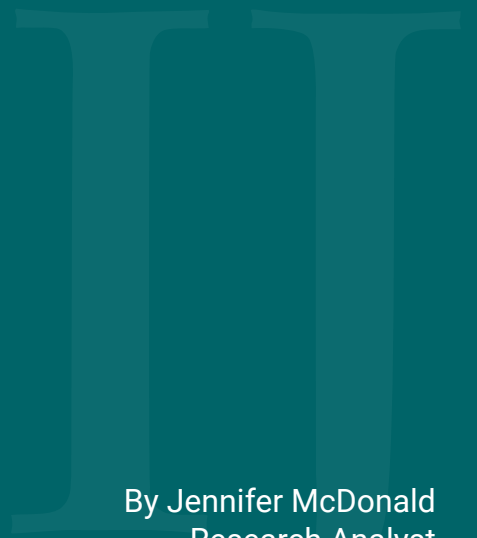


Civil Forfeiture, Crime Fighting and Safeguards for the Innocent

An Analysis of Department of Justice Forfeiture Data



Introduction

In July 2017, the Department of Justice (DOJ) under then-Attorney General Jeff Sessions revived a controversial federal forfeiture program the previous administration had sharply curtailed: “adoptive forfeitures” or “adoptions.”¹ In the months since, the DOJ has offered an ardent defense of adoptions and of civil forfeiture in general.² It claims 1) civil forfeiture overwhelmingly targets criminals, not innocents, and is thus a valuable crime-fighting tool and 2) the DOJ’s forfeiture program has new “safeguards” in place to ensure adoptions do not cause innocent people to unjustly lose their properties.³ Based on our best understanding of the DOJ’s own data—which only partially illuminate the black box that is the federal forfeiture process—the Institute for Justice (IJ) finds reason to doubt these claims. Specifically, we find that the DOJ cannot substantiate its claim that civil forfeiture fights crime. We also conclude that the DOJ’s new safeguards are unlikely to prevent innocent people from losing their property unjustly.

A Brief History of Federal Civil Forfeiture and Its Revitalization

Civil forfeiture is a mechanism that allows law enforcement agencies to seize property on the mere suspicion that it is connected to a crime and forces property owners to go up against the government to try to win it back. In contrast to criminal forfeiture, where property owners can lose their property only after a criminal conviction, civil forfeiture allows law enforcement to take property from innocent people who have never been formally charged with a crime, let alone convicted of one. This evasion of the criminal justice system is based on a legal fiction in which property alleged to be connected to a crime is deemed “guilty” of having somehow assisted in committing that crime. In criminal forfeiture, the government proceeds against the person charged with a crime; in civil forfeiture, the government proceeds against the property.⁴

This feature of American law can be traced to 17th-century English maritime law, which permitted courts to obtain jurisdiction over property when it was virtually impossible to obtain

¹ U.S. Department of Justice Office of Public Affairs. (2017, July 19). Attorney General Sessions issues policy and guidelines on federal adoptions of assets seized by state or local law enforcement [Press release]. Retrieved from <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state>; U.S. Department of Justice Office of Public Affairs. (2015, January 16). Attorney General prohibits federal agency adoptions of assets seized by state and local law enforcement agencies except where needed to protect public safety [Press release]. Retrieved from <https://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law>

² Rosenstein, R. J. (2017, November 9). Bernie Madoff and the case for civil asset forfeiture. *The Wall Street Journal*. Retrieved from <https://www.wsj.com/articles/bernie-madoff-and-the-case-for-civil-asset-forfeiture-1510237360>; U.S. Department of Justice Office of Public Affairs. (2018, February 12). Attorney General Sessions offers remarks to the National Sheriffs’ Association [Press release]. Retrieved from <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-national-sheriffs-association>

³ U.S. Department of Justice Office of Public Affairs, 2017.

⁴ For a detailed primer on civil forfeiture, please see Carpenter, D. M., Knepper, L., Erickson, A. E., & McDonald, J. (2015). *Policing for profit: The abuse of civil asset forfeiture* (2nd ed.). Arlington, VA: Institute for Justice. Retrieved from <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf>

jurisdiction over owners—pirates, for example—who had violated the law.⁵ For much of the nation’s history, civil forfeiture was something of a legal backwater. However, its use expanded greatly during the early 1980s with the War on Drugs. Today, unmoored from the practical necessities of enforcing maritime law, civil forfeiture is a popular tool of law enforcement.⁶

This is concerning for at least two reasons. First, because civil forfeiture proceedings are civil actions against property, not criminal actions against people, owners caught up in them lack rights afforded the criminally accused. Owners do not have the right to counsel, and the federal government faces a lower evidentiary threshold to forfeit property than it does to convict a person of a crime. Even people who had nothing to do with an alleged crime can lose their property through civil forfeiture unless they can prove their own innocence—flipping the American legal tradition of innocent until proven guilty on its head. Second, civil forfeiture laws often give law enforcement agencies a financial stake in forfeitures by awarding them some, if not all, of the proceeds of successful forfeiture actions. This financial incentive creates a conflict of interest and encourages the pursuit of property instead of the pursuit of justice.⁷

