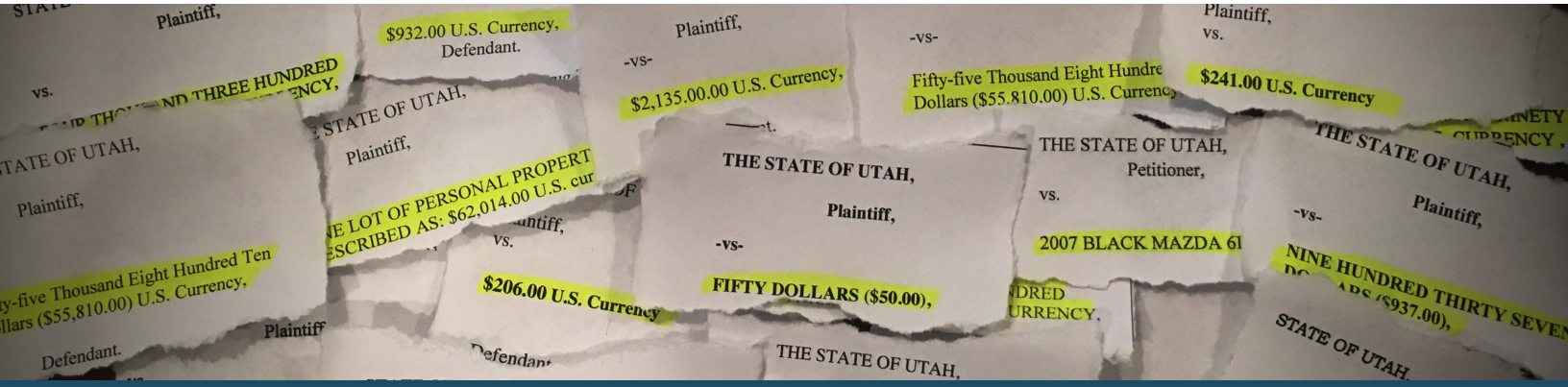
PUBLIC POLICY BRIEF

Civil Asset Forfeiture:
The Legalization of Theft

LIBERTAS INSTITUTE



SUMMARY

Utah voters passed Initiative B in 2000 to protect property rights and due process by limiting the government's authority to take ownership of a person's property. Ever since then, police and prosecutors have attempted to undermine the expressed will of the voters.

Civil asset forfeiture allows the government to confiscate property from an individual who may not even be charged with a crime. This power has been abused around the nation, including in Utah.

Contrary to claims that this legal tool is used to go after drug kingpins and crime syndicates, 74% of forfeiture cases in Utah involve under $5,000 in assets. This low amount enables the government to easily take the property; a person whose small amount of cash was taken is unlikely to pay an attorney thousands of dollars to recover it.

Critics are correct to point out that civil asset forfeiture is legalized theft. At a minimum, it is a law in dire need of substantive reform.

Property should not be taken from Utahns who haven't been charged with—let alone convicted of—a crime.

Crime should not pay. This is a reasonable assertion that is the foundation of forfeiture law—a legal tool whereby government can permanently take ownership of a person's property. If a thief buys a car with his ill-gotten gains, he should be charged and convicted, and the fruits of his misdeed should be confiscated.

That's how *criminal* forfeiture works. On the civil side, however, a person can lose their property to the state without being charged with—let alone convicted of—a crime. This is perfectly legal, and happens all the time throughout America, including in Utah.

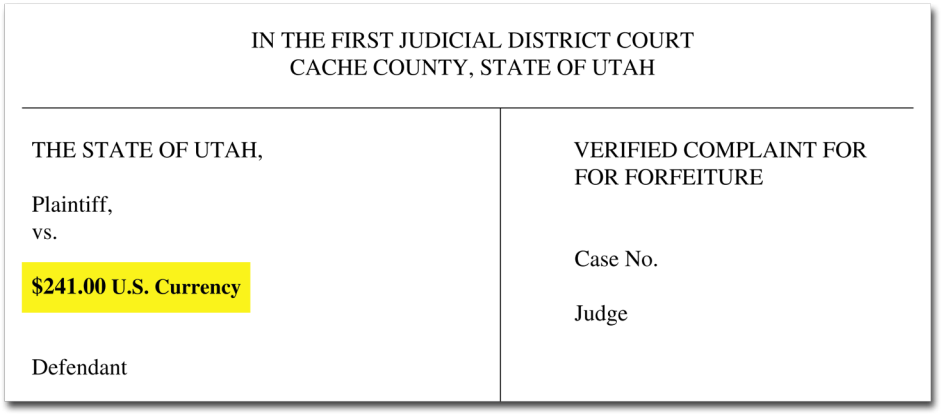
This arrangement leads to court filings where the state is a plaintiff against not the property owner, but the property itself. Civil asset forfeiture complaints are typically titled, for example, *The State of Utah vs. Four Hundred Dollars*.

