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Time to Reform Civil Asset Forfeiture

Peter L. Schenke*

I. Introduction

Russell and Patricia own and operate The Motel Caswell, located on 434 Main Street, Tewksbury, Massachusetts.¹ Mr. Caswell has been a resident of Tewksbury since 1955, when his father built The Motel Caswell,² and he has run it since taking over control from his father in 1984.³ The motel encompasses fifty-six rooms, rents approximately 14,000 rooms per year, has maintained proper licenses since its opening, and has never received any legal complaints, nuisance actions, or threats of litigation by neighbors of the motel or the town of Tewksbury.⁴ In its sixth decade of existence, the motel hosts tourists, workers on extended stay, and several elderly permanent residents.⁵

On September 29, 2009, the United States filed a complaint for Forfeiture *in rem* of the motel property, alleging that the motel rooms were used to “facilitate” a crime.⁶ Instead of charging Mr. or Mrs. Caswell with a crime, the government sued an inanimate object, The Motel Caswell. The action, initiated via the federal equitable sharing program, discussed in Part III,

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¹ United States v. 434 Main St., 961 F. Supp. 2d 298, 302 (D. Mass. 2013).

² *Id.* at 303. There are no mortgages or encumbrances on the property.

³ *Id.* The Caswell family has never been involved in any criminal activity at the motel and Mr. Caswell has never been charged with a crime in his life.

⁴ *Id.*

⁵ George F. Will, *When government is the looter*, THE WASH. POST, May 18, 2012, http://www.washingtonpost.com/opinions/when-government-is-the-looter/2012/05/18/gIQAUIKVZU_story.html.

⁶ *Id.*; See also *434 Main St.*, 961 F. Supp. at 2. The complaint alleged property is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7) because it was “used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of the Controlled Substances Act punishable by more than one year of imprisonment.”

allowed the town of Tewksbury to team up with the U.S. Department of Justice in order to force forfeiture of the property and share in the proceeds.⁷

The government alleged that from 1994–2008, approximately fifteen motel customers (representing less than 5/100ths of one percent of the total motel occupancy over a 6,700 day period) were arrested on drug-dealing charges.⁸ During that time, the Caswell’s voluntarily installed security cameras, photocopied customer’s identifications, recorded their license plates, cooperated with police, and were never asked by any law enforcement agency to do anything more before the government filed the forfeiture complaint against their motel.⁹ United States Drug Enforcement Agency (“DEA”) and the Tewksbury Police Department battled in court for the Motel’s forfeiture for over two years while the Caswell’s maintained their innocence. Fortunately, the Institute of Justice represented the Caswells, and on January 24, 2013, more than 2 years after the filing of the initial complaint, United States Magistrate Judge Judith G. Dein dismissed the forfeiture action against the Caswell’s, ruling that the government engaged in “gross exaggeration” of the evidence.¹⁰

Through this civil asset forfeiture process, the DEA, along with the Town of Tewksbury, targeted the Caswell’s \$1.5 million unencumbered property, and attempted to destroy the Caswell’s family-owned business.¹¹ The sheer lack of evidence connecting the motel to any drug related crime raised questions and concerns surrounding the incentive behind the attempted forfeiture of The Caswell Motel.¹² Had they been successful, Tewksbury Police Department

⁷ George F. Will, *supra* note 5.

⁸ 434 Main St., 961 F. Supp. at 311.

⁹ *Id.* at 304–307. The Court noted, “the evidence was consistent that no one from either law enforcement or the Town ever took steps to work with Mr. Caswell in an attempt to reduce drug crime at the Motel.”

¹⁰ *Id.* at 316, 329; See also John E. Kramer, *Fighting Civil Forfeiture Abuse, Federal & Local Law Enforcement Agencies Try to Take family Motel from innocent owners*, INSTITUTE FOR JUSTICE, <http://www.ij.org/massachusetts-civil-forfeiture-background>.

¹¹ Will, *supra* note 5.

¹² *Id.*

would have received a substantial share of the forfeited motel's \$1.5 million in assets, providing enormous revenue boost to their annual budget of only \$5.5 million.¹³ Addressing this concern, Mr. Caswell believed that if his motel "had a big mortgage, this would not be happening."¹⁴

Pursuant to the Department of Justice's Equitable Sharing program¹⁵, the Tewksbury Police Department teamed up with the DEA in order to federalize the investigation, thereby removing the forfeiture from state law jurisdiction.¹⁶ Proceeding under federal forfeiture law via equitable sharing instead Massachusetts' state forfeiture law, the Tewksbury Police Department were eligible to receive up to 80% of the forfeiture proceeds back from the Department of Justice.¹⁷ As discussed in more detail in Part III, that is because the practice of federal equitable sharing provides state and local law enforcement agencies with the opportunity to circumvent state law, in order to reap the distribution and evidentiary standard benefits of the federal forfeiture laws.¹⁸

Civil forfeiture actions, the type brought against The Motel Caswell, refer to non-conviction based forfeiture proceedings.¹⁹ Instead of criminally prosecuting the owner of the property, the government files the action *in rem* against the property itself.²⁰ Because the property is the defendant in these cases, it is not afforded to the same constitutional safeguards that are present in criminal matters.²¹ The nonexistence of any requirement that the property owner has been arrested or convicted of a crime in order for the property to be subject to

¹³ *Id.*

¹⁴ *Id.*

¹⁵ UNITED STATES DEPARTMENT OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES, (2009) [Hereinafter DOJ Equitable Sharing Guide]; *See, Infra* Part III.

¹⁶ Kramer, *supra* note 10.

¹⁷ *Id.*

¹⁸ *See, Infra* Part III.

¹⁹ STEFAN D. CASSELLA, CIVIL ASSET RECOVERY: THE AMERICAN EXPERIENCE, *Working Title*, 1–19 (Oxford Univ. Press 2013) available at http://works.bepress.com/stefan_cassella/30 (Chapter of a book submitted for publication discussing non-conviction based asset forfeiture).

²⁰ *Id.* at 4.

²¹ *Id.* Constitutional safeguards include the Fourth, Fifth, and Sixth Amendments.

forfeiture,²² combined with the fact that federal civil forfeiture laws carry a significantly lower burden of proof as compared to their criminal counterparts²³, has brought about daunting criticism of the current state of civil forfeiture laws.²⁴

Generally, asset forfeiture actions commence when law enforcement personnel determine that there is probable cause to believe that illegal activity has occurred.²⁵ Once probable cause has been established, the law enforcement agent is authorized under federal law to seize any applicable property or cash from the owner under federal law.²⁶ If the property owner timely contests the seizure, and if the seizure involves real property, or property with a value over \$500,000.00, then the government is required to establish—by a preponderance of the evidence—the property’s forfeitability at a judicial proceeding.²⁷ Thus, in order to for the government to succeed in forfeiting an individuals property, they are required to prove—that is more probable than not, i.e. by a preponderance of the evidence,—that the property is subject to forfeiture, or under the facilitating property theory, that there was a substantial connection between the property and offense.²⁸ As set forth in more detail in Part II, federal asset forfeiture laws authorize the takings of contraband, proceeds, and property used to commit, facilitate or involved in the commission of a criminal offense.²⁹ This process results in very unusual case

²² See, e.g., 18 U.S.C. §§ 981–83 (2015).

²³ DEE EDGEWORTH, ASSET FORFEITURE PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 8 (3rd ed. 2014)

²⁴ See, e.g., *infra* Part III. Criticism includes the inadequate standard of proof, law enforcement’s conflict of interest, (as they are able to retain and use the forfeited assets), and states’ inability to enforce their mandated forfeiture legislation due to the equitable sharing program.

²⁵ Jefferson Holcomb et al., *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273, 274 (2011).

²⁶ *Id.*

²⁷ Edgeworth, *supra* note 23, at 35–36.

²⁸ See, 18 U.S.C. § 983 (c)(1–3).

²⁹ See, *Infra* Part II.

names, i.e., United States v. \$557,993.89, More or Less, in U.S. Funds.³⁰ Once the forfeiture proceeds have been collected, federal law permits the distribution of proceeds directly to the law enforcement agencies, where funds can be used for law enforcement purposes only.³¹

While there are inherent concerns about the potential for abuse, there are several overarching policy justifications and reasons that the forfeiture laws were implemented.³² Aiming to combat illegal drug trafficking, asset forfeiture removes the tools of the crime from circulation so they cannot be used again, serves as a way to restore property to victims of crime, takes the profit out of the crime, and constitutes a form of punishment.³³ Thus, civil asset forfeiture permits the government to seize the property because it has been used in violation of the law and to recover “the fruits of the illegal conduct”.³⁴

Amidst concern over the increasing use of civil asset forfeiture, Congress has only reformed the law of forfeiture one time, with the passage of the Civil Asset Forfeiture Reform Act (“CAFRA”) of 2000.³⁵ CAFRA shifted the burden of proof to the government and created the uniform innocent owners exemption.³⁶ Unfortunately the CAFRA failed to implement adequate standards of proof and address the conflict of interest for law enforcement agencies, thereby leaving the most prominent abuses of forfeiture law untouched.³⁷ The conflict of interest surrounding law enforcement agencies arises from their authorization to retain all net forfeiture

³⁰ 287 F.3d 66 (2d Cir. 2002); *see also* United States v. Ninety-Three (93) Firearms, 330 F.3d 414 (6th Cir. 2003); United States v. One-Sixth Share, 326 F.3d 36, (1st Cir. 2003).

