

Bound By Oath | Season 3, Ep. 9 | Punishment Without Crime

John: Hello and welcome to Episode 9 of Season 3 of Bound By Oath, a legal history podcast from the Institute for Justice's Center for Judicial Engagement. On this episode, we'll dig into one of the gravest threats to property rights today: civil forfeiture, the government's practice of seizing and then keeping property that is suspected of being involved in crime.

Rep. Henry Hyde: Unless you take action in court, you cannot get your property back. They do not have to convict you, they do not have to even charge you with a crime.

John: With civil forfeiture, the government can take cash, houses, land, cars, bank accounts, and more without convicting anyone of a crime – or even charging anyone with one. The process to challenge a forfeiture is often complicated, expensive, and uncertain – a punishment in and of itself. It's enough for the government to make an accusation, and then the burden is usually on the property owner to prove their property is innocent.

Rep. Hyde: Under our jurisprudence, the burden of proof should be with the government. If you are guilty of anything, then prove it. ... So what we are asking is to turn justice right side up.

John: Civil forfeiture laws provide cops with an enormous incentive to behave like robbers. Because law enforcement agencies can keep up to 100 percent of the proceeds from what they seize.

Scott Bullock: Like many people who look at this issue for the first time, we could not believe that the power existed – that power that so sweeping, that can violate people's property rights to such an extent – exists under American law.

Dana Berliner: In our Philadelphia forfeiture case, the person was notified that their property was being forfeited, and they had to come to a courtroom, and they had to sit there for hours. And if they didn't show up, they lost any opportunity to challenge the forfeiture. But if they did show up, nothing would happen.

John: Long-time listeners will know that this is not our first time touching on civil forfeiture. On Season 1, on our episode about procedural due process, we dug into some of unfair procedures that prosecutors in Philadelphia subjected people to.

Dana Berliner: They would be sent home to come back in another month to do the exact same thing. And the purpose of this process was a war of attrition. You make people come in enough and miss enough days of work, they're just going to give up. And that's what many, many people did in Philadelphia.

John: And on our episode about the Excessive Fines Clause, also on Season 1, we talked about how it's really only a very recent thing that the Supreme Court has said that yes, civil forfeitures can be excessive. And civil forfeiture implicates many other constitutional provisions as well, such as the right to a jury trial or the right to counsel or against double jeopardy. But on this episode, rather than going through the Constitution – and state constitutions – clause by clause, we're going to dig into the history of forfeiture. Today's modern forfeiture regime was born in the 1970s and 80s as a part of the Drug War.

David Smith: Back then, I was in the Department of Justice. Forfeiture was a backwater. And nobody was interested in doing it. The age of shipping forfeitures had passed. It was being used in the nooks and crannies of certain laws. It was very limited.

John: Before the Drug War, forfeiture had virtually gone extinct, but it does have historic roots. When Congress convened for the first time in 1789, one of the very first things that they did was authorize civil forfeiture to enforce customs laws.

Kevin Arlyck: Federal officers could seize ships for all sorts of violations of customs duties, seizing property worth way more than the actual duties that had not been paid.

John: On this episode, we'll look at some historic forfeiture cases and we'll ask what early forfeiture practices mean for its constitutionality today. Which, as it happens, is something that the Supreme Court, after nearly 30 years of not hearing any civil forfeiture cases, strongly indicated just months ago that it wants to address.

Justice Sotomayor: We know there are abuses of the forfeiture system. We know it because it's been documented throughout the country repeatedly.

Justice Gorsuch: Clearly, there are some jurisdictions that are using civil forfeiture as funding mechanisms and say: Ah, you can get your car back if you call between 3 and 5 p.m. on a Tuesday and speak with someone who is never available, right? That is happening out there.

John: I'm John Ross, thanks for listening to Bound By Oath.

Bound By Oath montage

John: In 2009, Russ Caswell got a letter from the U.S. Attorney's Office. The federal government had seized the title to his family's motel.

Russ Caswell: The first notice I had of anybody having any problem with the motel was when I got forfeiture notices in the mail, registered letters, saying that they'd taken my property. My wife got one and I got one.

John: That's Russ. He and his family owned and operated a motel, the Motel Caswell, in Tewksbury, Massachusetts.

Russ Caswell: My father built it in 1955, when I was about 11 years old. And I helped him around there to clear the lot actually, driving a bulldozer, which was pretty unusual for 11 year old to be doing. And eventually I got into helping him carry lumber around and doing some painting and that sort of thing. And I progressed from there to doing maintenance and stuff like that. And I took it over in 84.

John: Russ' wife Patricia worked at the motel. So did their son and daughter. It supported the family for decades. Selling the property, which was worth about \$2 million dollars, was their retirement plan.

Russ Caswell: We've been planning to retire very shortly. And right out of nowhere the federal government is trying to steal our property.

John: Federal law allows for the forfeiture of properties that are quote “substantially connected” to drug trafficking. And it turned out that a DEA agent had been going through records and news reports in the area, looking for properties where drug crimes had occurred. And although, according to police logs, crime in general and drug crime in particular was not any worse at the Motel Caswell than at any of the other motels and other businesses in the area, the DEA zeroed in on Russ’ property.

Russ Caswell: I think it's quite obvious at this point why the federal government has gone after me and not other businesses. We’re a mom-and-pop-type operation and we have no mortgage, so anything that they get here they get to keep for themselves. Where the other places are big corporations and so on and they have vast resources to fight this sort of thing.

Scott Bullock: The reason why this epitomized so many problems with civil forfeiture laws, is that in the complaint, and during the case, the government made no allegation that Russ was involved, or his family was involved, in the drug trade.

John: That is IJ President and Chief Counsel Scott Bullock.

Scott Bullock: It was just he owned the property. It was the site of drug crimes, therefore, that was enough to forfeit the property, sell it, and then the revenue would go to the U.S. Attorney's Office and the Tewksbury Police Department. And it would leave Russ, whose property really was his 401k, was the only substantial investment his family had, penniless. And that really shows the incredible draconian nature of civil forfeiture.

John: Under what’s called the equitable sharing program, 80 percent of the proceeds from taking the property would go to the Tewksbury police department, giving the police a convenient

way to raise funds outside of their usual budget process. The other 20 percent would go to the federal government, which brought the forfeiture petition in federal court.

Scott Bullock: And so we heard about this case. We were contacted by a local attorney, a family friend of Russ's We investigated it. We were outraged by what was going on. And we said this is a case that we have to do.