Not only do federal law enforcement agencies seize property for forfeiture on their own, but they also partner with state and local agencies through a program called “equitable sharing.”⁸ There are two ways this partnership plays out: joint investigations and adoptions. Joint investigations, which make up the majority of equitable sharing,⁹ allow federal agents to partner with state and local agents to seize and forfeit property under federal law through, for example, a joint task force. Adoptions occur when state and local agents seize property under state law and then turn it over to the federal government, which then “adopts” the property and forfeits it under federal law.¹⁰

Equitable sharing adds yet another layer to the problem of civil forfeiture because it allows state and local agencies to circumvent state laws that make it more difficult or less profitable for law enforcement to forfeit property. For example, the burden of proof required to forfeit property is higher under New York state law than it is under federal law. And while New York state law allows seizing agencies to keep a maximum of 60 percent of the proceeds from forfeited property, the equitable sharing program allows agencies to receive up to 80 percent.¹¹ Unsurprisingly, New York agencies are among the most avid participants in equitable sharing nationwide.¹² North Carolina presents an even more extreme example: The state has completely

⁵ Boudreaux, D. J., & Pritchard, A. C. (1996). Civil forfeiture and the war on drugs: Lessons from economics and history. *San Diego Law Review*, 33, 79–135.

⁶ Rainbolt, G., & Reif, A. F. (1997). Crime, property, and justice: The ethics of civil forfeiture. *Public Affairs Quarterly*, 11(1), 39–55.

⁷ See Carpenter et al., 2015.

⁸ While a number of federal agencies engage in forfeiture and equitable sharing, this white paper focuses only on agencies that participate in the Department of Justice’s Asset Forfeiture Program, which are listed at <https://www.justice.gov/afp/participants-and-roles>.

⁹ Between 2000 and 2013, joint investigations accounted for 73 percent of DOJ equitable sharing seizures and 82 percent of the proceeds from DOJ equitable sharing forfeitures. Carpenter et al., 2015, pp. 29, 149.

¹⁰ Carpenter et al., 2015.

¹¹ Carpenter et al., 2015, pp. 110, 25.

¹² Carpenter et al., 2015, p. 111.

eliminated civil forfeiture and directs all proceeds from criminal forfeiture to public schools. Likely as a result, state and local law enforcement agencies actively participate in the DOJ’s equitable sharing program, bringing in more than \$11 million annually.¹³ And scholarly research, including a 2018 article published in the journal *Criminology and Public Policy*, confirms this phenomenon, finding that law enforcement agencies in states with more restrictive and less financially rewarding civil forfeiture laws receive more equitable sharing dollars.¹⁴

Former Attorney General Eric Holder severely curtailed adoptive equitable sharing in January 2015 following public outcry over the practice.¹⁵ The DOJ’s data suggest that federal adoptions virtually ended after Holder instituted this policy change (see Table 1 and Figure 1).

Table 1: Total Value of Property Seized by the DOJ, Joint Investigations vs. Adoptions, January 17, 2014–January 16, 2016