Forfeiture's History

While the use of civil asset forfeiture has exploded in recent decades, its history dates back several centuries. Forfeiture's roots are in British maritime law, where the Crown would seize vessels that were not flying the British flag in accordance with the British Navigation Acts.

The First U.S. Congress used the British model to enact America's first forfeiture statutes to help collect customs duties; it was easier to seize cargo than to pursue a claim against its owner who was in another country and thus beyond the reach of U.S. courts.[2]

For two centuries, customs enforcement was the primary target of forfeiture law, with one notable exception. During the Prohibition era, the law was amended to facilitate the seizure of vehicles used by bootleggers transporting illegal liquor.



IN THE FIRST JUDICIAL DISTRICT COURT
CACHE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,
vs.

$241.00 U.S. Currency

Defendant

VERIFIED COMPLAINT FOR
FOR FORFEITURE

Case No.

Judge

A civil forfeiture complaint filed in Cache County in 2015.

Recent data for Utah shows that 94% of forfeitures were conducted through the civil route. Only two other states require distinguishing between civil and criminal cases when reporting forfeitures: Oregon and Connecticut, where civil forfeitures account for just 57% and 69% of cases, respectively.[1]

Civil asset forfeiture became mainstream with passage of the Comprehensive Crime Control Act of 1984, the first major revision to the federal criminal code since the early 1900s. The new law allowed the government to use forfeiture to seize assets of organized crime rings, in an effort to target drug kingpins and crime syndicates as part of the recently escalated "war on drugs." Asset forfeiture, it was theorized, would undercut profits and thereby disincentivize criminal activity.

Since then, forfeiture has been applied to a wide range of cases; more than 400 federal statutes, covering a lengthy list of different crimes, authorize the use of forfeiture. In Utah, assets may be seized upon commission of any "offense"—which includes non-criminal violations of law, such as jaywalking or contempt of court. Real and personal property can be taken, and when forfeited civilly, a person need not be charged with a crime.

The increasing use of civil forfeiture, as opposed to criminal forfeiture, suggests to many observers that law enforcement authorities have shifted their focus from stopping crime to searching for forfeitable property.

Whether this is true to any degree, forfeitures are inherently problematic when law enforcement agencies are able to profit from all or part of the seized property.

Initiative B

This perverse financial incentive once existed in Utah law; police agencies regularly and directly benefitted from forfeitures, effectively turning agents of justice into profiteers of injustice. This practice was halted through passage of Initiative B in 2000, a ballot measure that passed by 69%.

The new law imposed substantial limits on forfeiture and, among other revisions, stipulated that all revenue

from forfeitures was to be deposited into the state's general education fund. No longer were police agencies allowed to benefit from forfeiture.

With the financial incentive gone, civil forfeitures almost entirely stopped.[3]

Other substantial changes were made through Initiative B, including placing the burden of proof on the government, eliminating the need for property owners to post a bond, and imposing procedural requirements upon the state, including time deadlines to ensure property owners could get into court to contest the taking of their assets.

State and local law enforcement agencies were emphatically opposed to the initiative, and even refused to obey the new law once it passed. Audits of the forfeiture program were not performed as required by law, and revenue from the few forfeitures that did occur was not deposited into the school fund.

"It's the law, and they are disregarding it," noted the state auditor in reference to prosecutors refusing to adhere to Initiative B. After the Institute for Justice initiated a legal action to hold prosecutors accountable to the law, the funds were released.[4]

Police and Prosecutorial Opposition

After passage, Initiative B was challenged in court by law enforcement officers from several counties, but Judge Dee Benson ruled it constitutional. Prosecutors in Attorney General Mark Shurtleff's office began crafting an amendment to the law that would enable law enforcement agencies to once again keep the revenue they seized.

