

A License to Steal: The Forfeiture of Property

Leonard W. Levy

Chapel Hill, N.C.: University of North Carolina Press, 1996, 272 pp.

During the Constitution's ratification debates, a Pennsylvanian writing under the pseudonym "Old Whig" described civil-forfeiture proceedings as "modes of harassing the subject." He recognized that such proceedings "are undoubtedly objects highly alluring to a government. They fill the public coffers and enable government to reward its minions at a cheap rate."¹

Old Whig's wary assessment of civil forfeiture—the government's practice of seizing property suspected of wrongful use—rings as true today as it did in 1787. Leonard Levy's *A License to Steal* catalogs numerous instances of property seizures that, on almost any scale of justice, amount to criminal behavior by government agencies. Consider, for example, Billy Munnerlyn's fate.

Operating an air-charter service, Munnerlyn flew a passenger, secretly carrying \$2.7 million, from Arkansas to California. The DEA seized the passenger's cash and Munnerlyn's Lear jet on suspicion that both were tied to the drug trade. Although charges were dropped against Munnerlyn, the DEA kept his jet. He eventually repurchased his jet, only to find that the DEA had damaged it to the tune of \$50,000 in a futile search for drugs. The DEA is not liable for the damages. Munnerlyn declared bankruptcy; he now makes his living driving a truck.

As the title of his book suggests, Levy is as leery as was Old Whig of civil forfeiture. Though uneven, Levy's book exposes the many ways that government abuses civil forfeiture in the name of law enforcement. Liberal readers will cringe at the high-handedness of police who find in forfeiture a loophole for escaping constitutional fetters on government's treatment of the criminally accused. Conservatives and libertarians will grieve for the further erosion in property rights.

Too recent to make it into Levy's book is the Supreme Court's March 4, 1996, decision in *Bennis v. Michigan*²—a case further confirming Levy's wariness of civil forfeiture. Detroit police caught John Bennis with his pants down in his car while being serviced by a prostitute. In addition to fining him, Michigan seized the car, which John owned with his wife Tina. Tina Bennis fought to protect her interest in the car. She argued that because she knew nothing of her husband's tryst with the prostitute, the government could not constitutionally take her share of the automobile without compensation. The Court disagreed, holding that Tina Bennis's innocence matters not a whit. Michigan keeps the car free of charge.

Tina Bennis is not alone. Fully 80 percent of people losing property to federal forfeitures are never charged with criminal wrongdoing. Those people are punished without due process of law. That statistic is unsurpris-

¹"Essays of an Old Whig," in Storing (1981: 28).

²116 S. Ct. 994 (1996).

ing given that under most civil-forfeiture statutes—such as the one in question in *Bennis*—an owner's innocence is no defense to property seizures. If law-enforcement officials have probable cause to suspect that the property was used wrongfully, it is forfeitable regardless of the owner's complicity. But even when the law does provide innocent-owner protection, it does so only half-heartedly. Innocent-owner defenses (when available) allow owners to regain their properties only after proving their innocence. Government does not bear the burden of proving guilt.

To worsen matters, courts are indulgent of government assertions of probable cause. Levy notes that the police "can rely on an informer's tip, circumstantial evidence, and hearsay." Indeed, racial stereotypes are frequently used. Oregon police admit that their drug-courier profile includes Hispanic ethnicity—which explains why "in more than three-fourths of the cases in which the police seized cash yet found no drugs on the driver, the drivers were Hispanic."

That presumption of guilt, combined with federal law allowing law-enforcement agencies to keep the lion's share of forfeited assets, makes civil forfeiture attractive to police. It is profitable to spend less time protecting citizens' property rights and more time sabotaging those rights. Concerning a case in which the DEA seized \$66,700 in cash from an innocent man, Levy remarks: "They weren't trying to get criminals off the streets, only the money out of the pockets of suspects."

Despite its title, Levy's book is no diatribe against forfeiture. It is a scholarly treatment of a complicated subject—but a study not without annoying weaknesses. The book just stops; it has no real ending. More substantially, while Levy does an admirable job recounting forfeiture's history, he fails to draw out the lessons that this history offers for contemporary practice.

Historically, civil forfeiture served to avoid jurisdictional difficulties presented by England's growing maritime trade. Civil forfeiture was first used by admiralty courts to punish foreign owners of pirate ships and ships used for smuggling. Those owners were typically beyond the reach of domestic courts. To solve that practical problem, admiralty courts in the 17th century adopted the fiction that captured pirate ships and smuggled goods were the wrongdoers. Such wrongfully used properties were forfeited. Foreign owners thus escaped personal criminal prosecution but still were punished in the form of property losses. Today, by contrast, civil forfeitures are used even when those suspected of wrongdoing are within the jurisdiction of a domestic court. The *Bennis* decision indicates how far the Supreme Court has let civil forfeiture stray from the original understanding of its purposes.

In light of the Court's hands-off attitude toward civil forfeiture, property owners must look to Congress for reform. In the closing chapter, Levy reviews several reform proposals. One of the most attractive is a bill introduced by Rep. Henry Hyde (R-Ill.). The Hyde bill would shift the burden of proof from the owner of seized property to the government. Rep. Hyde would also make law-enforcement agencies liable for damages

inflicted upon wrongly seized properties, and give property owners 60 (rather than 10) days to contest federal forfeitures. Such reforms are appropriate in a nation whose government allegedly respects citizens private property rights.

More sweeping than the Hyde bill is one introduced by Rep. John Conyers (D-Mich.). The Conyers bill would effectively abolish civil forfeiture by requiring that all property forfeitures follow only upon criminal convictions of owners. Levy prefers Conyers's bill, but supports Hyde's efforts as a step in the right direction.

Of course, any reforms adopted by Congress would rein in only federal forfeiture powers. Citizens would remain subject to abusive state forfeitures, such as the one suffered by Tina Bennis. Consequently, courts ultimately cannot escape their constitutional responsibility to ensure that government does not abuse its forfeiture powers. Most important among these responsibilities is looking past legislative labels to the substance of government action. If the government punishes someone for wrongdoing, the action should be treated for what it is: a criminal prosecution. Allowing government to inflict punitive sanctions under the guise of civil proceedings is too risky for innocent property owners.

As Levy reports, law-enforcement agencies are none too keen to have their forfeiture powers curtailed. Federal and state officers warn direly of criminals getting the upper hand if even modest reforms such as the Hyde bill are enacted. But to argue that the sanctity of property rights should be ignored in the war on crime is to forget the most important sentiment that Pennsylvania's Old Whig shared with other founding-era Americans: an unconstrained government is the most terrifying of all criminals.

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Reference

Storing, H.J. (ed.) (1981) *The Complete Anti-Federalist*, Vol. 3. Chicago: University of Chicago Press.

Madison on the "General Welfare" of America: His Consistent Constitutional Vision

Leonard R. Sorenson

Lanham, Md.: Rowman & Littlefield, 1995, 172 pp.

Article I, section 8 of the Constitution confers upon Congress certain enumerated powers and a potentially more sweeping authority to provide for the general welfare, a goal also set forth in the Preamble. For proponents of a limited central government, the General Welfare Clause has