Russ Caswell: We call the police if we suspect anything, but we have no way of knowing what somebody may be doing inside a locked motel room, we have no tools to deal with it with that sort of thing.

John: The Caswells had always cooperated with police, making records available, allowing police to do surveillance, installing security cameras, and putting up lights in the parking lot – doing everything that could be expected of a motel owner to make the place safe and welcoming while respecting the privacy of their guests. No officer had ever suggested that the property was a nuisance or that there were steps Russ needed to take to improve security.

Scott Bullock: And he had every incentive in the world to try to keep the property safe because his family, including a young granddaughter, lived right next door to it. And so he was just flabbergasted when he was met not with Hey, Russ, we want you to clean up the property. And here's ways we can work with you on doing this. His notice of this is when he was served with the forfeiture complaint by the U.S. Attorney's Office. And it just was mind boggling to him.

John: So how many drug crimes were being committed at the motel? The government identified 15 incidents over the course of 14 years. About one per year.

Russ Caswell: Which is roughly one per year out of 10 to 12,000 people that stay there. To me, that's a very good record. I don't know how I could do any better than that.

Scott Bullock: We had a four-day trial at the United States Courthouse in Boston. The judge, who was very fair and wanted to hear what was going on in the case, I could see her just get increasingly skeptical and couldn't believe that this is all the government had. And I think she kept waiting to hear more. Well, maybe Russ's family was involved in this in some way. And maybe he turned a complete blind eye toward what was going on. And that wasn't the case at all. And I remember her saying that, listen, there's drug deals that occur in the parking lot of the U.S. Courthouse. I've heard cases involving that. You can't just wave a magic wand and have all these things disappear. What was Russ to do?

John: After trial, [the judge dismissed](#) the forfeiture complaint in the strongest of terms, calling the government's efforts quote: "draconian" and finding it quote: "rather remarkable, in this court's view, for the Government to argue in this case that the Property owner should lose his property for failure to undertake some undefined steps in an effort to prevent crime." The feds did not appeal, and the Caswells were able to retire with their nest egg intact. But the ordeal lasted over three years. IJ is a nonprofit, and we represented Russ for free. But before we got involved, Russ had to borrow tens of thousands of dollars to fight the case. If he had had to pay for the trial himself, the cost to save the motel would have wiped him out.

Russ Caswell: It's taken an awful toll on our family. Our entire family just been thrown into turmoil over this thing. My wife has health problems, severe heart trouble. I think people should have to be convicted of a crime before the government can come along and just take their property.

John: The case set some important new precedents about, for instance, what it means for a property to be substantially connected to crime or not. But where did the government even get the authority to go after the Caswells and thousands and thousands of other Americans with scant regard for whether they'd actually done something wrong? It all started in the 1970s, when Congress turned to forfeiture to fight the war on drugs.

David Smith: In the 70s, civil forfeiture was still asleep. ...

John: That is forfeiture attorney David Smith, a litigator who has represented hundreds of property owners in forfeiture cases and who wrote [the treatise](#) on forfeiture law.

David Smith: Back then, I was in the Department of Justice. Forfeiture was a backwater. And nobody was interested in doing it. The age of shipping forfeitures had passed. It was being used in the nooks and crannies of certain laws. It was very limited.

John: In 1970, Congress enacted two criminal forfeiture statutes to go after the mafia and drug traffickers. Unlike like with civil forfeiture, criminal forfeiture requires a conviction before property can be taken. But by 1980, the federal government had pursued only 98 cases and forfeited a mere [\\$2 million dollars](#).

David Smith: This gives you an idea of how insignificant forfeiture was to the Justice Department back then. So how did we get the the initial staffing for the forfeiture office? Each of the the sections of the Criminal Division had to contribute one person, one lawyer to the new office. And guess who they would send us? The person that they wanted to get rid of. So we started out with all these people who were basically rejects from their own sections, which is a pretty stupid way to staff a new office.

John: But then a young senator from Delaware lit a fire under the Justice Department.

David Smith: Fellow named Joe Biden. He was a rising star. And so he held hearings. I went to the hearings to monitor them for the Justice Department. And he had people testifying about how little these statutes were being used.

John: Senator Biden pushed for new legislation to expand the use of forfeiture, and this time the bill included civil forfeiture.

Sen. Biden: Mr. President, The bipartisan crime bill I am introducing today ... is the product of many years' work in previous Congresses and hundreds of hours of work in this Congress by many of my colleagues.

John: That is Sen. Joe Biden on the floor of the Senate. Sort of. In 1983, they did not yet do audio recordings in Congress as extensively as they do today. So what you are hearing is in fact an AI rendering of Senator Biden's speech.

Sen. Biden: In April 1981, the General Accounting Office released a report that was done at my request entitled "[Asset Forfeiture - A Seldom Used Tool in Combating Drug Trafficking](#)." The central conclusion ... was that ... the Federal Government's record in taking the profit out of organized crime, especially drug trafficking, has been far below Congress' expectations. ... I ... believe that a strong forfeiture statute that is actively implemented is the most effective weapon we have for breaking the backs of sophisticated drug traffickers.

John: The bill he is referring to became the Comprehensive Crime Control Act of 1984, and if you had to pick a date for the birth of modern civil forfeiture, the passage of the Act is a leading contender.

David Smith: The most important thing about the 1984 statute is that it provided the biggest incentive to use forfeiture. Up until then, all the forfeited money went into the general treasury where it belongs. But in order to provide prosecutors and agents with an incentive to use forfeiture more, they changed the law so that all the money from forfeiture was earmarked solely for law enforcement purposes.

John: The law also created the equitable sharing program that allowed the DEA to go after the Motel Caswell with the assistance of the local police.

David Smith: It also allowed for the Justice Department to share the forfeiture money with state and local and even foreign police and law enforcement agencies if they helped the forfeiture case in any significant way, typically by being the first ones to seize the property. And that was a tremendous incentive. Until then there was very little activity on the state and local level. What came to be known as equitable sharing changed the whole game.

John: After 1984, virtually every state changed their laws to make it easier to forfeit property. And even if a state didn't do that, thanks to equitable sharing, law enforcement agencies within those states could just turn their seizures over to the federal government, which would process them in federal court, and send most of the proceeds back, where it would go directly into the seizing agency's budget, earmarked for law enforcement purposes – an end run around state forfeiture laws that provide more protections for property owners than federal law.