³¹ Holcomb, *supra* note 25, at 274.

³² Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, 173 SOUTH AFRICAN J. CRIM. JUST. 347, 347–48 (2004) [hereinafter *Overview of Asset Forfeiture Law*].

³³ *Id.*

³⁴ *Id.* (citing United States v. Ursery, 518 U.S. 267, 284 (1996)).

³⁵ Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106–185, 114 Stat. 202. *See also infra* Part II.

³⁶ David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 31 (2012).

³⁷ *See infra* Part III.

proceeds, brought about by the creation of the Department of Justice Asset Forfeiture Fund in 1984.³⁸

On July 23, 2014, Senator Rand Paul introduced the Fifth Amendment Integrity Restoration Act (“FAIR Act”), seeking to “protect the rights of citizens and restore the Fifth Amendment’s role in seizing property without due process of law.”³⁹ The FAIR Act would raise the government’s burden of proof to clear and convincing evidence, require state and local law enforcement agencies to abide by state law when forfeiting seized property (eliminating federal equitable sharing), and redirect the forfeiture assets from the Attorney General’s Asset Forfeiture Fund to the U.S. Treasury’s General Fund.⁴⁰ As set forth in Part IV, the time has come for Congress to reform federal asset forfeiture laws and strengthen individual’s property rights. Part II of this Comment will discuss the history of federal civil forfeiture laws, the first reform effort (CAFRA), and what constitutes forfeitable property. Part III of this comment will discuss the continuing problems and concerns with the current civil forfeiture system that CAFRA failed to address. Part IV of this comment argues why enacting the FAIR Act is a crucial step toward curbing the abuses associated with civil asset forfeiture, and Part V will conclude.

II. Overview and History of Forfeiture Laws and the Civil Asset Forfeiture Act of 2000

A. Methods and Categories of Asset Forfeiture

Federal asset forfeiture laws permit the takings of contraband, proceeds, and property used to commit, facilitate or involved in the commission of a criminal offense.⁴¹ The first theory

³⁸ See, *infra* Part II B.

³⁹ Press Release, Rand Paul, Sen. Paul Introduces the FAIR Act (Jul. 24, 2014), http://www.paul.senate.gov/?id=1204&p=press_release [hereinafter Sen. Paul Press Release].

⁴⁰ The Fifth Amendment Integrity Restoration Act, S. 2644, 113th Congress (2013–14); Sen. Paul Press Release, *supra* note 39.

⁴¹ Edgeworth, *supra* note 23, at 11.

of forfeiture, contraband *per se*, refers to property that is illegal to possess because the legislature has determined that it does not have a lawful purpose.⁴² By reason of its illegality, no individual can have a legal right to such property, and therefore the affirmative defense of an innocent owner exemption is not available in contraband forfeitures.⁴³ The second theory of forfeiture, proceeds forfeitures, targets property of any kind obtained directly, or indirectly, as a result of the illegal activity,⁴⁴ including and includes all interest, dividend, income, or other property derived from the criminal transaction.⁴⁵ When the government uses the proceeds theory of forfeiture, it bears the burden to establish a connection, through actual evidence, between the property seized and the illegal activity by a preponderance of the evidence in civil judicial forfeitures.⁴⁶ The last theory of forfeiture, and the most contentious, is facilitation forfeiture. Facilitating property encompasses any property “that makes the prohibited conduct less difficult or more or less free from obstruction or hindrance.”⁴⁷

There are three methods of federal asset forfeiture: (1) administrative; (2) civil *in rem*; and (3) criminal.⁴⁸ In administrative forfeitures, property is forfeited without formal court proceedings or judicial intervention.⁴⁹ In certain statutorily authorized situations,⁵⁰ administrative forfeiture permits law enforcement agents to seize property, generally pursuant to a judicial warrant based on probable cause to believe that the property is subject to forfeiture.⁵¹ When a law enforcement agent utilizes administrative forfeiture, he must give notice to all

⁴² *Id.*

⁴³ *Id.*; see *United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131, 1136 (9th Cir. 2005).

⁴⁴ 18 U.S.C. § 981 (a)(2)(A).

⁴⁵ Edgeworth, *supra* note 23, at 12; See 18 U.S.C. § 981(a)(1)(c).

⁴⁶ See 18 U.S.C. § 983(c)(1).

⁴⁷ Edgeworth, *supra* note 23, at 12 (citing *United States v. Shifferli*, 895 F. 2d 987, 990 (4th Cir. 1990)).

⁴⁸ Edgeworth, *supra* note 23, at 2.

⁴⁹ *Id.* at 19. See, e.g., 18 U.S.C. § 983.

⁵⁰ Property may only be forfeited administratively if it is currency or has a value under \$500,000. See, e.g., 18 U.S.C. § 981, 983; 19 U.S.C. § 1602–1621.

⁵¹ See Overview of Asset Forfeiture Law, *supra* note 32, at 13; see, e.g., § 981 (b).

potential claimants that the property has been seized based on probable cause, and is subject to forfeiture, and that unless someone files a claim opposing the administrative forfeiture action, the property will be declared “forfeited” to the government.⁵² If somebody files a claim opposing the forfeiture in a timely manner, however, then the proceeding is converted into a judicial civil forfeiture action.⁵³ This method of forfeiture is particularly desirable to law enforcement agents because it conserves judicial resources, yields faster resolution of uncontested matters, and permits the seizing agency to obtain possession of the property and to retain control throughout the entirety of the action.⁵⁴ But, administrative forfeiture can only be used for currency (any amount), personal property valued at \$500,000 or less (including cars and guns), and hauling conveyances of unlimited value;⁵⁵ thus, is not applicable in any forfeiture of real property.

Civil forfeiture is an *in rem* judicial action against the property and permits law enforcement to immediately seize and retain possession of property pending the resolution of the forfeiture proceedings.⁵⁶ After the government files a complaint alleging the property’s forfeitability, the property owners are required to file claims to the property as well as an answer to the complaint.⁵⁷ At the judicial proceeding, the government is required to establish—by a preponderance of the evidence (a standard far below the criminal forfeiture “reasonable doubt” standard)—that the property was derived from or was used to commit a crime.⁵⁸ If the government is able to meet its burden of proof, the claimant has the opportunity, and burden of

⁵² Edgeworth, *supra* note 23, at 3. Sixty day deadline from date of seizure to send notice to interested parties (§ 983(a)(1)(A)(i)), or ninety days if it is an adoptive forfeiture (§ 983(a)(1)(A)(V)).

⁵³ *Id.* Claimant has thirty days after the date of mailing of the notice letter to file a claim § 983 (a)(2)(B). The government then has ninety days to initiate judicial forfeiture action after claim is filed § 983(a)(3)(A).

⁵⁴ Edgeworth, *supra* note 23, at 19.

⁵⁵ DOJ Equitable Sharing Guide, *supra* note 15, at 31.

⁵⁶ Edgeworth, *supra* note 23, at 8. Seizure is authorized through either the issuance of an arrest warrant *in rem*, seizure warrant, or warrantless seizures based on probable cause. *Id.*

⁵⁷ Overview of Asset Forfeiture Law, *supra* note 32, at 358.

⁵⁸ 18 U.S.C. § 983(c); *see also* Overview of Asset Forfeiture Law, *supra* note 32, at 12.

proof, to contest the forfeiture as an innocent owner.⁵⁹ The innocent owner defense is designed to protect property owners who were unaware that their property was used for illegal purposes, or who took all reasonable steps under the circumstances to stop such activities.⁶⁰

The last method of forfeiture is criminal forfeiture. Criminal forfeiture is filed *in personam* and follows a criminal conviction of the property owner.⁶¹ This method of forfeiture is vastly different than the others due to the requirement of the property owner's prior conviction and the heightening of the government's burden of proof to "beyond a reasonable doubt."⁶² Because defendants in these actions are afforded Fourth, Fifth, and Sixth Amendment protections, as well as the higher burden of proof, criminal forfeitures will not be analyzed throughout this Comment.⁶³

B. The Inception of Civil Asset Forfeiture Laws

United States federal civil asset forfeiture law came to fruition in 1970 during the beginning stages of the War on Drugs with the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970.⁶⁴ Under the Act, the federal government was permitted to seize and forfeit property used in connection with illegal drug trade.⁶⁵ The scope of forfeitable property under this Act was very restricted, deeming all controlled substances, all raw materials, and equipment used or intended for use in manufacturing illegal drugs forfeitable.⁶⁶ This law, however, was unable to gain traction within law enforcement. For example, in the nine years

⁵⁹ See, e.g., § 983(d).

⁶⁰ *Id.* The burden is on the claimant to prove their innocence by a preponderance of the evidence. 18 U.S.C. § 983(d).

⁶¹ Pimentel, *supra* note 36, at 6.

⁶² *Id.*

⁶³ *Id.* at 7.

