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## The Next Step in Civil Asset Forfeiture Reform: Passing the Civil Asset Forfeiture Reform Act of 2014

### Cover Page Footnote

J.D. The Catholic University of America, Columbus School of Law, 2017; B.A. Hampden-Sydney College, 2012. The author would like to thank Professor Brooks B. Singer for providing invaluable guidance, suggestions, corrections, and for sharing his time and expertise. The author would also like to thank Alyson Parker Kierzewski, Janine Bakalis, Jenn Bruneau, and the editors and staff of the Catholic University Law Review for their assistance in editing and publishing this Note.

# THE NEXT STEP IN CIVIL ASSET FORFEITURE REFORM: PASSING THE CIVIL ASSET FORFEITURE REFORM ACT OF 2014

*Daniel Reed*<sup>+</sup>

One of our most cherished notions as American citizens is that our private property should be secure.<sup>1</sup> People should not have their property taken away without due process of law, and the Fifth Amendment of the Constitution codifies this fundamental principle.<sup>2</sup> Considering the importance of private property in our society,<sup>3</sup> the American people might assume that the federal government would do everything in its power to uphold basic property rights. However, in the murky world of civil asset forfeiture, this is not the case.

Consider the story of Lyndon McLellan: an average citizen and convenience store owner living in North Carolina.<sup>4</sup> Acting on the advice of his local bank teller, he kept his deposits of convenience store profits below \$10,000 to save his bank burdensome paperwork.<sup>5</sup> He could not have predicted that his well-intentioned act would get him into trouble with the United States Government.<sup>6</sup>

In July 2014, the Internal Revenue Service (IRS) seized all \$107,702.66 of McLellan's bank account without notice, accusing him of unlawfully "structuring" deposits to avoid reporting requirements.<sup>7</sup> Despite never being charged with a crime, McLellan suffered a protracted legal battle.<sup>8</sup> After ten grueling months and the intervention of a public interest law firm, the IRS finally

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1. ROGER PILON, THE CONSTITUTIONAL PROTECTION OF PROPERTY RIGHTS: EUROPE AND AMERICA 3–4 (2008), [http://object.cato.org/sites/cato.org/files/articles/pilon\\_031009.pdf](http://object.cato.org/sites/cato.org/files/articles/pilon_031009.pdf).

2. U.S. CONST. amend. V. A person shall not be "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.*

3. See PILON, *supra* note 1, at 1–2, 7–8 (discussing private property rights under the Constitution and the importance attached to such rights by the Framers).

4. Jason Pye, *This Business Owner Fought IRS Abuse of Civil Asset Forfeiture and Forced the Government to Return \$107,000 of Wrongfully Seized Cash*, FREEDOMWORKS (May 20, 2015), <http://www.freedomworks.org/content/business-owner-fought-irs-abuse-civil-asset-forfeiture-and-forced-government-return-107000>.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

returned his money.<sup>9</sup> Unfortunately, McLellan's story is far more common than one might expect.

Thousands of forfeiture cases are prosecuted annually in the United States and frequently involve owners who have not been charged with a crime in connection to the forfeited property.<sup>10</sup> Such forfeitures are known as "civil asset forfeitures" (or "civil forfeitures") because the proceedings are non-criminal and are considered to be against the property *in rem* rather than against the owner as a defendant.<sup>11</sup> Civil asset forfeiture can be greatly effective when taking property from criminal organizations and depriving people with unclean hands from benefitting from illegal activity.<sup>12</sup> Unfortunately, the lax regulations surrounding civil asset forfeiture have created an environment where abuse can thrive, with law enforcement often pursuing civil forfeitures out of inappropriate financial motivations.<sup>13</sup> As a result, many innocent people have found themselves caught in a dragnet originally intended to repurpose the assets of hardened criminals and scofflaws.<sup>14</sup>

With stories of questionable forfeitures becoming commonplace in the news, some members of Congress took notice of the inadequate protections offered under current civil asset forfeiture laws. On July 28, 2014, Representative Tim Walberg (R-MI) introduced a bill titled the Civil Asset Forfeiture Reform Act of 2014 (CAFRA 2014).<sup>15</sup> The Act proposes some important changes to federal civil asset forfeiture laws, including raising the burden of proof, expanding

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9. *Id.*

10. U.S. DEP'T OF THE TREASURY, 2007 NATIONAL MONEY LAUNDERING STRATEGY 101 (2007), <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/nmls.pdf>. A report from the Department of the Treasury noted that in fiscal year 2004 the Department of Justice filed 3,785 criminal asset forfeiture cases and 2,235 civil forfeiture cases. See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 48–49 (1998) ("There is no constitutional requirement that the property owner be at fault, or be prosecuted for the underlying criminal activity.").

11. Jennifer Levesque, *Property Rights - When Reform Is Not Enough: A Look Inside the Problems Created by the Civil Asset Forfeiture Reform Act of 2000*, 37 W. NEW ENG. L. REV. 59, 65–66 (2015). An action *in rem* is "an action determining the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property; a real action." See *Action in Rem*, BLACK'S LAW DICTIONARY (10th ed. 2014). *In rem* translated from Latin means "against a thing." *Id.* at *In Rem*.

12. Rachel L. Stuteville, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture to Take from Property Owners and Pad the Pockets of Local Government - The Righteous Hunt for Reform Is On*, 46 TEX. TECH L. REV. 1169, 1178–79 (2014).

13. 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, 1046, 1073–74 (2002) (discussing several flaws in current civil asset forfeiture laws and the government's financial motivation in civil forfeiture cases).

14. HENRY J. HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE 5–6 (1995); see also Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT'G REP. 87, 87 (2001).

15. Civil Asset Forfeiture Reform Act of 2014, H.R. 5212, 113th Cong. (2014).

notice of the right to counsel, and broadening proportionality considerations.<sup>16</sup> However, it quickly became bogged down in Congressional inefficiency, and gathered dust on the shelf of the House Judiciary Committee for over three years.<sup>17</sup> This Note will argue that CAFRA 2014 should pass because previous attempts at civil asset forfeiture reform have provided inadequate protection to the American people from civil forfeiture abuse.

Of the previous forfeiture reforms, the Civil Asset Forfeiture Reform Act of 2000 (CAFRA 2000) had the most impact.<sup>18</sup> CAFRA 2000 established some basic protections for property owners involved in forfeiture proceedings.<sup>19</sup> Ultimately, however, it did not do enough to protect citizens from civil forfeiture abuse.<sup>20</sup> CAFRA 2000's burden of proof is the preponderance of the evidence standard, which is an inappropriately light standard for the government to prove.<sup>21</sup> While the innocent owner defense is available, the burden of proof is improperly placed on the claimant to show that he or she is an innocent owner.<sup>22</sup> CAFRA 2000's notice requirements, proportionality standards, and equitable sharing restrictions are all inadequate to afford individuals appropriate protection from forfeiture abuse.<sup>23</sup>

After discussing the history of civil asset forfeiture, this Note analyzes CAFRA 2014 and examines its potential impact on the civil asset forfeiture process. This Note then reviews some deficiencies with current federal civil forfeiture laws and will examine the proposed changes in CAFRA 2014. After considering the positive impact that the proposed changes could have on civil asset forfeiture, this Note argues that Congress should pass CAFRA 2014 to provide beneficial reforms to federal civil asset forfeiture laws.

## I. FORFEITURE THROUGH THE AGES

### A. *From Exodus to the King's Treasury*

The modern concept of civil asset forfeiture originated from an ancient legal fiction dating back to biblical times.<sup>24</sup> A legal fiction exists when a fact is

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16. *Id.*

17. *H.R. 5212 (113th): Civil Asset Forfeiture Reform Act of 2014*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/hr5212> (last visited Apr. 4, 2017).

18. 18 U.S.C. §§ 981, 983 (2012 & Supp. III 2016); *see also* Johnson, *supra* note 13, at 1046, 1073–74; *see generally* Civil Asset Forfeiture Reform Act of 2000, H.R. 1658, 106th Cong. (2000).

19. §§ 981, 983.

20. *See* Johnson, *supra* note 13, at 1046.

21. *See* Levesque, *supra* note 11, at 76–78.

22. Darpana M. Sheth, *Policing for Profit: The Abuse of Forfeiture Laws*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 24, 27 (2013).

