CONTESTING THE GOVERNMENT'S CONFLICT OF INTEREST IN DRUG CASES

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In 1984, the civil asset forfeiture law was amended to allow the Justice Department and state law enforcement agencies to retain many of the "drug related assets" they seize for their own law enforcement purposes. Under this amendment, some local law enforcement agencies have managed to double or triple their appropriated budgets by targeting such assets. As former Attorney-General Richard Thornburgh has noted, "its now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation." The American people are paying a price for this largess, however: economic temptation now hovers over all law enforcement decisions, and law enforcement activity is becoming increasingly skewed in counterproductive ways. Since 1984, police and prosecutorial agencies have routinely operated under a conflict between their economic self-interest and traditional law enforcement objectives. Both the crime prevention and due process goals of our criminal justice system are compromised when salaries, continued tenure, equipment, modernization, and budget depend on how much money can be generated by forfeitures.

This article discusses the constitutional problems with this conflict of interest. When substantial, police and prosecutorial conflicts of interest violate the Due Process Clause -- and as we show below, such conflicts *are* substantial in a great many cases.

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We believe that the conflict of interest objection is appropriate not only in civil forfeiture cases themselves, but in any case in which the government's actions may have been influenced by the potential to fund itself through forfeiture. For example, in a criminal drug prosecution, counsel should consider a motion to dismiss when a wealthy defendant was singled out for prosecution because he possessed forfeitable assets; but a motion to dismiss may be equally sound on behalf of a poor defendant who was not offered as lenient a plea bargain as equally culpable co-defendants who were able to trade their assets for time. In both of these contexts, the defendant has suffered actual prejudice because of the government's conflict of interest. The government's conflict may also provide the basis for a motion to disqualify a prosecutor whose salary is in part dependent on forfeitures -- as in Eastern Massachusetts, where a recent investigation disclosed that 12% of the district attorneys' budgets were financed through forfeitures they obtained.

Of course, numerous other challenges may be posed in particular forfeiture cases, many of which are comprehensively discussed in David Smith's treatise, Prosecution and Defense of Forfeiture Cases. Here we focus on previously unasserted challenges to forfeiture's economic incentives. It may be that courts will prove more amenable to a well argued constitutional attack on this aspect of the forfeiture laws than they have been to attacks on the forfeiture laws generally or on the conduct of well-intentioned law enforcement officers in particular cases.

THE GOVERNMENT'S DRUG WAR DIVIDEND

The government's conflict results from two 1984 acts redirecting the disposition of assets forfeited under 21 USC 881. Under sec. 881, cash, bank accounts, jewelry, cars, boats, airplanes, businesses, houses, land and any other property which "facilitated" a drug crime may be seized and forfeited to the government. With the

Comprehensive Crime Control Act of 1984 (PL 98-473 sec. 309-310), these assets, which formerly were deposited in the Treasury's General Fund, were instead channeled into the Justice Department's Asset Forfeiture Fund where they would be available for law enforcement purposes. A second law initiated a federal "equitable sharing" program, whereby state police who turn seized assets over to the Justice Department for "adoptive federal forfeiture" receive back up to 80% of the value, to be used exclusively for law enforcement purposes. *See* 21 USC sec. 881(e)(1)(A) and 19 USC sec. 1616a(c). For many state and local police departments, 80% is a far larger proportion of the assets than they would receive by proceeding under their own state forfeiture laws, which generally require sharing with other state agencies. The profit and ease of federal adoption has led to widespread circumvention of stricter state forfeiture laws.

THE DUE PROCESS OBJECTION

The Constitutional due process guarantee includes the right to an impartial tribunal in both civil and criminal cases. Tumey v. Ohio, 273 U.S. 510, 523, 532 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). These precedents should outlaw such forfeiture statutes as Louisiana's, which authorizes the criminal court to issue a warrant for seizure of the property, order forfeiture, and then allocate forty percent of the proceeds to its own criminal court fund.

But the more potentially significant question is whether *police and prosecutorial decisions* must also satisfy due process standards of impartiality. At this point the Supreme Court has indicated only that (1) the stringent impartiality standard it requires of adjudicatory officials does not apply to prosecuting officials, but (2) neither is the prosecutor free from all conflict of interest restrictions. Some due process limits on law enforcement rewards do exist, but where between these poles they may be

found must still be spelled out, and likely will be when litigants focus on the equitable sharing payback law.