David Smith: There have been a lot of enhancements since 1984 to make it harsher and more easy to forfeit money. But none were as important as the earmarking provision.

John: And so just as civil forfeiture took off after 1984, so did the abuse of civil forfeiture. In the early 90s, newspapers and TV news programs around the country documented case after case after case of the government taking property from people who in no sense had it coming. And the issue also caught the attention of the Supreme Court, which took up and decided five cases about forfeiture in 1992 and 1993.

David Smith: All five that went up there, the government lost. Which, and this is at a time, this is the early 90s, when the Court was very concerned about crime. The government was winning almost all the criminal cases.

John: At a time when crime was at an all-time high and the Court was not particularly solicitous to criminal defendants, the justices were still interested in putting some limits on forfeiture. For instance, in the case of [Austin v. United States](#), the Court ruled in favor of the owner of an auto body shop in South Dakota, which had been seized by the federal government – along with his adjacent mobile home – after he pled guilty to a state-law charge of cocaine possession with intent to distribute. Austin argued that seizing his home and his means of earning a living after he served his prison sentence was an excessive fine. The government, on the other hand, argued that a civil forfeiture can just never be excessive. And the Court ruled in favor of Austin, finding that, yes, the Excessive Fines Clause does apply to civil forfeitures, at least when the federal government does them. Today, the Excessive Fines Clause also applies to the states, which if you recall from Season 1, is more a recent holding, achieved by us, actually, the Institute for Justice, in 2019. Anyway, another one of the cases that went up in 1993 was the

case of [United States v. James Daniel Good Real Property](#), which was the first civil forfeiture case that IJ played a role in.

Scott Bullock: The Institute for Justice first started getting interested in civil forfeiture during the early 1990s. And like many people who look at this issue for the first time, we could not believe that the power existed – that power that so sweeping, that can violate people's property rights to such an extent – exists under American law. So we thought we ought to do something about this. And what we at IJ thought we could bring to the table is to look at these laws and critique them from a property rights perspective, the impact that these laws have upon people's ability to continue to own and use their property.

John: A lot of well-meaning advocates who work in the area of criminal justice reform come at civil forfeiture from angles they're used to, such as fairness, due process, the rights of the accused, and the disproportionate burden our criminal justice system places on the poor and minorities. Those are all incredibly important perspectives. But at IJ we concentrate on the value of property rights and how they are essential for a healthy society – something that the rest of this season of Bound By Oath we hope demonstrates. We felt that perspective was missing in the fight against civil forfeiture.

Scott Bullock: So one of the first opportunities we had is when the Court accepted cert in the *James Daniel Good* case.

John: James Daniel Good owned a house on a [4-acre parcel](#) in Hawaii. In 1985, he was convicted in state court of dealing marijuana from his house. He served one year in prison, paid a fine, and was complying with all of the terms of his probation, and thought the matter was behind him when – over four and a half years after the initial search – the federal government

seized his house and his land without any kind of notice or any kind of explanation for the long delay.¹

Scott Bullock: The issue was whether or not the government had to provide notice and hearing, which he did not receive at all, under the due process clause of the Constitution. We decided to file [an amicus brief](#), which is oftentimes the way we start getting involved in certain areas of the law that we're concerned about.

John: At the time of the seizure, James Daniel Good was not even in the country. He had gone abroad as part of church trip and was teaching carpentry in Central America.²

Scott Bullock: And we critiqued civil forfeiture from a property rights perspective. And we were the only group to do that. There were a couple of other amicus briefs filed in that case – one by the ACLU, one by the National Association of Criminal Defense Lawyers – all very good briefs, but they were looking at it through a more traditional lens of this is unfair, and it violates our traditional notions of due process. We looked at it through a property rights lens. And I think it had an impact upon the Court, which did in fact hold that property owners – real property owners, land and homes and the like – were entitled to notice and hearing before the government can deprive you of your property.

John: In 1993, the Court ruled that due process requires notice and hearing before property can be seized – at least when it comes to real estate, which unlike a car or a boat can't just be driven off or sailed away.

¹ Per [oral argument transcript](#), the feds declined to answer interrogatories about reason for the delay

² James Kilpatrick, Seizure law: The good, the bad, and the ugly, Nov. 1. 1993, syndicated column

Scott Bullock: And Justice Kennedy, who wrote the opinion in that case, had these stirring words in the opinion, saying individual freedom finds tangible expression in property rights, something that IJ has long believed, and we were really glad to see the Court looking at it through that property rights lens.

John: As for the petitioners themselves, neither Richard Austin nor James Daniel Good got their properties back after winning at the Supreme Court, though they both were able to secure some compensation that made them better off if not necessarily totally whole.³ And while both cases were big wins that set important precedent, they addressed situations that were somewhat atypical in that both petitioners had been criminally charged. Whereas in the vast majority of civil forfeitures – something like 90 percent – there are no criminal charges. Thus, those cases didn't address a fundamental problem with forfeiture: what about when a property owner is entirely innocent of wrongdoing? Then, a few years later, the Supreme Court took up yet another civil forfeiture case, it's sixth in four years, that dealt with that question. In the case of [Bennis v. Michigan](#).

Tina Bennis: My name is Tina Bennis. Lived here all my life. Detroit's okay. I work two jobs, a as a lunch monitor in the Royal Oak school systems and then I work at TD Fluids, which is Toyota. I've been married to John for 43 years. We have five kids. And from two kids so far, we have 12 grandchildren.

John: In 1988, Tina Bennis and her husband John Bennis were in their 20s. John drove a delivery truck for a steel company.

³ Per phone conversation with James Daniel Goods' counsel, he got \$40,000. Good had been renting the house when it was seized, and the settlement was essentially compensation for several years' back rent. Austin received an "undisclosed sum" per Carl Horowitz, Investor's Business Daily, Dec. 9, 1993.

Tina Bennis: '88 I had – I just had another kid, my fourth. We just struggled with work and keeping a job. I was at home. I was a stay-at-home mom for about eight years.

John: And they bought a second car, an 11-year-old used Pontiac sedan, for \$600 for Tina to use for school dropoffs and other errands.

Tina Bennis: It was just a car we had bought from a neighbor. So it wasn't anything special or anything.

John: About a month later, John's car broke down. So he borrowed the Pontiac to get to work. On his way home, he committed a crime in the car, which I will let Tina's lawyer tell you about in a second. Maybe hit fast forward just a tad if you have youngsters around.