23. Civil Asset Forfeiture Reform Act of 2014, H.R. 5212, 113th Cong. (2014). *See* discussion *infra* Part I.F–K.

24. *See* Isaiah M. Hunter, *The War on Drugs and Taxes: How Tax Expenditure Analysis Can Shed Light on Civil Asset Forfeiture*, 9 NYU J.L. & LIBERTY 549, 551 (2015) (explaining that “civil asset forfeiture is rooted in the ancient legal fiction of the deodand,” which required property “used

assumed or created by an interpreting authority to justify a particular rule or operation of law.<sup>25</sup> In the forfeiture context, an example of the legal fiction at work can be seen in the book of Exodus, which stated “when an ox gores a man or woman to death, the ox must be stoned; its flesh may not be eaten. The owner of the ox, however, shall go unpunished.”<sup>26</sup> The idea was that chattel involved in a harmful act against humans was guilty of an offense against God’s “divinely ordained hierarchy of creation,” and could subsequently be destroyed for crimes of “high treason.”<sup>27</sup>

Medieval English scholars used biblical, Anglo-Saxon, and Roman traditions to create the first rudimentary forfeiture laws.<sup>28</sup> Building on the pre-Norman conquest practice of “noxal surrender,” which involved the gift of an animal or object causing death or serious injury (known as a “bane”) to a victim’s family as compensation,<sup>29</sup> scholars developed the concept of the deodand. The deodand, mistranslated from the Latin “deo dandum” meaning “given to God,” called for an object used in criminal conduct, or otherwise causing harm to a human, to be forfeited to the English crown.<sup>30</sup> The Coroner’s Rolls of thirteenth-century England provide examples of the deodand at work.<sup>31</sup> One account from Bedfordshire mentioned a sword seized after the arrest of an armed robber in the village of Sudbury: “[t]he township of Sudbury came with the hue and arrested John the felon . . . The sword is worth [twelve] pence and it is delivered to the township of Sudbury.”<sup>32</sup> The Coroner’s Rolls regularly mentioned seized property that was forfeited to the crown, including such things as vessels holding

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in [a] crime to be destroyed” on the grounds that it was “intrinsically evil”); Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 79–80 (2001) (citing PIERRE J.J. OLIVIER, *LEGAL FICTIONS IN PRACTICE AND LEGAL SCIENCE* 81 (1975)) (discussing the nature of a legal fiction, including a quotation from Professor Olivier who stated “a legal fiction is an assumption of fact deliberately, lawfully, and irrefutably made contrary to the facts proven or probable in a particular case, with the object of bringing a particular legal rule into operation or explaining a legal rule, the assumption being permitted by law or employed in legal science.”).

25. See *Legal Fiction*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“An assumption that something is true even though it may be untrue, made esp. in judicial reasoning to alter how a legal rule operates; specif., a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object.”).

26. *Exodus* 21:28.

27. Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L. Q. 169, 180–81 (1973).

28. *Id.* at 181–82.

29. Anna Pervukhin, *Deodands: A Study in the Creation of Common Law Rules*, 47 AM. J. LEGAL HIST. 237, 241 (2005).

30. Barnet, *supra* note 24, at 87.

31. See SELECT CASES FROM THE CORONERS’ ROLLS, A.D. 1265–1413 (Charles Gross ed., William S. Hein & Co., Inc. 1996) (1895).

32. *Id.* at 2. To finish the story, the Coroners’ Rolls state that “the said John, Richard Herbert’s son, struck William the Shepard with a sword on the right side of his head and cut away a portion of the head with the brains and the right ear, so that he died forthwith on the said bridge.”

boiling substances that scalded people to death.<sup>33</sup> The deodand could also include property unrelated to the cause of death of a victim, such as a lamb belonging to a murderer.<sup>34</sup> The deodand continued throughout medieval and early-modern England,<sup>35</sup> and vestiges of the concept followed British settlers to the United States,<sup>36</sup> despite widespread antipathy towards the practice.

### B. Forfeiture in the New Republic

In light of some hated British practices—such as the granting of Writs of Assistance, which gave crown officials a commission on seized goods—forfeiture was a detested practice in the American colonies.<sup>37</sup> Despite philosophical opposition, civil asset forfeiture took hold in the United States in several forms out of practical necessity.<sup>38</sup>

Admiralty law was one area where civil asset forfeiture was commonly used.<sup>39</sup> American legislatures grudgingly embraced civil asset forfeiture in this context as an important tool to combat maritime offenses and enforce customs laws.<sup>40</sup> One famous U.S. Supreme Court case involved the forfeiture of a Spanish pirate ship, *The Palmyra*.<sup>41</sup> Justice Story, writing the opinion for the court, affirmed the use of forfeitures *in rem* to seize property without a corresponding conviction of the property owner.<sup>42</sup> Ship owners guilty of smuggling or piracy were

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33. *Id.* at 15.

34. *Id.*

35. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974) (stating that “English Law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws—likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer”); Finkelstein, *supra* note 27, at 170 (observing that the deodand continued to operate in England until it was statutorily abolished in 1846).

36. *Calero-Toledo*, 416 U.S. at 683 (citing *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 139 (1943)) (“Long before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of (English and local) forfeiture statutes . . . .”); see also *J. W. Goldsmith, Jr., Grant Co. v. United States*, 254 U.S. 505, 511 (1921) (noting that although courts may question the propriety of asset forfeiture, “it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced”).

37. Blumenson & Nilsen, *supra* note 10, at 75–76; 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, 89 (2000).

38. See *infra* notes 39–42 and accompanying text.

39. *Locke v. United States*, 11 U.S. (7 Cranch) 339, 344 (1813) (upholding the forfeiture of a ship’s cargo for violations of customs laws); Brent Skorup, *Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases*, 22 GEO. MASON U. C.R. L.J. 427, 433 (2012).

40. LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 43 (1996); Barnett, *supra* note 24, at 91.

41. *The Palmyra*, 25 U.S. (12 Wheat.) 1, 3 (1827).

42. Justice Story’s opinion entrenched the constitutional legitimacy of civil *in rem* forfeitures.

difficult to prosecute in person because they were often absent and far outside the court's jurisdiction.<sup>43</sup> As such, the ability to gain *in rem* jurisdiction over vessels and cargo was quite useful in fighting nautical crimes because a "suspicious vessel could be arrested and prosecuted by name by the government, and the law treated the ship as if it were a guilty person."<sup>44</sup>

### C. Bootleggers, Mules, and Automobiles

During the latter half of the nineteenth century, civil asset forfeiture was often applied to violations of liquor smuggling and tax evasion laws.<sup>45</sup> In one amusing case, a North Carolina district court ordered the owner of two hired mules to forfeit them because they had been used without his knowledge to illegally transport liquor.<sup>46</sup> Actions against bootleggers continued to be a major operation of civil asset forfeiture through the early twentieth century, particularly in conjunction with the rise of automobiles as forfeitable property.<sup>47</sup> For example, in *Van Oster v. Kansas*,<sup>48</sup> an owner lent her vehicle to a car dealership, that then lent it to a third party, who was caught illegally smuggling liquor inside the

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He wrote:

[T]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offense be *malum prohibitum*, or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist, where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.

*Id.* at 14–15. This opinion remains an important reference for forfeiture law and has been cited by the Court in more recent opinions. See, e.g., *United States v. Bajakajian*, 524 U.S. 321, 330–31 (1998); *United States v. Ursery*, 518 U.S. 267, 274 (1996), *rev'd*, *United States v. \$405,089.23 in U.S. Currency*, No. 98–56383, 1999 WL 685967 (9th Cir. Sept. 1, 1999); *Bennis v. Michigan*, 516 U.S. 442, 446–47 (1996); *Austin v. United States*, 509 U.S. 602, 612 (1993); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683–84 (1974).

43. *Skorup*, *supra* note 39, at 433. The Palmyra, for example, was a Spanish ship sailing out of Puerto Rico. Although it is unclear who exactly owned the ship, if the owner were located in Spain or elsewhere around the world one can easily imagine the difficulty of bringing him to trial in the United States. See *The Palmyra*, 25 U.S. at 3, 5–6.

44. *Barnet*, *supra* note 24, at 90.

45. See *Dobbins' Distillery v. United States*, 96 U.S. 395, 403–04 (1877) (finding that property of landowner who leased his distillery to an operator who subsequently committed tax fraud was forfeitable, regardless of the fact that the landowner was unaware of the fraud); *LEVY*, *supra* note 40, at 58–59.

46. *United States v. Two Bay Mules*, 36 F. 84, 84 (W.D.N.C. 1888).

47. See *United States v. One Saxon Auto.*, 257 F. 251, 251 (4th Cir. 1919); *Logan v. United States*, 260 F. 746, 747 (5th Cir. 1919); Joel T. Kornfeld & Anthony A. De Corso, *Uncivil Forfeitures: Skillful Practitioners Can Take Advantage of the Newly Available Remedies to Undo Unjustified Civil Forfeitures*, 26 L.A. LAW. 39, 40 (2003).

