

August 2002

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Recommended Citation

Blumenson, Eric and Nilsen, Eva S., "The Next Stage of Forfeiture Reform" (2002). *Suffolk University Law School Faculty Publications*. 2.
https://lsr.nellco.org/suffolk_fp/2

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THE NEXT STAGE OF FORFEITURE REFORM

Eric D. Blumenson & Eva Nilsen*

In passing the Civil Asset Forfeiture Reform Act of 2000, Congress instituted some badly needed reforms to a system that had spawned a good deal of governmental abuse, media investigation, and popular outrage. Unfortunately, however, CAFRA does not address the aspect of asset forfeiture law that is perhaps most responsible for fueling overzealous, sometimes lawless use of the forfeiture power: federal forfeiture law continues to authorize law enforcement agencies to retain the drug-related assets they seize for their own use, and many state laws do as well.¹ Indeed, even when a state's law earmarks forfeited assets to education or other non-law enforcement purposes, federal law allows a local police force to "federalize" a seizure and receive back 80% of the assets for its own budget.² Under this arrangement, some local police forces have

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¹ 18 U.S.C. § 981(e); 28 U.S.C. § 524(c). Under 21 USC § 881, the federal government is authorized to seize and forfeit cash, bank accounts, jewelry, cars, boats, airplanes, businesses, houses, land and any other property which "facilitated" a drug crime. Prior to a 1984 amendment, the forfeited assets were deposited in the Treasury's General Fund. But with the Comprehensive Crime Control Act of 1984, PL 98-473 sec. 309-310, these assets were instead channeled into the Justice Department's Asset Forfeiture Fund where they are to be used for law enforcement purposes and, in some cases, funding prisons. 21 USC §881(e)(2)(B); 28 USC § 524(c)(1). For a listing of state statutes and their disposition formulae as of 1998, see Blumenson and Nilsen, "Policing for Profit: The Drug War's Hidden Economic Agenda," 65 University of Chicago Law Review 35, 52-53 n. 66 (1998).

² 21 U.S.C. § 881(e)(1)(A)) and 19 USC § 1616a(c) (equitable sharing of forfeited assets between federal and state agencies); 21 C.F.R. § 1316.91(1)(1998)(adoption). Seizures accomplished exclusively by state or local agencies may be "adopted" by the federal government whenever the conduct giving rise to the seizure is in violation of federal law. Directive 90-5, "The Attorney-General's Guidelines on Seized and Forfeited Property" (July 31, 1990), at II(A). When the federal government has "adopted" a state forfeiture case, 80% of judicially or administratively forfeited assets are allocated to the state or local agencies for

managed to double or triple their appropriated budgets through forfeitures.³ With facilities, cruisers, computer and other equipment, salaries and positions sometimes dependent on how much money can be generated by their own seizures, police and prosecution agencies still routinely operate under a conflict between their economic self-interest and traditional law enforcement objectives.⁴ Freeing law enforcement of this conflict of interest is the next stage of forfeiture reform.

Three years ago we reported in detail on the constitutional and policy problems inherent in this forfeiture reward scheme.⁵ We questioned the constitutionality of this arrangement on two grounds: first, because the prosecutorial conflict of interest is

law enforcement purposes, and 20% remains with the federal government. In joint seizures, the share is determined on a case-by-case basis based on the amount of work each agency performed. A GUIDE TO EQUITABLE SHARING OF FEDERALLY FORFEITED PROPERTY FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES, *in* DOJ ASSET FORFEITURE MANUAL 7-8 (3/94); 28 U.S.C. § 881(e)(3). The Justice Department requires state and local agencies receiving equitable sharing funds to use them for law enforcement purposes including but not limited to payments for law enforcement equipment, weapons, salaries and overtime, training, expenses for travel, informant reward money, detention facilities. *Id.* at 10-11. State and local prosecutors may also receive equitable sharing under specified conditions, which include preparing documents or providing an informant. *Id.* at 8-9.

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.

³ For example, the Little Compton, Rhode Island Police Department acquired assets of more than ten times its annual budget through participation in a single operation. Steve Stecklow, *Big Money for a Tiny Police Force*, *Phil Inq* A1 (Aug 24, 1992). Such individual forfeitures in the millions are not uncommon. See, for example, *United States v Cauble*, 706 F2d 1322 (5th Cir 1983) (concerning a multimillion dollar RICO forfeiture of marijuana smuggler's businesses). We discuss law enforcement's economic stake in forfeiture *infra*.

⁴ Funds forfeited federally, into the Department of Justice Asset Forfeiture Fund, may not be used to pay the salaries of United States employees, but may be used to pay informants for information, or to pay salaries of local police or other non-federal employees. 28 U.S.C. § 524; Directive 90-5, "The Attorney-General's Guidelines on Seized and Forfeited Property" (July 31, 1990), at VII(D). Federally-forfeited funds used to finance police salaries must supplement rather than supplant budgeted positions. Directive 91-4, A GUIDE TO EQUITABLE SHARING OF FEDERALLY FORFEITED PROPERTY FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES (Dec. 1990) at 8, *in* DOJ ASSET FORFEITURE MANUAL at B-584.35-36 (Prentice Hall 1994).