Senator John Valentine sponsored Senate Bill 31 in 2003 to repeal some of the restrictions enacted by the initiative. Proceeds would have been divided between drug court programs and a new grant program for police agencies overseen by the Attorney General's office. The bill would have also freed up nearly $4 million in federal forfeiture proceeds that were intended to be shared with Utah police agencies, but had been withheld because of the prohibitive restrictions put in place by the 2000 initiative.

Valentine withdrew his efforts after pushback from his constituents. Shurtleff, a strong and vocal opponent of the 2000 initiative, vowed to find another sponsor and accused Valentine of "giv[ing] in to a bunch of lies."[5]

Senator Chris Buttars sponsored Senate Bill 175 for Shurtleff the following year. The bill purported to increase certain protections for property owners while once again allowing law enforcement to financially benefit from state and federal forfeiture cases. Many Initiative B backers objected to the bill, claiming it effectively nullified their efforts and the will of the people as expressed in the 2000 vote. SB175 passed the Senate 16-9 and passed the House 46-27 after much controversy and debate.

Deception and Conspiracy

Forfeiture law remained untouched for nearly a decade following the 2004 changes. In the summer of 2012, prosecutors in state and local government agencies formed what they called a "working group" to propose additional legal changes.

These changes, however, were packed in over 50 pages of re-codification, meaning that the entire bill in the 2013 session was italicized and underlined, rendering it impossible to spot the changes that prosecutors had slipped into the bill.

Throughout the process, these attorneys, along with their bill sponsor, Representative Brad Dee, maintained that the bill made no substantive changes. Dee falsely told his colleagues that his bill was only a "recodification of current structure in statute."

Being thus assured by Dee, then the House Majority Leader, that the bill was merely a technical reorganization of existing law, the entire legislature unanimously voted for the bill, completely unaware that they were also authorizing changes that prosecutors had conspired to sneak through the process—changes that undermined property rights, due process, and the expressed will of the voters through Initiative B.

The Attorney General's Office, Statewide Association of Prosecutors, and Utah Chiefs of Police Association all "strongly supported" the 2013 "recodification" bill that allegedly contained no changes.

In fact, the bill deceptively undermined Initiative B.

Fighting the Rollback

Libertas Institute discovered the deceptive changes made to forfeiture law several months after the 2013 legislative session. We issued a report detailing each specific change and how it substantially undermined Initiative B, and we proposed a "rollback" bill to restore what had been changed and send a clear message to the conspiring prosecutors that their victory should not stand.

Senator Howard Stephenson sponsored the bill, Senate Bill 256. Unfortunately, the very prosecutors who had deceived the legislature the year before fought ardently against the proposal. Several closed-door meetings between Sen. Stephenson, Libertas Institute, and prosecutors from the Attorney General's office resulted in amending the bill to roll back most—but not all—of the previous year's changes.

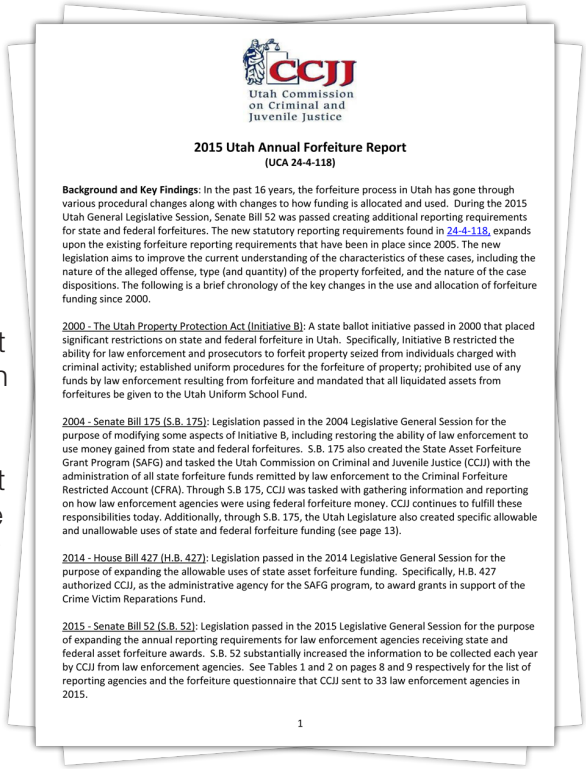
With the opposition from the Attorney General's office mostly neutralized, the compromise bill received a unanimous vote at each step. Property rights and due process protections were re-introduced to minimize abuse and restore the burdens on prosecutors who choose to use civil asset forfeiture.

