

Ill-gotten gains; abuse of asset-forfeiture statutes

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By Richard Miniter

On the morning of October 2, law-enforcement officers burst into the home of multimillionaire Donald Scott near Malibu, California. Confronted by the armed men, his wife cried out. Scott, half asleep and partially blinded by a recent eye operation, emerged from a bedroom holding a loaded .38-caliber revolver. When Scott failed to obey commands to drop the weapon, Los Angeles County Sheriff's Deputy Gary R. Spencer shot him twice in the chest. Scott died shortly thereafter.

Relying on a tip from an informant and some aerial surveillance, Spencer had obtained a search warrant for Scott's property and assembled a team of local, state, and federal law-enforcement agents. They expected to discover a large cache of marijuana. But an exhaustive search of the house and grounds found no trace of illegal drugs or drug paraphernalia.

After a five-month investigation, Ventura County District Attorney Michael D. Bradbury, whose jurisdiction includes Scott's property, released a report in March that said the raid was unjustified. He noted that Spencer's informant claimed in September 1992 that thousands of marijuana plants were growing on Scott's property. Yet two sets of aerial photographs taken that month showed no sign of cultivation. A Drug Enforcement Administration agent reported seeing 50 plants during an overflight on September 23, but Bradbury called that evidence inconclusive. Looking down at the property from a height of more than 1,000 feet without the aid of binoculars, Bradbury said, the agent could not have positively identified the plants as marijuana.

Bradbury discovered that Spencer had obtained the search warrant for the raid by withholding evidence and testimony from the judge who signed it. Ventura Municipal Court Judge Herbert Curtis III was not told that a federal reconnaissance team had found no drugs on Scott's land when they searched parts of it on two occasions a week earlier. Furthermore, Bradbury said, several of the affidavits used to support the request for a search warrant were either false or misleading.

Defending his department's actions, Capt. Larry Waldie, head of the sheriff's narcotics bureau, alluded to "historical documentation" showing that Scott's wife, Frances Plante, had been involved with drugs. Plante was convicted of possessing a small amount of marijuana in 1991, the year before she married Scott. Police sources also told the Associated Press that Plante had been seen with \$ 100 bills--hardly remarkable for the wife of a multimillionaire. Nicholas Gutsue, the executor of Scott's estate, finds the drug charge puzzling, since Scott was "known to be fanatically anti-drug."

Gutsue notes that Scott had repeatedly refused to sell his scenic 200-acre ranch to the National Park Service, which wanted to make it part of the Santa Monica Mountains National Recreation Area. Gutsue suspects that a deal was struck: After the raid, the police would seize the \$ 5-million

ranch under federal forfeiture law, which allows the government to take property used to commit a drug crime. The Park Service would buy the land, and the other participating agencies would share the proceeds. Gutsue notes that Park Service rangers took part in the raid, along with county, state, and federal drug warriors.

Park Service spokeswoman Jean Bray dismisses Gutsue's theory as "nonsense." She says three armed Park Service officials participated in the raid at the request of the Sheriff's Department but never entered Scott's house, remaining in the "perimeter containment area."

Whatever the Park Service's role, Bradbury's report cited forfeiture as an important motivation for the search. He noted that Spencer, the lead investigator, "knew that if marijuana were found growing, or if narcotics were found in sufficient quantity, it was possible that a very valuable piece of real estate would be forfeited to the government with the proceeds of a sale going to the Los Angeles Sheriff's Department."

Waldie denied Bradbury's allegation, telling the Los Angeles Times that "forfeiture was never the objective in this case." But two agents, including a forest ranger, told the Times that possible seizure of Scott's land was mentioned at a briefing just prior to the raid. And the Sheriff's Department had shared two documents with a federal drug agent: a property-appraisal statement and a parcel map on which the agent noted that a nearby 80-acre plot had sold for \$ 800,000. Bradbury observed: "We find no reason why law enforcement officers who were investigating suspected narcotics violations would have any interest in the value of the ranch or the value of the property sold in the same area other than if they had a motive to forfeit that property."

The Donald Scott case is a chilling reminder that, despite a series of exposes and calls for reform, asset-forfeiture statutes continue to pervert law enforcement and victimize property owners. Beginning with a path-breaking 1991 series in The Pittsburgh Press, the news media have dramatized forfeiture abuses, offering the stories of people who have lost homes, boats, cars, trucks, and cash to the government because police believed the property was connected to a crime. Some of these people were convicted of minor offenses, but many others were never charged with anything. The Press found that owners are not charged in most federal forfeiture cases, and investigations of state forfeitures in Florida, Missouri, and Illinois confirm that pattern. Publicity about such cases has aroused widespread indignation and prompted legislative hearings at the state and federal levels.