⁵ See "Policing for Profit: The Drug War's Hidden Economic Agenda," 65 *University of Chicago Law Review* 35 (1998). Portions of that article are summarized or reiterated herein.

substantial enough to abridge due process; and second, because providing executive agencies with the power to finance themselves in whatever amount they can seize violates the Appropriations Clause and the separation of powers it was designed to protect (or, regarding state forfeitures, analogous state constitutional provisions). We also argued that the forfeiture incentive is extremely bad public policy, documenting numerous cases in which federal, state, and local law enforcement agencies had promoted the targeting of assets at the expense of effective crime control and evenhanded justice. Since that time, these problems have drawn the attention and increasing concern of legislators and voters on many fronts. In November, 2000, voters in Oregon and Utah approved referenda that terminated the forfeiture incentive system in those states. By large margins, these voters redirected forfeited assets to drug treatment and public education respectively, and also prohibited law enforcement from turning over seized assets for federal adoption if this would alter the disposition of the assets.⁶ Similar laws were enacted in Arkansas and Missouri,⁷ were approved by the California legislature but

⁶ Both the Oregon Property Protection Act of 2000 (Measure 3, now codified as Ore. Const. Art. XV, s.10), and the Utah Property Protection Act (Initiative B, now codified as sec. 24-1-1 et. seq.) were approved by approximately 2/3 of the vote. The Oregon and Utah referenda also require the government to prove by clear and convincing evidence that the property was involved in a crime. (A referendum that would have redirected forfeited assets away from law enforcement and into a drug treatment fund was defeated in Massachusetts by a margin of 54% - 46%. "Election 2000; Massachusetts Ballot Initiatives," Boston Globe, Nov. 8, 2000 at B1.) Whether these initiatives will withstand legislative efforts to repeal and existing court challenges them remains to be seen.

It is worth noting that despite the government's continued emphasis on drug prohibition, interdiction, and severe punishment, voters have different ideas. In November, 2001, California voters passed Proposition 36 by 61%, thereby requiring the state to treat rather than incarcerate lesser drug offenders, and to allocate \$120 million per year for drug treatment programs. Up to 24,000 non-violent offenders and 12,000 parole violators could be diverted into drug treatment every year under this initiative. Another popular dissent from the Drug War is demonstrated by the overwhelming success of medical marijuana initiatives, which at this point have been favored by voters in Alaska, Arizona, California, Colorado, District of Columbia, Maine, Nevada, Oregon, and Washington. Cf. *United States v. Oakland Cannabis Buyers Cooperative*, ___ U.S. ___, 121 S. Ct. 1711, 1719 (2001) (federal law classifying marijuana as illegal has no exception for medical necessity, at least as applied to distributors).

⁷ Ark. Code Ann. sec. 5-64-505 (2001); Mo. Revised Code 513.605, 513.607, 513.647, and 513.653.

vetoed by its Governor,⁸ and have been introduced in the legislatures of Kansas, Massachusetts, New Mexico, New York and other states. A recent Second Circuit Court of Appeals decision suggests that because the “corrupting incentives” of the asset retention arrangement “evidently require a more-than-human judgment and restraint,” Congress should follow up CAFRA by repealing the asset retention provision.⁹

One avenue to reform that is only now beginning to be utilized is litigation. One federal decision has already expressed “grave concern about the constitutionality” of such incentive schemes,¹⁰ a view echoed by David Smith, the former Associate Director of the Department of Justice’s Asset Forfeiture Office, in his forfeiture treatise.¹¹ Smith adds that it is “remarkable that these statutes have not yet been challenged on due process grounds.”¹² As we write, however, a suit directly challenging New Jersey’s forfeiture

⁸ Karen Dillon, “California governor vetoes forfeiture-reform bill,” *Kansas City Star*, 09/27/2000.

⁹ *U.S. v. Wetterer*, 210 F.3d 96, 110 (2000) (“Congress recently passed legislation reforming certain features of the forfeiture statutes....The use of forfeiture proceeds by the Department of Justice for self-budgeting is a feature of the statute that also may merit congressional attention.”). The Court opined that the case before it “shine[s] a light on the corrupting incentives of this arrangement: we see aggressive but marginal claims asserted on dubious jurisdiction to seize charitable funds raised for the relief of abject orphans in an impoverished country, so that the money can be diverted for expenditure by the Department of Justice.” *Id.*

¹⁰ *Buritica v. United States*, 8 F.Supp.2d 1188 (N. D. Cal., 1998).

¹¹ David Smith, *Prosecution and Defense of Forfeiture Cases* Release 27, § 1.01 at 1-8.1 n. 21 (Matthew Bender, 2000) (“State statutes which allocate a portion of forfeited assets to local prosecutors would probably fail to pass constitutional muster...”). Smith adds that even statutes that earmark assets to the police who seized them, rather than the prosecutor, “particularly if the statute shifts the burden of proof to the property owner” as many state statutes still do....may violate due process....[B]ecause the forfeiture seizure is usually tantamount to a forfeiture judgment, it is a matter of great concern that the police agency responsible for making the seizure must forfeit a certain amount of property each year to pay police salaries and buy police cruisers, computers and the like.” *Id.*

¹² *Id.*

reward scheme directly on due process grounds is working its way through the state courts,¹³ and we expect more to come.

In this article, we describe various routes to this next stage of forfeiture reform – a stage we believe to be essential to restore integrity to drug law enforcement and fairness to the administration of justice. We first identify several situations in which litigation might bear fruit, and detail both due process and other constitutional objections to forfeiture in those cases.¹⁴ We then turn to the legislative route, with particular emphasis on *state* reforms that would not only eliminate the conflict of interest that exists under some state statutes, but also foreclose local police from evading their state’s distribution formula through federal adoption.

I. Reform through Constitutional Litigation

A. The Due Process Objection

When substantial, police and prosecutorial conflicts of interest may violate the Due Process Clause -- and as shall demonstrate, such conflicts *are* substantial in a great many forfeiture cases. 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

¹³ The case is *New Jersey v. One 1990 Ford Thunderbird*, Sup. Ct. of N.J. for Cumberland County, Docket No. CUM-L-000720-99. The claimant is a former police officer whose son was found driving her car with drugs in his possession. The counterclaim challenges New Jersey Code of Criminal Justice sec. 2C:64-6, which mandates that property seized and forfeited by the state must be divided between the prosecuting authority and any other law enforcement agency that participated in the surveillance, investigation, arrest or prosecution, to be used for law enforcement purposes only. As of this writing, the trial judge has permitted the constitutional claims to go forward despite return of the assets to the claimant.

