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Washington, D.C., Civil Forfeiture Reform: A Model for the States

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On November 18, the District of Columbia City Council passed Bill 20-48, the Civil Asset Forfeiture Amendment Act of 2014.[1] Two years in the making, Bill 20-48 touches on virtually every area of forfeiture law in the nation's capital city. It affords new and strengthened due process protections to property owners and aims to rein in some of the more questionable forfeiture practices employed by law enforcement agencies.

Civil forfeiture is a process whereby law enforcement authorities can permanently seize property that they believe was either used to facilitate or represents the fruits of a crime. To try to recover their property, innocent owners often spend huge amounts of time and money, with few due process protections and little chance of success.

Responding to these concerns, the District has now improved its forfeiture system considerably. In several key respects, the new law can serve as a model for reform at both the state and federal levels, balancing law enforcement priorities with civil liberties. Specifically, the new law:

- **Shifts the burden of proof to the government.** The burden of proof in forfeiture cases is now squarely on the government. To win the forfeiture of most types of property, government officials in the District will have to prove their case by a preponderance of the evidence. In the case of cars and real property, the burden of proof is elevated to the "clear and convincing" evidence standard. Furthermore, to seize a home, officials must also show that the homeowner was convicted of the crime that gave rise to the forfeiture. These reforms will not impede law enforcement authorities' ability to seize property actually related to a crime. Another burden placed on the government is the risk of damage: Government officials are now on the hook if they do not reasonably protect property that they seize.

- **Now presumes property owners to be innocent.** Previously in the District, the "innocent owner" defense required an individual to prove that he neither had nor should have had knowledge that his property was being used to commit an illegal act. This requirement afforded property owners—individuals who often have no legal training and cannot afford to hire a lawyer—only limited protection. Now the burden is on the government to prove that an owner either did know that his property was being used for an illicit purpose or was otherwise willfully blind to (in other words, intentionally avoided finding out about) the use of his property in criminal conduct.

- **Ends petty cash seizures.** As a result of officers' ability to seize any cash found in proximity to a controlled substance, half of all cash seizures in D.C. since 2009 have been for less than $141. This allowed cash to be confiscated without evidence that it actually was related to the crime in

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question. The new law, however, presumes that any amount up to $1,000 is not forfeitable. Law enforcement may rebut this presumption by clear and convincing evidence.

- **Eliminates vehicle seizure bonds.** Under the old law, just to challenge a vehicle seizure, an owner was required to pay a "penal sum" of up to $2,500 as a bond. An initial hearing would then be scheduled, but delays of months or years were common. Since the bond payment did not guarantee the return of the car in the interim, challengers faced the dual hardship of having no vehicle and significantly diminished financial resources. Bond payments as a precondition to challenge a vehicle seizure have now been eliminated. The bill also mandates timelines for speedy forfeiture proceedings; District law previously had no such timelines.

- **Eliminates fiscal conflicts of interest.** The proceeds of successful forfeitures are to be directed to the city's general fund rather than retained by law enforcement.

- **Ends equitable sharing.** District law enforcement agencies are barred from handing off forfeiture cases to the federal government, a process known as "adoptive forfeiture." Additionally, beginning on October 1, 2018, all proceeds from federal and multi-jurisdictional forfeitures are to be redirected to the general fund. This change runs afoul of federal equitable sharing rules, which require that these funds be used exclusively by law enforcement agencies for law enforcement purposes. States that have enacted similar measures have been cut out of the equitable sharing program.[2] Combined with the ban on adoptive forfeitures, this provision is expected to end equitable sharing in the District of Columbia. Once existing contracts expire, it is unlikely that the Department of Justice will renegotiate with the District.

- **Expedites return of assets.** The bill codifies a number of procedures to allow quick return of property to owners. Certain owners facing hardship can even get their property back pending an adjudication on the merits of the seizure. Another component of the bill requires return of the share of property not involved in a crime, even if some of the property in question was properly seized.

Each of these reforms is welcome. Furthermore, none of these reforms prevent law enforcement officials from seeking criminal forfeiture of property or from using civil forfeiture where the government can prove that property was related to a crime.

Does the Bill Kill Forfeiture?