But aside from some modest protection for innocent property owners growing out of a recent Supreme Court case, forfeiture laws remain as much of a menace as ever. Indeed, police and prosecutors are lobbying for state laws that would make it even easier to seize property. The resistance to reform is not surprising: Law-enforcement officials have a vested interest in maintaining and expanding asset forfeiture. It's a way to feed their budgets without tax increases. So, far from slowing down because of all the bad press, forfeiture is catching on. Pioneered by the feds, it has become a tool for small-town cops. Originally used primarily in drug cases, it is being extended to new areas by creative police and legislators.

Under federal provisions, law-enforcement agencies have seized assets worth more than \$ 2.6 billion since 1985; another \$ 1.5 billion is "in the pipeline," according to the Justice Department's

Executive Office for Asset Forfeiture. There have been more than 170,000 seizures since 1985 and more than 35,000 in 1992 alone. More than \$ 1 billion in cash and property forfeited under federal law has been transferred to more than 3,000 state and local agencies since 1986. A record \$ 289 million was disbursed in 1991, and the figure for 1992 is expected to be even higher.

Many law-enforcement agencies have become dependent on the money. A 1990 bulletin from the U.S. Justice Department warned U.S. attorneys that they were falling short of expectations. "We must significantly increase production to reach our budget target," the bulletin said. "Failure to achieve the \$ 470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget predictions. Every effort must be made to increase forfeiture income during the remaining three months of fiscal year 1990."

Many states have their own forfeiture laws, and state and local officials also keep an eye on the tallies. Oklahoma County District Attorney Bob Macy recently complained to The Daily Oklahoman that his office's forfeiture income had dwindled from \$ 685,730 in 1991 to \$ 350,000 the following year (out of a \$ 3.4-million budget). He blamed the drop on local cops who prefer to turn forfeiture cases over to the feds and thereby avoid giving the district attorney a cut.

For small towns with tight budgets, forfeiture is a boon. Lenexa, a suburb of Kansas City, Kansas, with a population of only 29,000, reaped at least \$ 250,000 from forfeitures in 1991. Police departments can even benefit from forfeitures carried out by other agencies. The Suffolk County, New York, District Attorney's Office proudly cites the forfeiture money it gives cities for new squad cars, radar detectors, and other equipment.

The forfeiture provisions of the 1984 Comprehensive Crime Control Act say that money from seizures may be used only for "law enforcement purposes," but this can mean luxuries for police officers or prosecutors. The Philadelphia Police Department purchased a new air-conditioning system with money from asset forfeitures. And Suffolk County, New York, District Attorney James M. Catterson Jr. drives a BMW 735i seized from a drug dealer. He spent \$ 3,412 from his office's forfeiture fund to repair the car, \$ 300 on a watch for a retiring secretary, and \$ 3,999 on chairs.

Forfeiture laws make it remarkably easy to take people's property. (See "United States v. One Assortment of 89 Firearms," May 1990.) In a civil forfeiture case, the owner need not be convicted or even charged with a crime. Under federal law, police may seize property when they have "probable cause" to believe that it was purchased with the proceeds of a drug crime (everything from jewelry to a house) or that it was or would have been used to commit a drug crime (a car with pot in the glove compartment or cash intended for a cocaine buy). Unless the owner challenges the seizure within 30 days, posting a "cost bond" equal to 10 percent of the property's value, the government automatically keeps the asset.

If the case goes to trial, the prosecution has to prove a connection between the property and a crime by a "preponderance of the evidence." This burden of proof is considerably lighter than the "beyond a reasonable doubt" standard in criminal cases. And the government does not provide an attorney if the owner cannot afford one--which is often the case when the government has taken most of the defendant's assets.

Meanwhile, the government keeps the property. Even if it ultimately loses the case, it doesn't have to pay the owner for legal expenses, lost benefits, or damage to the property. On the other hand, home owners must still pay mortgages and taxes. Because the government has so much leverage, it can often convince people to settle for a partial return of their property, sometimes in exchange for a payment.

The upshot is that police and prosecutors often have little reason not to seize someone's property. Wealthy individuals like Donald Scott have valuable property that can be a tempting lure. People of modest means probably cannot afford to challenge a seizure.