What constitutional guidance exists is found primarily in *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980). *Jerrico* upheld a section of the Fair Labor Standards Act that allowed a division of the Labor Department to retain the civil penalties it assessed for child labor violations, as compensation for the costs of determining violations and assessing penalties. Distinguishing the conflict of interest prohibitions governing a factfinder, who must be and appear impartial, from the less stringent limitations on law enforcement officials, the court held that prosecutors "need not be entirely neutral and detached. In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law." At 248. But this was far from a blank check for prosecutorial self-aggrandizement, because the Court simultaneously emphasized that prosecutors too are bound by at least some due process limitations on conflicts of interest:

> We do not suggest...that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law. Moreover, the decision to enforce — or not to enforce — may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions. (At 249-50).

In *Jerrico* the Court found that the constitutional barrier had not been crossed because the institutional benefit to the prosecuting department (the Employment Standards Administration) was too small to be a factor in decisions regarding whom to prosecute and how much to fine. The Court examined three relevant factors — the degree of institutional financial dependence on the prosecutorial decision, the official's

personal stake, and the penalty distribution formula — and none of them suggested any temptation towards impropriety. But in the forfeiture situation, each of these three factors cuts the other way, and to an extreme degree. One could hardly design an incentive system better calculated to bias law enforcement decisions than the present forfeiture laws. Taking the *Jerrico* factors in order:

Financial dependence: In *Jerrico* the penalties collected totaled less than 1% of the ESA's budget, and because more than this amount was returned to the Treasury, they had not increased the ESA's funding at all. By contrast, numerous law enforcement agencies now rely on forfeitures to fund a significant part of their operations. The gross amounts are prodigious: By 1987 the Drug Enforcement Administration was effectively paying for itself, with seizures exceeding its annual budget. Between 1985 and 1991, the Justice Department collected more than 1.5 billion in illegal assets; in the next five years, the Justice Department almost doubled this intake, depositing $2.7 billion in its Asset Forfeiture Fund. It appears that this forfeiture income is sometimes required to operate the Department, which has regularly exhorted its attorneys to make "every effort" to increase "forfeiture production" so as to avoid budget shortfalls. Similarly, Justice Department reports have observed that state and local law enforcement agencies are becoming increasingly dependent upon equitable sharing of forfeiture proceeds, and that multijurisdictional drug task forces "expect to have to rely increasingly on asset forfeitures for future resources."

Personal interest: Although the Justices found that the ESA Regional Administrators had no personal stake in the penalties they assessed, they did note that constitutional violations might have arisen had the arrangement injected a personal stake into the prosecutor's decisions. The revised forfeiture laws do create such a stake: when a police department is allowed to rely on forfeiture income to supplement its allocated budget, its officer's choice of who and what to target may mean the difference between a paycheck and a pink slip. Indeed, in some departments, police

salaries are paid directly from asset forfeiture funds, so long as the funds supplement rather than supplant budgeted positions.[1]

The funding formula: Finally, in Jerrico the court stressed that the statutory scheme reimbursed regional offices according to their expenses rather than their collections, providing no reason for regional offices to seek unreasonably large penalties. No such restraint exists in the asset retention statutes; the larger the seizure, the higher the reward each participating office receives.

The above three factors were singled out by the Supreme Court as *indicia* of whether police or prosecutors were affected by their financial stake in the case. But in many forfeiture-inspired cases, counsel will have direct evidence that decision making was corrupted in ways that violate the due process guarantee enunciated in *Jerrico*. In all of the following types of cases, a defendant may have suffered legally cognizable prejudice -- i.e. the defendant would not have been targeted, or treated as harshly, in the absence of the agency's financial interest:

1. *Selective prosecution of asset-rich defendants:* Consider whether the law enforcement agency selected its targets according to the funding they could provide rather than the threat they posed to the community. A Justice Department-commissioned report proposed precisely this approach to multijurisdictional task force commanders, suggesting that as asset seizures become more important "it will be useful for task force members to know the major sources of these assets and whether it is more efficient to target major dealers or numerous smaller ones." In one of the worst examples of such targeting, Donald Scott was killed in 1992 by a multijurisdictional team that invaded his property, looking (in vain) for drugs and (according to the

[1] Directive 91-4 at 8, in *DOJ Asset Forfeiture Manual* at B-584.35-36. *See also* "Money at the root of deals," Boston Globe at 1, 6 (Sept. 25, 1995)(reporting that forfeiture funds finance police overtime pay and rents, and that district attorneys "have grown dependent on the drug money as a way to help pay their basic operating expenses").

