UNITED STATES V. ONE ASSORTMENT OF 89 FIREARMS

Drug warriors are using an obscure medieval legal doctrine to sweep aside property rights and due process.

BY STEFAN B. HERPEL

U.S. Coast Guard personnel board a shrimp boat in the Florida Keys on a "routine" inspection and find three grams of marijuana stems and seeds in a crew member's wastebasket. The owner of the boat, who earns his living from shrimping, protests that the marijuana did not belong to him and that he knew nothing about it. The government seizes the boat.

• Acting without any authorization from a judge, the U.S. Marshal Service takes control of a multimillion-dollar hotel/restaurant complex in Port Salerno, Florida, summarily evicting the management and paying guests, including teachers attending a convention. The papers filed by the government fail to disclose any specific acts of wrongdoing in support of the seizure.

• On suspicion that a Massachusetts resident is a drug dealer, the Drug Enforcement Agency seizes nearly all of his worldly possessions, including his house, clothing, food, and bank accounts. The DEA confiscates his girlfriend's car and jewelry as well.

These are just a few examples of the extraordinary powers given to federal and state governments by drug laws to seize and permanently deprive citizens of their property without bringing criminal charges against them. Few people are aware that the laws granting these powers derive from a spurious medieval doctrine under which an inanimate object can be guilty of wrongdoing. But few who understand both the origin and the operation of these laws can disagree that they are fundamentally incompatible with the principles of a free society.

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The so-called civil forfeiture provisions of U.S. drug laws allow the government to seize property when it is used, or intended to be used, to facilitate a drug offense. Vehicles, boats, and homes are the most common items subject to seizure. The proceeds of illegal drug transactions and property believed to have been purchased with such proceeds are also subject to confiscation. Some time after a seizure (it may be months), the government brings a forfeiture lawsuit to permanently deprive the owner of his or her property.

Civil forfeiture essentially inverts the criminal-law principle that a person is presumed innocent until proven guilty and may not be punished until the government overcomes that presumption at a trial. Under federal forfeiture laws, the government is permitted to seize property, usually without a warrant or any prior judicial authorization, on what amounts to a mere suspicion that it has been used or obtained wrongfully. The government need not actually find drugs; forfeiture can occur when the owner merely *intended* to use the property to facilitate a drug law violation.

When a judicial hearing to validate the seizure finally does take place, after the fact, the burden of proof is shifted from the government to the owner. To avoid forfeiture, he or she must prove that the property is not the proceeds or tool of a drug crime.

Proof that one is innocent of any criminal acts is often not, by itself, a sufficient defense against forfeiture. In a 1987 case, an automobile owned by Missouri resident Ruth Allen was seized after her lover, Vernon Whitlock, Jr., used it to sell cocaine. A judge approved the seizure, even though he concluded that Allen "was unaware of and uninvolved in" the illegal use of her car. The forfeiture statute also makes the government's title to seized and forfeited property retroactive to the time of the acts on which the forfeiture is based. Thus, your property may be subject to seizure and forfeiture if you received or purchased it from someone who committed a drug offense.

Given all of these advantages over criminal prosecutions, it is no wonder that forfeiture became, in the words of the Justice Department, "one of the primary law enforcement tools of the 1980s." The states, too, have discovered the utility of forfeiture as a law-enforcement tool, adopting statutes similar to federal laws. In December 1988, for example, Detroit police raided a store to make a drug bust but failed to find any drugs. After police dogs sniffed traces of cocaine on three $1.00 bills in the cash register, the police seized the entire contents of the register and a safe, amounting to $4,384.

In the Middle Ages, when a man fell from a tree and died, the tree was chopped down. Civil forfeiture laws, which hold inanimate objects responsible for wrongdoing, are the modern versions of this practice.

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While forfeiture has come into prominence in the last few years, during the war on drugs, it is actually a relic of the medieval law of "deodands." The word *deodand* comes from the Latin expression *Deo Dandum*, which means "to be given to God." The old English rule was that an inanimate object causing the death of a person was forfeited to the king as a deodand, to be used for the good of the dead man's soul. The rule proceeded from the legal superstition that an inanimate object can itself be guilty of wrongdoing. Thus, if a man fell from a tree and died, the tree was chopped down as a deodand. And according to the great English legal scholar Blackstone, "If a man falls from a boat or ship in fresh water, and is drowned, it hath been said, that the vessel and cargo are in strictness of law a deodand."

Because the rule regarding deodands was premised on the guilt of the property itself, property was forfeitable regardless of the guilt or innocence of its owner. As one medieval writer put it, "Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner."