The latter category includes many car owners. In cities such as Washington, D.C., police seize the cars of suspected johns in areas of prostitution. Elsewhere police seize cars idling near "known centers of drug activity" such as New York's Morningside Park. New York City seizes an average of 10,000 cars per year. In Oakland, California, the city has posted signs bearing the words "DRUG BUYERS" in a red circle with a slash through it and the warning: "VEHICLES SUBJECT TO SEIZURE!" Such forfeitures are not likely to be challenged. Say the police seize a 1990 Honda Civic, with a blue-book price of \$ 9,050. The owner probably won't spend \$ 10,000 in legal fees to get it back.

Whether their targets are big or merely easy, forfeiture encourages police to seek profits rather than fight crime. Needless to say, this can lead to twisted priorities, even from a drug warrior's perspective. Who wants to seize a dilapidated crack house when a suspected pot grower's mansion is there for the taking?

At a recent conference on white-collar crime, Michael F. Zeldin, former director of the Justice Department's Asset Forfeiture Office, conceded that forfeiture has encouraged the narrow-minded pursuit of seizable property: "We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws...."

And former New York City police commissioner Patrick V. Murphy told Congress last fall, "The large monetary value of forfeitures ... has created a great temptation for state and local police departments to target assets rather than criminal activity." Murphy cited the example of a local police department that "has a financial incentive to impose roadblocks on the southbound lanes of 1-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed."

Cathy Green, president of the New Hampshire Association of Criminal Defense Lawyers, says, "There's a tremendous incentive for small local police departments to target" the wealthy. She cites a Bedford, New Hampshire, case in which the police asked an informant, "Who do you know who sells drugs and has a house?" The informant replied: "Bernardi." Although they had no evidence that he was selling drugs, undercover police visited Nicholas Bernardi and asked him to obtain and sell marijuana to them. After what Green calls "persistent badgering," Bernardi gave in. He later sold them marijuana, whereupon they arrested him and seized his house for its "use in the commission of a crime."

After learning of the cops' persistence in convincing Bernardi to commit a crime, a jury found him not guilty. But the police refused to return his house. In New Hampshire, local law-enforcement agencies get to keep 45 percent of the proceeds from the sale of forfeited property. "One of the real concerns in these civil-forfeiture cases is the motives of the police," says Green.

In some cases the motive is obvious. In 1987, police in Maui, Hawaii, found marijuana growing in the backyard of Joseph and Frances Lopes. It belonged to their mentally disturbed 28-year-old son. He pleaded guilty and was sentenced to probation and weekly psychotherapy. The Lopeses thought the incident was behind them. But four years later a detective scouring old records for forfeitable property found their names. Federal agents seized the house, citing the 1987 drug case. The Lopeses have been allowed to stay in their home until the forfeiture trial is complete.

The case of Billy Munnerlyn illustrates how difficult it is to challenge a forfeiture. Munnerlyn once owned a small but flourishing air-charter business and had dreams of expanding. Those hopes came crashing to the ground after he agreed to fly an old man named "Sullivan" and four locked blue plastic boxes from Little Rock, Arkansas, to Ontario, California, on October 2, 1989. About three hours after the plane landed, DEA agents arrested Munnerlyn and hauled him off to Cucamonga County jail. They told him he was under arrest for conspiracy to distribute cocaine. No drugs were found on the plane.

Munnerlyn had no criminal record, but he did have bad luck. His 74-year-old passenger turned out to be Albert Wright, a convicted cocaine dealer, and the blue boxes contained about \$ 3 million in cash. After 71 hours in jail, Munnerlyn was released. No charges were filed against him. But when he went to pick up his plane, Munnerlyn recalled in congressional testimony last year, "I found it guarded by a DEA agent. The agent told me that my jet was the property of the U.S. government and that I could not fly it or ... I would be arrested for stealing government property." The government also kept Munnerlyn's \$ 8,300 flight fee.

Munnerlyn had to rent a car to get back home to Las Vegas. He immediately began fighting for the return of his 1969 Learjet. He suffered three years of frustration and incurred more than \$ 120,000 in legal bills. He had to sell his other three planes and his office equipment to pay his debts. Eventually, he declared bankruptcy, and for a while the one-time pilot drove an 18-wheeler, making 22 cents a mile.

Rejecting several settlement offers involving large cash payments to the federal government, Munnerlyn insisted on a jury trial. He won. "The jury ordered the government to return my jet and charter fees," he says. The judge threw out the verdict on technical grounds and ordered a new trial. In the midst of the second trial, three years into the ordeal, Munnerlyn settled, "paying more than \$ 15,500 to buy back my own property," he says. "This isn't the legal system for which I fought in Korea."

