

TESTIMONY SUBMITTED TO SENATE JUDICIARY COMMITTEE
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REGARDING SUPPORT FOR SB869
STATE CAPITOL, HARRISBURG
OCTOBER 20, 2015

Good afternoon, Senator Greenleaf, Senator Leach, and members of the committee. Thank you for the opportunity to share with you the lessons I've learned from decades of experience with civil asset forfeiture.

As the director of the Asset Forfeiture Office of the United States Department of Justice from 1985 to 1989, I was heavily involved in the development and administration of the federal asset forfeiture program.¹ I oversaw prosecutions of civil forfeiture cases involving cash, cars, real estate and other assets seized from crime suspects under federal civil forfeiture laws. And I saw firsthand the abuses and injustices that result from civil forfeiture laws, which allow law enforcement agencies to take property from people who have not been convicted of crimes and keep the revenues for their own budgets.

Efforts to reform forfeiture laws have had mixed results. My experience prosecuting forfeiture cases and my involvement in reform efforts at the federal level and in New Mexico have led me to conclude that civil forfeiture is fundamentally unreformable.² To effectively balance law enforcement objectives with protections for property owners, forfeiture laws must do two key things: (1) require a criminal conviction of the property owner prior to forfeiture, and (2) eliminate law enforcement's direct financial incentive to pursue forfeiture, which leads to distorted enforcement decisions and the appearance of corruption.

Pennsylvania's reform bill, SB 869, embraces those two central components of effective reform, while preserving and strengthening criminal forfeiture as a legitimate crime-fighting tool. I respectfully urge you to support the bill.

¹ Before I ran the DOJ's Asset Forfeiture Office, I was a four-term Republican state legislator in New Mexico. Since returning from Washington, I have worked as counsel for the House Judiciary Committee during legislative sessions, and I was also the architect of the bill that recently abolished civil forfeiture in New Mexico and replaced it with criminal forfeiture.

² I am not the only former prosecutor to conclude that civil forfeiture is unreformable. My predecessor at the Justice Department, John Yoder, who directed the federal Forfeiture Office from 1983 to 1985, shares this view. See John Yoder and Brad Cates, *Government self-interest corrupted a crime-fighting tool into an evil*, Washington Post, Sept. 18, 2014, available at https://www.washingtonpost.com/opinions/abolish-the-civil-asset-forfeiture-program-we-helped-create/2014/09/18/72f089ac-3d02-11e4-b0ea-8141703bbf6f_story.html.

I. Forfeiture has evolved from a targeted program designed to fight drug cartels into a mechanism for generating revenues for law enforcement, including from innocent people.

The federal asset forfeiture program I administered was conceived in the 1980s as a way to cut into the profit motive that fueled rampant drug trafficking by cartels and other criminal enterprises by seizing the ill-gotten gains of big-time drug dealers and removing their financial incentive to traffic drugs. Originally, federal civil forfeiture laws only applied to a few crimes. The concept was then expanded to include not only cash earned illegally, but also purchases or investments made with that money. The property eligible for seizure was then further expanded to include “instrumentalities” in the trafficking of drugs, such as cars. And eventually, hundreds of crimes beyond drugs came to be included in the federal forfeiture scheme.

Even in the early years of civil asset forfeiture, law enforcement’s financial incentives led to abuses. Because much of the seized assets goes back to the agency that made the original arrest and the prosecutors who filed the forfeiture case, instead of a city or state general fund, civil forfeiture laws distort law enforcement priorities. Corruption has only increased as forfeiture laws have expanded to encompass more crimes and to allow forfeiture of property with an even more tenuous connection to crime. The fact that hundreds of law enforcement agencies now depend on civil forfeiture proceeds for a significant portion of their budgets creates a major incentive for police to seize cars, houses and money and for prosecutors to seek forfeiture aggressively, rather than to enforce the law even-handedly. This appearance of impropriety does not serve justice well.