Tina Bennis' lawyer at SCOTUS argument: On an October evening in 1988, petitioner's husband, John Bennis, was arrested for having illicit sex with a prostitute, and Detroit police seized the automobile.

John: Tina didn't learn about the arrest until the next day.

Tina Bennis: I had no idea where he was all night. So yeah, it was very scary.

John: John was arrested on a Monday night, and by Wednesday his name was all over the news.

Tina Bennis: We were told that he was the first person to be arrested under this new law. So that's why his name was all out there.

John: The seizure of the Pontiac was part of a new initiative by Detroit police and the Wayne County prosecutors office to combat prostitution by forfeiting vehicles.

Tina Bennis: I believe someone can make a mistake, you know. And we talked about that, too.

John: John was ultimately sentenced to community service and fined \$250. But even before his conviction, officials made clear that, thanks to the new law that allowed for the forfeiture of property connected to nuisances, they were taking the car.

Tina Bennis: Even back then I looked at it like, why are we going through this forfeiture stuff before we even had a trial? Before he was even found guilty of anything? The first thing that popped up in all the media was taking the car. Not that I knew a lot about the law, but I always found that that was – just didn't seem right to me. Because what if you would have gone to trial and we were found innocent? They still have your property. It took a took a long while to build that back up again for us to even to get another vehicle.

John: So even though the Bennis' did not enjoy the attention, Tina decided to fight.

Tina Bennis: I talked to my husband. It was an agreement between both of us. Because his name was out there again too. It was just kind of that whole thrown in the spotlight which was really bad.

John: Tina argued, and everybody agreed, that she had no reason to know her husband would use the car to commit a crime. And when the case arrived at the Supreme Court, she argued that it violates the due process of law to forfeit the property of an innocent owner. That wouldn't

have meant she'd get her car back necessarily since she and John we're both co-owners. Instead, she was just asking for her interest in the car, about \$300. And some of the justices were on board.

Justice Breyer: Why? Is there any reason why a person who is totally innocent should be punished for a criminal offense by having to give up the property that he or she owns?

Justice Stevens: Say the state found out that a teenager in a house had smoked marijuana in the house could they forfeit the house?

John: But by a vote of 5-to-4, the Court ruled in favor of Michigan. After several years of making modest improvements to forfeiture, the ruling was a startling about face. And as it turned out, it was the last time the Court would take up a major forfeiture case for almost 30 years.

Chief Justice Rehnquist: Forfeiture prevents illegal uses of the property and forfeiture schemes that extend to an innocent owner preclude evasion by dispensing with the necessity of judicial inquiries of collusion between the wrongdoer and the alleged innocent owner.

John: That's Chief Justice Rehnquist, who wrote the majority opinion. And he wrote that it might seem unfair to relieve prosecutors from quote, "the burden of separating co-owners who are complicit in the wrongful use of property from innocent co-owners." But on the other hand, he said, the threat of forfeiture is a useful warning to innocent property owners to be vigilant and take care that they don't lend their property to someone shady or otherwise allow it be put to illegal use. Also, there was precedent.

Chief Justice Rehnquist: A long and unbroken line of our cases rejects the innocent owner defense. These cases are too firmly fixed in the country's jurisprudence to be overturned at this late date.

John: In cases stretching back over 150 years, the Supreme Court has repeatedly turned aside people who said they didn't have any idea that property they owned was being put to illegal use. And we will return to that precedent and what it means for challenges to civil forfeiture going forward. But before we do that, the story of today's modern forfeiture regime must continue, and it does so not in court but in Congress. Not only was the Supreme Court very interested in civil forfeiture in the 1990s but so were elected officials in Washington, D.C. Officials like Illinois representative Henry Hyde.

David Smith: Henry Hyde was a regular reader of the Chicago Tribune, historically a very conservative Republican newspaper. And the Chicago Tribune like many newspapers, ran a series of articles about civil forfeiture abuse. Hyde read that series and said, this is ridiculous.

Rep. Hyde: Mr. Chairman and my colleagues, about 6 years ago I was reading a newspaper and I read an op-ed article in the Chicago Tribune explaining a process that goes on in our country, and I must tell you, I couldn't believe it.

John: That is Representative Hyde addressing the House in 1999.

Rep. Hyde: In civil asset forfeiture, the government, the police, the gendarmes, can seize your property upon the weakest, most flimsy, diaphanous charge. ... They can take your business, they can take your home, they take your farm, ... premised on ...

probable cause. What is also unbelievable is that unless you take action in court you can't get your property back. They don't have to convict you, they do not have to even charge you with a crime.

John: And Representative Hyde was not the only elected official to take note.

Rep. Canady: In September of 1988, the United States Government seized 4,346 acres of the Jones family ranchland and filed a civil forfeiture action against the ranch based on a plane crash that occurred two and half years earlier and on property a quarter of a mile from their ranch.

John: That's a representative from Florida, whose constituents had their ranch seized after drug traffickers crashed an airplane nearby. The family had nothing to do with drugs; the drugs had literally just fallen out of the sky. And a judge later ruled that the government didn't have any reason for suspecting otherwise. But it took the family six years to recover the ranch, which by then had fallen into serious disrepair.

Rep. Canady: No one in the United States of America should have to go through a legal nightmare like this. No one in America should be treated this way by the government of the United States.

John: Here's a representative from Massachusetts.

Rep. Delahunt: Now, let me put forth some examples; like the traveler whose property was seized at the Detroit airport because he was carrying a large amount of cash and simply happened to fit a profile of a drug courier. No arrest, no conviction. Or how about

the 72-year-old woman in Washington, D.C. whose home and personal effects were seized by the FBI because her nephew, who was staying in the house overnight, was suspected of selling drugs from her porch. The irony is that all of these people would have been entitled to some due process if they had been charged with a crime. If they had been charged criminally, they would have had a shot. But under the civil forfeiture laws, the government can seize the property of innocent owners without even triggering basic, minimal due process requirements.

John: Perhaps one of the most infamous examples of forfeiture run amuck in the early 90s is one that Henry Hyde wrote about in a book that he authored on forfeiture where over 30 local, state, and federal officers raided a ranch in Malibu, California looking for marijuana and shooting the owner of the ranch dead in front of his wife. An investigation, covered in detail on the news program 60 Minutes, found that the raid was motivated at least in part by the expectation that the government would be able to forfeit the ranch, whose owner had refused numerous offers to sell it to the National Park Service. But no marijuana was found and an innocent man was dead. Representative Hyde was truly outraged by that and the many other examples of abuse he collected in his book. So in 1993, he introduced the Civil Asset Forfeiture Reform Act, known as CAFRA, to reform forfeiture at the federal level.