Sunlight Disinfectant

Utah prosecutors have long alleged that civil asset forfeiture is not abused—that its opponents' complaints are merely theoretical. This was the primary argument made against the 2000 initiative, and government attorneys have continued to claim in recent years that legal reform is unnecessary because no person's rights have been violated.

Of course, the very existence of civil forfeiture is repugnant to the constitutional provision that no person should be deprived of property without due process, to say nothing of the fact that a person should be innocent until proven guilty—and without a criminal conviction, a person should not have their belongings legally stolen by the state.

But to put this argument to rest once and for all, Libertas Institute proposed a new transparency law that would require prosecutors to disclose detailed information on each forfeiture case, providing lawmakers, journalists, and the public with a better understanding of how this power was being used, how often, and why.



CCJJ
Utah Commission on Criminal and Juvenile Justice

2015 Utah Annual Forfeiture Report
(UCA 24-4-118)

Background and Key Findings: In the past 16 years, the forfeiture process in Utah has gone through various procedural changes along with changes to how funding is allocated and used. During the 2015 Utah General Legislative Session, Senate Bill 52 was passed creating additional reporting requirements for state and federal forfeitures. The new statutory reporting requirements found in 24-4-118, expands upon the existing forfeiture reporting requirements that have been in place since 2005. The new legislation aims to improve the current understanding of the characteristics of these cases, including the nature of the alleged offense, type (and quantity) of the property forfeited, and the nature of the case dispositions. The following is a brief chronology of the key changes in the use and allocation of forfeiture funding since 2000.

2000 - The Utah Property Protection Act (Initiative B): A state ballot initiative passed in 2000 that placed significant restrictions on state and federal forfeiture in Utah. Specifically, Initiative B restricted the ability for law enforcement and prosecutors to forfeit property seized from individuals charged with criminal activity; established uniform procedures for the forfeiture of property; prohibited use of any funds by law enforcement resulting from forfeiture and mandated that all liquidated assets from forfeitures be given to the Utah Uniform School Fund.

2004 - Senate Bill 175 (S.B. 175): Legislation passed in the 2004 Legislative General Session for the purpose of modifying some aspects of Initiative B, including restoring the ability of law enforcement to use money gained from state and federal forfeitures. S.B. 175 also created the State Asset Forfeiture Grant Program (SAFG) and tasked the Utah Commission on Criminal and Juvenile Justice (CCJJ) with the administration of all state forfeiture funds remitted by law enforcement to the Criminal Forfeiture Restricted Account (CFRA). Through S.B 175, CCJJ was tasked with gathering information and reporting on how law enforcement agencies were using federal forfeiture money. CCJJ continues to fulfill these responsibilities today. Additionally, through S.B. 175, the Utah Legislature also created specific allowable and unallowable uses of state and federal forfeiture funding (see page 13).

2014 - House Bill 427 (H.B. 427): Legislation passed in the 2014 Legislative General Session for the purpose of expanding the allowable uses of state asset forfeiture funding. Specifically, H.B. 427 authorized CCJJ, as the administrative agency for the SAFG program, to award grants in support of the Crime Victim Reparations Fund.

2015 - Senate Bill 52 (S.B. 52): Legislation passed in the 2015 Legislative General Session for the purpose of expanding the annual reporting requirements for law enforcement agencies receiving state and federal asset forfeiture awards. S.B. 52 substantially increased the information to be collected each year by CCJJ from law enforcement agencies. See Tables 1 and 2 on pages 8 and 9 respectively for the list of reporting agencies and the forfeiture questionnaire that CCJJ sent to 33 law enforcement agencies in 2015.

1

Senate Bill 52 was sponsored in the 2015 session to introduce this requirement; the bill passed quickly and unanimously.

The first results were released in July 2016, using data from forfeitures that had been finalized during the 2015 calendar year. The results confirm the suspicions of reform advocates, namely, that prosecutors heavily favor civil vs. criminal forfeiture, and that it is being used primarily for low-dollar values, and almost entirely for alleged drug offenses.

The data shows that 94% of reported forfeiture cases were done through the civil route, where the legal standard is lower and property can more easily be taken. This is a far higher rate than in the other states where data exists to differentiate between civil and criminal.

Only in a minority of cases did prosecutors actually file criminal charges for the alleged offense for which the property was seized. Almost all forfeitures pertained to alleged narcotic offenses—97.5% of the total—illustrating that this tool is used almost entirely as part of the "war on drugs." However, forfeiture is rarely used to confiscate property from cartel operators and drug kingpins. Instead, most cases involve less than a few thousand dollars.