48. *Van Oster v. Kansas*, 272 U.S. 465 (1926).



vehicle.<sup>49</sup> Although the owner challenged the forfeiture on the grounds that she had no knowledge of the third party's behavior or intention, the Supreme Court upheld the forfeiture.<sup>50</sup> Such bootlegger actions were common, and the use of civil asset forfeiture in this capacity remained prevalent up until the "War on Drugs" beginning in the 1970s.<sup>51</sup>

#### D. Forfeiture During the Drug Wars

In the 1970s, the "War on Drugs," as it is now called, propelled civil asset forfeiture from an intermittently used principle targeting bootleggers and tax-evaders into a ubiquitous and controversial law enforcement weapon.<sup>52</sup> When the Comprehensive Drug Abuse Prevention and Control Act passed in 1970, it gave law enforcement enhanced ability to seize property connected to drug crimes.<sup>53</sup> In 1978, Congress amended the law to broaden the types of property subject to forfeiture.<sup>54</sup> In 1984, Congress further amended the statute to include real property<sup>55</sup> and eliminated the requirement that forfeited assets be placed in the U.S. Treasury Department's general fund.<sup>56</sup> This enabled law enforcement agencies to seize property for their own benefit, with much less oversight and supervision.<sup>57</sup> Notorious cases of forfeiture abuse came to light, drawing public outcry and provoking action in Congress.<sup>58</sup> Organizations from across the

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49. *Id.* at 466.

50. *Id.* at 468–69.

51. Passage of the Comprehensive Drug Abuse Prevention and Control Act in 1970 dramatically increased the usage of civil asset forfeiture. *See generally* 19 U.S.C. § 1616a (2012) (providing statutory authority for equitable sharing programs, which will be discussed later in this Note); 21 U.S.C. §§ 801, 881 (2012) (providing statutory authority for federal asset forfeiture, including which types of property are subject to forfeiture); Skorup, *supra* note 39, at 433–34.

52. *See* Johnson, *supra* note 13, at 1045, 1049–1050 (discussing some of the changes to forfeiture laws resulting from the War on Drugs); Levesque, *supra* note 11, at 67–69 (observing that the changes brought "increased criticism over the state of the civil asset forfeiture laws").

53. Skorup, *supra* note 39, at 433–34.

54. The 1978 amendment added "moneys, negotiable instruments, securities, or other things of value furnished . . . in exchange for a controlled substance [to be forfeited]." Psychotropic Substances Act of 1978, S. 2399, 95th Cong. (1978) (codified as amended at 21 U.S.C. § 881(a)(6)(1994)). *See also* GREGORY M. VECCHI & ROBERT T. SIGLER, *ASSETS FORFEITURE: A STUDY OF POLICY AND ITS PRACTICE* 46 (2001); Skorup, *supra* note 39, at 433–34.

55. 21 U.S.C. § 881(a)(7); Johnson, *supra* note 13, at 1050.

56. Johnson, *supra* note 13, at 1050.

57. *See generally* Marian R. Williams et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INST. FOR JUST. 1, 6 (2010).

58. Several courts began to question whether the government was properly using civil asset forfeiture. In one instance, the Seventh Circuit proffered a stinging rebuke of the government's attempt to seize half a million dollars in cash from a restaurateur without probable cause. *United States v. \$506,231 in U.S. Currency*, 125 F.3d 442, 454 (7th Cir. 1997) (stating that "as has likely been obvious from the tone of this opinion, we believe the government's conduct in forfeiture cases leaves much to be desired"). The Second Circuit also voiced concern over the conduct of forfeiture proceedings. *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992) (stating "we continue to be enormously troubled by the government's increasing and virtually

political spectrum called for civil forfeiture reform and finally compelled Congress to act in the mid-1990s.<sup>59</sup>

### *E. Battle Lines in Congress*

Representative Henry Hyde (R. IL) led the effort that would eventually lead Congress to pass CAFRA 2000.<sup>60</sup> In the mid-1990s, Rep. Hyde presided over several hearings before the House Judiciary Committee where witnesses testified about instances of civil forfeiture abuse and mismanagement of forfeiture funds.<sup>61</sup> Rep. Hyde voiced dissatisfaction with contemporary application of civil asset forfeiture laws, stating “civil asset forfeiture all too often punishes innocent persons . . . We need to reform these procedures so as to ensure fundamental fairness and due process rights.”<sup>62</sup> He drafted and held hearings on House Bill 1916, titled “The Civil Asset Forfeiture Reform Act,” which proposed changes intended to curb abusive practices in civil asset forfeiture.<sup>63</sup> The U.S. Department of Justice proposed a counter bill, differing in many respects to House Bill 1916.<sup>64</sup> Representative—later Senator—Charles Schumer (D. NY) introduced House Bill 1745 in 1997, which was a version of the current administration’s bill.<sup>65</sup> Several weeks later, Rep. Hyde introduced House Bill 1835, a more expansive version of his own bill.<sup>66</sup> There was a

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unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.”).

59. Rulli, *supra* note 14, at 87 (observing that forfeiture reform was supported by “such diverse groups as the National Rifle Association, the U.S. Chamber of Commerce and the American Civil Liberties Union . . .”).

60. Rep. Hyde led several hearings before the House Judiciary Committee regarding the abuses within the civil asset forfeiture system and was the preeminent congressional voice for forfeiture reform. *See Civil Asset Forfeiture Reform Act: Hearing Before the Committee on the Judiciary on H.R. 1916*, 104th Cong. (1996). Rep. Hyde was so incensed about civil asset forfeiture abuse that he wrote a book decrying the practice, calling it a “jurisprudential Frankenstein monster.” *See HYDE, supra* note 14, at 1.

61. *See, e.g., Civil Asset Forfeiture Reform Act: Hearing Before the Committee on the Judiciary on H.R. 1916*, 104th Cong. 1 (1996). During the hearing, Representative Hyde interviewed a man named Willie Jones who had money for his lawn business seized at the airport despite the fact that he was never charged with a crime, after a ticket agent reported him for paying in cash, a behavior considered suspicious. *Id.* at 12–14.

62. *Id.* at 3.

63. Civil Asset Forfeiture Reform Act, H.R. 1916, 104th Cong. (1996).

64. The records of the 1996 hearing contain a bill proposed by the administration with a section-by-section analysis. *See Civil Asset Forfeiture Reform Act: Hearing Before the Committee on the Judiciary on H.R. 1916*, 104th Cong. 42 (1996) (statement of Stefan D. Casella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Department of Justice). One major point of contention was that the DOJ wanted the preponderance of the evidence standard rather than the clear and convincing evidence standard. *See id.* at 130–31.

65. The Forfeiture Act of 1997, H.R. 1745, 105th Cong. (1997); *see also* Stefan D. Casella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 98 (2001).

66. Civil Asset Forfeiture Reform Act, H.R. 1835, 105th Cong. (1997).

hearing and discussion over the two bills on June 11, 1997.<sup>67</sup> Later that year, both sides formulated a compromise bill that incorporated elements of House Bill 1835 and House Bill 1745, but it did not pass.<sup>68</sup> Finally, Rep. Hyde was able to get a revised version of his bill, House Bill 1658, passed in 1999.<sup>69</sup> As tedious as it was to pass the bill in the House of Representatives, getting it through the Senate would also prove difficult.

Senators Jeff Sessions (R. AL) and Schumer introduced Senate Bill 1707, a counter bill to House Bill 1658, which represented the administration's position and was more disposed to law enforcement.<sup>70</sup> Two other Senators, Orrin Hatch (R. UT) and Patrick Leahy (D. VT) "introduced another bill, [Senate Bill] 1931, that contained most of the reform provisions that were enacted as part of CAFRA [2000]."<sup>71</sup> After debate on these two bills, Rep. Hyde agreed to a version of House Bill 1658 that incorporated elements of the two Senate bills.<sup>72</sup> With Rep. Hyde's endorsement, the "House passed the bill as passed by the Senate without further amendment."<sup>73</sup> After four years of intense negotiation on Capitol Hill, President Clinton signed a heavily revised bill into law, which became known as the Civil Asset Forfeiture Reform Act of 2000.<sup>74</sup>

#### F. Lingerin Problems with CAFRA 2000

CAFRA 2000, while undoubtedly a step in the right direction, did not do enough to protect the people from abusive asset forfeiture practices.<sup>75</sup> The government continued to engage in questionable forfeitures and critics demanded further reforms.<sup>76</sup> They alleged, among other things, that there were insufficient notice requirements that failed to adequately inform claimants of their rights.<sup>77</sup>

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67. *Civil Asset Forfeiture Reform Act: Hearing Before the Committee on the Judiciary on H.R. 1835*, 105th Cong. 1–2, 61–62 (1997).

68. *Civil Asset Forfeiture Reform Act*, H.R. 1965, 105th Cong. (1997); *see also* Casella, *supra* note 65, at 99–100.

69. *Civil Asset Forfeiture Reform Act of 2000*, H.R. 1658, 106th Cong. (1999); Casella, *supra* note 65, at 101. For a record of the debate, *see* 145 CONG. REC. H4851 (daily ed. June 24, 1999).

70. Casella, *supra* note 65, at 101–02.

71. *Id.* at 101.

72. *Id.*

73. *Id.*

74. *Id.* at 97, 101–02. CAFRA 2000 was codified under 18 U.S.C. § 983 (2012). *See* 18 U.S.C. § 983 (2012 & Supp. III 2016).