Consistent with their origins, modern-day forfeiture suits are brought not against individual owners of property but against the property itself. Hence such quaint case titles as *United States* v. *One Assortment of 89 Firearms*, *U.S.* v. *$5,644*, and *One 1958 Plymouth Sedan* v. *Pennsylvania*. Today's version of the law of deodands is even stricter than its feudalistic counterpart. Property may become "deodand" when it is "guilty" of a transgression far less serious than causing death and when its connection to the offense seems tenuous at best.

To be sure, seized property is not always permanently confiscated. When its chances of prevailing in a forfeiture suit are slim, the federal government may be willing to return property to its owner. But even in these cases the owner

receives no compensation for the period during which he or she was deprived of the property. In fact, the owner is usually required to pay storage costs as a condition for the property's return. The shrimp boat described above was returned 41 days following seizure, but only after the owner, among other things, agreed to pay the $100-a-day storage costs incurred during that period.

Until recently, there were virtually no limits on the power of the government to hold property indefinitely. In one case reported in the *Detroit News* last October, the government held a seized $7,600 motorboat for three and a half months before returning it to the owner upon payment of $4,000 in storage and maintenance charges. In late 1988, in response to growing pressure, Congress provided that the government could not hold conveyances (vehicles, boats, etc.) for more than 60 days without beginning a civil forfeiture lawsuit. If the government misses the deadline, it must return the seized property to its owner.

But 60 days of deprivation is hardly an insignificant encroachment on property rights, and the government still may compel owners whose property is returned to pay heavy storage costs. While the legislation also provides a procedure for obtaining release of the conveyance pending trial, upon the posting of a bond, the U.S. attorney is given virtually unlimited discretion to deny such a release, making that provision almost worthless.

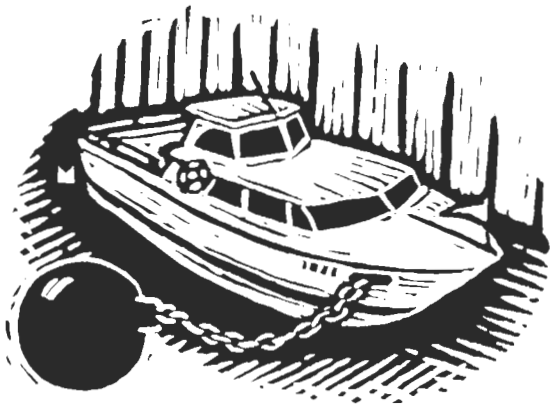
For the most part, the courts have been strangely untroubled by the operation of forfeiture laws and have generally declined to apply constitutional safeguards to them. There have been a few exceptions: In a 1965 case involving the seizure of an automobile for illegally transporting alcoholic beverages across state lines, the U.S. Supreme Court held that the Fourth Amendment's protection against unreasonable seizures applied no less to forfeiture cases than to criminal proceedings. And in *United States* v. *U.S. Coin and Currency*, a 1971 case involving the seizure of money derived from gambling activities, the Supreme Court held that the Fifth Amendment privilege against self-incrimination applied to forfeiture proceedings. Since then, however, most constitutional challenges to forfeiture laws or their applications have been unsuccessful.

The Supreme Court's 1974 decision in its first drug forfeiture case, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, affirmed the constitutionality of two important aspects of drug forfeiture law. The case involved the forfeiture of a $20,000 pleasure ship owned by the Pearson Yacht Leasing Co. When a marijuana cigarette was found on the yacht, which had been leased to two individuals, the vessel was seized under a Puerto Rico statute that, like the current federal civil forfeiture law, allows confiscation of property used in any way to facilitate the transportation, sale, or possession of controlled substances. No judicial hearing was held in advance of the seizure; nor was Pearson given any prior notice. The government granted that the firm was neither involved in nor aware of illegal activity aboard the yacht. Pearson claimed that the forfeiture violated due process, since the firm had no opportunity, before the fact, to argue against the seizure in court, and constituted a taking of property without compensation, in violation of the Fifth Amendment.

The Supreme Court, in a majority opinion written by Justice William Brennan, rejected Pearson's two-pronged challenge. The Court held, 8-1, that forfeiture is one of the "extraordinary situations" that "justify postponing notice and an opportunity for a hearing." Relying heavily on the fact that ancient and medieval law had approved forfeiture of an innocent's property, the Court also held, 7-2, that the confiscation did not violate the Takings Clause.

To be protected from forfeiture, the Court said, an innocent owner would have to prove not only that he was neither aware of nor involved in illegal activity but also that he had done "*all that reasonably could be expected to prevent the proscribed use of his property.*" The Court rationalized forfeiture of an innocent person's property with the cavalier statement that "to the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."

Innocent property owners fighting civil forfeiture enjoy less protection than do defendants in criminal cases. By pronouncing the magic word "civil," the government makes constitutional safeguards disappear.