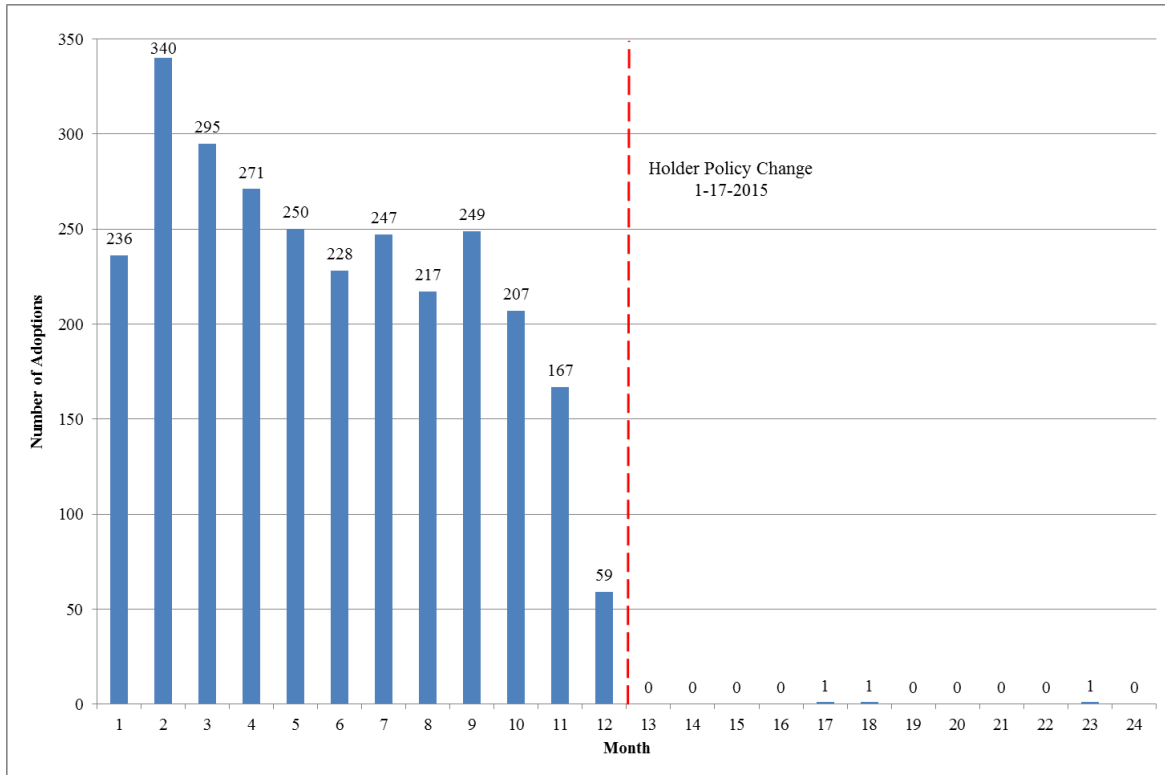
	Total Seized Under Joint Investigations	Percent of Total Federal Seizures	Total Seized Under Adoptions	Percent of Total Federal Seizures
1 Year Pre-Holder Policy:	\$516,487,639	89%	\$65,011,586	11%
1 Year Post-Holder Policy:	\$427,278,555	99.996%	\$15,628	0.004%

¹³ Carpenter et al., 2015, pp. 112–13.

¹⁴ Holcomb, J. E., Williams, M. R., Hicks, W. D., Kovandzic, T. V., & Meitl M. B. (2018). Civil asset forfeiture laws and equitable sharing activity by the police. *Criminology and Public Policy*, 17(1), 101–27; Carpenter et al., 2015, pp. 25–30.; Holcomb, J. E., Kovandzic, T. V., & Williams, M. R. (2011). Civil asset forfeiture, equitable sharing, and policing for profit in the United States. *Journal of Criminal Justice*, 39(3), 273–85.

¹⁵ U.S. Department of Justice Office of Public Affairs, 2015; Sallah, M., O’Harrow, R., Jr., Rich, S., Silverman, G., Chow, E., & Mellnik, T. (2014, September 6). Stop and seize. *The Washington Post*. Retrieved from <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>

Figure 1: Total Number of DOJ Adoptions, January 17, 2014–January 16, 2016



In July 2017, the DOJ under then-Attorney General Jeff Sessions lifted the limits on adoptions with the stated intent of shoring up federal crime-fighting efforts and resources.¹⁶ Perhaps in response to anticipated criticism,¹⁷ the DOJ added “safeguards” it said would protect innocent property owners from unwarranted adoptions. The safeguards include, among others, requiring 1) speedier notice of seizure for property owners, 2) additional documentation of the probable cause that led to seizures, and 3) additional scrutiny of cash seizures of \$10,000 or less.¹⁸ IJ’s analysis of federal forfeiture data casts doubt on the DOJ’s claim that civil forfeiture fights crime. It also sheds light on the DOJ’s past behavior, giving reason to doubt that new safeguards will truly protect property owners going forward.

¹⁶ U.S. Department of Justice Office of Public Affairs, 2017.

¹⁷ Wilson, J. J. (2017, July 19). Civil forfeiture is inherently abusive: Statement responding to DOJ’s announced policy change increasing use of civil forfeiture [Press release]. Arlington, VA: Institute for Justice. Retrieved from <http://ij.org/press-release/civil-forfeiture-inherently-abusive/>

¹⁸ U.S. Department of Justice Criminal Division. (2017). Policy guidance on the Attorney General’s order on federal adoption and forfeiture of property seized by state and local law enforcement agencies (Policy Directive 17-1). Retrieved from <https://www.justice.gov/criminal-mlars/file/985636/download>

IJ's Analysis

To examine the DOJ's claims that civil forfeiture overwhelmingly targets criminals and that new "safeguards" will protect innocent owners, IJ used the DOJ's own data. The DOJ keeps track of the property its agencies seize and forfeit using a database called the Consolidated Asset Tracking System (CATS). CATS contains information on the type and value of property seized, whether property was seized as part of a joint investigation or adoption, what kind of legal procedures were used to forfeit the property, and much more.¹⁹ We initially obtained the CATS database from the DOJ through a Freedom of Information Act request, but the database is now publicly accessible on the DOJ's website.²⁰

For this analysis, we examined CATS data on cash seizures conducted between 1997 and 2015.²¹ We examined all of the DOJ's cash seizures—as opposed to just those conducted as part of the equitable sharing program—because such an analysis provides an indication of the DOJ's policies more generally.²² We find that the DOJ cannot substantiate its claim that civil forfeiture is an essential crime-fighting tool because it does not even track whether its civil forfeiture efforts are advancing criminal investigations. We also conclude, based on past behavior by the DOJ and its agencies, that the new safeguards are unlikely to protect innocent people from losing their property unjustly.