⁶⁴ REP. HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS 24 (1995); see 21 U.S.C. § 881(a) (1988 & Supp. IV 1992).

⁶⁵ Marian Williams, *Civil Asset Forfeiture: Where Does the Money Go?*, 27 GA. ST. U. CRIM. JUST. REV. 321, 323 (2002).

⁶⁶ Eric L. Jensen & Jurg Gerber, *The Civil Forfeiture of Assets and the War on Drugs: Expanding Criminal Sanctions While Reducing Due Process Protections*, 42 Crime & Delinquency 421, 422 (1996).

following its enactment, less than thirty million dollars in assets had been forfeited.⁶⁷ For comparison, almost the same amount was forfeited in 1985 alone.⁶⁸

The Act was amended in 1978, adding subsection (a)(6) to § 881 and permitting the forfeiture of money and other things of value furnished, or intended to be furnished, in exchange for a controlled substance and all proceeds traceable to such transaction.⁶⁹ As Rep. Henry Hyde proclaimed, this was the start to an “important progression of events here that must be recognized.”⁷⁰ The progression of events that Rep. Hyde referenced involved the vast expansion of the scope of federal forfeiture laws. This continued pattern of drug forfeiture law expansion did not stop until 1992.⁷¹

The most significant, and controversial, expansion in federal civil forfeiture occurred in 1984. The Comprehensive Crime Control Act amended § 881 to include the forfeiture of all real property used, or intended to be used, to commit or to facilitate the commission of a drug crime,⁷² thus authorizing the seizure of any ‘facilitating’ real property.⁷³ Furthermore, the 1984 bill included two other highly controversial provisions. The first provision authorized the creation of the new Department of Justice Asset Forfeiture Fund, in which the Attorney General deposits all net forfeiture proceeds for use by the DOJ or other federal agencies,⁷⁴ instead of the General Fund of the Treasury where the proceeds were deposited prior to the 1984 amendment.⁷⁵ As discussed in Part III, below, the switch from the U.S. Treasury General Fund to the Justice

⁶⁷ *Id.* at 424 (referencing William Nelson, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1315 (1992).

⁶⁸ *Id.*

⁶⁹ Psychotropic Substances Act of 1978 (found at 21 U.S.C. § 881(a)(6) (1988)); *see* Hyde, *supra* note 64, at 25.

⁷⁰ Hyde, *supra* note 64, at 25.

⁷¹ *Id.*

⁷² *Id.*; *See, e.g.*, The Comprehensive Crime Control Act of 1984 (found at 21 U.S.C. § 881(a)(7) (1988)).

⁷³ *Id.*

⁷⁴ LEONARD LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 115 (1996).

⁷⁵ *Id.*

Department's Asset Forfeiture Fund created a profit incentive and a conflict of interest via the opportunity given to law enforcement agencies to keep the assets they seize.⁷⁶

The second controversial provision in the Comprehensive Crime Control Act established the Department of Justice equitable sharing program.⁷⁷ Utilizing the practice of equitable sharing, state and local law enforcement agencies have the ability to request that a federal agency "federalize" or "adopt" the forfeiture, and in return receive up to eighty percent of the forfeiture's total net value.⁷⁸

The Act was later amended in the 1986 Anti-Drug Abuse Act, which authorized civil forfeitures of proceeds of money-laundering activity.⁷⁹ Congress did not stop there. In 1990, the Act was amended to include proceeds from counterfeiting and other financial offenses.⁸⁰ Two years later, Congress expanded the scope of forfeiture once again, this time adding proceeds traceable to motor vehicle theft and other categories.⁸¹ The final expansion of federal forfeiture law occurred in 1992.⁸² That amendment eliminated the requirement of identifying the specific property that is subject for forfeiture, and allowed the government to seize "any identical property found in the same place or the same account as the property involved in the offense."⁸³

After the enactment of the 1984 Comprehensive Crime Control Act, the use of forfeitures skyrocketed.⁸⁴ In 1985, asset forfeiture receipts totaled \$27.2 million.⁸⁵ In the 1992 fiscal year,

⁷⁶ Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 40 (1998).

⁷⁷ Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, policing incentives, and local budgets*, 91 J. PUB. ECON. 2113, 2116 (2007).

⁷⁸ *Id.*

⁷⁹ Hyde, *supra* note 64, at 25. *See, e.g.*, 18 U.S.C. § 981(a)(1)(A) (1988 & Supp. IV 1992).

⁸⁰ *Id.* (expressing concern over the expansion of forfeiture laws); 18 U.S.C. § 981(a)(1)(C) (Supp. IV 1992);

⁸¹ 18 U.S.C. § 981(a)(1)(F) (Supp. IV 1992).

⁸² Hyde, *supra* note 64, at 25; *see* 18 U.S.C. § 984(b)(1) (Supp. IV 1992)

⁸³ Hyde, *supra* note 64, at 25 (quoting 18 U.S.C. § 984(b)(2) (Supp. IV 1992)).

⁸⁴ Jensen & Gerber, *supra* note 66, at 424.

⁸⁵ *Id.* (citing Nelson, *supra* note 67, at 1324).

asset forfeiture receipts ballooned up to \$874.9 million.⁸⁶ In the short seven-year time frame from 1985–1992, asset forfeitures multiplied almost fortyfold.⁸⁷ The colossal increase of \$847.7 million in total forfeiture receipts from 1985-1992, compared with the meager near \$30 million increase from 1970-1979⁸⁸, provides an illustration of the dramatic expansion and subsequent utilization of federal forfeiture laws. Unfortunately, as the government expanded the scope of federal forfeiture law, it directly affected and reduced individual’s fundamental property rights.⁸⁹

C. The Civil Asset Forfeiture Reform Act of 2000.

Amongst concern over the increasing abuse of forfeiture laws, the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”) was enacted and signed into law by President Clinton on April 25, 2000.⁹⁰ CAFRA aimed to bolster individual’s rights in federal civil forfeiture proceedings and minimize the procedural controversies surrounding civil forfeiture.⁹¹ Scholars regarded its enactment as the first significant victory for civil asset forfeiture’s critics.⁹² CAFRA implemented several changes to federal civil asset forfeiture law; the shift of the burden of proof in forfeiture proceedings from the property owner to the government, the creation a uniform innocent owner defense, the elimination of the cost bond requirement, the addition of notice and filing time restrictions, and the authorization of reasonable attorney’s fees for prevailing property owners in forfeiture proceedings.⁹³

⁸⁶ Jensen & Gerber, *supra* note 66, at 424.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See* Hyde, *supra* note 64.

⁹⁰ Barbara J. Van Arsdale, Annotation, *Validity, Construction, and Application of Civil Asset Forfeiture Reform Act of 2000 (CAFRA)*, 195 A.L.R. FED. 349; *see* Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106–185, 114 Stat. 202.

⁹¹ *Id.*

⁹² John L. Worrall, *Addicted to the drug war- The role of civil asset forfeiture as a budgetary necessity in contemporary law enforcement*, 29 J. OF CRIM. JUST. 171, 175 (2001); *see also* Williams, *supra* note 65, at 322.

⁹³ The Fifth Amendment Integrity Restoration Act, S. 2644, 113th Congress (2013–14).

The first, and most crucial, reform of CAFRA was the shifting of the burden of proof in civil forfeiture proceedings to the Government.⁹⁴ Prior to CAFRA, the government was only required to show probable cause of the property's forfeitability.⁹⁵ Once probable cause was shown, the burden of proof shifted to the property owner to establish that the property was not subject to forfeiture.⁹⁶ CAFRA addressed this procedural dilemma and shifted the burden of proof to the Government, requiring it to prove the property's forfeitability by a preponderance of the evidence.⁹⁷ But, in order to trigger the Government's burden of proof, the property owner must timely contest the forfeiture.⁹⁸ CAFRA also established a uniform defense for innocent owners, providing protection to both property interests existent at the time of the illegal conduct, as well as to bona fide purchasers who acquired the property interest after illegal conduct has occurred.⁹⁹ As discussed below, one recurring problem, however, is that a majority of civil forfeitures proceed uncontested and are not challenged in judicial proceedings.¹⁰⁰

The reform act also implemented new procedural requirements.¹⁰¹ CAFRA requires that the government provide notice to owners that their property has been subject to forfeiture within sixty days of the seizure.¹⁰² Once the government has filed the forfeiture complaint, property owners who wish to contest and challenge the seizure are required to file such claim no later 30 days after the date of service of the government's complaint.¹⁰³ In addition, CAFRA enumerated

⁹⁴ Worrall, *supra* note 92, at 175.

⁹⁵ Pimentel, *supra* note 36, at 20.

⁹⁶ *Id.*

⁹⁷ *Id.* at 21; *see, e.g.*, 18 U.S.C. § 983(c)

⁹⁸ *Id.*

⁹⁹ *See* Van Arsdale, *supra* note 90; *see, e.g.*, 18 U.S.C. § 983(d) (noting the claimant has the burden of proving his or her innocence by a preponderance of the evidence.)

¹⁰⁰ *See infra* Part III.

¹⁰¹ Barclay Thomas Johnson, *Restoring Civility-the Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1070 (2002).