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Constitutional challenges to forfeiture on other grounds have fared no better than those attempted in *Pearson*. The usual reason for rejecting such challenges has been that forfeiture is "civil" rather than "criminal" in nature, so the protections for criminal defendents contained in the Bill of Rights do not apply. The courts often distinguish the two types of proceedings by saying that the purpose and effect of criminal laws are "punitive," while those of civil laws are "remedial." Of course, to an individual who loses his or her property through forfeiture, the loss is no less a punishment than is a criminal fine. The Supreme Court has largely skirted that issue, however, by declaring that the principal criterion for determining whether a particular penalty is civil or criminal is the label Congress has used to describe it.

But labeling forfeitures "civil" is largely an arbitrary matter. Congress has enacted some forfeiture measures that are expressly criminal, such as the forfeiture provisions of RICO, the Racketeer Influenced and Corrupt Organizations Act. Indeed, it has enacted drug legislation with criminal forfeiture provisions to supplement the existing civil forfeiture provisions. Aside from the fact that an owner must be proven guilty of criminal acts before criminal forfeiture can occur, there is no essential difference between civil and criminal forfeiture. Thus, through the simple expedient of calling a particular forfeiture sanction "civil," Congress has effectively circumvented the Constitution in the application of that sanction.

One important constitutional challenge to forfeiture is based on the exceptional shifting of the burden of proof from government to owner. In a criminal case, the Due Process Clause has been construed to require that the state prove every element of its case "beyond a reasonable doubt." That is to be distinguished from the more lenient "preponderance of the evidence" standard applied to most civil cases, which only requires proof that something is more likely than not to have happened.

In a civil forfeiture action, however, the government's burden of proof is even lighter. It need only demonstrate that there is "probable cause" to believe that the seized property was used or intended to be used to facilitate a violation of the drug laws, or that it represents the proceeds of a drug crime. While *probable cause* is officially defined to be stronger than a suspicion, in practice it often amounts to nothing more than that. Once probable cause is established to the satisfaction of the court, the owner has the burden of proving that the seized property is not forfeitable or that he or she is entitled to the innocent-owner defense, such as it is.

Five federal circuit courts of appeal have rejected the argument that shifting the burden of proof in forfeiture trials from the state to the owner is a violation of due process. They have reasoned that because forfeiture is predominantly a "civil" rather than a "criminal" remedy, the due process requirement that the government carry the burden of proof in criminal cases does not apply to forfeitures. Similarly, federal courts have ruled that the Double Jeopardy Clause of the Fifth Amendment, the Ex Post Facto Clause of Article I, and the Excessive Fines Clause of the Eighth Amendment do not apply to forfeitures.

Whether a particular penalty is civil or criminal in nature seems a question of legal philosophy that the Supreme Court is best equipped to address. It is odd, therefore, that the Court would defer so heavily to Congress's classification of forfeiture as civil rather than criminal. In any event, the distinction is an elevation of form over substance. Courts would do well to heed the late Justice John Harlan's insights regarding the nature of forfeiture statutes, expressed in *United States* v. *U.S. Coin and Currency*:

"'[P]roceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of an offense committed by him, though they may be civil in form, are in their nature criminal' for Fifth Amendment [self-incrimination privilege] purposes....From the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674 because he has used the money in illegal...activities and a man who pays a criminal fine of $8,674 as a result of the same course of conduct."

Justice Harlan's analysis, coupled with that of Justice William O. Douglas's dissent in *Pearson*, affords the Supreme Court a coherent basis upon which to reexamine the law of forfeiture and bring a halt to a practice that, whatever its acceptability in the Dark Ages, has no place in our system of limited government.

If an owner forfeits property because of drug-law violations, the forfeiture action should be regarded as "criminal" for constitutional purposes, so that all the protections that the Bill of Rights gives criminal defendants would apply. When a forfeiture suit is directed against the property of an individual innocent of any criminal acts, it should be treated as an unconstitutional taking without compensation under the Fifth Amendment, as Justice Douglas argued in *Pearson*.

Milton Friedman's September 7 open letter to drug czar William Bennett warned about the threat to freedom posed by proposals to expand the role of the criminal justice system and the military in the war on drugs:

"Every friend of freedom...must be as revolted as I am by the prospect of turning the United States into an armed camp, by the vision of jails filled with casual drug users and of an army of enforcers empowered to invade the liberty of citizens on slight evidence. A country in which shooting down unidentified planes 'on suspicion' can be seriously considered as a drug-war tactic is not the kind of United States that either you or I want to hand on to future generations."

Through their impact on property rights, the drug forfeiture laws have already eroded fundamental freedoms. The fact that this has occurred so easily, with barely a whimper of protest from the courts and virtually no opposition from thoughtful commentators, gives real credence to Friedman's warnings about where the war on drugs may take us.

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