The DOJ does not track, and therefore cannot substantiate, whether its civil forfeiture efforts are advancing criminal investigations.

The DOJ argues that civil forfeiture is an important tool to fight crime and combat the illegal drug trade.²³ But these claims are difficult, if not impossible, to substantiate because the DOJ does not track in CATS whether criminal charges or convictions accompany the seizure and forfeiture of property. Not one of the more than 1,300 variables contained in CATS indicates

¹⁹ U.S. Department of Justice Justice Management Division. (2014). *Major information systems*. Retrieved from <https://www.justice.gov/jmd/major-information-systems>

²⁰ U.S. Department of Justice Asset Forfeiture Program. (2017). *Freedom of Information Act*. Retrieved from <https://www.justice.gov/afp/freedom-information-act>. For this analysis, we used the version of the database that was up to date as of the end of Fiscal Year 2016.

²¹ This is the longest time period for which we had complete calendar-year data at the time of analysis. We limited our analysis to cash seizures because we believe they are the most accurately valued assets in CATS. With other types of property, such as vehicles or electronics, a certain amount of error is likely introduced when the estimated value is entered into the database. On the other hand, \$5,000 in cash has a clear value of \$5,000, making for a cleaner analysis.

²² While the results presented here reflect analyses conducted on all DOJ cash seizures, we ran the same analyses on the subset of seizures conducted as part of the equitable sharing program. Differences in results were negligible.

²³ The DOJ also claims forfeiture allows it to return substantial sums of forfeiture proceeds to crime victims: \$4.4 billion since 2000, half of which the DOJ says came from civil forfeiture. Rosenstein, 2017; U.S. Department of Justice Office of Public Affairs, 2017; C-SPAN. (2017, July 29). *Attorney General announcement on civil asset forfeiture* [Video file]. Retrieved from <https://www.c-span.org/video/?431550-1/attorney-general-announces-civil-asset-forfeiture-directives>. But \$2.2 billion is less than 9 percent of the more than \$25 billion the DOJ reportedly forfeited between fiscal years 2001 and 2016.

whether criminal charges were ever filed in conjunction with a seizure.²⁴ This leaves open the possibility that innocent people are losing their property unjustly. The DOJ's own Office of the Inspector General (OIG) has come to similar conclusions.

Concerned about civil liberty abuses from the DOJ's forfeiture activity, the OIG conducted its own investigation into the quality of the DOJ's oversight of its agencies' forfeiture activity. Because the DOJ does not track information about crimes associated with seizures, the OIG was forced to go directly to the source: It examined Drug Enforcement Administration (DEA) records for a sample of 100 cash seizures that were executed without a warrant and without the presence of drugs—indicators that these seizures were likely to violate property owners' civil liberties. It found that in more than half of the cases, the DEA could not verify whether warrantless interdiction seizures advanced a criminal investigation, warning:

When seizure[s] and administrative forfeitures do not ultimately advance an investigation or prosecution, law enforcement creates the appearance, and risks the reality, that it is more interested in seizing and forfeiting cash than advancing an investigation or prosecution.²⁵

The DOJ's new "safeguards" fail to address the most fundamental problems with federal civil forfeiture and are unlikely to offer meaningful protection for innocent property owners.

The DOJ touts new "safeguards" within the revived adoptions program it says will protect innocent owners from losing property unjustly. These safeguards include requiring 1) speedier notice of seizure for property owners, 2) additional documentation of the probable cause that led to seizures, and 3) additional scrutiny of cash seizures of \$10,000 or less.²⁶ Analysis of past DOJ forfeiture data suggests that these safeguards will not do enough to protect innocent property owners because they fail to address three significant problems with federal civil forfeiture:

- Filing a claim for return of property is an uphill battle, increasing the likelihood that owners will lose their properties without cause.
- Most seizures are adjudicated administratively, not judicially, meaning the government does not have to prove property's connection to a crime before a neutral judge.
- The DOJ's internal processes do not provide a meaningful check on the power of administrative forfeiture.

²⁴ Erickson, A. C., McDonald, J., & Menjou, M. (n.d.). Department of Justice report card. *Forfeiture transparency and accountability: State-by-state and federal report cards*. Arlington, VA: Institute for Justice. Retrieved April 24, 2018, from <http://ij.org/report/forfeiture-transparency-accountability/?state=DOJ>. For a complete list of variables contained in CATS, see <https://www.justice.gov/afp/page/file/441201/download>

²⁵ U.S. Department of Justice Office of the Inspector General. (2017). *Review of the Department's oversight of cash seizure and forfeiture activities*. Retrieved from <https://oig.justice.gov/reports/2017/e1702.pdf>, p. iii.