David Smith: Hyde introduced the original CAFRA bill in 1993, and I was working with Hyde all the way to the enactment of the statute. I worked with him. But sometimes I felt like I was working for him. Because I was in his office day after day. And the same thing happened with Senator Leahy when the action moved to the Senate.

John: So by the time the Supreme Court released its decision in *Bennis* in 1996, people in Congress were already keen to do something to rein in abuse.

David Smith: Everyone was shocked when the Court decided 5-to-4 in favor of the state of Michigan, and the editorial writers went crazy all over the country denouncing this decision. My recollection is that I couldn't find one editorial that supported the decision.

John: The fact that the Court ruled against Tina Bennis only added fuel to the reform fire.

David Smith: Civil forfeiture reform commanded huge bipartisan majorities, and the only people who opposed it were the law enforcement people. That was it. They had nobody on their side. But it was still hard to get through Congress.

John: After seven years of legislative wrangling, CAFRA finally passed in 2000.

David Smith: It only got enacted as a result of a compromise with law enforcement. Congress would have passed it anyhow. But they wanted to get it done in the year 2000, which was an election year and it was basically held up in the Senate until there could be a vote by unanimous consent. It had to be a unanimous vote. Otherwise, Trent Lott, who was then the Senate majority leader, said I don't want this coming up in an election year. Because they didn't want to have to take a stance against law enforcement in an election year. Meanwhile, Henry Hyde, he was dying, basically, and wanted to see this enacted before he died. And that was another factor requiring a compromise.

John: Representative Hyde proposed to put an end to the profit incentive; instead of forfeiture proceeds going to law enforcement, the money would be rerouted back to the general fund.

David Smith: And that was the one thing that was beyond the his political reach. Because that was the one thing that the state and local police and the state and local prosecutors could not stomach and that was their red line. The state and local folks were not that concerned with all the procedural reforms.

John: Symbolically, the passage of CAFRA was monumental. And it did make some positive changes.

David Smith: The government was allowed to use hearsay to show probable cause under the old law. So they could just put an agent on the stand – if there was a trial – and he would say, Well, so and so confessed to having drugs in his car. That's all they had to say. It's blatant hearsay. But that was allowed Today, the government has to use admissible evidence, just like in any civil or criminal case. They can't use rank hearsay.

John: CAFRA raised the standard of proof from probable cause to a preponderance of the evidence. And it said that, at least in federal cases, being an innocent owner would now be a defense. And that's the defense that Russ Caswell used to save the motel. We didn't win that case on a constitutional issue. We won under CAFRA. But the fact that the government even tried to forfeit the Motel Caswell in the first place shows that unfortunately CAFRA did not get to the root of the problem.

David Smith: It didn't make that much difference because people are ignoring the law, and they're getting away with it. The same judges who said yes, there's probable cause for forfeiture now just say, yeah, the government has proven its case by a preponderance of the evidence – even if it hasn't – because some dog alerted on their money. That's proof. Which is nonsense.

John: Outrageous cases of abuse continued after CAFRA.

John Oliver: Public trust in the police is one of the most vital elements in a civilized society, but for many Americans that trust has been undermined by a procedure called civil forfeiture.

KRNV reporter: Some are calling it highway robbery. Not by a criminal but legally by Nevada troopers and the justice system that allows it.

David Vocatura: The IRS seized over \$68,000 dollars from our checking account and based it on the fact that they thought I was structuring by the way I was depositing our money in the bank. Until the day they came in I had no idea what structuring was.

Kermit Warren: When they seized my life savings – every penny that I’ve worked for, every honest dollar that I earned over the last 25 to 30 years – it made me feel like I was the dirt on the ground.

CNN Reporter: This is Main Street. You can see it’s a quiet, sleepy place. But the sheriff’s department deputies are very active and busy. Getting forfeiture money is a very important industry here.

CNN: Without warning, Souravelis says, Philadelphia police and prosecutors seized his house. ... all because of their son’s first-offense drug charges.

John: And arguments against reform are pretty much the same today as they were in the 90s.

Rep. Ramstad: Yes, there have been some abuses under current law. We all know that. But several unfortunate anecdotal experiences do not justify legislation that would turn back the clock in the war against drugs.

Rep. Weiner: The straw man here is the argument that these abuses represent the true state of civil forfeiture law in this country.

John: According to forfeiture proponents, the frequent and well-documented reports of abuse are just anecdotes. But, it seems fair to ask, how can you be so sure?

David Smith: I'm still surprised that so few lawyers handle these cases. There's only maybe a dozen private lawyers in the whole country that regularly handle these types of cases.

John: Once property is seized, you generally need to hire a lawyer to get it back.

David Smith: That's an important fact because even if somebody has the money to hire a lawyer, it's very hard for them sometimes to find one. It's not an easy area to learn because there's a lot of technicalities involved.

John: The median currency forfeiture is small – just over \$1,200 dollars in the 21 states that make data available – far less than the cost of hiring a lawyer. And the vast majority of property is forfeited by default – perhaps because property owners will spend more trying to get their property back than the property is worth. If they can even find a lawyer to look at their case. And given that the value of property seized is so small in most cases, one has to wonder about another key justification for civil forfeiture.

Rep. Sweeney: Drug kingpins. **Rep. Delahunt:** The drug kingpins and racketeers.

Michigan lobbyist: Fight violent crime, fight criminals, go after cartels. This is about going after the most violent. **Sen. Biden (AI):** Breaking the backs of sophisticated drug traffickers. **Rep. Weiner:** Civil asset forfeiture is the only way to really get at the root of crime. **Rep. Ramstad:** This legislation would absolutely gut the most important tool of law enforcement in the War on Drugs. **Texas sheriff:** A state senator in Texas was

talking about introducing legislation to require a conviction before we could receive that forfeiture money. **President Trump:** Can you believe that? **Texas sheriff:** And I told him that the cartel would build a monument to him in Mexico if he could get that legislation passed. **President Trump:** Who is that state senator? Do you want to give his name? We'll destroy his career.

John: Civil forfeiture was supposed to break the backs of sophisticated criminal syndicates, but it's been 40 years, and there's just no evidence that's ever happened – or that forfeiture affects the crime rate generally.

Lisa Knepper: There is not much evidence that forfeiture takes a bite out of crime.