¹⁴ For more extensive arguments on the due process and separation of powers objections, and additional sources, see “Policing for Profit: The Drug War’s Hidden Economic Agenda,” 65 *University of Chicago Law Review* 35 (1998).

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 an investigation disclosed that 12% of the district attorneys' budgets were financed through forfeitures they obtained.¹⁵

What constitutional guidance exists is found primarily in *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980). The Supreme Court had already held that the Constitutional due process guarantee includes the right to an impartial tribunal in both civil and criminal cases.¹⁶ *Jerrico* addressed the due process limitations on *prosecutorial* conflicts. While declining to apply the stringent impartiality standard required of adjudicatory officials to prosecuting officials, the Court indicated that at some level a prosecutor's conflict of interest will violate the Constitution.

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

¹⁵ Dick Lehr and Bruce Butterfield, *Accused's Assets are Key Chips in Plea Bargains*, Boston Globe Metro 1 (Sept 25, 1995). These articles were parts of a four-part series titled *Criminal Justice/Overdosing on the Drug War*, published by the Boston Globe from Sept 24 through Sept 27, 1995. Former D.O.J. Associate Forfeiture Director David Smith agrees that "state statutes which allocate a portion of forfeited assets to local prosecutors would probably fail to pass constitutional muster under *Marshall v. Jerrico, Inc.*, 446 U.S. 238... (1980)." Smith, *Forfeiture*, *supra* note 11, at 1.01, fn. 21.

¹⁶ *Tumey v. Ohio*, 273 U.S. 510, 523, 532 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Connally v. Georgia*, 429 U.S. 245, 250-51 (1977). 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.

compensation for the costs of determining violations and assessing penalties.

Distinguishing the conflict of interest prohibitions governing a fact finder, 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."¹⁷ 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.¹⁸

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

¹⁷ Id. at 248.

¹⁸ Id. at 249-50.

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: 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.¹⁹ In 1999, more than .6 billion dollars were deposited in the Justice Department's Asset Forfeiture Fund alone.²⁰ 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.²¹ Similarly, Justice Department

¹⁹ Sharon Walsh, *Give and Take on the Hot Issue of Asset Forfeiture*, Wash Post F7 (Mar 11, 1996). The article reports that the federal government has received the following amounts from asset forfeitures in criminal cases: 1986: \$93.7 million; 1987: \$177.6 million; 1988: \$205.9 million; 1989: \$580.8 million; 1990: \$459.6 million; 1991: \$643.6 million; 1992: \$531.0 million; 1993: \$555.7 million; 1994: \$549.9 million. These figures include nondrug-related forfeited assets, particularly from insider trading cases. *Id.* During the period of major growth, 1985 through 1990, asset seizures increased at an average annual rate of 59 percent, with the Asset Forfeiture Fund inventory quadrupling to \$1.3 billion. Smith, *Forfeiture*, *supra* note 11, ¶ 1.02 at 1-23 to 1-24, citing *Annual Report of the Department of Justice Asset Forfeiture Program* 5 (DOJ 1990).

²⁰ "Total Deposits to the Fund by State of Deposit," a report to Congress pursuant to 28 U.S.C. 524©(6), available at www.usdoj.gov/jmd/afp/Report1.html. This figure does not include forfeitures conducted by the U.S. Dept. of Treasury or its components, including the Bureau of Alcohol, Tobacco and Firearms; the Customs Service; the Financial Crimes Enforcement Network; the IRS; and the U.S. Secret Service. It has been reported that the total value of civil forfeitures in 1999 from all sources totaled \$957 million. William E. Gibson and Lisa J. Huriash, "Drug cops may be reined in: Congress is likely to make it harder for the government to take money, homes, cars and other items in drug cases," Orlando Sentinel, Apr. 11, 2000 at A-1 (citing the Senate Judiciary Committee).

²¹ See *United States v James Daniel Good Real Property*, 510 US 43, 56 n 2 (1993), quoting Executive Office for United States Attorneys, 38 *United States Attorney's Bulletin* 180 (DOJ 1990).

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."²² After Utah voters closed the forfeiture spigot in the last election, many drug units there expected downsizing or termination to follow.²³

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.²⁴

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.

²² Justice Research and Statistics Association, *Multijurisdictional Drug Control Task Forces: A Five-Year Review 1988-1992* at 23 (Oct 1993). The report provides figures showing an 89 percent increase in asset seizures by task forces between 1988 and 1992, noting that such seizures "provide resources to task forces that have experienced decreased funding." *Id.* at 9.

²³ Pat Reavy and Jennifer Dobner, "Police drug units are assessing the impact of Initiative B", *Desert News*, Dec. 19, 2000.

²⁴ 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").

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 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*: Did the police force select its targets according to the funding they could provide, rather than the threat they posed to the community? A Justice Department-commissioned report proposed the former 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."²⁵ In one of the worst examples of targeting assets, Donald Scott was killed in 1992 by a multijurisdictional team that invaded his property, looking

²⁵ Justice Research and Statistics Association, *Multijurisdictional Drug Control Task Forces: A Five-Year Review 1988-1992* at 23 (Oct 1993). A distinction might be drawn between the forfeiture of "proceeds" of illegal drug transactions and the forfeiture of assets that "facilitated" the offense. In the former case, there is little injustice involved in removing such ill-gotten gains, but in the latter case, a suspect whose wealth derived from entirely lawful sources might lose his house because marijuana plants were grown on the property. The targeting suggested by the above report does not draw such a distinction, however, urging only that law enforcement calculate the potential "take" in fashioning its agenda.

