

The Forfeiture Curmudgeons

When we were young, asset forfeiture was only used against evil drug kingpins, to take the profit out of crime, because we were pure at heart and would never tolerate an abuse of the vast power entrusted to us.

–Paraphrased from a [Washington Post op-ed](#) John Yoder and Brad Cates

These aren't two random lunatics, but two men in whom the United States of America reposed huge power to wreak havoc with the fundamental underpinnings of our legal system. And they did.

John Yoder was director of the Justice Department's Asset Forfeiture Office from 1983 to 1985. Brad Cates was the director of the office from 1985 to 1989.

I can still remember sitting in the judge's chambers on my first asset forfeiture conference, the judge looking sternly at the AUSA and saying, "you know, the law abhors a forfeiture, right?" It's unbearably quaint today. I suspect newer judges aren't even familiar with the maxim, no less interested in uttering it. And it's all because of Yoder and Cates.

Asset forfeiture was conceived as a way to cut into the profit motive that fueled rampant drug trafficking by cartels and other criminal enterprises, in order to fight the social evils of drug dealing and abuse. Over time, however, the tactic has turned into an evil itself, with the corruption it engendered among government and law enforcement coming to clearly outweigh any benefits.

The idea seemed so simple: Seize the ill-gotten gains of big-time drug dealers and remove the financial incentive for their criminality. After all, if a kingpin could earn \$20 million and stash it away somewhere, even a decade in prison would have its rewards. Make that money disappear, and the calculus changes.

Simple indeed. Decide who was guilty first, strip them of their ability to defend, and then prove after the fact you were right all along. But when Yoder and Cates ran the show, it was wonderful. After all, they only did it to drug kingpins. How do we know this? What, don't you trust them? They say so.

Then, in 1986, the concept was expanded to include not only cash earned illegally but also purchases or investments made with that money, creating a whole scheme of new crimes that could be prosecuted as "[money laundering](#)." The property eligible for seizure was further expanded to include "instrumentalities" in the

trafficking of drugs, such as cars or even jewelry. Eventually, more than 200 crimes beyond drugs came to be included in the forfeiture scheme.

Before 1986, Americans used something that is now so frowned upon as to be presumptive proof of criminality. It's called cash. We would carry it in our wallets, and when we wanted to buy something, we would remove it and give it to somebody else. If the thing we wanted to buy was too expensive that the cash needed was more than our wallet could bear, we would put it in our pockets, our briefcases, maybe even a paper bag. It would take a while to count it out, but that was how commerce happened.

Then cash became the crime. The government figured out that drug sales weren't done on Visa or MasterCard, but in currency. Evil currency. So they criminalized cash. And then they figured out that people would exchange the cash for things, whether they be cars or houses or jewelry, and so they criminalized the exchange of cash for goods. But if it happened before they could swoop in and prevent it, they would be denied their chance to glom the cash. So was born the notion of "substituted proceeds," the things that cash could buy, whether or not there was any cash involved.

But that still wasn't enough to feed the hunger of the government and starve the drug kingpins, so then the "instrumentalities of the crime" was conceived. If you drove to a drug deal, the car was an instrumentality. If the drug deal happened in a house, the house was the instrumentality. And even if there was no drug deal at all, it was all an instrumentality or substituted proceeds because Yoder and Cates knew who were drug kingpins even if they couldn't get the evidence to prosecute them criminally.

Take the profit out of crime. This became as important, if not more so, than proving the existence of a crime at all. And it was [so much easier](#).

Law enforcement agents and prosecutors began using seized cash and property to fund their operations, supplanting general tax revenue, and this led to the most extreme abuses: law enforcement efforts based upon what cash and property they could seize to fund themselves, rather than on an even-handed effort to enforce the law.

Many Americans are familiar with old-time speed traps, which became so notorious that most state legislatures reformed their systems to require local police and courts to deposit traffic fines into the state treasury to avoid the appearance of biased justice. Today, the old speed traps have all too often been replaced by forfeiture traps, where local police stop cars and seize cash and property to pay for local law enforcement efforts. This is a complete corruption of the process, and it unsurprisingly has led to widespread abuses.

Law enforcement is so corrupt now, with its corrupt and abusive use of asset forfeiture. This would never have happened if good and honest guys like Yoder and Cates were still in charge. It's not like everything they did created the foundation for this problem. It's not like their creation of a system of *in rem* forfeitures with only a probable cause burden on

the government, made out of the most spurious of claims where anyone in possession of cash was presumed to be a drug kingpin, was the cause.

But these are drug kingpins, your Honor. We may not have the evidence to prosecute them, but trust us, these are bad people and we must take the profit out of their crime.

–Paraphrased response of asset forfeiture assistant to judge in chambers in response to “the law abhors a forfeiture, right?”

And that’s why we’re here.

This entry was posted in Uncategorized on September 20, 2014 [<http://blog.simplejustice.us/2014/09/20/the-forfeiture-curmudgeons/>] by SHG.

9 comments on “The Forfeiture Curmudgeons”

Jeff Gamso

September 20, 2014 at 10:29 am

But think of how well it’s worked. By taking the profit from major drug kingpins and giving it to the cops, we’ve completely stopped the illegal drug trade and created a society where no taxes go to law enforcement.

Oh, wait.

SHG Post author

September 20, 2014 at 10:36 am

As Yoder and Cates say, “the idea seemed so simple.”

John Barleycorn

September 20, 2014 at 12:35 pm