Ventura County District Attorney's investigation[2]) for a chance to forfeit his multi-million dollar ranch.

A similar motivation may have prompted the tactics used in the mid-1980's by both the New York City and Washington, D. C. police. Invoking 21 USC 881(a)(4), police instituted a practice of seizing the cash and cars of persons coming into the city to buy drugs.[3] The consequence of this strategy was that the drugs which would have been purchased continued to circulate freely. Patrick Murphy, formerly the Police Commissioner of New York City, described a similar strategy in Florida in testimony to Congress, noting that police had

> a financial incentive to impose roadblocks on the southbound lanes of I-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 dept., while seized drugs can only be destroyed.

For prosecutors too, funding exigencies have pre-empted other considerations. One Department of Justice manual governing racketeering prosecutions, for example, suggests that prosecution may be contingent on the presence of forfeitable assets, rather than forfeiture being an incident of prosecution.

2. *Drug buyers who have been victims of a "reverse sting".* In a reverse sting, police pose as dealers and sell drugs to an unwitting buyer. The chief attraction of the reverse sting is that it allows police to seize a buyer's cash rather than a seller's drugs (which have no legal value to the seizing agency). According to J. Mitchell Miller, who while a graduate student in the South worked as a police officer and participated in

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[2] *Report on the Death of Donald Scott* 37-41 (Office of District Attorney, Ventura County, Cal, Mar 30, 1993).

[3] David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 1.01 at 1-14 to 1-15 (Matthew Bender June 1995, Release 16). Presumably these alleged "buyers" were identified by an informant, a wiretap, or by the existence of sufficient cash revealed in a roadblock. But entirely lawless versions were documented in Florida, *id.* at 1.02, p. 1-25, and in Louisiana by NBC Dateline, which revealed massive numbers of pretext arrests for "improper lane changes", followed by searches and seizures of money found on the entirely unsupported grounds that the cash was drug related. "Probable Cause? Policemen in Louisiana harass motorists and their property for no apparent reason." Dateline NBC, Jan. 3, 1997

some reverse stings, "this strategy was preferred by every agency and department with which I was associated because it allowed agents to gauge potential profit before investing a great deal of time and effort. [Reverse stings] occurred so regularly that the term *reverse* became synonymous with the word *deal."* Whether the suspects were engaged in major or trivial drug activity, and whether the strategy actually placed more drugs on the street, were of little if any importance.

3. *Disparate plea offers or sentences*: Forfeiture laws promote unfair, disparate sentences by providing an avenue for affluent drug "kingpins" to buy their freedom. Although wealthy defendants may be targeted in the investigatory stage, in the plea bargaining context the ultimate losers are the defendants without assets to trade for time. The harsher treatment they receive is a direct result of the prosecutor's conflicting financial interest, and thus should be cognizable under the due process clause. (*See also* the 1997 unanimous Supreme Court decision in Bracy v. Gramley, 117 S. Ct. 1793, which held that a judge's favoritism towards *other* defendants who bribed him may have violated the petitioner's right to an impartial trial by giving the judge a motive to camouflage his lenient treatment with a conviction: it would violate due process if the judge "was biased in this...compensatory sense...to avoid being seen as uniformly and suspiciously 'soft' on criminal defendants.") Investigations in several jurisdictions have documented that criminal defendants with the most assets to turn over to the authorities routinely serve shorter prison sentences and sometimes no prison sentence at all. In Massachusetts, where as noted 12% of prosecutorial budgets are financed by forfeitures, a recent investigation by journalists found that on average "payment of $50,000 in drug profits won a 6.3 year reduction in a sentence for dealers," while agreements to forfeit $10,000 or more bought elimination or reduction of trafficking charges in almost 3/4 of such cases. These distorted, disparate plea offers remain untested under the due process right to an impartial prosecutor, and the most

hopeful challenge may come from the asset-poor defendants who suffer the most in plea bargaining from the government's conflict of interest.