(in vain) for drugs and (according to the Ventura County District Attorney's investigation) for a chance to forfeit his multi-million dollar ranch.²⁶

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.²⁷ The consequence of this strategy was that the drugs that 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.²⁸

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.²⁹

²⁶ *Report on the Death of Donald Scott* 37-41 (Office of District Attorney, Ventura County, Cal, Mar 30, 1993). Los Angeles County and the federal government recently settled a suit filed by the Scott family for five million dollars. Associated Press, "Family of Man Slain in Raid Rewarded," Jan. 12, 2000 15:10 EST.

²⁷ 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

²⁸ Richard Minitzer, *Ill Gotten Gains*, 25 Reason 32, 34 (Aug/Sept 1993).

²⁹ See the Department of Justice manual concerning racketeering forfeitures, which notes that a "preliminary investigation to determine what property would be subject to forfeiture may be required simply in order to obtain Departmental authorization for a RICO or CCE prosecution." David B. Smith and

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. Although buyers are ordinarily both less culpable and less dangerous than dealers, targeting the former rather than the latter has been justified as a community-protective, racially neutral way to shut down inner city drug markets, since buyers often come from the suburbs and are thus more geographically and racially diverse than sellers in such markets.³⁰ However, it may be that the real attraction of the reverse sting, and the one accounting for its mushrooming use, 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. This is the observation of J. Mitchell Miller, who while a graduate student in the South worked as a police officer and participated in some reverse stings. He says that the reverse sting, "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*."³¹ 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.

Edward C. Weiner, *Criminal Forfeitures Under the RICO and Continuing Criminal Enterprise Statutes* 7 (DOJ 1980).

³⁰ Meares and Kahan, *Law and (norms of) Order in the Inner City*, 32 LAW AND SOCIETY REVIEW 805, 816-819 (1998). Meares and Kahan argue that because they do not result in the incarceration of so many inner city residents, reverse stings do not threaten the kind of social disorganization of inner city communities that targeting dealers does.

³¹ J. Mitchell Miller and Lance H. Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 Justice Q 313, 325 (1992). See also Associated Press, *State Finds Room for Improvement in Drug Team*, Louisville Courier-J 1B (Sept 5, 1993), citing a state report on a Paducah,

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.³² As one California court has noted, "a scheme that provides monetary rewards to a prosecutorial office might carry the potential impermissibly to skew a prosecutor's exercise of the charging and plea bargaining functions."³³ That this has come to pass has been documented by investigations in several jurisdictions showing that criminal defendants with significant assets to forfeit routinely serve shorter prison sentences and sometimes no prison sentence at all.³⁴ In New Jersey, for example, a defendant facing a "drug

Kentucky multijurisdictional task force that criticized the task force for making reverse stings "standard operating procedure."

³² Such a challenge is additionally fortified by the unanimous Supreme Court decision in *Bracy v. Gramley*, 117 S. Ct. 1793 (1997), 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."

³³ *People v. Eubanks*, 14 Cal. 4th 580, 59 Cal. Rptr. 200, 929 P. 2d 310, 320 (Cal. 1996). The court also noted that rewards to a prosecutorial office could be just as dangerous, and unconstitutionally suspect, as rewards to individual prosecutors personally. *Id.* at 319. Of course, plea bargains have long been approved by the Supreme Court, *see e.g.* *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978), and the Federal Sentencing Guidelines provide concessions to defendants in return for such factors as their "acceptance of responsibility" or their "substantial assistance in the investigation or prosecution of another." 28 USC §§ 994(n); 18 USC § 3553(e); USSG § 5K1.1. But prosecutorial discretion in whether to recommend such concessions may not be based on improper motives or on factors that are not rationally related to any legitimate state objective. *Wade v. United States*, 504 U.S. 181 (1992).

³⁴ According to Eric Sterling, Director of the Criminal Justice Policy Foundation, "only 11 percent of drug offenders in federal prison are high-level traffickers, while more than 50 percent are low-level." Derrick Z. Jackson, *Our Fraudulent War on Drugs*, Boston Globe A27 (Sept 13, 1996). First Circuit Chief Judge Juan Torruella has noted that in his experience, "penalties for drug trafficking are not imposed on those most culpable The 'big fish,' if caught at all, work out deals with the government which may leave them with light sentences or even free from prosecution. This . . . is an essentially immoral outcome, and it tarnishes our entire judicial system." Torruella, *One Judge's Attempt at a Rational Discussion of the So-Called War on Drugs*, 6 B. U. PUB. INT. L. J. 1, 24-25 (1996). Relatively harsher penalties for the "mules" often result because they usually have neither forfeitable assets nor useful information to trade for prosecutorial leniency.

kingpin” indictment (twenty-five years to life) obtained a dismissal of that charge and parole eligibility in five years on a lesser conviction, by agreeing to forfeit over \$1 million in assets.³⁵ In Massachusetts, where as noted 12% of prosecutorial budgets are financed by forfeitures, a recent investigation by journalists found that on average a “payment of \$50,000 in drug profits won a 6.3 year reduction in a sentence for dealers,”³⁶ while agreements to forfeit \$10,000 or more bought elimination or reduction of trafficking charges in almost three-fourths of such cases.³⁷ And the Supreme Court has facilitated this practice by finding no right to a judicial inquiry as to whether property relinquished pursuant to a guilty plea is properly subject to forfeiture.³⁸ As Justice Stevens noted in dissent, “it is not unthinkable that a wealthy defendant might bargain for

Drug cases are theoretically subject to assorted mandatory minimum sentences promulgated by the Anti-Drug Abuse Act of 1986, and by the parallel incarceration periods mandated by the Guidelines sentencing grid. However, if the prosecutor wishes to evade these sentences in service of an appealing plea bargain, he may obtain a much lower sentence in one of two ways. He may file a motion pursuant to 18 USC § 3553(e), allowing the court to reduce the sentence for a defendant who has provided “substantial assistance” in the prosecution of others; or he may tell the federal probation department that the defendant’s crime involved a lesser quantity of drugs than was actually the case. The Anti-Drug Abuse Act of 1986, Pub L No 98-473, 98 Stat 1989, codified at 18 § USC 3553(e) (1994).