¹⁰² 18 U.S.C. § 983(a). If the government fails to notify the owners within the sixty days, the forfeiture action terminates and the property must be returned. Time period for notice is extended to ninety days for seizures via the federal equitable sharing program. 18 U.S.C. § 983(a)(1)(A)(iv).

¹⁰³ 18 U.S.C. § 983(a)(4)(A).

a specific set of rules for real property forfeitures.¹⁰⁴ Emphasizing the importance and necessity of real property to individuals, CAFRA requires both notice to the owner and a judicial proceeding before forfeiture of such property.¹⁰⁵

Furthermore, CAFRA provided more protection to individual property owners after the initial seizure has taken place via the creation of the hardship provision, the right to an appointment of counsel, and the elimination of the cost bond requirement.¹⁰⁶ Under the hardship provision, an owner has the ability to keep property subject to forfeiture pending the resolution of the forfeiture proceedings if he or she is able to show substantial hardship without it.¹⁰⁷ In making a final determination, the court will balance the hardship on the owner against “the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned during the pendency of the proceedings.”¹⁰⁸ If the property owner/claimant is indigent, CAFRA authorizes the appointment of counsel if the property at issue is the claimant’s primary residence.¹⁰⁹ Prior to CAFRA, the law required a claimant to post a cost bond, the lesser of either \$5,000 or ten percent of the seized property’s value,¹¹⁰ in order to contest the forfeiture.¹¹¹ Noting that the cost bond requirement jeopardized indigent claimants’ ability to contest forfeitures,¹¹² the U.S. House Committee on the Judiciary believed that it served as an unnecessary and unconstitutional deterrent, and thus eliminated the cost bond entirely.¹¹³ Lastly, CAFRA attempted to clarify the necessary relationship between forfeitable property and the

¹⁰⁴ Johnson, *supra* note 101, at 1071.

¹⁰⁵ Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 7, 114 Stat. 202.

¹⁰⁶ *See, e.g.*, 18 U.S.C. § 983; Pimentel, *supra* note 36, at 21-26.

¹⁰⁷ Pimentel, *supra* note 36, at 25; 18 U.S.C. § 983(f)(7).

¹⁰⁸ 18 U.S.C. § 983(f)(7).

¹⁰⁹ 18 U.S.C. § 983(b)(2). Subsection (b)(1) also provides counsel if the indigent claimant is already represented by court-appointed counsel in a related criminal proceeding.

¹¹⁰ 19 U.S.C. § 1608 (1999).

¹¹¹ Brant C. Hadaway, *Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. MIAMI L. REV. 81, 110 (2000).

¹¹² H.R. Rep. No. 105-358, pt. 1, at 34 (October, 30, 1997).

¹¹³ *Id.*

underlying offense triggering the seizure by requiring the government to prove that there is a “substantial connection” between the facilitating property and the offense.¹¹⁴

Part III: CAFRA’s Failure to Resolve Federal Civil Forfeiture Concern: Continuing Problems

Despite serving as the first vital step in the commencement of civil asset forfeiture reform, scholars have widely criticized the Act’s failure to address the major concerns and constitutional inequities present in our current system.¹¹⁵ In particular, CAFRA fails to implement the appropriate burdens and standards of proof, to resolve the misuse in the practice of federal equitable sharing, and to rectify law enforcement’s conflict of interest surrounding the ever-present profit incentive.

A. Inadequate Standards of Proof

The first shortcoming of the CAFRA was its failure to appropriately balance the burdens of proof between the government and property owners. In initially determining that the appropriate standard of proof was the clear and convincing evidence standard, the House Committee on the Judiciary noted, “[t]he general civil standard of proof—preponderance of the evidence—is too low a standard to assign to the government in this type of case. A higher standard of proof is needed that recognizes that in reality the government is alleging that a crime has taken place.”¹¹⁶ Unfortunately, the House bill’s clear and convincing evidence standard was met with opposition in the Senate, resulting in the adoption of a preponderance of the evidence standard of proof.¹¹⁷ Rep. Henry Hyde, the sponsor of the House CAFRA bill, expressed concern about the inverse, and very troubling, correlation between the vast scope of forfeiture

¹¹⁴ Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106–185, § 2, 114 Stat. 202.

¹¹⁵ Pimentel, *supra* note 36 at 28; Johnson, *supra* note 101, at 88; David Ross, *Civil Forfeiture: A Fiction That Offends Due Process*, 13 REGENT U. L. REV. 259, 271 (2000); Hadaway, *supra* note 111, at 92.

¹¹⁶ H.R. Rep. No. 106-192, pt. 1, at 13, 106th Cong., (1999).

¹¹⁷ Hadaway, *supra* note 111, at 104; *See* S. 1901, 106th Cong. (1999); S. 1701, 106th Cong. (1999).

laws and individual's property rights as follows: "All this recent statutory expansion means not only a dramatic increase in the number of crimes covered by civil asset forfeiture but also a significant lessening of any relationship between an owner's guilty act or offense, if any, and the property that is subjected to forfeiture."¹¹⁸ Interestingly, and non-coincidentally, the clear and convincing evidence standard has been at the forefront of civil forfeiture debate since the very beginning of the reform efforts.¹¹⁹ The current inadequacy of the burdens of proof endangers the strength and practical application of the innocent owner's defense and fails to rectify the problem of uncontested forfeitures.

First, the present allocation of the burdens of proof in civil forfeiture proceedings restricts the strength of the innocent owner's defense.¹²⁰ CAFRA included a provision that created a uniform innocent owner's defense, placing the burden on the property owner to prove his or her innocence by a preponderance of the evidence.¹²¹ At first glance it may appear as though innocent owners and the government stand on equal ground with the same preponderance of the evidence standard of proof.¹²² That appearance, however, is nothing more than a façade. In reality, innocent owners face an additional hurdle that the government does not, the requirement of proving a negative, i.e., that they are not guilty.¹²³ In order to establish their innocence, property owners must rebut and negate the government's allegations,¹²⁴ and prove by a preponderance of the evidence that he or she "did not know of the conduct giving rise to

¹¹⁸ *Id.* at 25.

¹¹⁹ Hyde, *supra* note 64, at 79-81.

¹²⁰ Johnson, *supra* note 101, at 1076-77.

¹²¹ Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000). A property owner can prove his innocence by showing either that he did not know of the conduct giving rise to the forfeiture or that, upon learning of such conduct, he took all reasonable steps to terminate the illegal use. 18 U.S.C. § 983(d)(2)(A) (2015). But, if the claimant acquired the property interest after the conduct occurred, then he must prove he was a purchaser or seller for value and he did not know and was reasonably without cause to believe that the property was subject to forfeiture. *Id.* § 983(d)(3).

¹²² Johnson, *supra* note 101, at 1076 n.168.

¹²³ *Id.* at 1066.

¹²⁴ *Id.* at 1084.

forfeiture” or “upon learning of the conduct... did all that reasonably could be expected under the circumstances to terminate such use of the property”.¹²⁵ Thus, even though both parties have the same standard of proof, the property owners face an additional burden of proof in negating the government’s allegations, as well as proving their innocence through § 983(d) as set forth above. To make matters worse, the federal courts have not uniformly assessed or determined what constitutes knowledge and consent on the property owner’s behalf,¹²⁶ with some district courts using an objective standard of review¹²⁷ while other circuit court’s employing a subjective standard.¹²⁸ The government’s preponderance of the evidence standard of proof fails to recognize the additional burden of proof that property owners must bear in order to establish their innocence, and provides the government with a favorable advantage in proving the property’s forfeitability.

Furthermore, property owners asserting the innocent owner’s defense carry the burden to establish their own innocence, an arrangement of innocence that is completely at odds with notion of “innocent until proven guilty” that applies in criminal cases.¹²⁹ Instead of benefitting from the criminal principle of “innocent until guilty”, property owners must prove—by a preponderance of the evidence—that their property was not guilty in order to exempt the property from forfeiture.¹³⁰ If the government proceeds under the facilitating property theory, they simply have to establish that there was a “substantial connection between the property and the

¹²⁵ *Id.* § 983(d)(2)(A)(i–ii).

¹²⁶ Edgeworth, *supra* note 23, at 191.

¹²⁷ *Id.* citing *In Re Moffitt, Zwerling & Kemler, PC*, 846 F. Supp. 463, 475 (E.D. Va. 1994)).

¹²⁸ *Id.*, citing *United States v. Four Million Two Hundred Fifty-Five Thousand*, 762 F.2d 895, 906 (11th Cir.1985); *In Re Forfeiture of One 1970 Chevrolet Chevelle*, 215 P.3d 166, 171 (Wash. 2009).

¹²⁹ Marian R. Williams et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture, Part I: Policing for Profit*, FORJUSTICE (March 2010), <https://www.ij.org/part-i-policing-for-profit-2> [hereinafter Institute For Justice]

¹³⁰ *Id.*

offense.”¹³¹ But, regardless of which theory of forfeiture the government asserts, individuals must prove their innocence by a preponderance of the evidence.¹³² This difference in the allocation of the burdens jeopardizes potentially truly innocent property owners, as there is no way that the government’s facilitating property-substantial connection standard equates with the innocent owner’s preponderance of the evidence standard, and bearing the burden in proving his or her innocence.