75. *See* Rulli, *supra* note 14, at 88 ("CAFRA [2000] does not alter the inherent conflict of interest that provides a powerful economic incentive for law enforcement authorities to overreach and to evade accountability with large sums of public monies.").

76. Johnson, *supra* note 13, at 1045–46, 1052.

77. Levesque, *supra* note 11, at 69.

### G. *Insufficient Notice Requirement*

The Supreme Court has held that a party must receive due process before property is taken, and in the civil forfeiture context, this includes notice of a proceeding and a fair opportunity to be heard.<sup>78</sup> CAFRA 2000's notice provisions allow the government to delay sending notice to potential claimants for at least sixty days after seizing property.<sup>79</sup> An additional concern is that, although CAFRA 2000 provides for reduced rate or free legal representation under some circumstances, there is no requirement that the government must provide notice of that fact to interested parties.<sup>80</sup> Since the government has no obligation to inform claimants of the potential right to counsel, forfeitures are frequently uncontested or challenged on a *pro se* basis. Without the assistance of a lawyer, indigent or uneducated claimants often lack time or resources to devote to the process.<sup>81</sup> This is especially true when considering the strict filing deadlines in CAFRA 2000, which provides only thirty-five days to prepare a complaint.<sup>82</sup>

The uncertainty associated with inadequate notice is exacerbated by the fact that appointment of counsel is discretionary in most civil asset forfeiture cases.<sup>83</sup> Courts have repeatedly distinguished civil matters from criminal cases in the Sixth Amendment context, emphasizing that there is no right to counsel in civil proceedings.<sup>84</sup> However, CAFRA 2000 contains one situation in which a claimant is absolutely entitled to legal aid.<sup>85</sup> If forfeiture proceedings are against real property used as a "primary residence" by a claimant who is financially unable to obtain representation, then the court must appoint an attorney if the claimant requests one.<sup>86</sup> However, this does little for a claimant who is unaware of this right, hence the need for a notice requirement.<sup>87</sup> Many seizures are

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78. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993).

79. 18 U.S.C. § 983(a)(1)(A)(i), (iv).

80. § 983(b)(1).

81. *Williams et al.*, *supra* note 57, at 13; *Levesque*, *supra* note 11, at 88; *see also* HYDE, *supra* note 14, at 32.

82. The filing requirements mandated by CAFRA 2000 are somewhat rigorous. A claimant must file a sworn claim "identify[ing] the specific property being claimed" and "stat[ing] the claimants interest in such property" within thirty-five days after receipt of a forfeiture notice. § 983(a)(2)(B).

83. *See* Rulli, *supra* note 14, at 89 ("While the statute does not mandate this appointment of counsel, it does encourage courts to exercise their discretion to appoint counsel when the property owner has standing to contest the forfeiture and asserts a claim in good faith.").

84. *See* *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995), *as amended* (May 24, 1995) (holding that the Sixth Amendment applies exclusively to criminal proceedings, after an indigent defendant asserted his right to counsel in a civil forfeiture proceeding).

85. § 983(b)(2)(A).

86. *Id.*; *see also* *United States v. 777 Greene Ave.*, 609 F.3d 94, 98 (2d Cir. 2010).

87. Rebecca Hausner, *Adequacy of Notice Under CAFRA: Resolving Constitutional Due Process Challenges to Administrative Forfeitures*, 36 CARDOZO L. REV. 1917, 1945-46 (2015).

uncontested because people are not adequately informed of forfeiture proceedings, are unsure of how to contest them, or are unaware of the ability to obtain free or reduced rate legal representation.<sup>88</sup> Ultimately, the inadequate notice provisions in CAFRA 2000 contribute to a deck stacked against property owners in civil asset forfeiture cases.<sup>89</sup>

#### H. Light Burden of Proof

The burden of proof in federal civil asset forfeiture cases is preponderance of the evidence.<sup>90</sup> Preponderance of the evidence does not require the government to “demonstrate a direct connection between [d]efendant property and the illegal activity.”<sup>91</sup> It only requires the government to demonstrate “that the existence of the contested fact is more probable than its nonexistence.”<sup>92</sup> This means that even if a mere fifty-one percent of the evidence supports the property’s relation to illegal activity, then the property can be subject to forfeiture.<sup>93</sup> The low evidentiary bar effectively allows the government to use the lack of obvious legitimacy as a substitute for evidence of illegitimacy.<sup>94</sup> Although the Supreme Court has countered assertions that forfeiture proceedings are quasi-criminal in nature,<sup>95</sup> they undeniably possess essential connections to criminal law.<sup>96</sup> Furthermore, the Court has admitted that civil forfeiture proceedings are

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88. *Id.* at 1932; see Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 787 (2009) (observing that only twenty percent of property owners ever attempt to reclaim forfeited property).

89. Hausner, *supra* note 87, at 1932–33.

90. 18 U.S.C. § 983(c)(1).

91. *United States v. \$21,000 in U.S. Postal Money Orders and \$785.00 in U.S. Currency*, 298 F. Supp. 2d 597, 601 (E.D. Mich. 2003).

92. Neil Orloff & Jerry Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159, 1159 (1983).

93. See *Preponderance of the Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[Preponderance of the evidence] is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.”).

94. *United States v. \$174,206.00 in U.S. Currency*, 320 F.3d 658, 662 (6th Cir. 2003) (finding that a claimant’s failure to prove that income was acquired by legitimate means was sufficient to support a forfeiture); *United States v. \$21,000 in U.S. Postal Money Orders and \$785.00 in U.S. Currency*, 298 F. Supp. 2d 597, 604 (E.D. Mich. 2003) (observing that “unrebutted evidence of insufficient income does satisfy the government’s burden of proof in certain contexts”).

95. *United States v. Ursery*, 518 U.S. 267, 290 (1996), *rev’d*, *United States v. \$405,089.23 in U.S. Currency*, No 98-56383, 1999 WL 685967 (9th Cir. Sept. 1, 1999); see also *United States v. 8 Gilcrease Lane*, 656 F. Supp. 2d 87, 89 (D.D.C. 2009) (citing *United States v. Ursery*, 518 U.S. 267, 288, 290 (1996)).

96. All forfeitures must theoretically result from some sort of connection between property and illegal (criminal) activity. In a criminal forfeiture proceeding, the forfeiture is a result of punishment for a criminal conviction. A criminal conviction is not necessary in a civil forfeiture proceeding, but the government must meet the burden of proof that the property was connected to illegal activity. See *Forfeiture*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining both civil and criminal forfeitures).

partially intended to punish the owner regardless of guilt.<sup>97</sup> Many innocent owners have had cash or other valuables seized under the preponderance of the evidence standard, simply because it was unusual or suspicious to carry large amounts of currency.<sup>98</sup> The preponderance of the evidence standard is too easy for overzealous prosecutors to abuse, and does not create enough of a safeguard against frivolous forfeiture actions.<sup>99</sup> The Supreme Court has held that forfeitures are disfavored and should only be done in circumstances where they are “within both letter and spirit of the law.”<sup>100</sup> Considering this admonishment, CAFRA 2000 leaves much to be desired regarding the burden of proof.

### *I. Inadequate Innocent Owner Defense*

CAFRA 2000 states that “an innocent owner’s interest in property shall not be forfeited under any civil forfeiture statute” and places the burden on the claimant to prove by preponderance of the evidence that he or she is an innocent owner.<sup>101</sup> However, the great deficiency of CAFRA 2000’s innocent owner defense is that it requires the claimant to exercise the burden of proof.<sup>102</sup> Forcing a claimant to prove what he or she did not know is a fallacy; it is harder for an individual to prove that they did not know something than for the government to prove that they did.<sup>103</sup> In the law’s current state, a claimant is effectively guilty until proven innocent, despite the ubiquitous principle in our justice system that a party is innocent until proven guilty.<sup>104</sup> The Supreme Court has historically admitted that forfeiture proceedings are quasi-criminal in nature despite modern attempts to deny the punitive aspects of civil forfeiture laws.<sup>105</sup>

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97. *Austin v. United States*, 509 U.S. 602, 618 (1993).

98. *United States v. \$124,700 in U.S. Currency*, 458 F.3d 822, 826 (8th Cir. 2006) (citing *United States v. \$84,615 in U.S. Currency*, 379 F.3d 496, 501–02 (8th Cir. 2004)) (holding that “possession of a large amount of cash is ‘strong evidence’ of a connection to drug activity”); *United States v. \$52,000.00, More or Less, in U.S. Currency*, 508 F. Supp. 2d 1036, 1038 (S.D. Ala. 2007).

99. HYDE, *supra* note 14, at 80–81; *see also* Johnson, *supra* note 13, at 1075–1079; Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. TIMES (Oct. 25, 2014), [http://www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html?\\_r=0](http://www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html?_r=0).

100. *United States v. One 1936 Model Ford V–8 De Luxe Coach, Motor No. 18–3306511*, 307 U.S. 219, 226 (1939).

101. 18 U.S.C. § 983(d)(1) (2012).

102. *Id.* § 983(d).