³⁵ The forfeited assets were then distributed among the prosecutor’s office and participating law enforcement agencies. Martin Haines, *Prosecutors and Criminals Sharing Wages of Crime*, NJ L J 17 (Oct 19, 1992).

³⁶ Dick Lehr and Bruce Butterfield, *Small Timers Get Hard Time*, Boston Globe Metro 1 (Sept 24, 1995).

³⁷ Dick Lehr and Bruce Butterfield, *Accused’s Assets are Key Chips in Plea Bargains*, Boston Globe Metro 1 (Sept 25, 1995). These articles were parts of a four-part series titled *Criminal Justice/Overdosing on the Drug War*, published by the Boston Globe from Sept 24 through Sept 27, 1995.

The investigation, by Boston Globe reporters, included a comprehensive examination of prosecution records from the four largest Massachusetts counties, as well as numerous case studies comparing defendants who were similarly situated except for their assets. For example, one defendant who sold cocaine to lower-level dealers was able to reduce a “mandatory” fifteen-year sentence to two and a half years served; another defendant—less culpable in that undercover agents ran him through five relatively small drug buys before arrest in order to reach a level of quantity that would qualify him for a ten-year sentence—received the full ten years. The difference was that the first defendant had \$460,000 in forfeitable bank deposits to offer in lieu of hard time. *Id* at Metro 1.

³⁸ See *Libretti v United States*, 116 S Ct 356, 362-63 (1995). *Libretti* refutes one claim that is sometimes made, that prosecutorial conflicts are not dangerous because so long as there is an impartial tribunal down the line, any abuses can be corrected.

a light sentence by voluntarily ‘forfeiting’ property to which the Government had no statutory entitlement.”³⁹ But 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.

Will any of the above due process challenges 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,"⁴⁰ and that "it makes sense to scrutinize governmental action more closely when the state stands to benefit."⁴¹ 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.⁴² Writs of assistance authorized customs officers to seize suspected contraband, and retain a share of the proceeds, often a third, for themselves and

³⁹ *Libretti*, 116 S Ct at 370 (Stevens dissenting).

⁴⁰ *Caplin & Drysdale, Chartered v United States*, 491 US 617, 634 (1989).

⁴¹ *U.S. v. James Daniel Good Real Property*, 510 US 43, 56 (1993). See also *Jones v. Drug Enforcement Admin.*, 819 F. Supp. 698 (M.D. Tenn., 1993)(agencies’ stake in forfeiture creates dangerous potential for abuse, requiring heightened judicial scrutiny).

⁴² John Adams, a student of the writs of assistance cases, wrote that public outcry against the writs of assistance was one of the sparks leading to American independence, as discussed in Smith, *The Writs of Assistance Case* 251-56 (California 1978). For discussion and additional authorities on this point, see Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S Cal L Rev 1, 15-25 (1994).

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."⁴³ The same fundamental grievances are now lodged against our present forfeiture laws. What court can read such formative concerns out of the Constitution?

B. The 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."⁴⁴ This situation should be found to violate 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.⁴⁵ By

⁴³ Nelson B. Lasson, *The History and Development of the Fourth Amendment to the US Constitution* 59 (Da Capo 1970), quoting John Adams.

⁴⁴ Justice Research and Statistics Association ("JRSA"), *Multijurisdictional Drug Control Task Forces: A Five-Year Review 1988-1992* 9 (Oct 1993).

⁴⁵ Supreme Court cases articulating this principle include *Cincinnati Soap Co v United States*, 301 US 308, 321 (1937); *Bradley v United States*, 98 US 104, 112-13 (1878); *Knote v United States*, 95 US 149,

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

154 (1877). According to the GAO, “the effect of 31 U.S.C. § 484 is to ensure that the executive branch remains dependent on the congressional appropriations process . . . [It] emerges as another element in the statutory pattern by which Congress retains control of the public purse under the separation-of-powers doctrine.” GAO, *Principles of Federal Appropriations Law* at 5-65.

The supporting statutes are the Miscellaneous Receipts Act, 31 USC § 3302(b), which requires all funds collected to be deposited in the public treasury, subject to few exceptions; and the Anti-Deficiency Act, 31 USC § 1341(a)(1), which bars a government employee from authorizing or incurring an obligation without a congressional appropriation.

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.⁴⁶

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..."⁴⁷

The prospect of a self-financing law enforcement branch, largely able to set its own agenda and accountable to no one, is a development wholly incompatible with democratic institutions. It presents the kind of dangers one of the framers, George

⁴⁶ 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); *American Trucking Ass'n v. EPA*, 175 F.3d 1027, (D.C. Cir., 1999), cert. granted sub nom. *Browner v. American Trucking Ass'n*, 530 U.S. 1202 (2000)(EPA should interpret the Clean Air Act (CAA) so as to avoid violation of the nondelegation doctrine). See also *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 336 (1999)(reversing FCC's interpretation of its authority) and Justice Kennedy's concurring opinion in the *Supreme Court's* decision holding the line item veto unconstitutional, *Clinton v. City of New York*, 118 S. Ct. 2091, 2108 (1998).

⁴⁷ *OPM v Richmond*, 496 US 414, 428 (1990). The Court described this function as Section 9's "fundamental and comprehensive purpose." Id at 427.

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."

C. Other Court Challenges

We merely note here some other constitutional questions raised by the forfeiture reward scheme. A recent U.S. District Court opinion conveys “grave concerns” about the cash incentives for customs inspectors, stating that “it appears to the court that the very existence of this program may very well run afoul of the Fourth Amendment.