John: That is my colleague, Lisa Knepper, who is IJ's Senior Director of Strategic Research.

Lisa Knepper: There are a number of different ways to empirically evaluate, on the one hand, whether forfeiture is an effective crime-fighting tool as proponents argue or instead is just a way for law enforcement to raise funds outside of the normal budgeting and appropriations process.

John Ross: For instance:

Lisa Knepper: In 2015, New Mexico became the first state in the country to abolish civil forfeiture. So you can compare crime rates there to counties just over the state's borders in Texas and Colorado, two states with fewer restrictions on forfeiture and whose laws did not change like New Mexico's did.

John Ross: In New Mexico, prosecutors can still target criminals and their ill-gotten gains, but they need to obtain a conviction first. All forfeiture proceeds now go to the state's general fund. And law enforcement agencies are not permitted to participate in federal equitable sharing, except in certain narrow circumstances.

Lisa Knepper: Using not one but two rigorous analytical methods — called difference-in-differences and interrupted time-series — we measured changes in crime rates in the years before and after New Mexico's reforms, and we did so across five different measures of crime. What we found was that there was no statistically significant impact on crime rates. If forfeiture proponents were right, you'd expect crime in New Mexico to increase compared to its neighbors, but that's not what happened.

John: Other studies examining different datasets support those conclusions.

Lisa Knepper: We also worked with an economist at Seattle University, Brian Kelly, to perform a different kind of analysis looking across law enforcement agencies to see whether generating more forfeiture money made them any better at fighting crime — and also to see whether more forfeiture translated into reduced drug use in local communities, which is after all the ultimate point of a lot of forfeiture activity. Professor Kelly did this using a decade's worth of data from the nation's largest forfeiture program—the Department of Justice's equitable sharing program—plus data from five states that make reasonably good records available. With those data and rigorous methods, we were able to come to some conclusions about whether civil forfeiture really has these beneficial effects.

John: An increase in forfeiture proceeds at a given agency does not translate to a decrease in illicit drug use nor does it appear that more forfeiture money makes police more effective.

Lisa Knepper: But even more than that, we found something that does correlate with forfeiture funds agencies receive: the amount of fiscal stress they face. Put another way, our results suggest when budgets are tight, police make greater use of forfeiture. And these results were both statistically and practically significant. Stepping back, the big picture takeaway from all these studies is that forfeiture doesn't appear to be an effective crime fighting tool. Instead, it just might be a good way for law enforcement to generate revenue.

John: But it's not just research results like these that suggest law enforcement is more interested in revenue than fighting crime. It's also the data that they track.

Lisa Knepper: Mostly, government agencies aren't very transparent or forthcoming with data describing their forfeiture programs, but when they do collect and report data, it's often information about how much money they take in. Other kinds of data, like whether forfeitures are tied to real criminal cases and convictions – in other words, the kinds of data you'd want to know to evaluate whether forfeiture is working – that's often not recorded or made public.

John: Civil forfeiture is a civil rights nightmare. There's no evidence it's breaking the backs of sophisticated criminal syndicates or that it's making anyone safer. And there's a lot of evidence law enforcement is just ripping people off on a massive scale, seizing billions annually from people who haven't been convicted of anything. It is contrary to fundamental notions about fairness and the sanctity of property rights. We're going to take a quick break, and when we come back, we'll talk about how on earth civil forfeiture could ever be tolerated in American law.

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Kevin Arlyck: In the 1790s and the early 19th century, the federal government's major law enforcement function was collecting the revenues and then going after people who were trying to skirt the revenue laws.

John: That is Professor Kevin Arlyck of Georgetown University.

Kevin Arlyck: Federal officers could seize ships for all sorts of violations of customs duties, seizing property worth way more than the actual duties that had not been paid. On the surface, it just seems wildly disproportionate to allow the forfeiture of really, really valuable property – and especially when you're getting into ships, but sometimes the cargo itself could be extremely valuable – and the violation, fairly minor.

John: When Congress convened for the first time in 1789, one of the very first pieces of legislation that they passed authorized civil forfeiture to punish the failure to pay taxes on imported goods.

Kevin Arlyck: Customs revenue was the government's lifeblood at the time. The federal government couldn't run without customs revenue. It was 75% or more of the government's revenue in every year in the first several decades.

John: Customs regulations were numerous, and they were strict. For instance, if a ship unloaded cargo worth more than \$400 without paying for a permit, the government could take the cargo and the ship.

Kevin Arlyck: There were rules about the size of the barrels in which you transported wine or liquor. And this was for a good reason: The bigger the barrel, the harder it is to smuggle. But for

people who violated them with no intent to smuggle that seems like the kind of minor violation that a fairly significant forfeiture could result from. And then there's the incentives, which I think to modern eyes seem frankly crazy. The officers charged with enforcing the law got more personal compensation the more forfeiture that they did.

John: At the time, the federal government was tiny and there was no money to pay anything more than meager salaries to customs officers. And they were expected to supplement their incomes by sharing in the proceeds of forfeiture. Moreover, it was also procedurally easy for the government to prosecute a forfeiture. Often, officials didn't need to do a whole lot more than make an accusation.

Kevin Arlyck: It wasn't difficult for the government to institute forfeiture actions. I went through court cases file after file after file. And oftentimes, the allegations are pretty thin.

John: Forfeiture cases were not tried before a jury and there was no need to convict anyone of a crime.

Kevin Arlyck: Perhaps most importantly, these cases would be tried to a judge and not to a jury. Now, what's interesting about this is that this was a practice that the British used in the colonial period, and which caused a lot of outrage and consternation. One of the contributing factors for the American Revolution, actually, was the fact that trade and revenue cases would be tried in British vice admiralty courts before a judge without a jury.

John: But then the Founders did the same thing.

Kevin Arlyck: Having a case tried before a federal judge rather than by a jury, reduces the possibility that local sympathy for merchants and other people who run afoul of the customs regulations is going to let them get off.

John: All of which sounds a lot like modern forfeiture. But on closer inspection that's only part of the picture. Professor Arlyck reviewed over 500 civil forfeiture decisions from between 1789 and 1807 as well as correspondence about forfeiture between federal officials. And what he found was that forfeiture at the Founding was not nearly so harsh or draconian as it is today.

Kevin Arlyck: When I started, reading the 500-something cases what I discovered is that actually a huge percentage of forfeitures that the government sought, it was actually the Treasury Secretary who said we're gonna give this property back.