²⁶ U.S. Department of Justice Criminal Division, 2017.

1. Filing a claim for return of property is an uphill battle, increasing the likelihood that owners will lose their properties without cause.

The Attorney General’s office boasts that “[a]bout 80% of the time, nobody even tries to claim the seized assets” and suggests that this is because “[m]ost cases are indisputable.”²⁷ Aside from the fact that the DOJ cannot substantiate this assertion, this statement ignores the host of obstacles confronting owners of seized property that deter many from even attempting to fight the federal government.

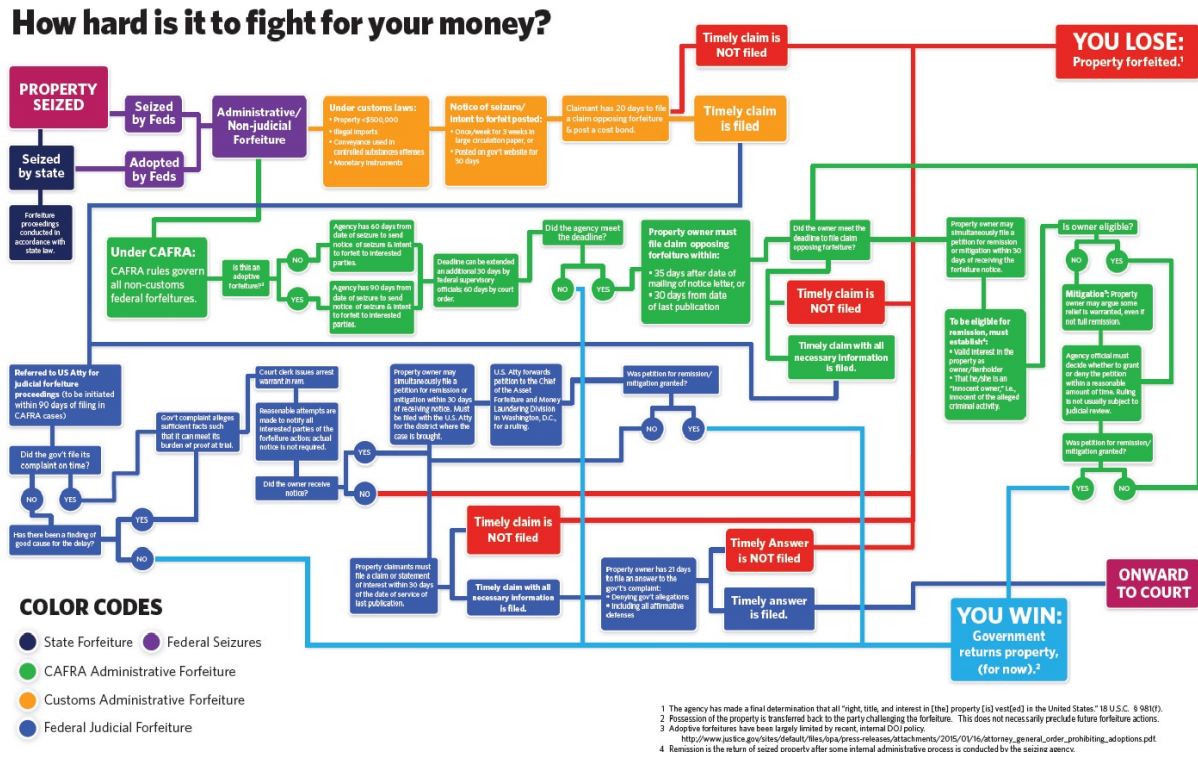
When the DOJ seizes or adopts property, it is required to provide the property owner with written notice of the seizure within 90 days.²⁸ The AG’s office argues that cutting this time in half will help innocent owners challenge the seizure of their property more promptly,²⁹ but such a policy change will do nothing to streamline the daunting process required to claim seized property. Unlike in criminal proceedings, victims of civil forfeiture are not entitled to an attorney. Claimants must therefore either spend thousands of dollars to retain counsel—often more than the value of the seized property at stake—or attempt to navigate the byzantine federal forfeiture process alone (see Figure 2). Faced with these hurdles, many property owners may feel their only option is to walk away.

²⁷ Rosenstein, 2017.

²⁸ 18 U.S.C. § 983(a)(1)(A)(iv).