103. Johnson, *supra* note 13, at 1059.

104. § 983(d)(1). The statute requires a claimant to prove by preponderance of the evidence that they are an innocent owner. *But see* Coffin v. *United States*, 156 U.S. 432, 453 (1895) (holding “[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law”).

105. *Compare* *United States v. Ursery*, 518 U.S. 267, 293 (1996) (Kennedy J., concurring) (“Although there is language in our cases to the contrary . . . civil *in rem* forfeiture is not a punishment of the wrongdoer for his criminal offense.”), *rev’d*, *United States v. \$405,089.23 in*

Given this acknowledgement, it seems inequitable that the law forces a claimant to affirmatively assert innocence, rather than making the government meet the burden of proof.

The Supreme Court has taken pains to emphasize that forfeiture serves as a deterrent, apart from its punitive nature.<sup>106</sup> The Court has also denied that there is a constitutional right to an innocent owner defense.<sup>107</sup> However, it does not seem reasonable to deter or punish a paradigmatic innocent owner, who is by definition not guilty.<sup>108</sup> One of the only foreseeable “deterrent” effects is that people will be less willing to share or loan their property to others, lest the borrower commit an illegal act and subject the property to forfeiture.<sup>109</sup>

### *J. Disproportionate Forfeitures*

CAFRA 2000’s proportionality section states that the court “shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture,” but gives no further guidance on other proportionality concerns for the court to consider.<sup>110</sup> Lack of guidance on the scope of proportionality elements has led to unduly harsh forfeitures that undermine the interests of property owners.<sup>111</sup>

Civil asset forfeiture proceedings have been criticized for placing a severe burden on property owners, especially when the value of the forfeited property

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U.S. Currency, No 98–56383, 1999 WL 685967 (9th Cir. Sept. 1, 1999), with *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (stating “a forfeiture proceeding is quasi–criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law”), and *Boyd v. United States*, 116 U.S. 616, 633–34 (1886) (holding “[w]e are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal”).

106. *Bennis v. Michigan*, 516 U.S. 442, 452 (1996); see also *Van Oster v. State of Kansas*, 272 U.S. 465, 467–68 (1926) (holding that the law “suggest[s] that certain uses of property may be regarded so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner.”).

107. *Bennis*, 516 U.S. at 446–47.

108. *Innocent*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining innocent as “[f]ree from guilt; free from legal fault”).

109. See generally *Van Oster*, 272 U.S. 465 (indicating that when a wrongdoer is “one intrusted [sic] by the owner with the possession and use of the offending vehicle,” the court need not inquire as to the state’s power to effect the seizure of the innocent owner’s property).

110. 18 U.S.C. § 983(g)(2) (2012 & Supp. III 2016).

111. *United States v. 45 Claremont St.*, 395 F.3d 1, 6 (1st Cir. 2004) (holding that the residence of a mother of four was subject to forfeiture after drug activity occurred in the house and that such a punishment was not grossly disproportional); see also *United States v. Lot Numbered One (1) of Lavaland Annex*, 256 F.3d 949, 958 (10th Cir. 2001) (holding that a motel could be forfeited, even if the corporation was not guilty of any crime) (“Admittedly there is no evidence that RMI [motel] was guilty of the criminal conduct described in these statutes. However, there is no dispute that the defendant property was used to conceal and otherwise facilitate the commission of those violations.”).

is disproportionate to the alleged criminal connection.<sup>112</sup> The Supreme Court held in *Austin v. United States*<sup>113</sup> that the Eighth Amendment's prohibition on excessive fines applies to *in rem* civil forfeiture proceedings.<sup>114</sup> This is in contrast to the Court's long held, dubious assertion that civil forfeitures are remedial civil sanctions and are not inherently punitive.<sup>115</sup> Notably, the *Austin* Court declined to articulate a test to determine what constitutes an excessive forfeiture.<sup>116</sup>

In an attempt to provide clarity on the nature of an excessive forfeiture, the Supreme Court held in *United States v. Bajakajian*<sup>117</sup> that a forfeiture is unconstitutionally excessive if it is "grossly disproportional to the gravity of a defendant's offense."<sup>118</sup> Justice Thomas's majority opinion noted that judicial measurements of the "gravity of a particular criminal offense will be inherently imprecise."<sup>119</sup> This is especially true in the context of civil asset forfeitures, when there may never be an underlying conviction for the court to consider.<sup>120</sup> In effect, the law requires courts to consider proportionality as a factor when determining the scope of forfeiture, but only so far as to "compare the forfeiture to the gravity of the offense giving rise to the forfeiture."<sup>121</sup> As the law currently stands under CAFRA 2000, there is not enough of an impetus on the court to analyze forfeiture under multiple proportionality considerations.

#### K. Not So "Equitable" Sharing

As CAFRA 2000 recognized, civil asset forfeiture is conducted at all levels of law enforcement, from small town police departments to federal agencies,

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112. See Johnson, *supra* note 13, at 1060–61 (discussing some problems with the current jurisprudential approach to cases of disproportionate forfeiture, particularly in the context of forfeitures resulting from minor drug offenses); see, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668, 689 (1974) (finding the forfeiture of a lessor's yacht after a lessee was arrested on drug charges to be constitutional despite the lessor not having any knowledge of or involvement in the criminal activity).

113. 509 U.S. 602 (1993).

114. *Id.* at 604.

115. *United States v. Ursery*, 518 U.S. 267, 278 (1996) ("*In rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause."), *rev'd*, *United States v. \$405,089.23 in U.S. Currency*, No 98–56383, 1999 WL 685967 (9th Cir. Sept. 1, 1999).

116. *Austin v. United States*, 509 U.S. 602, 622–23 (1993).

117. *United States v. Bajakajian*, 524 U.S. 321 (1998).

118. *Id.* at 334.

119. *Id.* at 336.

120. See *supra* notes 10–11 and accompanying text.

121. 18 U.S.C. § 983(g)(2) (2012 & Supp. II 2016); see, e.g., *Bajakajian*, 524 U.S. at 334 (stating that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.").



such as the Drug Enforcement Agency and Federal Bureau of Investigation.<sup>122</sup> It can be a windfall for local police agencies that often work with limited resources.<sup>123</sup> However, when numerous state legislatures acted to curb civil asset forfeiture, state and local authorities began to engage in a practice known as “equitable sharing” to circumvent state regulations.<sup>124</sup>

Equitable sharing involves a state or local agency taking property and then giving it to federal authorities to institute forfeiture proceedings, which they may do if the underlying conduct leading to the forfeiture is a violation of federal law.<sup>125</sup> The Department of the Treasury or the Department of Justice usually handle these proceedings.<sup>126</sup> If the forfeiture proceedings are successful, then the state or local law enforcement agency receives a percentage of the profits back from the federal government.<sup>127</sup> While proponents cite improved cooperation among state and federal authorities, stiffer federal penalties, and an expedited forfeiture process as reasons for equitable sharing, there is an obvious financial motivation.<sup>128</sup>

When property is transferred to the federal government, CAFRA 2000 holds that it must be found forfeitable by a preponderance of the evidence.<sup>129</sup> The preponderance of the evidence standard is easier to meet than the standard set

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122. § 983(a) (1)(A)(iv); *see* Hunter, *supra* note 24, at 554 (articulating that states “have their own respective forfeiture statutes distinct from the federal government’s statute.”); George F. Will, *When Government is the Looter*, WASH. POST. (May 18, 2012), [https://www.washingtonpost.com/opinions/when-government-is-the-looter/2012/05/18/gIQAUIKVZU\\_story.html](https://www.washingtonpost.com/opinions/when-government-is-the-looter/2012/05/18/gIQAUIKVZU_story.html) (describing an example of equitable sharing abuse); John Enders, *Forfeiture Law Casts a Shadow on Presumption of Innocence: Legal System: Government Uses the Statute to Seize Money and Property Believed to be Linked to Narcotics Trafficking. But Critics Say it Short-Circuits the Constitution*, L.A. TIMES (Apr. 18, 1993), [http://articles.latimes.com/1993-04-18/local/me-24209\\_1\\_forfeiture-law](http://articles.latimes.com/1993-04-18/local/me-24209_1_forfeiture-law) (observing questionable use of forfeited assets by local law enforcement, including a southern sheriff using a forfeited Rolls Royce as his personal vehicle).

123. JOHN L. WORRALL, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUSTICE, PROBLEM-ORIENTED GUIDES FOR POLICE: RESPONSE GUIDES SERIES NO. 7: ASSET FORFEITURE 2 (2008), [http://www.popcenter.org/responses/pdfs/asset\\_forfeiture.pdf](http://www.popcenter.org/responses/pdfs/asset_forfeiture.pdf); LEVY, *supra* note 40, at 148–149; *see also* HYDE, *supra* note 14, at 36.