Specifically, the median value of forfeited property was $1,324. This creates a substantial disincentive for the property owner to contest the taking; a person is highly unlikely to pay an attorney to recover property that is valued less than the cost of the attorney. In part due to this reason, 61.3% of forfeiture cases in Utah were resolved through a default judgment, where the owner did not bother to contest the taking. Only 13% of cash-only forfeitures resulted in some funds being returned to the claimant after resolution of the forfeiture case.

The Reform Effort

As the public becomes increasingly informed about the inherent problems with civil asset forfeiture, and as more media outlets continue highlighting examples of innocent individuals wrongly targeted and forced to relinquish their property, states are taking matters into their own hands.

Forfeiture practices vary from state to state. In the vast majority of states, at least some amount of resulting proceeds—including cash, computers, or cars—are diverted to law enforcement budgets. Ample evidence has surfaced in recent years showing that many law enforcement agencies have come to depend on their state's forfeiture statutes to help offset budget gaps or even to fund the acquisition of tools, treats, or even football tickets.[6]

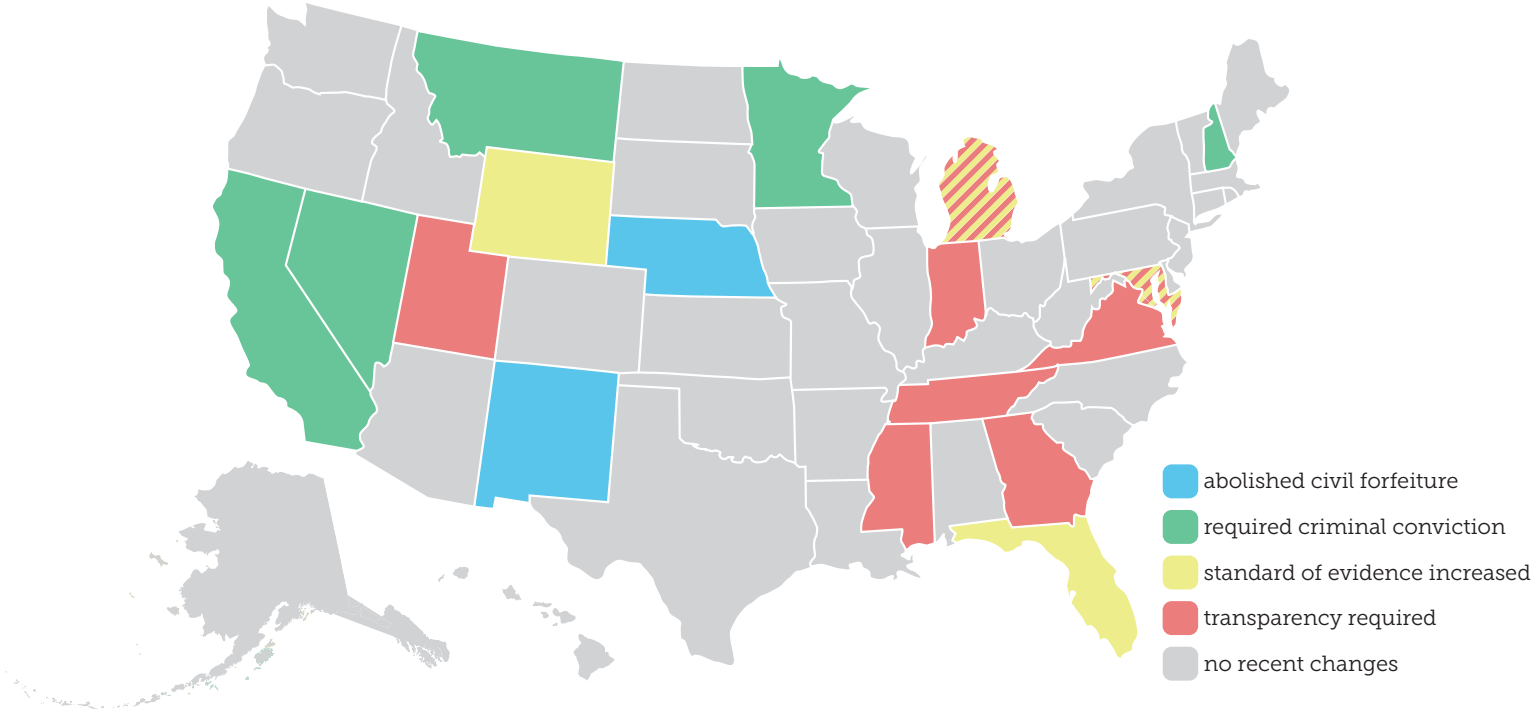
Just as the policies and their implementation vary from state to state, so too do the proposed reforms of these laws. Nebraska and New Mexico, for example, have eliminated civil forfeiture, requiring prosecutors to only pursue forfeiture in criminal court. Other states, such as Montana, Nevada, Minnesota, and California, require prosecutors to obtain a criminal conviction as a condition of civilly forfeiting the individual's property.