²⁹ Rosenstein, 2017

Figure 2: Federal Forfeiture Flow Chart³⁰



Even if a property owner decides to take on the federal government and file a claim for return of property, doing so correctly is difficult, though the DOJ presents it as a fairly straightforward process. According to the DOJ's website, once property owners receive notice of the government's intent to forfeit their property, all they have to do is mail in a claim to the seizing agency. Claims must:

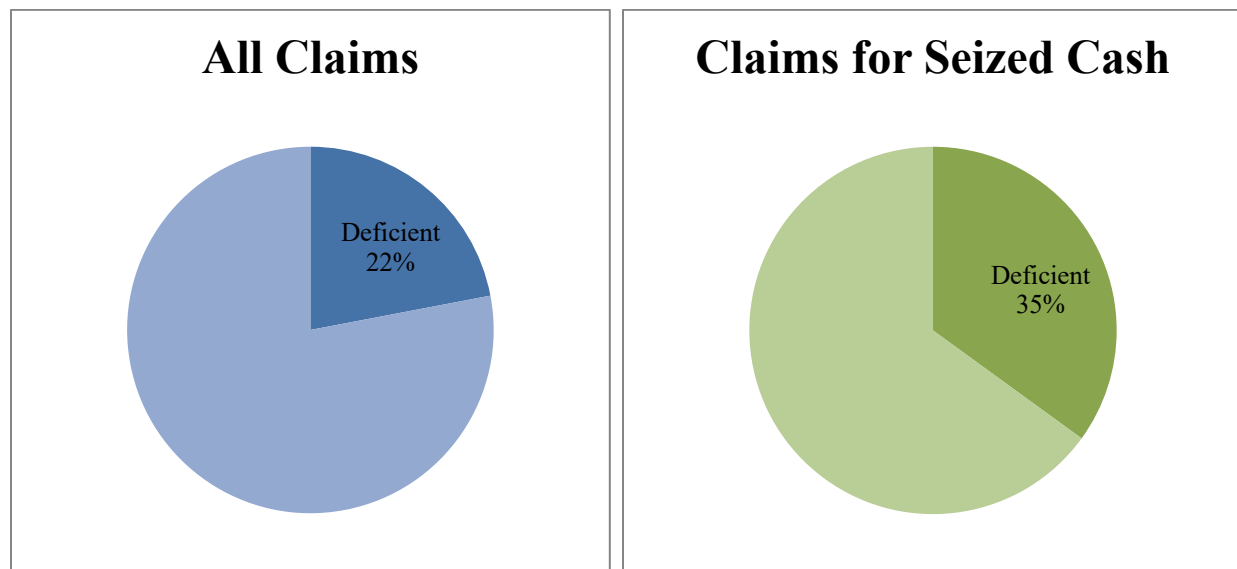
- Be in writing.
- Describe the seized property.
- State ownership or other interest in the property.
- Be made subject to penalty of perjury.
- Be made before the deadline indicated on the seizure notice.³¹

³⁰ Figure reproduced from Heritage Foundation. (2015). *Arresting your property: How civil asset forfeiture turns police into profiteers*. Retrieved from http://thf_media.s3.amazonaws.com/2015/pdf/Forfeiture-Booklet-FINAL-Full.pdf, pp. 10–11.

³¹ U.S. Department of Justice. (n.d.). *Claims*. Retrieved April 24, 2018, from <https://www.forfeiture.gov/FilingClaim.htm>

But this process is rife with pitfalls, and running into one can cause a claim to be deemed deficient—and property to be forfeited automatically. Indeed, a large portion of claims are deemed deficient by the government: one-fifth of all claims made between 1997 and 2015 and one-third of all claims made for seized cash during that time (see Figure 3).

Figure 3: Portion of Claims Deemed Deficient under Justice Asset Forfeiture Program, 1997–2015



The biggest pitfall is that the seizing agency itself—and not a judge or other neutral arbiter—gets to determine whether a claim is deficient. And it can deem a claim deficient for a variety of reasons, as shown in Table 2. By far the most common reason is that a claim was “not executed and sworn to by the claimant.” Overall, 68 percent of deficient claims for seized cash fell into this trap. The DEA, which conducts the lion’s share of the seizures recorded in CATS, has proved to be particularly fastidious about this. For example, it has in the past deemed claims sworn before a public notary deficient because they do not explicitly say they were sworn “subject to penalty of perjury,” even though courts have frequently ruled that such language is not necessary to support a perjury conviction.³²

The next largest share of deficient claims—a full 16 percent—were so deemed for “other” reasons. This finding reveals that the claims process is often a black box.

³² *United States v. Jones*, No. CR 12-10084-PBS, 2017 U.S. Dist. LEXIS 13147, 2017 WL 421644 (D. Mass. Jan. 31, 2017).