Even getting his plane back proved to be a pyrrhic victory. As Munnerlyn learned, the government has no obligation to maintain or safeguard the property in its custody--despite charging him storage fees. His plane had been ripped apart in a futile search for drugs, and he couldn't determine how many hours it had been flown. The Learjet Co. told him it would cost more than \$ 100,000 for repairs and maintenance to pass a federal airline inspection.

Because fighting a forfeiture is so hard, officials don't have to be careful about picking their targets. "It is kind of like the old saying, (Kill them all and let God sort them out,'" says Scott Bullock, an attorney with the Institute for Justice in Washington, D.C. "Only now the government is saying, (Seize it all and let the innocent sue to get it back.'"

One favored way of raking in money is searching suspected drug couriers and seizing any cash they're carrying, on the assumption that it's either proceeds from a sale or the bankroll for a buy. Allen Coulter Kidd was riding his motorcycle through Chesterfield County, Virginia, in 1991 when he was stopped by local police. The police found no drugs on Kidd, but they took him down to headquarters anyway. They seized the \$ 2,780 in cash he was carrying and his Harley Davidson motorcycle.

The 35-year-old pleaded not guilty to the drug charges, and the case was dismissed three months later, when the government could not supply any evidence. Yet Kidd had to wait more than a year before he got his motorcycle and half of his money back. The police kept the remaining \$ 1,390. "They come here on suspicion and take anything I own," Kidd told The Richmond Times-Dispatch. "It's a big joke--a joke that ain't funny."

In Volusia County, Florida, police have seized more than \$ 8 million in cash and property in the last three years from motorists stopped for minor traffic violations. In many cases, drivers were stopped because police thought they were drug couriers, but no drugs were found. Sometimes police will cite traces of cocaine on seized money as evidence that it's connected to drug crime. But random tests find that more than 80 percent of U.S. currency is contaminated by cocaine, which adheres readily to paper and can be detected in trace amounts for months. Federal and state courts have begun to question the validity of such evidence. In April, U.S. District Judge Thomas A. Wiseman Jr. ordered federal drug agents to return \$ 9,000 they had seized from a Nashville landscaper at an airport in 1991. "The presence of trace narcotics on currency," he wrote, "does not yield any relevant information whatsoever about the currency's history."

Even though such trace evidence is not likely to stand up in court, police can keep the money until the owner mounts a costly, time-consuming lawsuit to get it back. Most just give up--and the funds go into police coffers. Carey H. Copeland, director of asset forfeiture at the U.S. Justice Department, concedes that in most cash seizures the owners are "technically innocent."

Concerns about the "technically innocent" have prompted calls for reform. "We continue to be enormously troubled by the government's increasing and unchecked use of the civil forfeiture statutes and disregard for due process," George C. Pratt, a judge on the U.S. Court of Appeals for the Second Circuit, wrote in a 1992 case, *U.S. v. All Assets of Statewide Autoparts Inc.* He urged federal district courts to stay asset seizures until after the owner is convicted of a crime, arguing that "through courageous and sensitive application of their discretionary powers the district courts can then ensure that due process remains a reality and is not reduced to a mere encomium."

In *United States v. 92 Buena Vista Ave.*, decided in February, the U.S. Supreme Court offered some protection to innocent property owners. A New Jersey woman, Beth Ann Goodwin, challenged the forfeiture of a home she had purchased with money that her boyfriend, an alleged

marijuana importer, had given her. The Court ruled that the "innocent-owner defense" allowed by federal law entitles Goodwin to present evidence that she did not know the money came from illegal activity. If she can convince a court, she can keep her home.

In two pending Supreme Court cases, property owners argue that forfeiture violates the Eighth Amendment's prohibition of cruel and unusual punishment and excessive fines when it imposes penalties that are grossly disproportionate. In *Alexander v. the United States*, a criminal forfeiture case, the government seized an entire chain of adult book stores and movie theaters based on the presence of a few obscene items. In *Austin v. United States*, a civil forfeiture case, the government took a North Dakota man's car-repair business and mobile home after he sold two grams of cocaine to an undercover agent. Although it upheld that forfeiture, the U.S. Court of Appeals for the Eighth Circuit wrote: "We are troubled by the government's view that any property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction."

Recognizing that civil forfeiture constitutes punishment without trial, reformers argue that forfeiture should be allowed only after the owner has been convicted of a crime. This requirement would end arbitrary seizures of cash, curtail searches that are not likely to turn up evidence of a crime, and require prosecutors to establish a case before taking someone's assets. Property owners would enjoy the same protections as criminal defendants, including the presumption of innocence, the right to a prompt hearing, and freedom from cruel and unusual punishment.

Critics of forfeiture also argue that proceeds from the sale of confiscated assets should go into the government's general fund rather than law-enforcement coffers. This change would encourage police to focus on law enforcement rather than forfeiture.