The imbalance among the standards of proof is evidenced in the overwhelming percentage of uncontested forfeitures.¹³³ Nearly eighty percent of all forfeitures in federal court go uncontested.¹³⁴ Despite CAFRA’s implementation of the preponderance of the evidence standard of proof on the government, it has been reported that the percentage of uncontested forfeitures has remained reasonably steady.¹³⁵ This realization should raise concern, as forfeiture deprives individuals their right to property, signaling fundamental due process concerns. The Due Process Clause of the 5th Amendment provides that, “Nor Shall any person... be deprived of life, liberty, or property, without due process of the law...”¹³⁶ Commentators have hypothesized that a primary reason of the uncontested forfeitures is the inability to afford legal fees in order to contest the forfeiture, estimating that legal fees in a federal case can easily amount to \$25,000.¹³⁷ An article published in the Philadelphia City Paper found that in 2010, the Philadelphia District Attorney filed upwards of 8,000 civil forfeiture cases for the seizure of currency alone, averaging

¹³¹ See, e.g., 18 U.S.C. § 983(d)(3).

¹³² § 983.

¹³³ Pimentel, *supra* note 36, at 33.

¹³⁴ Levy, *supra* note 74, at 130.

¹³⁵ Pimentel, *supra* note 36, at 33-34; see also Overview of Asset Forfeiture Law In the United States, *supra* note 32, at 355.

¹³⁶ U.S. Const., amend V.

¹³⁷ Levy, *supra* note 74, at 130.

a total of \$550 per case.¹³⁸ That is quite a hefty expense to bear for the average individual, especially considering the fact that the individual was never charged with or convicted of a crime. Despite the elimination of the cost bond requirement, property owners continue to face financial difficulties before even appearing in court to contest the forfeiture. Raising the standard of proof to clear and convincing evidence would combat this problem by ensuring that the government has the proper investigatory and evidentiary foundation before proceeding with seizure and forfeiture. In theory, a higher standard of proof would deter the government from targeting property based on flimsy or weak evidence, and instead proceed only against property that it is substantially certain to be subjected to forfeiture.

B. Continuing Profit Incentive & Misuse of Equitable Sharing

The second shortcoming of CAFRA was its failure to rectify the abuse associated with the practice of federal equitable sharing and eliminate law enforcement personnel's profit incentive stemming from the distribution of forfeiture proceeds through the Department of Justice's Asset Forfeiture Fund.

The Comprehensive Control Act of 1984 created the practice known as equitable sharing,¹³⁹ and includes two separate methods: joint investigations and adoptive forfeitures.¹⁴⁰ Joint investigations occur when state or local law enforcement agencies partner with a federal agency to investigate and enforce federal criminal law.¹⁴¹ The percentage of forfeiture funds that state or local agencies receive via joint investigations is determined by their role, direct

¹³⁸ Isaiah Thompson, *The Cash Machine*, PHILADELPHIA CITY PAPER, Nov. 28, 2012, <http://citypaper.net/The-Cash-Machine/>.

¹³⁹ Holcomb, *supra* note 25, at 274.

¹⁴⁰ DOJ Equitable Sharing Guide, *supra* note 15, at 6.

¹⁴¹ *Id.*

participation, and effort in the seizure.¹⁴² Adoptive forfeitures occur when a state or local law enforcement agency seizes property, requests a federal agency to adopt it, and transfers the seizure to such agency for federal forfeiture proceedings.¹⁴³ The state or local law enforcement agency then receives back up to eighty percent of the total net assets obtained through the forfeiture,¹⁴⁴ with the requirement that it must use the funds for law enforcement purposes only.¹⁴⁵ When adoptive forfeitures occur, the state's law is disregarded and the seizure is subject exclusively to federal jurisdiction.¹⁴⁶

There are two main reasons why state and local law enforcement agencies choose adoptive forfeitures instead of proceeding under their own state's laws. Unlike federal law, the forfeiture laws of the individual states vary in strength and distribution jurisdiction to jurisdiction.¹⁴⁷ First and most prominent, federalizing forfeitures gives state or local agencies the ability to receive back more forfeiture funds, exclusively for law enforcement purposes, than would otherwise have been received under state law.¹⁴⁸ Second, local and state law enforcement agencies may decide to federalize a forfeiture because the federal law provides a more relaxed, government-friendly burden of proof than the laws of a state.¹⁴⁹ Thus, not only is it more profitable for certain agencies to proceed federally, it may also be easier by requiring a lower threshold level of evidence.

At the most basic level, adoptive forfeitures through the practice of equitable sharing provide state and local agencies with a powerful toolbox, in which they are able to pick and

¹⁴² Holcomb, *supra* note 25, at 274; DOJ Equitable Sharing Guide, *supra* note 15, at 12.

¹⁴³ *Id.* In order to qualify for adoption, the conduct giving rise to the seizure must be in violation of federal law.

¹⁴⁴ Holcomb, *supra* note 25, at 274-75.

¹⁴⁵ DOJ Equitable Sharing Guide, *supra* note 15, at 16-17. (Law enforcement use includes: law enforcement investigations, training, facilities, equipment, travel and transportation, awards and memorials, and drug and gang awareness programs.)

¹⁴⁶ *Id.*

¹⁴⁷ Blumenson & Nilsen, *supra* note 76, at footnote 66.

¹⁴⁸ Blumenson & Nilsen, *supra* note 76, at 100; *see also* Hyde, *supra* note 64, at 67.

¹⁴⁹ Holcomb, *supra* note 25, at 274-75. *See also* Hyde, *supra* note 64, at 67.

choose which jurisdiction provides the most favorable burdens and benefits of forfeiture.¹⁵⁰ Scholars Jefferson Holcomb, Tomislav Kovandzic, and Mirian Williams analyzed the relationship between the forfeiture distribution laws of states, standards of proof, and the amount of equitable sharing proceeds allocated to them in an empirical study of 563 municipal and sheriff's offices that participated in the 2003 Law Enforcement and Administrative Statistics survey.¹⁵¹ Setting out to determine whether equitable sharing is used to circumvent less profitable state distribution laws, they implemented a cross-sectional research design to compare the per capita amount of equitable sharing payments to each state with how restrictive their forfeiture distributions laws are.¹⁵² With no surprise, the results determined that law enforcement agencies located in states where distribution laws were generous received significantly lower equitable sharing payments.¹⁵³ In addition, they measured the equitable sharing payments received by states in comparison with the standards of proof necessary to forfeit property under applicable state law,¹⁵⁴ finding that law enforcement agencies located in states with higher standards of proof receive larger equitable sharing payments. The direct correlation between how profitable states' distribution laws are, the degree of standards of proof, and the amount of equitable sharing payments the agencies receives illustrates that state and local law enforcement agencies follow the profit incentive and abuse the practice of equitable sharing in order to reap the financial or evidentiary benefits.¹⁵⁵

With full knowledge of the additional funds available, state and local law enforcement agencies have “an enormous economic stake in federal forfeiture law” through the availability of

¹⁵⁰ Blumenson & Nilsen, *supra* note 76, at 50.

¹⁵¹ Holcomb, *supra* note 25, at 276.

¹⁵² *Id.* at 274–76.

¹⁵³ *Id.* at 280.

¹⁵⁴ *Id.* at 277

¹⁵⁵ *Id.*

a new source of income.¹⁵⁶ As more and more state and local law enforcement agencies proceed via adoptive forfeitures, states are left powerless and unable to ensure that the agencies are following the law of the state's legislature.¹⁵⁷ This (optional) bypassing and circumvention of the laws of the individual states, and subsequent transfer into federal jurisdiction should be recognized and identified as violations of the fundamental principle of federalism.¹⁵⁸

Furthermore, the creation of the Justice Department's Asset Forfeiture Fund has provided federal law enforcement agencies with a similar profit incentive that their state and local counterparts utilize through the practice of equitable sharing.¹⁵⁹ Since the Comprehensive Crime Control Act of 1984, the net proceeds of forfeitures are deposited into the Department of Justice's Asset Forfeiture Fund, and at the discretion of the Attorney General, are used to pay for a wide array of law enforcement purposes including seizure and inventory expenses, payments contract services, reimbursement to any Federal agency participating in the Fund for investigative costs, and law enforcement training.¹⁶⁰ The switch from the U.S. Treasury General Fund to the Justice Department's Asset Forfeiture Fund in 1984 enabled law enforcement agencies to keep and retain all of the net forfeiture profits from their seizures.¹⁶¹ The use of Asset Forfeiture Fund has skyrocketed exponentially through forfeitures by federal agencies and equitable sharing, particularly in the past two decades.¹⁶² Starting in 1986, two years after its creation, the fund received \$93.7 million in deposits from currency and property forfeitures.¹⁶³

¹⁵⁶ Blumenson & Nilsen, *supra* note 76, at 51.

¹⁵⁷ Michael J. Duffy, *A Drug War Funded with Drug Money: The Federal Civil Forfeiture Statute and Federalism*, 34 SUFFOLK U. L. REV. 511, 537 (2001).

¹⁵⁸ *Id.*; *see infra* Part IV.