Table 2: Reasons for Deficient Claims, DOJ Cash Seizures 1997–2015

Percent of Claims Deemed Deficient	Reason for Deficiency
68%	Claim was not executed and sworn to by the claimant
16%	Other
5%	Claimant neglected to state their interest in such property
4%	Claimant did not state intent to contest seizure in District Court
3%	Claimant did not state claim of ownership
1%	Property was not properly identified by the claimant
1%	Claim of indigency not adequately supported
1%	<i>In forma pauperis</i> claim insufficient - no affidavit of indigency
0.4%	Claim was received without a bond
0.3%	Claim submitted was in photocopy and not original
0.1%	Bond not payable to U.S. DOJ, returned to claimant
0.1%	Insufficient bond received, returned to claimant

2. *Most seizures are adjudicated administratively, not judicially, meaning the government does not have to prove property’s connection to a crime before a neutral judge.*

Civil forfeiture cases can be adjudicated in one of two ways: judicially or administratively. With judicial procedures, the property’s fate is decided, at least in theory, by a judge who serves as a neutral arbiter weighing the merits of the government’s case against the property owner’s claim. With administrative procedures, in contrast, law enforcement officials decide whether to forfeit, allowing them to play the role of judge. Three-quarters of all federal forfeitures are adjudicated administratively.³³

According to the DOJ, filing a claim for the return of seized property automatically triggers judicial proceedings.³⁴ When property is not claimed, the DOJ generally assumes it is administratively forfeitable.³⁵

The DOJ argues that administrative forfeiture is so common because most people are guilty and know they have no case; therefore, they do not file a claim.³⁶ Yet, as already noted, the DOJ does

³³ This rate holds true for all property types, not just cash.

³⁴ U.S. Department of Justice. (n.d.). *Civil asset forfeiture backgrounder*, p. 2. Copy on file with the Institute for Justice. The data cast doubt on the DOJ’s claim, however, suggesting that the reality of the federal civil forfeiture process is less cut and dried: In over 9,000 cases between 1997 and 2015, cash was forfeited administratively even though someone filed a claim for its return. With some of these forfeitures, the “forfeiture type” switched between judicial and administrative proceedings at least once before the cash was finally forfeited administratively. Although we cannot be sure why these changes occur—or indeed why claimed property is ultimately forfeited administratively, in conflict with the DOJ’s public statements about the process—it might be because claimants settle with the government or drop out of the onerous process. Either way, the data suggest that even if judicial proceedings are begun, it is still possible for a case to be decided by DOJ officials rather than a federal judge. Our analysis uses the most recent forfeiture type assigned to an asset at the time it was forfeited.

³⁵ U.S. Department of Justice, 2017, p. 2.

not track the data necessary to back up this argument, and OIG findings cast doubt on its veracity. Moreover, as detailed in the previous section, filing a claim can be an uphill battle and there are many reasons why a person may be unable or unwilling to fight for the return of their property even if they are innocent of any wrongdoing. It is therefore likely that innocent owners face administrative forfeiture, with the fate of their property up to the discretion of law enforcement officials.

In theory, administrative forfeiture requires law enforcement officials to weigh the evidence linking a property to a crime. Even in the absence of a claim, officials are supposed to consider whether property is subject to forfeiture before seizing and forfeiting property administratively. However, the data give reason to question whether this is truly happening in practice: Between 1997 and 2015, just 2 percent of cash seizures for administrative forfeiture resulted in the cash (or a portion of it) being returned to its owner. In contrast, fully one-third of cash seizures for judicial forfeiture resulted in a return of the money. It is possible that innocent owners are more likely to fight forfeiture, leading to a higher return rate for judicial forfeitures, but it is unlikely, given the obstacles to filing a claim, that this can fully account for the difference.³⁷ Indeed, that so many owners with the opportunity and means to fight win some or all of their property back calls into question whether seizure standards are too lax in the first place. It also suggests that the presence of a neutral arbiter makes a difference in forfeiture outcomes.

3. *The DOJ's internal processes do not provide a meaningful check on the power of administrative forfeiture.*

The DOJ claims that strengthening some of its internal processes for adoptions amounts to new “safeguards” that will further protect innocent property owners. Specifically, it says that it will require additional documentation of the probable cause that led to a seizure and additional scrutiny for lower-value seizures. Using the CATS database and building on past research, our analysis of how these safeguards have worked in the past gives reason to doubt that they have provided meaningful protection or that they will do so in the future, even once strengthened.

A. Documentation of probable cause

In order to seize property, law enforcement must have probable cause. This is the same low evidentiary burden that police must meet before searching a car at a traffic stop without a warrant and a lower one than that required to forfeit property federally and in nearly all states.³⁸ The DOJ says that it will now require additional documentation of the probable cause that gave rise to the seizure of property that is later adopted. While a step in the right direction, ensuring probable cause existed for a seizure is a basic law enforcement responsibility and no more than what agencies should already be doing. Additional documentation might weed out the most blatantly

³⁶ Rosenstein, 2017; C-SPAN, 2017.

³⁷ And, as previously mentioned, some properties are forfeited administratively even though a claim is filed. The data do not allow us to ascertain whether this is because some sort of settlement agreement was reached, because claimants dropped out of the process for reasons that had nothing to do with their guilt or innocence, or because of some other reason or process to which the public is not privy.

³⁸ Carpenter, et al., 2015, p. 17

unjust adoptions, but it does not constitute a drastic improvement to a fundamentally unjust process.