But reformers who urge Congress and the state legislatures to curtail forfeiture abuses face stiff opposition from police and prosecutors, who like forfeiture and want to expand its use. The Justice Department's Copeland would like a forfeiture provision for every federal offense. Many prosecutors look to Arizona, which has the nation's strongest and broadest forfeiture laws. Unlike most states, Arizona does not give property owners a right to a jury trial. Just to file a forfeiture challenge, an owner must supply highly detailed information about the property's history. If he wins, he must pay his own legal fees; if he loses, he must pay the cost of the government's investigation and prosecution.

Arizona also allows seizure of property associated with "racketeering," which it defines very broadly. Under Arizona law (unlike the federal Racketeer Influenced and Corrupt Organizations Act), racketeering need not involve a pattern of activity or more than one offense. Just about any crime punishable by more than a year in prison, when committed for profit, qualifies. This includes not only biggies such as homicide, robbery, and kidnapping but also gambling, usury, drug offenses, weapons violations, obscenity, prostitution, restraint of trade, money laundering, and the sale of securities by unregistered brokers. His state's goal, says Assistant Attorney General Cameron Holmes, is "(social engineering) accomplished through government intercession in commercial activity harmful to the economy as a whole." He sees Arizona's approach as a model for other states.

In California, a battle is brewing over whether to renew the state's forfeiture law, which expires January 1. The stakes are high: Californians forfeited about \$ 56 million under the law in 1991, the most recent year for which figures are available, and police and prosecutors keep 90 percent of the proceeds from each forfeiture they handle. No conviction is required, and the prosecution has only to prove its case by a preponderance of the evidence. The government may seize land and buildings related to a drug violation and vehicles used in any manner to facilitate the sale of illegal drugs. On the other hand, the law exempts jointly owned family cars and up to \$ 100,000 in jointly owned real property if the innocent spouse could not reasonably have known about the crime. And real property cannot be seized for marijuana offenses.

If this law expires, an earlier statute would go into effect. That law defines forfeitable property more narrowly and allows broader exceptions for community property. It requires conviction before forfeiture, except for cases involving more than \$ 25,000 in cash or when the defendant flees prosecution. And even in those instances, prosecutors have to provide "clear and convincing evidence," a tougher standard of proof than the current one.

Sen. Ken Maddy (R-Fresno), supported by Gov. Pete Wilson, Attorney General Dan Lungren, and an impressive array of police and prosecutors, wants to extend the current law and add provisions to make forfeiture easier. He argues that "asset forfeiture is one of the most potent weapons we have in combating illicit drug trafficking. Losing this valuable weapon now would be a disastrous blow to the progress we've been making against drug criminals."

Among other things, Maddy's bill would shift the burden of proof to the accused in some cases and eliminate the community-property exemptions for homes and vehicles. It would also allow the government to take an entire tract of land if any part of it was involved in a drug crime and would permit forfeiture of real property in marijuana cases involving more than 100 plants. It would let police seize property allegedly purchased with drug money up to 10 years after the fact (the limit now is five), regardless of who the current owner is.

In testimony before the California Assembly's Committee on Public Safety last fall, witnesses urged legislators to reject Maddy's approach. Opponents included such mainstream organizations as the California State Grange, the California Bankers Association, the California Land Title Association, and the California Restaurant Association. These groups are concerned because forfeiture laws hold owners accountable for illegal activity on their property, whether they know about it or not. Business people are also worried about the "relation-back doctrine," which allows the government to seize tainted property from subsequent owners.

Witnesses noted the conflict of interest created by giving forfeiture money to police and prosecutors. As summarized by the Committee on Public Safety, "Asset forfeiture is a multi-million-dollar source of revenue for law enforcement. Thus, there is an incentive to seize property as a revenue source. Opponents state that ... persons suspected of participation in or having knowledge of drug crimes rarely will be given the benefit of the doubt by those who will gain financially by the seizure. This is viewed as a particular problem in times of tight budgets."

The response of police and prosecutors who testified in favor of Maddy's bill was not reassuring. As the committee's report put it: "Proponents acknowledge the possibility of a conflict of interest,

but state that strict guidelines and training are in place to prevent this from occurring. They state that they are unaware of any actual problem in this area." In other words, "Trust us."

Brenda Grantland, an attorney who co-founded the civil-liberties group FEAR (Forfeiture Endangers American Rights), is skeptical. Police behavior is certain to be influenced by "the unbounded opportunity for financial gain," she says. "You can never trust the police, because they're profiting off this."

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