PROSPECTS FOR REFORM

Will such a due process challenge bear fruit? Although the Supreme Court has rejected most forfeiture law reform challenges, the Court *has* recognized that forfeiture "can be devastating when used unjustly," *Caplin & Drysdale, Chartered v United States*, 491 US 617, 634 (1989), and that "it makes sense to scrutinize governmental action more closely when the state stands to benefit." *U.S. v. James Daniel Good Real Property*, 510 US 43, 56 (1993). Some of the justices are also committed to strengthening property rights, or restricting legislative delegations to the executive -- legal values entirely at odds with the present forfeiture laws. Most fundamentally, for a court to sidestep this issue would betray one of the central concerns that led to the founding of our constitutional order. Financial incentives promoting police lawlessness and selective enforcement, in the form of the customs writs of assistance, were high on the list of grievances that triggered the American Revolution. Writs of assistance authorized customs officers to seize suspected contraband, and retain a share of the proceeds, often a third, for themselves and their informants. From the viewpoint of the Crown, this incentive could help insure that goods landing in American ports were taxed or, if prohibited, confiscated. But for the colonists, it was an outrage that brought with it corrupt officials, lawless seizures, selective enforcement, fabricated evidence, and extortionate agreements from subjects who had no effective legal recourse. From these complaints, John Adams said, "the child Independence was born." The same fundamental grievances are now lodged against our present forfeiture laws. What court can read such formative concerns out of the Constitution?

END

APPENDICES

A SEPARATION OF POWERS OBJECTION

Agencies that can finance themselves through asset seizures need not justify their activities through any regular budgetary process. As a Justice Department report notes, "one 'big bust' can provide a task force with the resources to become financially independent. Once financially independent, a task force can choose to operate without Federal or state assistance." Justice Research and Statistics Association ("JRSA"), *Multijurisdictional Drug Control Task Forces: A Five-Year Review 1988-1992* 9 (Oct 1993). This situation violates not only a defendant's due process rights, but also the constitution's Appropriations Clause and the separation of powers framework that the clause was designed to support, as follows.

Under Art. I, sec. 9, cl. 7, Congress is vested with exclusive appropriations power. Along with supporting statutes, the Appropriations Clause assures that government income cannot be spent until a specific congressional appropriation releases it. By contrast, under 28 U.S.C. 881(e)(2)(B) money seized by a federal agency is deposited in the Department of Justice's Asset Forfeiture Fund, where it is then available to the Department and other federal agencies for drug law enforcement and, in some cases, funding prisons. This arrangement bypasses the Treasury, leaving the Justice Department free to determine the contours of its own budget. The Justice Department, the DEA and other federal law enforcement agencies have essentially been given the freedom to fund themselves in whatever amount their agents can legally seize. The constitutional questions are whether this kind of blank check comports with section 9 and, more broadly, the constitutional scheme of separate powers that serve to check and balance each other.

The complication is that this blank check was issued by Congress, and in theory it can terminate the privilege at any time. This generates two alternative possible interpretations: sec. 881 might be deemed either an *exercise* of the congressional appropriations power, or it might be considered an unconstitutional *transfer* of this power to the executive branch. Obviously executive agencies must exercise legislatively delegated power, but just as obviously there must be limits of degree or the organizing principle of the constitutional structure, the separation of powers, could be lawfully destroyed. In theory the non-delegation doctrine is designed to discern this limit. After a long period of decline, the non-delegation doctrine has been showing new signs of life. [4]

If some delegations of legislative power are constitutionally suspect, giving law enforcement agencies the opportunity to set the size of their own budgets through police seizures must be one of them. By issuing this blank check Congress has alienated the vital legislative function assigned to it by the Appropriations Clause: specifying the size and nature of the government's activities. This is precisely what Congress did *not* do when it enabled law enforcement agencies to fund themselves with whatever assets they might lawfully seize. A law enforcement agency can now decide for itself what its size and resources will be, unconstrained by any legislative determination of an appropriate budgetary level. This wholly thwarts sec. 9's constitutional function as defined by the Supreme Court, which is "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents..." OPM v. Richmond, 496 U.S. 414, 428 (1989).