124. Williams et al., *supra* note 57, at 23.

125. *Id.*

126. *See* U.S. DEP’T OF THE TREASURY: ABOUT TREASURY EXEC. OFFICE FOR ASSET FORFEITURE, <https://www.treasury.gov/about/organizational-structure/offices/Pages/The-Executive-Office-for-Asset-Forfeiture.aspx> (last visited Apr. 4, 2017); *Overview Asset Forfeiture Program*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/afp> (last visited Apr. 4, 2017).

127. *See* 21 U.S.C. § 881(e)(1)(A) (2012) (“Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may . . . transfer the property to any federal agency or to any state or local law enforcement agency which participated directly in the seizure or forfeiture of the property.”); Williams et al., *supra* note 57, at 25; Hunter, *supra* note 24, at 558–59.

128. Williams et al., *supra* note 57, at 25.

129. 18 U.S.C. § 983(c)(1).

by many states in forfeiture proceedings.<sup>130</sup> This means a successful forfeiture and accompanying windfall is more likely at the federal level.<sup>131</sup> Given this motive, law enforcement agencies frequently choose to conduct forfeiture at the federal level rather than at the state level.<sup>132</sup> In addition, states often have provisions mandating that forfeited assets be distributed for purposes other than law enforcement, such as education or the general treasury fund.<sup>133</sup> The federal government, however, has no such restrictions and mandates that forfeited funds be used solely for law enforcement purposes.<sup>134</sup> Equitable sharing provides the perfect mechanism to circumvent inconvenient state restrictions of civil asset forfeiture.<sup>135</sup> In bypassing state law, state and local authorities are profiting surreptitiously from forfeiture and behaving in a manner inconsistent with notions of federalism and due process.<sup>136</sup>

#### L. *The Next Step*

CAFRA 2000's numerous inadequacies elicited calls for reform that ultimately led Rep. Walberg to introduce CAFRA 2014.<sup>137</sup> Although the Act has bipartisan support, including fifteen Republican and five Democratic cosponsors in the House of Representatives, it has now sat idle for over three years.<sup>138</sup> CAFRA 2014 proposes several important changes to federal civil asset forfeiture laws and these revisions are discussed in the following section.

### II. CAFRA 2014'S IMPACT AND SIGNIFICANCE

CAFRA 2014 has seven total provisions and six substantive provisions.<sup>139</sup> The six substantive provisions introduce changes that will affect the following areas: notice of potential representation by an attorney, burden of proof, innocent

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130. See Williams et al., *supra* note 57, at 22 (observing that Kentucky, New York, Oregon, Colorado, Connecticut, Florida, Minnesota, Nevada, New Mexico, Ohio, Utah, Vermont, California, Nebraska, North Carolina, and Wisconsin all require more than preponderance of the evidence).

131. *Id.* at 25.

132. *Id.*

133. *Id.*

134. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND FY 2014 MANAGEMENT'S DISCUSSION AND ANALYSIS 5 (Jan. 2015) [hereinafter ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND FY 2014 MANAGEMENT'S DISCUSSION AND ANALYSIS], <https://oig.justice.gov/reports/2015/a1508.pdf#page=1> (stating that "[a]ll property and cash transferred to state and local agencies and any income generated by this property and cash is to be used for law enforcement purposes").

135. Williams et al., *supra* note 57, at 26.

136. Stuteville, *supra* note 12, at 1185–86.

137. Rulli, *supra* note 14, at 87; Civil Asset Forfeiture Reform Act of 2014, H.R. 5212, 113th Cong. (2014); see also 160 CONG. REC. H7392–01 (daily ed. Sept. 10, 2014).

138. H.R. 5212 (113th): *Civil Asset Forfeiture Reform Act of 2014*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr5212/details> (last visited Apr. 4, 2017).

139. Civil Asset Forfeiture Reform Act of 2014, H.R. 5212, 113th Cong. (2014).

owner defense, proportionality, increased visibility, and equitable sharing agreements.<sup>140</sup>

#### A. Providing Notice of Legal Assistance

The first reform proposed by CAFRA 2014 concerns the notice of legal assistance requirement.<sup>141</sup> The amendment requires the government to provide notice to claimants of their potential right to legal representation.<sup>142</sup> If property owners are informed of the potential right through a required written notice, then it is more likely that owners will choose to exercise that right and obtain assistance of counsel. This benefits claimants since many forfeit their assets because they cannot afford the expense of contesting the seizure, or otherwise do not have the knowledge, expertise, or ability to fight the forfeiture.<sup>143</sup> Because CAFRA 2014 requires the government to provide helpful information to property owners, it is an improvement over CAFRA 2000 and helps to ensure that claimants are given adequate notice of their legal rights.<sup>144</sup> Although CAFRA 2014 does not address filing deadlines,<sup>145</sup> the legal assistance notice provision is a step in the right direction.

#### B. Increasing the Burden of Proof

CAFRA 2014 proposes striking the preponderance of the evidence standard in favor of the clear and convincing evidence standard.<sup>146</sup> Raising the burden of proof to clear and convincing evidence will require the government to present more evidence in order to prove that assets are subject to forfeiture.<sup>147</sup> Clear and convincing evidence does not represent an unreasonable burden for officers to meet and can help restore public trust in law enforcement agencies by making it

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140. *Id.*

141. *Id.* § 1.

142. The text of the amendment is the following: “The government shall include in any such notice that the person receiving the notice may be able to obtain free or reduced legal representation under subsection (b).” Civil Asset Forfeiture Reform Act of 2014, H.R. 5212, 113th Cong. (2014); *see also* 18 U.S.C. § 983(a)1(A)(i).

143. Rulli, *supra* note 14, at 89; LEVY, *supra* note 40, at 130–131; Sheth, *supra* note 22, at 26.

144. Civil Asset Forfeiture Reform Act of 2014, H.R. 5212, 113th Cong. (2014).

145. *See generally id.*

146. *Id.* § 3.

147. *See Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (stating that the clear and convincing standard requires parties to provide evidence that “could place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are ‘highly probable.’”); *compare Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining clear and convincing evidence as “indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials”), *with id.* at *Preponderance of the Evidence* (“The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”).

less likely that innocent people will have their property taken away.<sup>148</sup> Furthermore, the clear and convincing standard requires less evidence than the beyond a reasonable doubt standard used in criminal cases,<sup>149</sup> meaning that officers will still need less evidence than what they would normally need for criminal convictions.<sup>150</sup> Since an owner does not need to be charged with a crime to subject his or her assets to forfeiture, there is an innate possibility that more innocent people will be drawn into forfeiture proceedings.<sup>151</sup> Given this dilemma, it seems equitable to raise the burden of proof and thereby make it less likely that innocent people will lose their property to unmerited forfeitures.<sup>152</sup>

Since one of the overarching principles in civil asset forfeiture is that forfeitable property must have been acquired by unlawful means or otherwise used to further illegal activity,<sup>153</sup> it is reasonable to increase evidentiary burdens given the catastrophic impact that unjustified forfeiture has on innocent owners.<sup>154</sup> One might think that legislators would welcome any reform that protects law-abiding citizens from unwarranted seizures; however, there is a strong force pushing for evidentiary standards to remain the same.<sup>155</sup>

While drafting CAFRA 2000, Rep. Hyde initially advocated for the clear and convincing evidence standard, but was unable to muster enough support for that

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148. See Moores, *supra* note 88, at 784–85 (illustrating the negative public perception of civil asset forfeiture).

149. For more on application of the beyond reasonable doubt standard, see generally *Victor v. Nebraska*, 511 U.S. 1, 5 (1994); *In re Winship*, 397 U.S. 358, 361 (1970). Although there is no standard definition for reasonable doubt, it has been defined as “such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused.” *Victor*, 511 U.S. at 18. To compare with the clear and convincing evidence standard, see *supra* note 146–147.

150. See generally Jon O. Newman, *Beyond “Reasonable Doubt”*, 68 N.Y.U. L. REV. 979, 983–86 (1993).

151. See *United States v. Funds in the Amount of \$239,400*, 795 F.3d 639, 641 (7th Cir. 2015) (finding currency seized from a traveler to be subject to forfeiture despite never charging him with a crime); see also Sarah Stillman, *Taken: Under Civil Forfeiture, Americans who Haven’t Been Charged with Wrongdoing can be Stripped of Their Cash, Cars, and Even Homes. Is that All We’re Losing?*, THE NEW YORKER (Aug. 12, 2013), <http://www.newyorker.com/magazine/2013/08/12/taken>.

152. For some examples of questionable forfeitures that CAFRA 2014 could alleviate, see the following: *United States v. \$48,100.00 in U.S. Currency*, 756 F.3d 650, 653–55 (8th Cir. 2014); *United States v. \$10,700.00 in U.S. Currency*, 258 F.3d 215, 225 (3d Cir. 2001); *United States v. \$9,230.00 in U.S. Currency*, 58 F. Supp. 3d 945, 948 (D. Neb. 2014).