And in civil proceedings, the deck is stacked against property owners, who have none of the protections afforded to people accused of crimes, like the right to an attorney. Unlike the burden on the government in criminal cases, civil forfeiture laws presume someone’s personal property to be tainted, and place the burden of proving it “innocent” upon the owner. And prosecutors can win the vast majority of forfeiture cases without a property owner contesting the case (called “default” forfeitures), which means the government never has to prove any connection between the property and the crime. Regardless of the merits of the case, winning by default is easy under civil laws like Pennsylvania’s that do not contain robust notice requirements or appointed counsel and allow law enforcement to go after even very small amounts of cash. Many property owners never even know about the forfeiture case, and the costs of litigating a forfeiture case outweigh the value of property at stake more often than not.

My experience as a prosecutor has led me to believe that the corruption and pervasive abuses that civil asset forfeiture laws engender among government and law enforcement clearly outweigh their benefits. My involvement in both unsuccessful and successful efforts to reform forfeiture laws has reinforced that view.

II. Efforts to reform civil forfeiture that did not require a criminal conviction and eliminate law enforcement's financial incentives have failed.

Efforts to reform civil asset forfeiture at the federal level were a resounding failure. The Civil Asset Forfeiture Reform Act was enacted in 2000 in an attempt to rein in abuses, but virtually nothing changed. The law beefed up notice requirements, required law enforcement to get a warrant in some circumstances before seizing property for forfeiture, imposed time limits for prosecutors to bring forfeiture cases, and offered some remedies for violations of the Act, but it did not require a criminal conviction or divert forfeiture revenues to general funds. Under CAFRA, owners were still required to prove their own innocence, often without the benefit of appointed counsel. And under CAFRA, a property owner's failure to meet a filing deadline by even a day often results in immediate forfeiture, whereas agencies can allow property to languish in their custody for years.

CAFRA also expanded the availability of criminal forfeiture and purported to encourage its use, but civil forfeiture remained prosecutors' forfeiture method of choice after the passage of the Act, and in the years since CAFRA, the federal government has continued to use civil forfeiture to take large amounts of property from many thousands of people who have not been convicted of crimes.

III. The only way to reform forfeiture is to make it part of the criminal process after the property owner is convicted of a crime, not a separate civil proceeding independent of criminal charges. Civil forfeiture is unreformable.

CAFRA failed because civil forfeiture is fundamentally at odds with our judicial system and notions of fairness. So long as forfeiture proceedings happen independent of any criminal case, instead of as *part of* the criminal process, police and prosecutors will continue to take and keep property from innocent people. And requiring a property owner to prove his own innocence turns our most basic notions of fairness and justice on their head.

Making forfeiture a criminal process has the added benefit of ensuring that property owners have access to a lawyer. Under civil laws that don't carry a right to counsel, many innocent property owners will continue to lose their property not because the government's case against them has merit, but because challenging the forfeiture is too expensive and difficult without a lawyer.

And so long as law enforcement agencies control every dollar of forfeiture revenues, there will be a perverse incentive for police and prosecutors to use their powers aggressively, whether or not the outcomes are just or fair.

Testimony of Brad Cates, Esq.
Senate Judiciary Committee Hearing on SB869
October 20, 2015

The question is not whether civil forfeiture laws could ever be used appropriately for the narrow purpose for which they were intended—they could, with a lot of self-regulation by police and prosecutors. But civil forfeiture laws leave far too much room for misuse and abuse. Property owners deserve legal protections against unfair forfeitures that they simply don't have under Pennsylvania's current forfeiture laws.

And civil forfeiture isn't necessary to fight crime. Criminal forfeiture is a valid, time-tested way to take money away from drug lords—after they've been proven guilty.

That's why, when folks in my home state of New Mexico became outraged at too many cases of innocent property owners being plundered by law enforcement, I knew that meaningful reform would require making forfeiture exclusively part of the criminal process and ending law enforcement's direct financial stake in the game. I wrote a bill to do just that.

Even in the divided New Mexico legislature, the forfeiture reform bill had widespread bipartisan support. It was passed unanimously. And the Governor, a former prosecutor, signed the landmark reform.

New Mexico's new law preserves criminal forfeiture, under which property can be forfeited if the owner is convicted of a crime. Crucially, this new law also requires that all forfeiture money be deposited in the general fund, removing the financial incentive for unlawful seizures.

SB869 shares the central features of New Mexico's successful reform law. I urge you to support this common-sense bill that simultaneously strengthens forfeiture by making it part of the criminal process and offers much-needed legal protections for property owners.

Thank you for your time and attention.