¹⁵⁹ Hyde, *supra* note 64, at 66; *see, e.g.*, 28 U.S.C. § 524(C) (1988 & Supp. IV 1992).

¹⁶⁰ *See, e.g.*, 28 U.S.C. § 524.

¹⁶¹ Hyde, *supra* note 64, at 30.

¹⁶² *See* Institute for Justice, *supra* note 129.

¹⁶³ *Id.*

In 2001, fifteen years later, \$406.8 million was deposited into the fund.¹⁶⁴ In 2006, five short years later, the fund received \$1.125 billion in total deposits, and in 2008 the fund held over \$1 billion in net assets for the first time ever.¹⁶⁵ This expansion spurred criticism and concern regarding the lack of congressional accountability and the incentive for law enforcement agencies to engage in profitable seizures.¹⁶⁶

Scholars have appropriately criticized that the distribution of the Justice Department Asset Forfeiture Fund violates the Appropriations Clause of the United States Constitution.¹⁶⁷ Congress's exclusive appropriations power, enumerated in Article I, sec. 9, cl. 7 of the United States Constitution, requires a specific congressional appropriation before government income is spent.¹⁶⁸ Currently, federal forfeiture revenue is deposited, maintained, and distributed through the Department of Justice Asset Forfeiture's Fund, without any Congressional or Treasury budgetary control.¹⁶⁹ This delegation of power to the Department of Justice is arguably inherently unconstitutional, and has now given "law enforcement agencies the opportunity to set the size of their own budgets through police seizures."¹⁷⁰ This troubling opportunity has further resulted in a conflict of interest among law enforcement between policing legitimate law enforcement goals and policing for profit.¹⁷¹ Until the law enforcement agencies are held accountable, and oversight is restored, the incentive to distort police agendas toward profitable seizures will remain. At minimum, the forfeited assets should be subjected to a budgetary

¹⁶⁴ *Id.* (Table 6 provides deposits to Department of Justice Asset Forfeitures Fund from 2001 to 2008).

¹⁶⁵ *Id.*

¹⁶⁶ See Pimentel, *supra* note 36, at 17-18; Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 785-86 (2009); Hadaway, *supra* note 111, at 116; Blumenson & Nilsen, *supra* note 76, at 84; Hyde, *supra* note 64, at 30.

¹⁶⁷ Moores, *supra* note 167; Blumenson & Nilsen, *supra* note 76, at 84-87; Hyde, *supra* note 64, at 66.

¹⁶⁸ U.S. CONST. art. I, § 9, cl. 7. See also Blumenson & Nilsen, *supra* note 76, at 85.

¹⁶⁹ 21 U.S.C. § 881(e)(2)(B); see Blumenson & Nilsen, *supra* note 76, at 85-86.

¹⁷⁰ Blumenson & Nilsen, *supra* note 76, at 88.

¹⁷¹ *Id.*, at 56.

release before they become available for use by the seizing law enforcement agency, a situation that does not parallel the status quo.

Despite the enactment of CAFRA, the federal civil forfeiture system continues to allow the law enforcement agencies to profit off asset forfeiture at the expense of property owners. First, the preponderance of the evidence standard of proof implemented by CAFRA upon the government is inadequate, and fails to combat the problem of uncontested forfeitures and protect innocent owners. In addition, CAFRA failed to address the most prominent concerns surrounding civil forfeiture; the circumvention of state laws through federal equitable sharing and adoptive forfeitures, federal law enforcement's continuing incentive to engage in profitable seizures, and the lack of accountability in the distribution of forfeited assets in the Justice Department's Asset Forfeiture Fund.¹⁷²

Part IV: Proposed Legislation: The Fifth Amendment Integrity Restoration Act and Subsequent Executive Policy Orders

A. The Fifth Amendment Integrity Restoration Act

On July 23, 2014, Senator Rand Paul introduced the Fifth Amendment Integrity Restoration Act ("FAIR Act").¹⁷³ The bill is designed to protect the rights of citizens and reinforce the Fifth Amendment's role in seizing property without due process of the law.¹⁷⁴ "The FAIR Act will ensure that government agencies no longer profit from taking the property of U.S. citizens without due process, while maintaining the ability of courts to order the surrender of

¹⁷² Pimentel, *supra* note 36 at 28; Johnson, *supra* note 101, at 88; David Ross, *Civil Forfeiture: A Fiction That Offends Due Process*, 13 REGENT U. L. REV. 259, 271 (2000); Hadaway, *supra* note 111, at 92.

¹⁷³ Sen. Paul Press Release, *supra* note 39.

¹⁷⁴ *Id.*

proceeds of crime.”¹⁷⁵ The FAIR Act contains three major changes to federal law; it would raise the government’s standard of proof, eliminate the practice of federal equitable sharing, and redirect the distribution of federal forfeiture assets from Justice Department’s Asset Forfeiture Fund to the Treasury General Fund.¹⁷⁶

First, section 2 of the FAIR Act would amend 18 U.S.C. § 983(c)(1), and require that the government establish, by clear and convincing evidence that the property is subject to forfeiture.¹⁷⁷ In addition, the FAIR Act amends section 18 U.S.C. § 983(c)(3), regarding facilitating property, requiring the government to establish by clear and convincing evidence that “(A) there was a substantial connection between the property and the offense; and (B) the owner of any interest in the seized property- (i) intentionally used the property in connection with the offense; or (ii) knowingly consented or was willfully blind to the use of the property by another in connection with the offense.”¹⁷⁸ Also, section 2 of the FAIR Act amends 18 U.S.C. § 983(d), the innocent owner defense, by eliminating § 983(d)(2)(A)(i), “did not know of the conduct giving rise to forfeiture” while leaving § 983(d)(2)(A)(ii) intact.

Section 3 of the FAIR Act amends 21 U.S.C. § 881(e)(1) by removing property forfeited civilly from the Attorney General’s jurisdiction, as well as § 881(e)(2)(b) requiring the Attorney General to forward forfeiture assets to the Treasurer of the U.S. for deposit in the General Fund of the U.S. Treasury.¹⁷⁹ Additionally, section 3 of the FAIR Act amends 18 U.S.C. § 981(e), eliminating the Attorney General’s authorization to retain or transfer the forfeited assets and in turn requiring the forfeited assets to be deposited into the General Fund of the Treasury. Furthermore, § 981(e)(7) is amended by removing the first two sentences, “The Attorney

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*; see The Fifth Amendment Integrity Restoration Act, S. 2644, § 3–4, 113th Congress (2013–14).

¹⁷⁷ S. 2644, § 2.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* § 3. See also 21 U.S.C. § 881(e)(1) (2015).

General... shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate state or local law enforcement agency so as to reflect the contribution of any such agency participating directly in any of the acts which led to the seizure and forfeiture of such property.”¹⁸⁰

Lastly, section 4 of the FAIR Act amends 28 U.S.C. § 524(c)(4) by striking subparagraphs (A) and (B),¹⁸¹ which provide for the deposit in the Asset Forfeiture Fund all amounts of forfeited property by the Department of Justice ¹⁸², as well as all amounts representing the federal equitable share for any federal agency participating in the Asset Forfeitures Fund.¹⁸³

Simply put, the FAIR Act provides for three drastic changes to the current federal civil forfeiture regime. First, the FAIR Act increases the government’s standard of proof in civil forfeiture proceedings, requiring the government to prove the property’s forfeitability by clear and convincing evidence.¹⁸⁴ This represents a significant increase from the current preponderance of the evidence standard. The harder it is for the government to prove the property’s forfeitability, the more protection property owners are afforded. Additionally, by eliminating federal equitable sharing, the Act would require state and local law enforcement agencies to abide by state laws when forfeiting seized property.¹⁸⁵ State and local enforcement agencies will no longer be able to federalize or adopt forfeitures, and must proceed through their own applicable state laws. So, state and local law enforcement agencies will no longer be able to reap the financial or evidentiary benefits of federal law. Last, the Act redirects forfeited assets

¹⁸⁰ S.2644, § 3. *See also* 18 U.S.C. § 981(e) (2015).

¹⁸¹ S. 2644, § 4.

¹⁸² *See, e.g.*, 28 U.S.C. § 525(c)(4)(A) (2015).

¹⁸³ § 524(c)(4)(B).

¹⁸⁴ *See* Sen. Paul Press Release, *supra* note 39.

¹⁸⁵ *Id.*

from the Justice Department's Asset Forfeiture Fund to the U.S. Treasury General's Fund, disabling federal law enforcement agencies' ability to receive the forfeited assets directly from their seizures without accountability or budgetary constraint.¹⁸⁶ Redirecting forfeited assets to the General Fund of the Treasury ensures congressional oversight of the distribution of such funds.