153. See 18 U.S.C. §§ 981, 983(c); 21 U.S.C. § 881; *United States v. \$63,530.00 in U.S. Currency*, 781 F.3d 949, 955 (8th Cir. 2015) (holding that in order “[t]o successfully effectuate the forfeiture of seized currency under 21 U.S.C. § 881, the government must prove, by a preponderance of the evidence, that a substantial connection exists between the seized currency and drug activity”).

154. Robert O’Harrow, Jr., Michael Sallah, & Steven Rich, *They Fought the Law. Who Won?*, WASH. POST. (Sept. 8, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/08/they-fought-the-law-who-won/>.

155. See *infra* notes 156–157 and accompanying text.

provision.<sup>156</sup> Law enforcement agencies and their legislative allies in the Senate put up a firm resistance to the higher evidentiary burden, and were able to pressure Rep. Hyde into accepting the lower threshold.<sup>157</sup> It is not surprising that this happened, given that law enforcement agencies have a vested pecuniary interest in civil asset forfeiture.<sup>158</sup> If the standards are kept lower, then it is easier for them to seize valuables that can be appropriated for their own uses.<sup>159</sup> However, raising the evidentiary standard may also benefit law enforcement by improving their reputation and restoring public esteem.

As previously stated, if the burden of proof is increased, then the government will have to present more credible evidence to successfully forfeit property.<sup>160</sup> This lessens the likelihood that the government will waste time and resources on weaker, circumstantial cases that are more likely to be overturned or dismissed on appeal.<sup>161</sup> Conversely, if the government is required to present more substantial evidence, then it will be more likely to succeed on the forfeiture cases that it decides to prosecute. As a result, it will be more difficult to undermine the government's position in legitimate forfeiture cases.<sup>162</sup>

Law enforcement agencies are concerned with maintaining credibility and their public image with the American people.<sup>163</sup> Civil asset forfeiture abuse undermines trust, making the public uncooperative and discontented.<sup>164</sup> Ideally, having the government meet rigorous standards prior to seizing property will make it appear more even-handed and impartial in the public's eye.<sup>165</sup> With

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156. H.R. REP. NO. 106-192, at 11-12 (1999), *reprinted in* 199 U.S.C.C.A.N. 1, 1999 WL 959202; *see also* Levesque, *supra* note 11, at 73.

157. Levesque, *supra* note 11, at 73.

158. HOWARD E. WILLIAMS, ASSET FORFEITURE: A LAW ENFORCEMENT PERSPECTIVE 14-15 (2002); *see* Johnson, *supra* note 13, at 1069-70.

159. *See* AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND FY 2014 6 (observing that total assets in the DOJ forfeiture fund "increased in FY 2014 to \$8,708.4 million from \$6,388.0 million in FY 2013, an increase of 36.3 percent. If seized assets, which are not yet owned by the Government, are not included, the adjusted assets of the AFF increased to \$7,335.1 million in FY 2014 from \$4,952.7 million in FY 2013, an increase of 48.1 percent. This is attributable to realizing a stable level of recurring forfeited assets in FY 2014 from FY 2013, thus indicating a strong current and future potential stream of assets flowing into the AFF"); Williams et al., *supra* note 57, at 20.

160. *See supra* notes 146-147 and accompanying text.

161. *See* *United States v. 3234 Wash. Ave. N.*, 480 F.3d 841, 846 (8th Cir. 2007) (finding prosecutors introduced insufficient evidence to justify a forfeiture case against real property); *United States v. \$10,648.00 in U.S. Currency*, 975 F. Supp. 2d 163, 168 (D.N.H. 2013) (holding that the government failed to carry its burden for summary judgment regarding forfeiture of cash allegedly obtained from the drug trade).

162. *See supra* notes 147-148 and accompanying text.

163. *See generally* James K. Robinson, *Restoring Public Confidence in the Fairness of the Department of Justice's Criminal Justice Function*, 2 HARV. L. & POL'Y REV. 237 (2008) (discussing how damage to a law enforcement agency's credibility can negatively impact its mission and affect its public perception within the American people).

164. Moores, *supra* note 88, at 784-85.

165. *Id.* at 792.

reputation in mind, several United States Attorneys General have already dabbled with changes to the civil asset forfeiture process.<sup>166</sup> If CAFRA 2014 is enacted, then police may receive a significant boost in public esteem rather than the negative publicity associated with controversial seizures.<sup>167</sup>

### C. Innocent Owner Defense

CAFRA 2014 amends the innocent owner defense, so that the burden of proof shifts to the government after the claimant establishes a prima facie case for the defense.<sup>168</sup> The government would have to prove that the “claimant knew or reasonably should have known that the property was involved in the illegal conduct giving rise to the forfeiture.”<sup>169</sup> This revision represents a positive change for property owners because, as the law currently stands, an innocent owner is effectively required to prove his or her own innocence.<sup>170</sup> It is sensible to require the government to prove scienter rather than to make an innocent owner prove a negative.<sup>171</sup> CAFRA 2014 will relieve property owners of the active burden of establishing their own innocence,<sup>172</sup> and will allow claimants to have the favorable position of rebutting the government’s case rather than meeting the burden of proof.<sup>173</sup> If enacted, this measure would protect innocent owners and eliminate a burdensome and detrimental imposition on claimants.<sup>174</sup>

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166. Eric Holder took steps to limit cash seizures in structuring cases. Press Release, U.S. Dep’t of Justice, Attorney General Restricts Use of Asset Forfeiture in Structuring Offenses (Mar. 31, 2015), <http://www.justice.gov/opa/pr/attorney-general-restricts-use-asset-forfeiture-structuring-offenses>. Attorney Generals from as far back as the Clinton administration have recognized problems within the civil asset forfeiture system and taken steps to correct them. See Barnett, *supra* note 24, at 104 (observing that former “Attorney General Janet Reno instructed the Department of Justice to review and recommend changes to civil forfeiture policies and procedures”).

167. See *supra* notes 163–164 and accompanying text.

168. Civil Asset Forfeiture Reform Act of 2014, H.R. 5212, 113th Cong. § 4 (2014). Perhaps in light of previous common law ambiguity, the language of the bill clearly states “the innocent owner defense shall be available to a claimant . . .” *Id.*

169. *Id.*

170. See *supra* notes 102–103 and accompanying text.

171. See Johnson, *supra* note 13, at 1057–59.

172. Compare H.R. 5212 § 4 (placing the burden of proof on the government to establish that the claimant is not an innocent owner) with 18 U.S.C. § 983(d)(1) (stating “the claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence”).

173. *United States v. 2001 Honda Accord EX*, 245 F. Supp. 2d 602, 607 (M.D. Pa. 2003) (noting that in CAFRA 2000, “‘Innocent ownership’ remains an affirmative defense, as it was under all previously enacted forfeiture statutes, notwithstanding the fact that CAFRA [2000] now shifts the initial burden to the Government in its case-in-chief”). CAFRA 2014 will shift the burden of proof to the government after the claimant establishes an initial prima facie claim of innocent ownership, so that the claimant no longer has to affirmatively prove innocence. See H.R. 5212 § 4.

174. Johnson, *supra* note 13, at 1076–77.

#### D. Proportionality Considerations

CAFRA 2014 expands the proportionality requirements into areas such as fair market value, the range of available sentences, and “hardship to the property owner and dependents.”<sup>175</sup> Appellate courts are required to review excessive fines arguments—under which many civil asset forfeitures are challenged—at the *de novo* standard.<sup>176</sup> Given CAFRA 2014’s additional proportionality factors, courts will be less likely to uphold grossly excessive forfeitures because they will have to consider a broader range of proportionality factors.<sup>177</sup>

Forfeitures not only pose a severe burden to adult property owners,<sup>178</sup> but can also impact property holders’ families and children, subjecting them to suffering and deprivation without any underlying criminal conviction.<sup>179</sup> CAFRA 2014 will allow courts to consider hardship to these people as a component of whether the forfeiture is unconstitutionally excessive.<sup>180</sup> Overall, CAFRA 2014’s additional proportionality factors represent a positive development for claimants because courts will be able to undertake more extensive proportionality analyses and be less likely to uphold excessive forfeitures.<sup>181</sup>

#### E. Clarity and Transparency in Reporting Forfeitures

CAFRA 2014 attempts to increase accountability and transparency among law enforcement agencies that participate in civil asset forfeiture programs.<sup>182</sup> It proposes an amendment to 28 U.S.C. § 524, which establishes the asset forfeiture fund.<sup>183</sup> The current law under that section calls for an annual report documenting the total amount of deposited funds to be issued to Congress and made available to the public no more than four months after the end of each

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175. H.R. 5212 § 5.

176. *United States v. Jalaram, Inc.*, 599 F.3d 347, 351 (4th Cir. 2010). See *Appeal De Novo*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“An appeal in which the appellate court uses the trial court’s record but reviews the evidence and law without deference to the trial court’s rulings.”).

177. The bill would require the court to consider the “seriousness of the offense, the extent of the nexus of the property to the offense, the range of sentences available for the offense giving rise to forfeiture, the fair market value of the property, and the hardship to the property owner and dependents.” H.R. 5212 § 5.

