fact, the store continued to sell large quantities of Polar Pure. The brothers sold as many as 12 bottles to a single customer in a single transaction. Over a three-year period, the store grossed approximately $400,000 from the sale of more than 20,000 bottles of Polar Pure.

The federal government sought judgments of $269,751 against each brother under the Comprehensive Forfeiture Act, which requires the forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of certain drug crimes."

Supreme Court Justice Sonia Sotomayor, in writing the unanimous 8-0 opinion, noted that criminal forfeiture statutes "serve important governmental interests such as 'separating a criminal from his ill-gotten gains,' 'returning property, in full, to those wrongfully deprived or defrauded of it,' and 'lessen[ing] the economic power' of criminal enterprises."

The court ruled, however, that Terry Honeycutt could not be held to pay the judgment obtained against him because forfeiture pursuant to the relevant statute "is limited to property the defendant himself actually acquired as the result of the crime." She noted that Terry Honeycutt had no ownership interest in his brother's store and did not personally benefit from the Polar Pure sales.

Commenting on the case, John Marti — a former federal prosecutor now in private practice in Minneapolis, Minnesota — said, "In short, federal criminal statutes and forfeiture statutes are not blank checks for prosecutors."

What is most objectionable, even in drug cases, is when police confiscate a person's property on suspicion of a drug offense, before any conviction has been obtained. According to a Cato Institute study conducted in December 2016, 84 percent of Americans oppose civil asset forfeiture defined as police "taking a person's money or property that is suspected to have been involved in a drug crime before the person is convicted of a crime." Interestingly, only 16 percent thought police should be allowed to seize property before a person is convicted.

"Civil asset forfeiture is a process by which police officers seize a person's property (e.g. their car, home, or cash) if they suspect the individual or property is involved with criminal activity," the Cato Institute noted in reporting these findings. "The individual does not need to be charged with, or convicted of, any crime for police to seize assets. In most jurisdictions police departments may keep the property they seize or the proceeds from its sale. However, as these survey results demonstrate, most Americans oppose this practice."

A study published by the Institute for Justice in March 2010, entitled "Policing for Profit: The Abuse of Civil Asset Forfeiture," was critical of state and federal civil forfeiture laws that allow law enforcement to keep some or all of the proceeds from civil asset forfeitures. The study concluded that this incentive has led to a concern that civil asset forfeiture encourages policing for profit, especially when law enforcement agencies pursue forfeitures to boost their budgets at the expense of other policing priorities.

"These concerns are exacerbated by legal procedures that make civil asset forfeiture relatively easy for the government and hard for property owners to fight," the study noted. "For example, once law enforcement seizes property, the government must prove it was involved in criminal activity to forfeit or

permanently keep it. But in nearly all states and at the federal level, the legal standard of proof the government must meet for civil asset forfeiture is lower than the strict standard of 'beyond a reasonable doubt' required for criminal convictions."

The study concluded that most civil asset forfeiture laws are written in such a way that owners trying to get their property back bear the burden of proof in establishing their innocence, and that when law enforcement agencies seize the property of a criminal suspect, "property owners are effectively guilty until proven innocent."

Conservative columnist George Will discussed a case in which the police department in Tewksbury, Massachusetts, threatened to seize the livelihood and retirement asset of Russ Caswell, who owned a hotel where 30 customers had been arrested on drug charges since 1994. Wills estimated that this number represented less than 1 percent of the 125,000 rooms Caswell had rented over the more than 6,700 days in question. The government, charging these rooms had been used to "facilitate" a crime, wanted to confiscate Caswell's hotel and sell it for an estimated $1.5 million.

Under federal-state civil asset forfeiture laws, the U.S. Department of Justice intended to give up to 80 percent of the proceeds from the hotel sale to the Tewksbury Police Department, whose budget was just $5.5 million.

Commenting on this case, Will noted that the 80-percent-sharing principle at the heart of civil asset forfeiture laws is defined as "equitable sharing" – a principle he characterized as "the consensual splitting of ill-gotten loot by the looters."

"Equitable sharing" is a law enforcement principle that derives from the fact that state and local governments can turn seized property over to the federal government, and the federal government can then elect to "adopt" the seized property for federal forfeiture if the conduct giving rise to the seizure is in violation of federal law, and the federal law violated provides for forfeiture.

Thus, the cash and property seized by state and local authorities becomes subject to federal forfeiture law, not state law. Through "equitable sharing," up to 80 percent of the proceeds seized can be returned, or "shared," with the state and local agencies, with the federal government retaining 20 percent. To authorize civil asset forfeiture under the laws of most states, no criminal charges or convictions are required.

Will observed that "equitable sharing" reeks of the moral hazard that exists in situations in which incentives are for perverse behavior. Commenting on the Institute of Justice's 2010 report rating civil asset forfeiture laws, Wills noted that the state-by-state analysis constituted "a sickening litany of law enforcement agencies padding their budgets and financing boondoggles by, for example, smelling, or pretending to smell, marijuana in cars they covet."

Will concluded by noting that James Madison warned in *The Federalist*, No.48, that government power "is of an encroaching nature." If unresisted, Will argued, "it produces iniquitous sharing of other people's property."

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