Specifically, such a program creates perverse law enforcement incentives that have an unduly dangerous propensity to encourage unreasonable searches and detentions.”⁴⁸

Regardless of how small the rewards are, the Court found it “unacceptable for the government to provide its officers with such incentives [because] the risks of overzealous and biased law enforcement are simply too great.”⁴⁹ Moreover, because this incentive encourages seizures wholly disproportionate to any wrongdoing on the part of the owner, recent Supreme Court cases holding the 8th Amendment’s excessive fines clause applicable to civil and criminal forfeitures may provide additional recourse to an aggrieved claimant.⁵⁰

⁴⁸ *Buritica v. United States*, 8 F.Supp.2d 1188 (N. D. Cal., 1998). The Court there was concerned with a similar incentive law which gives customs inspectors cash rewards for interdicting drug smugglers, based on, inter alia, the amount of drugs seized and whether the seizure led to further law enforcement activity.

⁴⁹ *Id.* at 1195. *See also* *United States Currency in the Amount of \$150,660.00*, 980 F.2d 1200, 1208 (8th Cir., 1992)(Bright, J., dissenting)(where government based probable cause on police officer’s opinion that cash smelled of marijuana, and his department would financially benefit from the forfeiture, court should find no probable cause); *cf. Connally v. Georgia*, 429 U.S. 245 (1977)(holding that Georgia statute providing payment to magistrates for each search warrant they issued violated Fourth Amendment).

⁵⁰ *Austin v. United States*, 509 U.S. 602 (1993)(unanimously holding that forfeiture constitutes punishment regardless of whether it is denominated civil or criminal, and if subject to the Eighth Amendment’s prohibition on excessive fines); *United States v. Bajakajian*, 524 U.S. 321 (1998)(holding that the test of excessiveness in *criminal* forfeitures is whether the forfeiture was grossly disproportionate to the gravity of the criminal offence.) The constitutional constraints established by these two cases were incorporated as Section 2(g) of the Civil Asset Forfeiture Reform Act of 2000, PL 106-185, 114 Stat. 202 (2000), which permits the claimant to petition the court to determine whether the forfeiture was constitutionally excessive. Under this provision, the claimant must prove that the forfeiture was grossly disproportional by a preponderance of the evidence.

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,⁵¹ 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.

Finally, the past year has seen the initiation of several class action suits seeking return of assets that were transferred to the U.S. Department of Justice for adoption, in defiance of state statutes that require a court order allowing such adoptions.⁵² Because such statutes exist in 35 states but have been generally ignored by local police and the Justice Department, such suits could play a significant role in preventing adoptions and restoring a state’s ability to earmark forfeited assets for non-law enforcement uses.

II. Reform via Legislation and Voter Initiatives

1. Federal Legislation

⁵¹ See *United States v. Morrison*, 529 U.S. 598 (2000)(invalidating Violence Against Women Act); *Printz v. United States*, 521 U.S. 898 (1997)(federal government may not commandeer state officials, in this case to perform background checks on gun buyers); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995)(finding no federal power to regulate guns near schools); *New York v. United States*, 505 U.S. 144 (1992). These cases mark a sea change in constitutional interpretation of the Tenth Amendment.

⁵² See Karen Dillon, “Governor expected to sign forfeiture reform law today,” *Kansas City Star*, 5/16/2001 (reporting class actions filed in 6 Missouri counties for return of assets improperly transferred to the federal government without a court order).

CAFRA's laudable reforms do not include any measures to rectify equitable sharing and other asset distribution provisions or the conflict of interest and accountability problems that result. Few are predicting that Congress will enact such reforms with dispatch. Former House Judiciary Committee Chair Henry Hyde did not include asset allocation reform in his annual reform efforts despite its importance because, he said, "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...."⁵³ Nevertheless, as voters and legislators at the state level demonstrate the potency of this issue, and as a growing number of judges, commentators, and politicians demand change,⁵⁴ the reform movement in Congress is also likely to gain

⁵³ Henry Hyde, *Forfeiting our Property Rights* 68 (Cato Institute, 1995).

⁵⁴ See, e.g., *U. S. v. Currency Totaling \$14,665, Manuel J. Espinola, claimant*, 33 F.Supp.2d 47, 60 (D. Mass., 1998) ("Our nation's drug forfeiture system is drawing increasing and exceedingly sharp criticism from scholars and commentators. [Citations omitted] Where the government seeks to forfeit a person's money under such tenuous circumstances as these, I am obliged to add my voice to this growing chorus of dissent."); *United States v. That Certain Real Property Located at 632-636 Ninth Avenue, Calera, Alabama*, 798 F Supp 1540, 1551 (N D Ala 1992) ("More and more courts are voicing frustration at what appears to be overreaching by the United States in the drug war, particularly in forfeiture cases where law enforcement agencies have a 'built-in' conflict of interest because they share in the product of the seizure."). As noted above, a Second Circuit opinion urges Congress to terminate the asset retention arrangement. *U.S. v. Wetterer*, 210 F.3d 96, 110 (2001). The Second Circuit had previously denounced the federal government's "virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *United States v. All Assets of Statewide Auto Parts*, 971 F.2d 896, 905 (2d Cir.1992).

In 1994, a politically eclectic coalition led by the ACLU urged President Clinton to appoint a national commission to review the policies and practices of all federal law enforcement agencies, criticizing in particular the "inappropriate and disproportionate use of forfeiture proceedings to obtain financing for law enforcement equipment and activities." ACLU, *News Release* 4 (Jan 10, 1994). Other signers included the National Rifle Association, the National Legal Aid and Defender Association, the Second Amendment Foundation, and the National Association of Criminal Defense Lawyers. *Id.* at 2. For a sampling of commentators and journalists who have lodged complaints against the forfeiture incentive system, see David Smith, *Forfeiture*, *supra* note 11, at 1.01, p. 1-8 (not only state police agencies but even state prosecutors are in thrall to a reward system that resembles bounty-hunting).

strength. In his campaign, President Bush pledged to create a task force that would, among many tasks, investigate the need for additional forfeiture reform.⁵⁵

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.⁵⁶ If Congress cannot or will not enact this fundamental reform, 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.