178. See Christopher Ingraham, *How the DEA Took a Young Man’s Life Savings Without Ever Charging Him with a Crime*, WASH. POST. (May 11, 2015), <https://www.washingtonpost.com/news/wonkblog/wp/2015/05/11/how-the-dea-took-a-young-mans-life-savings-without-ever-charging-him-of-a-crime/>; see generally, Stillman, *supra* note 151.

179. *United States v. Bieri*, 68 F.3d 232, 237 (8th Cir. 1995) (“We conclude that . . . intangible factors, including the property’s character as a residence or the effect of forfeiture on innocent occupants and children, may be relevant to the Eighth Amendment analysis in some cases. This may be true in civil *in rem* forfeiture cases where the owner has not been convicted of any crime.”).

180. H.R. 5212 § 5.

181. *Id.*

182. *Id.* § 6.

183. *Id.*; see also 24 U.S.C. § 524(c)(1) (2012).

fiscal year.<sup>184</sup> However, CAFRA 2014 proposes a slight, but beneficial clarification.<sup>185</sup>

The proposed change specifies how forfeiture deposits should be documented.<sup>186</sup> Rather than simply requiring a report on total deposits, CAFRA 2014 mandates a report of specific deposits “from each type of forfeiture, and specifically identifying which funds were obtained from criminal forfeitures versus civil forfeitures.”<sup>187</sup> This will allow the public to keep track of the use of civil asset forfeiture and gauge the government’s practices and priorities under the asset forfeiture system. Although there is no requirement for law enforcement agencies to document how funds are spent,<sup>188</sup> the proposed change will nonetheless help achieve greater accountability by allowing the public to keep track of the prevalence of civil asset forfeiture.

#### F. *Curbing Abuse in Equitable Sharing Programs*

CAFRA 2014 implements a statutory bar to federal agencies accepting state forfeitures when law enforcement is acting to circumvent forfeiture restrictions.<sup>189</sup> Because law enforcement often uses equitable sharing in duplicitous ways,<sup>190</sup> CAFRA 2014 requires the Attorney General to “assure” that equitable sharing is not abused by state authorities.<sup>191</sup> If implemented, this

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184. See 28 U.S.C. § 524(a)(6)(A)(v) (stating “the Attorney General shall transmit to Congress and make available to the public, not later than 4 months after the end of each fiscal year, detailed reports” regarding the nature and composition of forfeited property).

185. See *infra* notes 182–183 and accompanying text.

186. H.R. 5212 § 6.

187. *Id.*

188. *Id.* (excluding any requirement for documentation of fund expenditures by law enforcement agencies in the proposed amendment).

189. *Id.* § 7.

190. Civil forfeiture abuse often results when local law enforcement seizes assets based on weak premises, transfer the property to the federal government and then receive a substantial cut if the forfeiture succeeds. Owen Sucoff, *From the Courthouse to the Police Station: Combating the Dual Biases That Surround Federal Money-Laundering Asset Forfeiture*, 46 NEW ENG. L. REV. 93, 111–112 (2011).

191. The bills exact language is that “[t]he Attorney General shall assure that any equitable sharing between the Department of Justice and a local or State law enforcement agency was not initiated for the purpose of circumventing any State law that prohibits civil forfeiture or limits use or disposition of property obtained via civil forfeiture by State or local agencies.” H.R. 5212 § 7. From a cynical perspective, a clever attorney general would likely be aware that the word “assure” has more than one definition, and can either mean to make a person “sure or certain: convince” or “to make certain the coming or attainment of: guarantee.” *Assure*, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1997). Using the former definition, an attorney general could provide assurances that abuse is not occurring, without it being remotely true, and still be in compliance with CAFRA 2014. The Act would do better to use the word “ensure,” which removes this potential backdoor for deceitful conduct. See *Ensure*, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1997).



provision will restrict the controversial aspects of equitable sharing,<sup>192</sup> and help restore the public's faith in an asset forfeiture system that has come under fire for abusive practices.<sup>193</sup> Apart from benefitting property owners, the change will be good for government officers by increasing professional standards and restoring their public image.<sup>194</sup> This may in turn encourage cooperation with law enforcement and boost the government's credibility.<sup>195</sup> Eventually, CAFRA 2014's changes will help to restore credibility to agencies that have suffered damage to their reputations based on unconscionable or baseless forfeitures.<sup>196</sup>

Even the nation's top law enforcement officials have recognized the need for action against equitable sharing abuse. In January 2015, then Attorney General Eric Holder issued a statement prohibiting equitable sharing, except under certain public safety circumstances.<sup>197</sup> While Attorney General Holder's policy change was a positive step forward, it did not extend beyond his term in office and subsequent attorneys general are free to change departmental policy at will.<sup>198</sup> For example, current Attorney General Jeff Sessions reinstated the equitable sharing program, drawing criticism from across the political

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192. H.R. 5212 § 7 (proposing to eliminate circumvention of state laws limiting civil forfeitures by local law enforcement agencies).

193. See Nick Sibilla, *Seize First Ask Questions Later: Philadelphia Police Take Over \$6 Million a Year in Civil Asset Forfeiture*, INST. FOR JUST. (Nov. 30, 2012), <http://ij.org/action-post/seize-first-ask-questions-later-philadelphia-police-take-over-6-million-a-year-in-civil-asset-forfeiture/> (quoting Attorney Scott Bullock, who described the civil asset forfeiture law in Pennsylvania as a law that has “turned law-enforcement officials into bounty hunters”); Brenda J. Buote, *Tewksbury Motel Owner Glad to Close Book on Seizure Threat*, BOSTON GLOBE (Jan. 31, 2013), <http://www.boston.com/news/local/massachusetts/2013/01/31/tewksbury-motel-owner-glad-close-book-seizure-threat/sNrZdQH4XG1EcKMYZVsKFI/story.html> (describing a case in which a federal prosecutor had attempted to seize a motel under a law that allows property to be seized if it is “linked to drug crimes, even if the owner of the property is not charged with any crime”); Stillman, *supra* note 151 (describing several cases in which local law enforcement used traffic stops based on suspicion of drug-related conduct as a pretext to seize property and the efforts to challenge civil asset forfeiture laws through class action suits); Dewan, *supra* note 99 (describing a number of cases in which federal agencies seized checking accounts of middle-class citizens for making several bank deposits under \$10,000 to avoid triggering a required government report).

194. Johnson, *supra* note 13, at 1075–77.

195. *Id.* at 1077–78.

196. See *supra* notes 131–136 and accompanying text.

197. Press Release, U.S. Dep't of Justice, *Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety* (Jan. 16, 2015), <http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law> (restricting civil asset forfeiture adoptions by the Department of Justice to property affecting “public safety concerns, including firearms, ammunition, explosives and property associated with child pornography”); Radley Balko, *Breaking Down Holder's Move to Limit Civil Asset Forfeiture Abuse*, WASH. POST. (Jan. 16, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/01/16/breaking-down-holders-move-to-limit-civil-asset-forfeiture-abuse/>.

198. See Pye, *supra* note 4 (calling for Congress to enact meaningful reform to civil asset forfeiture laws).

spectrum.<sup>199</sup> To stop the practice from recurring under future administrations, CAFRA 2014's proposed legislation will obligate all future attorney generals to assure that federal asset forfeiture programs are not being used to circumvent state laws or administrative processes.<sup>200</sup>

### III. CONCLUSION

CAFRA 2014 has the potential to help safeguard property rights and restore confidence in a controversial civil asset forfeiture system. If it passes, the increased notice requirements, higher burden of proof, revamped innocent owner provision, proportionality considerations, and restrictions on equitable sharing would combine to bring additional accountability and due process in an area of law that has always been rife with confusion, uncertainty, and abuse. While efforts at reform will undoubtedly encounter entrenched resistance from law enforcement entities and prosecutors,<sup>201</sup> the myriad abuses that have come to light in recent years merit significant reform. Until some meaningful change improves the system, Americans will continue to suffer injustice in which their livelihood is ripped from their possession by the force of an opaque, but powerful, operation of engrained legal fiction.

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199. Matt Ford, *The Bipartisan Opposition to Session's New Civil Forfeiture Rules*, THE ATLANTIC (July 19, 2017), <https://www.theatlantic.com/politics/archive/2017/07/sessions-forfeiture-justice-department-civil/534168/>.

200. Civil Asset Forfeiture Reform Act of 2014, H.R. 5212, 113th Cong. § 7 (2014).

201. *Legislation Opposed by the National Fraternal Order of Police in the 114th Congress*, FRATERNAL ORDER OF POLICE, <https://www.fop.net/CmsPage.aspx?id=35> (last visited Apr. 4, 2017) (observing that the National FOP opposes “legislation or amendments that would have the effect of weakening P.L. 106–185, the ‘Civil Asset Forfeiture Reform Act of 2000’”); see also Moores, *supra* note 88, at 787–888; Pye, *supra* note 4.