John: In 1790, just one year after Congress authorized the aggressive use of forfeiture, it passed another law that gave the Secretary of the Treasury discretion to return seized property.

Kevin Arlyck: So this was statutory scheme that was actually Alexander Hamilton's initiative. He proposed to Congress in 1790 that Congress develop a scheme by which forfeitures could be what's called remitted. And Hamilton goes to Congress and says that we need this to mitigate forfeiture's harshest effects, particularly in cases of inadvertent violations of the law or in situations where someone was ignorant of the law.

John: According to Professor Arlyck, even though the law merely gave Hamilton and his successor Treasury Secretaries the discretion to remit forfeitures, they acted as if they were obligated, you might say bound by oath, to grant them.

Kevin Arlyck: The treasury secretaries really went out of their way, as far as the correspondence suggests, to make sure that property owners who deserve to get their property back in fact did. What we see is Hamilton actually writing federal officers, judges, district attorneys, customs collectors, saying, I want to know more about this case. My initial instinct is not to remit, but I want to make sure that there's no basis for remission here. Alexander Hamilton is an incredibly busy man. He's running the government, essentially. He's President Washington's right hand man, yet he's taking the time to place a burden on himself and on federal officers to further investigate cases in situations when it's the petitioner's initial responsibility to make the case. That to me really suggested a sense of obligation to make sure that forfeiture was not being used excessively.

John: In the hundreds of cases Professor Arlyck reviewed, when a property owner petitioned for remission, 91 percent of the time they were successful.

Kevin Arlyck: The petitioners got the benefit of the doubt. Even if there were circumstances where there was reason to suspect that they knew or should have known what they were doing. It does seem like the treasury secretaries understood themselves to be under some sort of obligation to make sure that this theoretically harsh forfeiture power was actually used moderately in practice. And Albert Gallatin, who was Jefferson's Secretary of the Treasury, actually says as much in a report that he gives, where Congress wanted an update on how remission was going. And he essentially says that when there's a plausible case for remission, I feel bound to give it.

John: So, what does all this mean for constitutional arguments about forfeiture today? Does it mean that as long as there is a remissions process that the Constitution is satisfied? At IJ, we think not.

Kevin Arlyck: I think what this history shows is that a concern about imposing forfeiture on people who did not intend to violate the law is deeply rooted in the practices and the beliefs from the Founding Era.

John: Rather, the lesson is that as harsh as forfeiture may have appeared on paper at the Founding, in practice it just wasn't anything like forfeiture today. It was moderate. It was mild. And federal officials were deeply concerned about excessive and unfair penalties. You didn't see any constitutional challenges to forfeiture at the time, likely because, as Professor Arlyck notes in his article, people just didn't need to raise constitutional arguments in court when they could just petition for remission and get their property back. Today, the remissions process still exists. If the government seizes your property, you can absolutely fill out a form and ask for it back. But Alexander Hamilton is no longer in charge.

David Smith: The remission process is really a sham. The government tells people Oh, well, you can petition for remission after they take your money – all you have to do is write a letter or something. But it's almost impossible for them to win. There's an institutional bias against granting remission petitions even if you can make a strong case.

John: And there are other ways that modern forfeiture law and practice are just a wholly different ballgame than they were in the early Republic. For example, in Tina Bennis's case, when the Supreme Court said that taking property from an innocent owner did not violate due process, the majority cited a long line of precedent.

Chief Justice Rehnquist: A long and unbroken line of our cases rejects the innocent owner defense.

John: The oldest case the Court cited was decided by the Supreme Court in 1827, a case called [The Palmyra](#). By then, Congress had authorized civil forfeiture for a few other law enforcement purposes besides customs enforcement. One of those other purposes was [combatting piracy](#), and The Palmyra, which was a Spanish brig, was accused of piracy, captured, and brought into port in Charleston, South Carolina by American sailors led by a Lieutenant Gregory. Lieutenant Gregory stood to personally profit from the forfeiture of ship, but a federal judge ordered The Palmyra [released to its captain](#). According to an account by future president John Quincy Adams, who was then the Secretary of State, the district judge felt that the testimony of the American sailors and the testimony of The Palmyra's crew canceled each other out, and so there wasn't enough evidence to justify forfeiting the ship. On appeal, a circuit judge not only agreed that the ship should be released, but also he ordered Lieutenant Gregory to pay over \$10,000 dollars in damages for seizing the ship without probable cause. Which would amount to hundreds of thousands of dollars today. And that points to another major difference between forfeiture today and in the past. As we talked about on Season 2, today's immunity doctrines that protect government officials who commit, for instance, wrongful seizures, simply did not exist. Judges viewed themselves as bound to say what the law is and to decide whether it had been violated. And if an officer had exceeded their authority, even in good faith, it was the responsibility of the legislative branch and not the courts to shield them from liability. And that's how the case of The Palmyra may have been known to history if it had not advanced beyond the circuit court – as a stern warning to government officials that, however much you stand to gain from a successful forfeiture, you will face the real possibility of personal liability if you seize property without sufficient justification. Today, that counterweight has all but disappeared. In any event, on appeal at the Supreme Court, the justices affirmed the part of the circuit court's order that allowed the ship to be returned. But it reversed on the question of damages, holding that in fact Lieutenant Gregory had had sufficient justification for the seizure –

not that he was immune from suit, he just hadn't violated the law. But that's not why the case is still cited today. Instead, it's because the owner of *The Palmyra*, presumably a wealthy merchant on the other side of the Atlantic, had made the argument that since he hadn't been convicted of anything, the forfeiture of the ship was unlawful. And the Supreme Court rejected that. It said that quote "in cases of this nature" end quote, a civil forfeiture and a criminal prosecution are two totally separate things, and you can have one with or without the other. And that's the holding that the Supreme Court cited in *Bennis* over 150 years later. But there is good reason to believe that that holding in *The Palmyra* was never meant to apply too far outside the context of admiralty and revenue cases – as an exception to the usual rule that if the government is going to punish someone, it has to convict them first – a rule that is deeply intuitive to just about everyone.

Russ Caswell: I think people should have to be convicted of a crime before the government can come along and just take their property.

Rep. Hyde: Under our jurisprudence, the burden of proof should be with the government. If you are guilty of anything, then prove it.