2. State Legislation and Voter Initiatives

In the short run, state legislation and voter initiatives may have the best prospects of substantially reducing the corrupting influence of forfeiture incentives. As already noted, efforts are accelerating on both fronts, with significant successes. In states which currently allow law enforcement agencies to keep the assets they seize, the central component of reform is to redirect the funds elsewhere, of course. But an additional

⁵⁵ Karen Dillon, *Property Seizure Reforms Catch On: Drug Money Tactics by Police Questioned*, The Kansas City Star A1 (Jan. 16, 2001).

component is required: no state effort to eliminate self-dealing by its law enforcement agencies can be successful *unless it simultaneously closes the back door of federal adoption*, because otherwise police will simply evade state requirements by federalizing their forfeitures. In Missouri, where the constitution requires forfeited funds to be used for public schools, the state auditor found that *85 percent* of all forfeitures were going through the federal system rather than the state prior to its 2001 reform law.⁵⁷

To be effective, a comprehensive state reform bill would address the following issues:

(1) *Disposition of assets*. The legislation must redirect forfeited assets away from the seizing agency or law enforcement generally. We note that both referenda organizers and legislators have proposed earmarking forfeited assets to particular uses, such as public schools, drug treatment, or literacy, no doubt partly because such uses have much more political appeal than would a law depositing the assets in the Treasury's General Fund. The crucial point is that unless the financial rewards for seizures are entirely eliminated, the risk remains that police agencies and drug task forces will become increasingly unaccountable, self-financing, and dependent on prosecuting the drug war for their economic survival.

(2) *Circumvention via federal adoption*. The law might take any of several forms: requiring law enforcement to turn over D.O.J. distributed-funds to the state treasury; prohibiting the receipt of funds from the Department of Justice; deducting all funds received back by law enforcement from its budget allotment; prohibiting law

⁵⁶ 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.

⁵⁷ Karen Dillon, "Loophole in drug forfeiture law closed" Kansas City Star, 05/17/01.

enforcement from federalizing a seizure absent an agreement with the Department of Justice authorizing distribution of assets returned according to the state formula; and so on. Each of these provisions would either eliminate the incentive to federalize a seizure, or prevent an adoption agreement because current federal law requires distributed funds to be used for law enforcement purposes only. Many states have also attempted to limit federal adoptions by requiring a court finding that specific (and sometimes statutorily enumerated) circumstances warrant transfer.⁵⁸ However, police have often flouted this requirement with impunity. The efficacy of this or any of the other adoption restrictions above depends on a state court maintaining control over the forfeited property – something best achieved by a statute affording in rem jurisdiction over all property seized by state officers.⁵⁹

⁵⁸ For example, in Missouri, a court may permit transfer only if its finds that the activity giving rise to seizure (1) is a felony under Missouri or federal law and (2) either involves more than one state or “is reasonably likely to result in federal criminal charges being filed, based upon a written statement of intent to prosecute from the United States attorney with jurisdiction.” Mo. Revised Code 513.647. Under the new Utah law passed by voter initiative last November (but currently enjoined), the court cannot approve a transfer unless the activity giving rise to the forfeiture is interstate in nature and sufficiently complex to justify the transfer; or the seized property may only be forfeited under federal law; or pursuing forfeiture under state law would unduly burden prosecutors or law enforcement agencies. Even in such cases, the court may refuse to enter a transfer order if the transfer would circumvent the protections of Utah law. Sec. 24-1-15.

⁵⁹ See, e.g., *United States v. 490, 020 In United States Currency*, 911 F. Supp. 720, (NYSD 1996)(N.Y. statutory scheme regarding search warrants provides state with in rem jurisdiction, and bars U.S. Attorney from instituting forfeiture proceedings without a turnover order from State court); *Scarabin v. DEA*, 966 F.2d 989, (5th Cir. 1992)(although DEA had physical control over money seized by sheriff’s department, it lacked in rem jurisdiction to forfeit the money because under Louisiana law the state district court had exclusive control over the res by virtue of issuing the search warrant; “A federal agency cannot obtain jurisdiction over the res--and thus cannot find the res administratively forfeit--when a state court obtains jurisdiction first and never relinquishes that jurisdiction,” at 991). Compare *United States v. Winston-Salem*, 902 F.2d 267 (7th Cir., 1990) and *United States v. Certain Real Property Known as Lot B*, 755 F.Supp. 487 (1st Cir. 1990)(both finding that because state lacked in rem jurisdiction, it was powerless to direct disposition of state-seized but federally adopted assets. Where two suits in rem or quasi in rem as to the same property are in litigation in separate jurisdictions concurrently, one jurisdiction must yield. To avoid conflict in the administration of the judicial system, the principle applicable to both federal and state courts is that the court first assuming jurisdiction over the property may maintain jurisdiction to the exclusion of the other. *Penn General Casualty Co. v. Pennsylvania Ex Rel. Schnader, Attorney General*, 294 U.S. 189, (1935).