B. Attorney General's Executive Policy Order

During the process of writing this comment, on January 16, 2015, Attorney General Eric Holder issued a policy order limiting a significant portion of the federal equitable sharing program.¹⁸⁷ The order bans the federal adoption (i.e., adoptive forfeitures) of property seized by state and local law enforcement under state law, with one categorical exception for property directly related to public safety concerns.¹⁸⁸ The public safety exception includes firearms, ammunition, explosives, and property associated with child pornography.¹⁸⁹ Effective immediately, vehicles, valuables, and cash are prohibited from federal adoption, requiring state and local law enforcement to proceed pursuant to their respective state laws.¹⁹⁰

Attorney General Holder's order banning adoptive forfeitures represents a significant victory for individual property owners across the nation, as Equitable Sharing and federal adoptions have been at the heart of forfeiture criticism for at least two decades.¹⁹¹ But, one important limitation to note is that this prohibition only extends to adoptive forfeitures, and does not affect the other category of equitable sharing, joint investigations. Thus, state and local law

¹⁸⁶ *Id.*

¹⁸⁷ Press Release, Attorney Gen. Eric Holder, Prohibition On Certain Federal Adoptions Of Seizures By State and Local Law Enforcement Agencies (Jan. 16, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Hyde, *supra* note 64, at 80.

enforcement agencies are still permitted to engage in the equitable sharing of seized assets through joint investigations with federal authorities, joint task forces with federal authorities, or through the issuance of federal seizure warrants.

Part V: Why Congress Should Enact the FAIR Act

The FAIR Act should be enacted by Congress because it appropriately equalizes the burdens and standards of proof, removes law enforcement's lingering profit incentive, and ensures that appropriate state laws are not purposely evaded by state and local law enforcement agencies.

A. The Clear and Convincing Standard of Proof

Currently, in civil forfeiture proceedings the government must establish—by a preponderance of the evidence—that the property is subject to forfeiture.¹⁹² Recognizing that the current allocation is inadequate, the FAIR Act increases the government's standard of proof to a clear and convincing evidence standard.¹⁹³ The clear and convincing standard requires a higher degree of certainty than a preponderance of the evidence, but less than the criminal standard of beyond a reasonable doubt.¹⁹⁴

Raising the standard of proof to a clear and convincing evidence standard aligns with the true character of *in rem* civil forfeitures.¹⁹⁵ This middle-ground standard of proof appropriately illustrates that the government alleging that a crime has taken place, and seeks to punish the wrongdoing through the forfeiture of assets. Indeed, critics have argued that the punitive essence of *in rem* civil forfeitures equates more with standard criminal proceedings than civil

¹⁹² See, e.g., 18 U.S.C. 983(c)(1)

¹⁹³ Sen. Paul Press Release, *supra* note 39.

¹⁹⁴ Holcomb, *supra* note 25, at 278.

¹⁹⁵ See Johnson, *supra* note 101, at 1075–78.

proceedings.¹⁹⁶ And this criticism is exactly on point. The Supreme Court has expressed a similar description, concluding that forfeiture is “quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law.”¹⁹⁷ Combined with the fact that the property owner’s guilt or innocence is irrelevant to the forfeiture as it is filed *in rem* against the property itself,¹⁹⁸ this perceived notion of criminality does not resonate with the preponderance of the evidence standard of proof, and is an issue that must be addressed by Congress.

Interestingly, the clear and convincing standard of proof was initially proposed in Rep. Henry Hyde’s Civil Asset Forfeiture Reform Act of 1993.¹⁹⁹ Explaining why he choose clear and convincing evidentiary standard of proof, he noted “there comes a point where civil penalties are so overwhelmingly punitive in nature that a high burden of proof should be assigned to the government.”²⁰⁰ For example, the story of 72-year-old retired carpenter and cancer patient Thomas Williams demonstrates the potentially devastating consequences associated with asset forfeiture’s low burden of proof.²⁰¹ During one quiet November morning in 2013, the Southwestern Enforcement Team, an agency operated by the Michigan State Police, raided Mr. William’s home with a battering ram, black masks, and holding guns at their sides alleging that Mr. Williams was a marijuana dealer.²⁰² Mr. William’s carries a medical marijuana card thereby allowing him to cultivate up to 12 personal marijuana plants in his home. Instead of charging Mr.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*; (citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (citing *Boyd v. United States*, 116 U.S. 616, 634 (1886)).

¹⁹⁸ Ross, *supra* note 115, at 263.

¹⁹⁹ Hyde, *supra* note 64, at 79. *See also* Levy, *supra* note 74, at 210.

²⁰⁰ *Id.* at 60.

²⁰¹ L.L. Brasier, *Police Seize Property and Cash in Questionable Raids*, DETRIOT FREE PRESS, Feb. 23, 2015, <http://www.freep.com/story/news/local/michigan/2015/02/22/civil-asset-forfeiture-michigan-seizures-aclu-heritage-foundation-institute-justice/23737663/>.

²⁰² *Id.*

Williams with a crime, the police seized his Dodge Journey, \$11,000 in cash, his television, his cell phone, his shotgun, and are attempting to take his home.²⁰³ As a result of the seizure, Mr. Williams, a feeble and disabled 72-year-old man who lives alone without a landline, was stranded for days without his cell phone or car until somebody stopped by to check on him.²⁰⁴ Like many other stories involving innocent property owners, more than a year after the seizure, Mr. William's is still fighting to get his belongings back and retain possession of his house.²⁰⁵

If the government is alleging that a crime has occurred and is punishing therewith, it is extremely hard to justify the forfeiture based on a preponderance of the evidence, a determination of whether the property is more likely than not forfeitable. The FAIR Act's clear and convincing evidence standard of proof appropriately illustrates and implements the 'quasi-criminal' nature of civil in rem forfeitures, and requires the Government to produce evidence of the property's forfeitability that is *substantially* more likely than not true.

Additionally, the FAIR Act would provide innocent owners with practical protection. As discussed in Part III, the application of the innocent owner's defense results in an unlevelled allocation of the burdens of proof, with the government enjoying the favorable burden. The FAIR Act addressed this concern in section 2 by requiring the government to produce clear and convincing evidence of the "substantial connection between the property and the offense" as well as the owner's "intentional use," "knowing consent," or "willfully blind" use of the property in connection with the offense.²⁰⁶ The clear and convincing evidence standard bolsters the procedural protections afforded to innocent property owners by initially requiring the government to produce stronger evidence of the property's forfeitability before the burden is

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ The Fifth Amendment Integrity Restoration Act, S. 2644, § 2, 113th Congress (2013–14).

shifted to the property owner.²⁰⁷ Under the Act, in order to establish the innocent owners defense, property owners will continue to bear the heavy burden of negating the government's allegations by a preponderance of the evidence.²⁰⁸ The heavy burden stems from the requirement that individuals establish the innocence of their property through rebutting the government's allegations of guilt. But, before innocent property owners bear this burden, the government must first prove the property's forfeitability by clear and convincing evidence.

While proponents of the current civil forfeiture system may argue that raising the government's standard of proof will create an unbalanced evidentiary advantage favoring property owners,²⁰⁹ in reality it will properly align the allocation of the burdens and standards of proof in all federal civil asset forfeiture proceedings. The practical feasibility of the clear and convincing standard of proof is evidenced by the fact that thirteen states have already enacted their own forfeiture laws implementing and adopting a clear and convincing evidence standard upon the government.²¹⁰ Even though they are not in the majority, the fact that *thirteen* states²¹¹ have passed more stringent legislation than the federal government illustrates that the clear and convincing evidence standard is both practically feasible and sustainable.

B. Elimination of the Profit Incentive

The FAIR Act removes federal law enforcement's profit incentive and accountability issues by redirecting forfeiture funds from the Justice Department's Asset Forfeiture Fund to the General Fund of the Treasury. As discussed in Part III, above, by depositing the funds into the

²⁰⁷ Moores, *supra* note 166, at 799.

²⁰⁸ 18 U.S.C. § 983(d).

²⁰⁹ The FAIR Act does not change the preponderance of the evidence standard of proof in the Innocent Owner defense, and thus the balance of the burdens appear to favor the property owners.

²¹⁰ Institute for Justice, *supra* note 129.

²¹¹ *Id.*

General Fund of the Treasury, the Attorney General will no longer possess unbridled discretion in the distribution of the forfeited assets, and congressional oversight and accountability will be restored thereby alleviating the constitutional issue of the Appropriations Clause.²¹²

In addition to restoring accountability, directing funds to the General Fund of the Treasury would eliminate the profit incentive inherent in the current regime.²¹³ Currently, federal forfeiture proceeds are deposited into the Justice Department's Asset Forfeiture Fund and allocated to the seizing agency by the Attorney General to be used for law enforcement purposes only.²¹⁴ By redirecting the forfeited assets into the General Treasury Fund, the FAIR Act ensures that the funds will be appropriated based on areas and departments of need.²¹⁵ This method of distribution aligns with the duties and functions of the Department of the Treasury, as the Treasury is responsible for "operating and maintaining systems that are critical to the nation's financial infrastructure" including revenue collection.²¹⁶ Furthermore, depositing forfeiture proceeds in the General Fund of the Treasury disables law enforcement agencies from retaining all of the assets that they seize, and such agencies would no longer possess the ability to directly fund themselves through forfeitures.²¹⁷ Thus, the FAIR Act eliminates law enforcement's profit incentive because the General Fund of the Treasury will not distribute all of the forfeited assets back to the seizing agency for law enforcement uses only, as the current Asset Forfeiture Fund permits. In theory, this would eliminate any conflict of interest upon law enforcement to stray their attention from actual crime prevention goals and objectives.²¹⁸

²¹² Blumenson & Nilsen, *supra* note 76, at 109.