While law enforcement agencies have routinely protested reform efforts around the country, the financial incentive they have to profit from forfeiture cases tends to undermine the integrity of their position. Without question, forfeiture revenue is sometimes used for legitimate and beneficial purposes, but innocent people should not be forced to fund such programs through confiscation of their property. At a minimum, the entire arrangement carries an appearance of impropriety by creating a conflict of interest for police.

Unfortunately, many police officers are misled to believe that reform of civil asset forfeiture laws—or even their abolition—would hamper their ability to fight crime. This, of course, is patently false. *Criminal* forfeiture remains a completely viable option for confiscating illegally obtained assets. Further, law enforcement officers do not deal directly with forfeiture—their power to seize property that they believe to be involved in criminal conduct remains intact despite these reform efforts.

The true villain in the reform effort, therefore, is the prosecutor who desires civil asset forfeiture as a convenient procedure by which property can be taken by the government without having to meet the legal burden required in the criminal process. Neither professional incompetence nor convenience justify the perpetuation of a law that unfairly violates property rights and due process.

Recent Civil Asset Forfeiture Reforms



This chart—updated as of October 2016—highlights numerous reforms made only in the past few years.

Tales of Trouble

The transparency report mentioned previously requires prosecutors to disclose detailed information about each forfeiture case. Using this data, Libertas Institute has conducted a review of specific cases included in the report, using the individualized data provided by the Commission on Criminal and Juvenile Justice.

While the aggregate statistics are relevant and interesting, the specific stories—real people whose lives have been negatively impacted by this policy—deserve particular attention.

> **"We could be czars. We could own the city. We could be in the real estate business."[7]**
>
> **—A New Mexico prosecutor enthusiastically informing elected officials of their ability to forfeit and obtain revenue from property.**

The following stories are true and accurate, though the names have been changed. Most property owners and their attorneys have been reluctant to openly fight against the policy for fear of retribution by prosecutors. When criminal charges have not been filed and the statute of limitations has not expired, a vindictive prosecutor might initiate charges as a punishment for speaking out against civil asset forfeiture. This potential has silenced the victims of civil asset forfeiture.

Peter, a resident of Missouri, drove through Utah along I-80 in the summer of 2013 on his way to California. His mother was facing the foreclosure of her home, as her mortgage was in default and she was unable to pay. Peter had sufficient money to help his mother, so he and his wife took a road trip to pay off the loan and save the home.

But Peter didn't trust banks and therefore did not have an account. Because of this, he couldn't wire the money or obtain a cashier's check. Instead, he simply drove across the country with the cash to deliver to the bank.

Peter was pulled over by a Utah Highway Patrol officer who alleged he had exceeded the speed limit. A subsequent search of the vehicle found two marijuana cigarettes in a compartment of one of the doors, in open view, along with $62,014 in cash.

Officers and the county prosecutor alleged that the currency was the result of a sale of illegal controlled substances, despite furnishing zero evidence to substantiate the claim. Peter and his wife were further accused of money laundering. Again, no evidence was provided; the allegations were vehemently denied by both Peter and his wife.

The currency was taken, and a complaint for civil forfeiture was filed: *The State of Utah, Plaintiff, vs. One Lot of Personal Property, described as: $62,014.00 U.S. currency*.

Peter was able to obtain documents substantiating his claim and showing that his mother's unpaid mortgage debt equated closely to the amount of cash he had. Despite this, prosecutors did not relent and relinquish the money. Instead, they made a deal: let us keep $10,000 and we'll give you the rest. Facing mounting legal costs, Peter decided to cut his losses and take the $52,014, leaving $10,000 of his money in the government's hands. The case concluded, and the portion of the money was returned, a full 16 months after it was initially taken from Peter.

