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One Crime, Two Punishments - Asset Forfeiture Cases Offer Chance to Sort out Double Jeopardy Issues

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Asset forfeiture cases offer chance to sort out double jeopardy issues

BY RICHARD C. REUBEN

At a time when anti-government sentiment is running high in some quarters, the U.S. Supreme Court is considering several cases on the hot-button issue of government seizure of private property linked to crimes, known as asset forfeitures.

Critics of big government "might well point to forfeiture as another example of the problems that come with entrusting matters to a bureaucracy, particularly one with a financial interest that could skew law enforcement decisions," observes forfeiture expert Gary M. Maveal, a law professor at the University of Detroit Mercy School of Law.

The justices already have heard arguments in two cases this fall, and are expected to add at least one or two others to the docket.

Congress began dramatically expanding the forfeiture power in 1984. There are now more than 100 such federal laws, and civil forfeiture proceedings have become a key weapon in the war on crime and drugs.

But critics claim asset forfeiture gives unfair leverage to the government in criminal cases. "It allows the government to whipsaw the forfeiture claimant by forcing him to defend on both the civil and criminal fronts," says Richard J. Troberman, a Seattle lawyer who chairs the Forfeiture Abuse Task Force of the National Association of Criminal Defense Lawyers.

The Supreme Court, in its current conservative mode, might be expected to be sympathetic to prosecution needs. But forfeiture is one area in which the Court has been putting on the brakes, issuing four pro-defendant opinions since 1992.

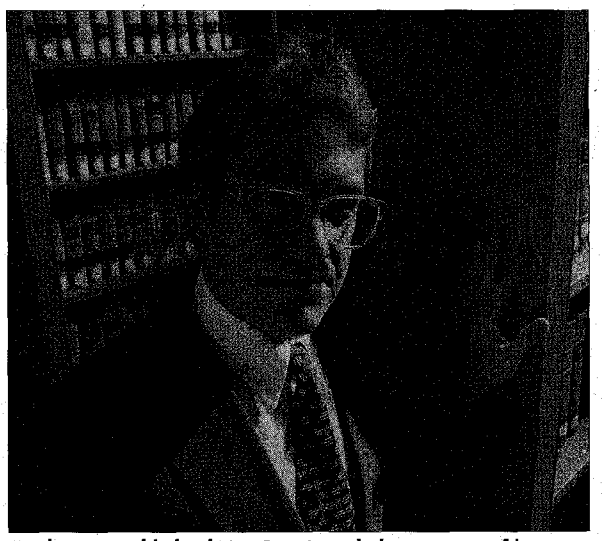
This paradox speaks directly to fissures in conservative legal thought. Crime is abhorrent, beyond a doubt, but in the view of conservatives, so is unchecked government—particularly when it exercises its power by confiscating private property.

That tension is apparent throughout this term's cases.

For instance, *Bennis v. Michigan,* No. 94-8729, argued in November, questions whether the government may seize the property of an innocent party.

Bennis involves the confiscation by Detroit police, under state law, of a car in which they caught John Bennis in a sex act with a known prostitute.

The Michigan courts upheld the forfeiture of Tina Bennis' half interest in the car, even though she did not know her husband was using it for illicit purposes.



Stephan Herpel helped Tina Bennis seek the recovery of her car.

Before the Supreme Court, Mrs. Bennis is challenging that ruling on grounds that the forfeiture was an unconstitutional "taking" of private property.

Forfeiture of Third-Party Interests

Innocent owners also factored into *Libretti v. United States,* No. 94-7427, which was argued before the Court on Oct. 3.

Midway through his drug-crimes trial, Joseph V. Libretti agreed to a deal with prosecutors that included the forfeiture of all tainted property. After the plea was entered, however, several third parties challenged the forfeiture, contending that their innocent interests were being forfeited, as well.

Reversing the trial court, the 10th U.S. Circuit Court of Appeals at Denver held that trial courts do not have to find a factual basis for forfeiture under Rule 11(f) of the Federal Rules of Criminal Procedure because forfeiture is part of the plea-bargained punishment rather than a part of the substantive offense.

The impact of these cases may prove limited. Most state and federal statutes, for instance, are believed to include specific exemptions for innocent owners.

Similarly, federal forfeiture policy has changed since the lower courts considered *Libretti*, and now calls for prosecutors to suggest that trial courts find a factual basis for forfeitures.

The Court is expected, however, to move into more fundamental ground later this term by granting review on the more controversial issue of whether a prior civil forfeiture action bars a criminal prosecution, or vice versa, under the double jeopardy clause of the Fifth Amendment.

At least two federal circuit courts earlier this year held that double jeopardy bars the subsequent criminal action, in *United States v. $405,089.23 U.S. Currency,* 33 F.3d 1210 (9th Cir.) and *United States v. Ursery,* 59 F.3d 568 (6th Cir.).

"These rulings have thrown forfeiture into present turmoil because of the uncertainty in the law," says Stefan D. Cassella, a leading trial attorney in the Justice Department's forfeiture program.

A Supreme Court decision barring civil forfeiture and criminal prosecution in the same case, he says, would force prosecutors "to choose between seeking a criminal prosecution and a civil forfeiture in cases where there is no criminal forfeiture statute." ■

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