²¹³ Moores, *supra* note 166, at 798-99.

²¹⁴ 21 U.S.C. § 881; *see* Moores, *supra* note 166, at 793.

²¹⁵ Moores, *supra* note 166, at 798.

²¹⁶ U.S. DEPARTMENT OF THE TREASURY, *About: Duties & Functions of the U.S. Department of the Treasury* (Feb. 22, 2011, 1:25pm), <http://www.treasury.gov/about/role-of-treasury/Pages/default.aspx>.

²¹⁷ Blumenson & Nilsen, *supra* note 76, at 88; *see also* Moores, *supra* note 166, at 793.

²¹⁸ Blumenson & Nilsen, *supra* note 76, at 56.

C. Ending the Federal Equitable Sharing Program

The FAIR Act ensures that individual state's laws will not be circumvented or evaded by eliminating the practice of federal equitable sharing. Through the elimination of the equitable sharing, the FAIR Act disallows state and local law enforcement agencies to forum shop their seizures, through adoptive forfeitures, in order to maximize revenue or evidentiary benefits, thereby comporting with the fundamental principle of federalism.

The current practice of equitable sharing by state and local law enforcement agencies infringes upon the fundamental constitutional principle of federalism.²¹⁹ Federalism involves the concept of “dual sovereignty”, providing for a balance of power between the federal government and individual states, as certain powers are constitutionally enumerated to the federal government and all other powers belonging to the sovereign states.²²⁰ This principle is embedded throughout the Constitution, including: the Judicial Power Clause (Art. III, sec. 2), the Privileges and Immunities Clause (Art. IV, sec. 2), the Guarantee Clause (Art. IV, sec. 4), the amendment provision (Art. V), and the enumerated powers of Congress (Art I., sec. 8).²²¹ The idea of state sovereignty is illustrated in the Tenth Amendment of the U.S. Constitution, providing “the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”²²² Thus, dual sovereignty involves the independent and concurrent authority and jurisdiction over the people between federal and state governments.²²³ This concept does not provide for complete independence, as

²¹⁹ Duffy, *supra* note 157, at 199; *see also* Moores, *supra* note 166, at 794; Blumenson & Nilsen, *supra* note 76, at 105.

²²⁰ Duffy, *supra* note 157, at 513 (citing generally *Printz v. United States*, 521 U.S. 898, 919 (1997)).

²²¹ *Printz*, 521 U.S. at 919 (citing *Lane Cnty v. Oregon*, 74 U.S. 71, 76 (1869); *Texas v. White*, 74 U.S. 700, 725 (1869)).

²²² U.S. CONST. amend. V.

²²³ Duffy, *supra* note 157, at 513 (citing *Printz*, 521 U.S. at 934–935).

Congress retains certain authority to regulate state activity, i.e., through the Commerce Clause.²²⁴ But, Congressional authority to regulate state activity comes with limitations. As set forth in *Printz v. United States*, “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program... such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”²²⁵ In simpler terms, the federal government cannot force state governments to cooperate with federal regulatory programs against their will.

The Supremacy Clause of the United States Constitution provides that federal law “shall be the supreme law of the land”, notwithstanding the contrary law any state might have.²²⁶ The clause establishes federal precedence over states’ laws and constitutions. Simply put, federal laws trump or preempt any conflicting state law, thereby establishing this ground floor that invalidates state law in conflict. The Supreme Court has posited that the constitutional principle still allows states to have discretion in the creation, adoption, and enforcement of their respective laws, particularly in when Congress has “legislated... in a field which the States have traditionally occupied.”²²⁷ The Court further held that “the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”²²⁸ The argument can be made that the federal equitable sharing program conflicts

²²⁴ *Id.* at 537 (citing *New York v. United States*, 505 U.S. 144, 173 (1992) (explaining that Congress must either offer states the option of regulating certain activity or preempt states by removing their ability to regulate the activity altogether).

²²⁵ *Printz*, 521 U.S. at 935.

²²⁶ U.S. CONST. art. VI, cl. 2.

²²⁷ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

²²⁸ *Id.*

with this fundamental constitutional principle, as Congress “clear and manifest purpose” was not to remove the police powers of the States.²²⁹

As discussed in Part III, above, when state and local law enforcement agencies proceed through federal equitable sharing via adoptive forfeitures, the seized assets are transferred to a federal agency for federal proceedings, liquidated, and then distributed back to the state or local seizing agency for the purpose of law enforcement use only, completely disregarding the state’s law pertaining to standard of proof and the distribution of forfeited assets.²³⁰ This violates the fundamental principles of federalism and state sovereignty because states are powerless with no choice in the matter but to comply with the equitable sharing and adoptive forfeitures.²³¹ The current situation is completely at odds with the concept of state sovereignty, “the preservation of states as independent and autonomous political entities”,²³² because states are unable to enforce their own laws pertaining to the distribution of forfeited assets and the standard of proof necessary to establish the property’s forfeitability. Instead of requiring state and local law enforcement agencies to abide by state mandated legislation, the federal equitable sharing program and the existence of adoptive forfeitures provides an avenue for state and local law enforcement agencies to circumvent the applicable state law in order to reap the distribution and evidentiary benefits available through federal asset forfeiture law. Upon adoption of the seizure by a federal agency, the forfeiture proceedings commence under federal law and jurisdiction, leaving the state powerless to adjudicate the proceeding under their legislation. The lack of choice on the part of states does not resonate with the concurrent and independent authority

²²⁹ *Id.*

²³⁰ *See infra* Part III.

²³¹ *Id.*

²³² *Printz*, 521 U.S. at 928.

under dual sovereignty, and practice of federal equitable sharing and adoptive forfeitures should be recognized as an unconstitutional command enforcing a federal regulatory program.²³³

Through the elimination of the equitable sharing, the FAIR Act disables state and local law enforcement agencies from circumventing appropriate state law in order to maximize revenue or evidentiary benefits. The abuse of the equitable sharing program should be recognized as nothing less than infringing upon the fundamental principle of federalism and must be abolished.

Part VI: Conclusion

The time has come to reform federal civil forfeiture law. CAFRA provided the first reform of the civil forfeitures laws, but left several glaring inequities. Currently, the federal government enjoys too low of an evidentiary standard of proof, triggering due process concerns, and restricting the practical application of the innocent owner defense. The preponderance of the evidence standard currently utilized in civil *in rem* forfeitures can no longer be justified and does not align or resonate with the true character of such proceedings, as individual property owners are deprived of their property without compensation because the government has alleged that a crime has taken place, and does not align with the true character of such proceedings. Senator Paul's FAIR Act requires the government to prove the property's forfeitability by a clear and convincing evidence standard, a necessary step in the protection of individual's fundamental property rights.

In addition, the practice of federal equitable sharing provides state and local law enforcement agencies with the opportunity to circumvent state law and proceed under federal jurisdiction in order to benefit from favorable advantages, whether that is an easier evidentiary

²³³ Duffy, *supra* note 157, at 537.

standard of proof or the ability to receive back a larger percentage of the forfeiture funds through distribution. The FAIR Act alleviates this problem by eliminating the equitable sharing program and requiring state and local law enforcement agencies to abide by their own state law. Attorney General Holder's recent ban of adoptive forfeitures provides the FAIR Act with a foundation to its implementation, but it is only the first step toward correcting the abuses of civil asset forfeiture.

Last, the ability to directly retain forfeited assets provides law enforcement agencies with an unjust profit incentive. The lack of congressional budgetary accountability further exacerbates this problem, as the Attorney General retains vast authority and discretion over the use and distribution of the current Justice Department's Asset Forfeiture Fund. The FAIR Act removes this concerning profit incentive by redirecting the forfeited assets from the Justice Department Asset Forfeiture Fund to the General Fund of the Treasury. By depositing the funds in the General Fund of the Treasury, the Attorney General will no longer possess the authority to distribute the forfeited assets directly back to the seizing agency via the Asset Forfeiture Fund, and federal law enforcement agency's incentive to engage in profitable civil forfeitures is effectively eliminated.

Despite addressing several prominent areas of civil asset forfeiture abuse, the FAIR act fails to eliminate all of the concerning systematic inequities present in the current civil asset forfeiture regime. Nearly eighty percent of all forfeitures in federal court proceed uncontested.²³⁴ While the FAIR Act addresses the back-end of this problem by raising the standard of proof necessary to establish a property's forfeitability in an *in rem* judicial proceeding, the Act fails to rectify the standard of proof necessary to permit the initial seizure of

²³⁴ Levy, *supra* note 74 at 130.

the individual's property; leaving property owners in a financial plight as they are forced to expend considerable amount of money on legal fees in order to contest the forfeiture in a judicial proceeding.

Thus, enacting the FAIR Act will finish the job CAFRA left undone. In order to provide an adequate level of protection to individuals' property rights, the status quo cannot be maintained. If enacted, the FAIR Act will not only provide the appropriate protection to the citizens of this great nation, but also restore the fundamental constitutional principle of federalism that has been embedded in our society since its creation.