In the spring of 2014, Utah resident James was pulled over for allegedly stopping slightly passed the marked "stop" line on the street. Officers discovered a small amount of cannabis products in the trunk and $4,335 in James's pocket. The money was taken, with officers and the county prosecutor claiming that it was involved in a drug sale transaction—without any evidence offered to substantiate the claim.

In fact, James was on his way to purchase a food truck to begin a business, and the money was derived from part-time jobs he had worked along with some gambling earnings made in Wendover, Nevada.

This was not satisfactory to prosecutors. Rather than returning the property, let alone apologizing for taking a person's money without any justification, they offered to settle with James by offering him half of the money if they could keep half. This was the best option available to him, of course, because had he continued to fight he would have expended more money in legal costs than he would have obtained by settling and recovering half of his money.

Numerous such cases exist, and though some involve corresponding illegal activity, few of the incidents result in criminal charges. Civil asset forfeiture has become the path of least prosecutorial resistance.

A REASONABLE RESTRAINT ON CIVIL ASSET FORFEITURE

Rather than a complete repeal of civil asset forfeiture, we propose some meaningful restraints on and reforms of the process to ensure that property rights and due process are protected, and that government operates upon the principles of justice.

24-1-102. Definitions.

The definition of "innocent owner" should be changed such that a person whose property is found to be involved in the commission of a crime is not legally required to "take reasonable steps to prohibit the illegal use" in order to be deemed innocent. This provision imposes a dangerous requirement that may unnecessarily endanger the property owner. The current definition of "proceeds" includes property that is "indirectly" acquired through criminal activity. In order to minimize abuse and ensure proportionality in prosecution, the definition should be narrowed to "direct" involvement.

24-4-102. Property subject to forfeiture.

The law currently states that any "federal or state offense" may lead to property forfeiture. This includes non-criminal activity such as *malum prohibitum* offenses such as jaywalking or exceeding the speed limit. The law should target only *criminal* offenses. Further, the law should not target "all property that has been used to facilitate" a crime, but only the property that has been *directly* used in criminal conduct.

24-4-103. Initiating forfeiture proceedings -- Notice of intent to seek forfeiture.

The notice of intent to seek forfeiture, provided by the prosecutor, should articulate the alleged relationship between the property and the related criminal conduct so as to require the government to specify a demonstrable association.

24-4-104. Civil forfeiture procedure.

Civil forfeiture complaints should be overturned and the property released to the claimant, if the prosecutor either declines to file criminal charges against the property owner or fails to secure a conviction.

24-4-107. Innocent owners.

Property owners who are innocent and regain their property should be compensated with interest along with court costs and reasonable attorney fees.

24-4-110. Attorney fees and costs.

The legislature should repeal the current statute that caps an award of attorney fees at 20% of the value of the property. As it stands, this provision disincentivizes property owners from contesting the taking of their property.

Endnotes

1. "New Data Shows Utah Law Enforcement Overwhelmingly Prefer Civil to Criminal Forfeiture," Institute for Justice, July 7, 2016, http://ij.org/new-data-shows-utah-law-enforcement-overwhelmingly-prefer-civil-criminal-forfeiture/.
2. "Civil Forfeiture Laws And The Continued Assault On Private Property," *Forbes*, June 8, 2011, http://www.forbes.com/2011/06/08/property-civil-forfeiture.html.
3. "State targets forfeiture law," *Deseret News*, November 10, 2002, http://deseretnews.com/article/947842/State-targets-forfeiture-law.html?pg=all.
4. "IJ Helps End Utah's Prosecution for Profit," Institute for Justice, October 2003, http://ij.org/ll/october-2003-volume-12-number-5/ij-helps-end-utahs-prosecution-for-profit/.
5. "Asset-forfeiture plan 'is dead'," *Deseret News*, February 16, 2003, http://deseretnews.com/article/965212/Asset-forfeiture-plan-is-dead.html.
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7. "Police Can Seize And Sell Assets Even When The Owner Broke No Law," *NPR*, November 10, 2014, http://www.npr.org/sections/thetwo-way/2014/11/10/363102433/police-can-seize-and-sell-assets-even-when-the-owner-broke-no-law.

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FREQUENT RECURRENCE TO FUNDAMENTAL PRINCIPLES IS ESSENTIAL TO THE SECURITY OF INDIVIDUAL RIGHTS

UTAH CONSTITUTION
ARTICLE I, SEC 27

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