Although opponents can be expected to argue that state restrictions on federalizing seizures are preempted by federal law,⁶⁰ recent Supreme Court cases concerning federalism seem to doom this argument, and safeguard the states' right to decline cooperation with the federal program.⁶¹ While the reach of these cases is uncertain, the Court has clearly held that Congress cannot commandeer state officials to execute federal laws. In *Printz v. United States*, the Brady law's provision requiring state officials conduct background checks of gun owners was found unconstitutional under the Tenth Amendment, because the "power of the Federal Government would be augmented immeasurably if it were able to impress into its service--and at no cost to itself--the police officers of the 50 States."⁶² Were a court to hold that a state could not decline to participate in the federal adoption program, it would be putting an unconstitutional gloss on the adoption law by interpreting it as commandeering the state executive.⁶³

(3) *Reporting requirements.* The law should mandate periodic accounting by police, prosecutors, and the ultimate recipient, of all properties seized, sold, transferred

⁶⁰ After the Utah initiative passed, sec. 24-1-15, the anti-adoption provision, was enjoined by a federal judge on grounds that it may conflict with the federal program. *Kennard v. Leavitt*, Case No. 01CV00171B (Order dated March 19, 2001). The Utah Supreme Court declined to certify and answer questions concerning interpretation of the state law (in *Kennard v. Leavitt*, Case No. 20010355). The case is currently before the Judge Benson in the United States District Court for the District of Utah, Central Division, who is expected to issue a final ruling on plaintiffs' request for declaratory relief and a permanent injunction later this year.

⁶¹ *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). Apart from these cases, which invalidated laws commandeering state officials, the Supreme Court has significantly reconfigured the federal-state balance in such cases as *United States v. Morrison*, 529 U.S. 598 (2000); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); and *United States v. Lopez*, 514 U.S. 549 (1995)(finding no federal power to regulate guns near schools). See also *South Dakota v. Dole*, 483 U.S. 203, 207-8 (1987), in which the Court upheld a federal law reducing federal highway assistance to states that permitted public possession of alcohol by a minor, finding it a proper exercise of the art I, sec. 8 spending clause. Key to that decision was the finding that states may knowingly exercise their choice to either accept or reject the funds.

⁶² 521 U.S. 898, 922 (1997).

⁶³ *Printz v. United States*, 521 U.S. 898 (1997).

and forfeited, subject to an annual audit. Records of both the accounting and the audit should be available to the public.

(4) *Sanctions for non-compliance.* We have previously documented the truly remarkable record of governmental non-compliance with forfeiture requirements,⁶⁴ a disturbing situation that continues to this day.⁶⁵ The recent ballot initiatives have included civil and criminal sanctions for transfers or distributions of funds in violation of law.⁶⁶

⁶⁴ See Blumenson and Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, cited at note 1 (detailing police lawlessness in the seizure and administration of forfeiture in Malibu (at 73-75); Oakland (at 82); Florida, Los Angeles, and Louisiana (at 83); Paducah (at 96-99); and Boston, New York, and Philadelphia (at 99 n. 254). For one description of the shell game that sometimes ensues when federal and local agencies combine to defeat state law, see *Scarabin v. DEA*, 966 F.2d 989, (5th Cir. 1992) (“the actions of the federal and state agents in appropriating Scarabin’s money... would have constituted illicit money laundering if perpetrated by private parties... [W]e shall watch from the sidelines with interest to see if the DEA struggles to retain its ill-gotten 10% laundering fee as strenuously as it has struggled to avoid returning any money to Scarabin”).

⁶⁵ Missouri is the most comprehensively documented example, thanks to a continuing series of articles by reporter Karen Dillon in the *Kansas City Star* reporting a consistent evasion of state requirements by local police and the U.S. Department of Justice. In 1990 the Missouri Supreme Court ruled that retention of seized assets by law enforcement violated Article IX, sec. 7 of state constitution, which requires forfeited assets to be used for education. *School Dist. No. 7 v. Douthit*, 799 S.W.2d 591 (Mo. banc 1990). The response by local police was to transfer many of the assets they seized to the U.S. Department of Justice for adoption, which would result in return of 80% of the assets to the police. But Missouri law also provides that seized property cannot be transferred to a federal agency without the approval of the local prosecutor and a court order, based on a finding that the case would be “better pursued” federally. Mo. Revised Code 513.647. See also *State v. Sledd*, 949 S.W.2d 643 (Mo.App. W.D., 1997). Therefore, to circumvent Missouri’s constitutional mandate, local law enforcement also had to circumvent this statute -- and did so regularly. Despite almost no court orders, 85% of all Missouri forfeitures were sent through the federal system, with Missouri police claiming that they had not seized these assets but merely “held” them for later seizure by the D.E.A. See Karen Dillon, “Loophole in drug forfeiture law closed” *Kansas City Star*, 05/17/01. That argument was rejected in a November, 2000, Missouri Appellate Court decision (*Karpierz v. Easley*, 31 S.W.3d 505 (2000)), and again rebuffed by a May, 2001 legislative enactment. Mo. Revised Code 513.605(9). The dogged efforts of law enforcement to hold on to the assets it seized resulted in almost none of the assets being used for educational purposes despite the constitutional requirement. The series of articles recounting these events are compiled and available on the internet under the title “To Protect and Collect” at “www.kcstar.com/projects/”. See also *In re U.S. Currency, \$844,520.00*, 136 F.3d 581 (8th Cir., 1998)(describing the Missouri police’s circumvention of state law as both illegal and bad policy).

⁶⁶ Utah sec. 24-1-15(4); Ore. Const. Art. XV, s.10 (2000).

The ballot efforts in the last year addressed the forfeiture incentive, but also included other reforms, such as certain due process protections, substituting treatment for incarceration of low level offenders, tying forfeiture to conviction, and so on. These important areas have also proved fertile, at least among voters, and should be pursued. Now that CAFRA has succeeded at the federal level, many states will likely follow in instituting similar provisions. We continue to believe, however, that the forfeiture incentive in particular poses some of the greatest risks, and is already fostering a dangerous new kind of police agency -- unaccountable, self-financing, and dependent on prosecuting the drug war for its economic survival. These law enforcement agencies already constitute a tenacious, powerful lobby against the reforms we have advocated here. But unless our representatives want to abandon all hope of regaining control over the Drug War bureaucracy they have created, they had better pull the plug on self-funded agencies sooner rather than later.