In his testimony on bill 20-48, then-Attorney General of the District of Columbia Irvin Nathan made clear that his office opposed many of these provisions.[3] He warned that law enforcement would see a reduction in revenues owing to the loss of control of forfeiture funds, and he complained that executing successful forfeitures would now be impossibly difficult.

Taking issue with the provision placing the burden of proof on the government rather than the individual, the former Attorney General testified that he believed forfeitures would be nearly impossible under the bill. This stance earned him a strong rebuke in the committee report on the bill: "Implicit in this argument is the suggestion that the District typically seeks forfeiture with little evidence, relying primarily on the fact that District law places the burden of proof on property owners."[4]

These arguments give the appearance that the government is more concerned with easy, speedy seizures and the consequent revenues than with gathering evidence tying property to crime. Mr. Nathan indicated that complying with the new presumption of innocence standard would be "virtually impossible," despite having to comply with the very same presumption (and a much higher burden of proof) in every criminal case.

1. Civil Asset Forfeiture Reform Bill of 2014, Council Bill 20-48, http://lims.dccouncil.us/_layouts/15/uploader/Download.aspx?legislationid=29204&filename=B20-0048-CommitteeReport1.pdf (accessed December 4, 2014).
2. Ibid.
3. Ibid.
4. Ibid.

Mr. Nathan also testified that it should be assumed that currency found in proximity to an illegal controlled substance is forfeitable, regardless of actual evidence proving a link between the cash and a crime. Remarkably, the Attorney General argued that the government need not collect or assert that evidence because "the person trying to get the money returned will be the one to have the evidence that it was earned legally."

There are serious concerns with this approach. Burdens of proof are not a semantic game, and an innocent person ought not be required to prove a negative. Shifting the burden to the government will certainly make forfeitures harder on the government, but if forfeiture is as useful a crime-fighting tool as its proponents argue, then the new forfeiture rules would only tip a cost-benefit analysis against forfeitures that are based on little to no evidence. Forfeitures where the government has a strong interest in developing evidence, or where evidence of criminal activity is readily available, will pass muster under the new D.C. law and are exactly the forfeitures that ought to be allowed.

Is Revenue Enough to Justify Forfeitures?

Without question, these reforms will have a significant financial impact on law enforcement. Washington's Chief Financial Officer estimates that annual equitable sharing "losses" alone could total roughly $670,000. It also stands to reason that the virtual elimination of petty cash seizures and the increased burden of proof for real property and vehicle seizures will depress the number of forfeiture cases brought forward under the new District law.

This ought not affect the funding of D.C. police. Revenues derived from the types of forfeitures now prohibited by D.C. law were already coming out of the community. The costs were hidden, however, and disproportionately borne by a minority of property owners. To maintain balance sheets after the law takes effect, the D.C. government will have to raise revenue and budget for police operations using ordinary budget processes—a desirable development in its own right. Alternatively, the police department might have to spend money more wisely.

The diversion of funds away from the Metropolitan Police Department is delayed by four years. Moreover, despite federal prohibitions against the practice, the MPD has already budgeted for an expected $2.7 million in future forfeiture earnings through 2018. This practice highlights the need for stronger legislative oversight of forfeiture and budgeting practices.

Closing a budget gap should be a debate about tax policy and spending priorities, not about whether to afford due process protections to citizens. Civil forfeiture should not be a revenue-generating tool; it is a means to fight crime. Laying out future forfeiture revenue targets has the same effect as setting a quota for forfeitures: It will incentivize officers to seize and forfeit property on increasingly dubious grounds as fiscal years wear on. The danger of armed agents of the state financing their own operations at gunpoint is expressly why revenue replacement is banned.

A Model for Reform

Looking ahead, the D.C. law should serve as a model for reform in other jurisdictions. Once these reforms are implemented, the sky will not fall. Rather, law enforcement agencies will come out as winners in two crucial ways: (1) officers will be freed of any revenue-generating obligations once legislatures fully fund departmental operations, and (2) public confidence in the justice system will no longer be strained by frequent reports of "policing for profit."

If all goes well, states that reform civil asset forfeiture will see a marked improvement in community life, with law enforcement agencies able to concentrate on the "big fish" while also respecting property rights.

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