B. Additional scrutiny of lower-value seizures

When the DOJ reinstated adoptions, it also reinstated a rule requiring that lower-value cash seizures receive additional scrutiny and raised the threshold for this additional scrutiny from \$5,000 to \$10,000. Although intended to provide protection for innocent property owners, this policy is troubling because it implies that the DOJ assumes the more cash a person is carrying, the more likely it is that the cash is related to criminal activity.

But it is not a crime to carry even large amounts of cash. Indeed, there are any number of reasons a person might carry a large amount of cash that do not involve criminal activity, such as raising money for charity,³⁹ buying or selling property,⁴⁰ working in a primarily cash-based business,⁴¹ or avoiding credit card debt.⁴² Moreover, members of certain populations, including many disadvantaged groups, are less likely to have a bank account, which makes them more likely to carry cash.⁴³ The DOJ's threshold is also arbitrary: It is unclear why someone carrying \$10,001 deserves less due process than someone carrying \$9,999.

The data also give reason to doubt the logic behind the threshold. Assuming the DOJ really has given sub-\$5,000 seizures additional scrutiny in the past, the data show at most a slight difference in return rates for cash seizures above and below the threshold (see Table 3). If higher-value seizures were truly more likely to be indicative of criminal activity—something which, as discussed above, the DOJ does not even track—we might expect to see a lower return rate for them than for lower-value seizures. The fact that we do not suggests the threshold is arbitrary and raising it will have little effect on protecting property owners.

³⁹ Ingraham, C. (2016, April 25). How police took \$53,000 from a Christian band, an orphanage and a church. *The Washington Post*. Retrieved from https://www.washingtonpost.com/news/wonk/wp/2016/04/25/how-oklahoma-cops-took-53000-from-a-burmese-christian-band-a-church-in-omaha-and-an-orphanage-in-thailand/?utm_term=.8afa910a59d4

⁴⁰ Liberty project intervenes, government drops all charges. (Summer 2017). *DKT Liberty Project Newsletter*. Retrieved from <http://dktlibertyproject.org/wp-content/uploads/2017/05/DKTLP-Summer-2017.pdf>, p. 1; Kirby, B. (2015, June 22). When cops seize money or property in Alabama, it's owner's burden to prove he's innocent. *AL.com*. Retrieved from

http://www.al.com/news/mobile/index.ssf/2015/06/when_cops_seize_money_or_prope.html

⁴¹ O'Harrow, R., Jr., Sallah, M., & Rich, S. (2014, September 8). They fought the law. Who won? *The Washington Post*. Retrieved from http://www.washingtonpost.com/sf/investigative/2014/09/08/they-fought-the-law-who-won/?utm_term=.300e487f5551

⁴² The good and bad of carrying cash: Does it really pay? (n.d.). Retrieved April 24, 2018, from <https://www.daveramsey.com/blog/good-and-bad-carrying-cash>

⁴³ Nine million U.S. households did not have a bank account in 2015, with Hispanic, black, working-age disabled, lower-income, less-educated and younger households more likely to be in this group than the rest of the population. Federal Deposit Insurance Corporation Division of Depositor and Consumer Protection. (2016). *2015 FDIC national survey of unbanked and underbanked households: Executive summary*. Retrieved from <https://www.fdic.gov/householdsurvey/2015/2015execsumm.pdf>

Table 3: Return Rates Above and Below \$5,000, DOJ Cash Seizures, 1997–2015

	Civil Judicial		Administrative	
	<\$5,000	≥\$5,000	<\$5,000	≥\$5,000
Return Rate	44%	34%	2%	1%

Where a difference in return rates is observed, however, is between judicial and administrative forfeitures. For example, while seizures processed judicially both above and below the threshold are returned in over one-third of cases, those processed administratively are hardly ever returned. This discrepancy is further evidence that a judge’s involvement in a forfeiture case can mean all the difference to an innocent property owner.

Conclusion: The deck is stacked in favor of the government and new “safeguards” are unlikely to protect property owners.

The DOJ assumes that the low rate of claims made for return of property is evidence that its civil forfeiture program ensnares primarily the criminals it is intended to target. But IJ’s analysis offers an alternative explanation for this trend: The DOJ and federal civil forfeiture law make it very difficult for innocent owners to get their property back. The civil forfeiture process is designed in such a way that the government has the upper hand at each stage, forcing property owners to navigate a nearly unintelligible legal process, prove their own innocence and do it all without the benefit of a lawyer if they cannot afford to hire one (or if the seized property is worth less than the cost of an attorney).

Making matters worse, the vast majority of this activity happens without the oversight of a judge or jury. Modest modifications to internal procedures are unlikely to do much to protect property owners when the system itself and the incentives it provides police and prosecutors remain unchanged. As long as the decision to forfeit property rests with the very individuals who stand to benefit from forfeiting it, administrative “safeguards” will likely offer little to no meaningful protection against an energized federal forfeiture machine.