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[4] *See, e.g., Industrial Union Department, AFL/CIO v American Petroleum Institute*, 448 US 607 (1980); *INS v Chadha*, 462 US 919, 944-59 (1983); *See also* Justice Kennedy's concurring opinion in the *Supreme Court's recent decision holding the line item veto unconstitutional,* Clinton v. City of New York, 118 S. Ct. 2091, 2108 (1998).

The prospect of a self-financing law enforcement branch, largely able to set its own agenda and accountable to no one, might sound promising to Colonel North or General Pinochet -- but it should not be mistaken for a legitimate organ in a democracy. It presents the kind of dangers one of the framers, George Mason, must have had in mind when he warned that "the purse and the sword ought never to get into the same hands, whether legislative or executive."

THE LEGISLATIVE REFORM OPTION

It appears likely that Congress will enact some measure of forfeiture reform in the coming year. But pending forfeiture reform bills do not include any measures to rectify equitable sharing and other asset distribution provisions or the conflict of interest and accountability problems that result. House Judiciary Committee Chair Henry Hyde has omitted asset allocation reform from his bill despite its importance because, he says, "the financial considerations involved in the present federal adoption system mean unyielding opposition from law enforcement officials at all levels to any change in the law...." Hyde, *Forfeiting our Property Rights* 68 (Cato Institute, 1995). Nevertheless, unless Congress wants to abandon any hope of regaining control over the drug war bureaucracy it has created, it had better try to do so sooner rather than later.

The most obvious federal reform, and one that would cure both the conflict of interest and accountability hazards of the present system, would require forfeited assets to be deposited into the Treasury's general fund. This one measure would restore congressional budgetary oversight, and remove the incentive for police departments to distort their agendas for budgetary reasons. An alternative, identical in

effect, would require that a law enforcement agency debit the value of any forfeited assets it retains from the budget it receives through congressional appropriation.

If Congress cannot or will not enact these fundamental reforms, there are lesser but crucial steps it might take to ameliorate the particularly destructive impact of the adoption procedure, which allows local police to "federalize" a forfeiture and receive back 80% of the assets, more than their own state laws might provide. Adoption serves to provide police with a means of manipulative forum shopping without furthering any other, more legitimate purpose. Congress should either (1) repeal the federal adoption law or (2) amend it to require that money given back to the states after an adoptive forfeiture be allocated according to state forfeiture law.

SOME OTHER CONSTITUTIONAL CHALLENGES

If the Supreme Court is unresponsive to constitutional claims regarding asset retention, there are other, less direct litigative strategies to limit the abusive application of Sec. 881. A significant 1993 Supreme Court decision provides one such avenue: in *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801 (1993), the Court held unanimously that civil forfeitures are subject to the Eighth Amendment's prohibition on excessive fines. This is an important limitation because on its face, sec. 881 would seem to allow forfeiture of any property, no matter how valuable, if it could be linked to even a minor drug violation. Civil forfeiture formerly was thought not to implicate the excessive fines provision because it was labeled civil. In *Austin*, however, the Court found that forfeiture constitutes punishment regardless of whether it is considered civil or criminal, and therefore is subject to the Eighth Amendment. (Just this year, in U.S. v. Bajakajian, 118 S. Ct. 2028 (1998), the Court announced that the test of excessiveness in *criminal* forfeitures is whether the forfeiture was grossly

disproportionate to the gravity of the criminal offence.) Presumably *Austin's* holding will now provide recourse for a family whose home was seized because a teenage son had sold "nickel bags" in his bedroom.

As forfeiture law and constitutional doctrine continue to develop, additional possible challenges may be grounded in the ethical constraints that govern prosecutors or doctrinal limitations on "outrageous governmental conduct"; or in the Supreme Court's emerging doctrines designed to protect states' rights against national power. Given the Supreme Court's rapidly increasing interest in the latter issue -- *see* United States v. Lopez, 115 S. Ct. 1624 (1995), Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 117 S. Ct. 2365 (1997) -- there may come a time when the adoptive forfeiture law -- which permits local police departments to combine with the federal government in order to circumvent their own state forfeiture laws -- is ripe for effective challenge on federalism grounds.