John: Courts in the 19th century were keenly aware that civil forfeiture blurred the lines between civil and criminal, imposing criminal punishments without protections, like a right to trial by jury, constitutionally due to criminal defendants. As one court⁴ noted in 1893, quote: "[I]f the government enacts a statute, which provides that a case in its nature criminal, whose purpose is punishment, whose prosecutor is the state, and whose successful prosecution disgraces the defendant, and forfeits his property to the state as a punishment for crime, may be brought in the form of a civil suit, does that change the rule of evidence that may be applied to it? ... Is a

⁴ United States v. Shapleigh, 54 F. 126 (8th Cir. 1893)

wolf in sheep's clothing a wolf or a sheep?" And the Supreme Court recognized as much as well – that by slapping the label "civil" on civil forfeiture, the government was imposing criminal penalties without a criminal conviction. For instance, in the case of [Miller v. United States](#), decided in 1871. The case involved what were called the Confiscation Acts, which were passed by Congress during the Civil War.

David Smith: After the Civil War began, Congress passed a bill to punish traitors and people participating in the insurrection. And this Act not only had criminal provisions in it but it also had draconian civil forfeiture provisions.

John: In addition to creating some new federal crimes, the Acts authorized the forfeiture of all property owned by Confederate officers, officials, and anyone who had provided aid and comfort to the Confederacy – no need for a trial or a conviction. One man who had his property confiscated was Samuel Miller, a resident of Lynchburg, Virginia, and the [wealthiest man](#) in the state.

David Smith: No wonder he could afford to litigate all the way up to the Supreme Court.

John: Miller was in his 70s, and apparently hadn't left his home, which is [still standing](#) and is on the [National Register of Historic Places](#), in decades, owing to his poor health. If you go to Lynchburg today you will find a park named after him, as well as two schools for disadvantaged children that still exist and that were founded with money from his will. In any case, in 1864, the federal government filed a forfeiture complaint to take possession of 534 stocks he owned in two northern railroad companies. By the time the case reached the Supreme Court in 1871, Miller had died. But the case continued. And the question it presented was: were the Confiscation Acts constitutional?

David Smith: And the Court was divided. The majority said it passes constitutional muster simply as a war measure.

John: The majority said that Congress had every right to authorize the confiscation of enemy property that could be used to support the Confederate war effort. That was plainly within the just powers of government.

David Smith: Justices Field and Clifford dissented in a memorable dissent. They argued that, contrary to the majority, the forfeiture provisions of the statute really were designed to punish.

John: Justice Field wrote a dissent, joined by Justice Clifford, arguing that the language of the statute made clear that what Congress was actually doing was punishing treason without convicting anyone of treason.

David Smith: The dissent is very eloquent and really raises the fundamental question of whether it's proper to use civil forfeiture to punish people for crimes that they haven't been convicted of, which is still the question being asked by many reformers today.

John: Importantly, although the justices disagreed on the purpose of the statute, all of them – both the majority and the dissent – agreed that it would be unconstitutional if indeed the purpose was to punish treason without a conviction. As Justice Field wrote, it would quote: “sound strange to modern ears to hear that proceedings *in rem* to confiscate the property of the burglar, the highwayman, or the murderer were authorized not as a consequence of their conviction ..., but without such conviction ... upon the assumption of their guilt.” In other words, civil forfeiture in the areas of customs and piracy was a limited exception to the usual rule that a conviction

must precede punishment. And, they all agreed, it was an exception that should not be allowed to swallow all of criminal law, lest, as Justice Field accused the majority of doing, it would quote: “work[] a complete revolution in our criminal jurisprudence, and establish[] the doctrine that proceedings for the punishment of crime against the person of the offender may be disregarded, and proceedings for such punishment be taken against his property alone.”

David Smith: Civil forfeiture is used to punish people, just like criminal statutes. But the law treats it as a civil matter, and therefore doesn't provide most of the protections that the Constitution provides for defendants in criminal cases. It's a way of getting around those protections.

John: Today, that complete revolution that Justice Field warned about has happened. Civil forfeiture has been authorized across the board – far beyond admiralty cases and far beyond just drugs crimes. Michigan, for instance, permits forfeiture without a conviction not only for drug crimes and not only for nuisances like in Tina Bennis' case, but also for burglary, arson, bribing public officials, counterfeiting, embezzlement, and more. At this very moment, we are suing the City of Detroit and Wayne County, Michigan, for its practice of forfeiting cars – about 1,000 of them a year – under those various forfeiture statutes without any probable cause to believe a crime was actually committed. Tellingly, in Detroit, if your car is seized, you can pay a \$900 fee and get it back – no questions asked. Is the car actually connected to a crime? Who cares? Pay the fee and get it back. But if you can't afford the fee or if you want to challenge the basis for the seizure perhaps because you're innocent, you must wait up to a year or more to get a hearing – by which time, as happened to our clients, your car will no longer be operable after sitting out in the elements. At oral argument before the U.S. Court of Appeals for the Sixth Circuit last year, the judges pointedly asked why, if Detroit suspected our clients' cars were connected to crime, was it offering to return them if they could pay what amounts to a ransom.

Judge Thapar: So it looks at least to me that it isn't about the nuisance or all these other things. You're just preying on these poor people to make money.

John: Civil forfeiture is also widely used for crimes that no one would actually know is a crime. For instance, structuring, which is the crime of making cash deposits in the bank in amounts of less than \$10,000.

David Vocatura: The IRS seized over \$68,000 dollars from our checking account and based it on the fact that they thought I was structuring by the way I was depositing our money in the bank. Until the day they came in I had no idea what structuring was.

John: In 2013, eight armed federal agents showed up at IJ client David Vocatura's bakery. Several more went to his home. The government said that by depositing cash from the bakery in amounts of less than \$10,000 each week, David was trying to evade federal reporting requirements that are meant to prevent money laundering. But David wasn't doing any money laundering. Nonetheless, it took three years and a lawsuit to get his money back. And while Congress has since changed the law to ban forfeitures for so-called legal-source structuring like David's, federal and state law books are chock full of crimes like it. Sometimes, the government also pursues forfeiture without saying what crime they think someone has committed. That's what happened to IJ clients Henry and Minh Cheng (or more precisely, their jewelry company) in our most recent case filed this month. The Chengs had cash shipped via FedEx seized by Indianapolis police, who have a policy of seizing all cash they can find in parcels that happen to be routed through FedEx's facility there. It's not illegal to ship cash. And the Cheng's company has no connection to Indiana. And the Cheng's are also legitimate business people, and they can prove they were conducting a legitimate and legal transaction. For their part, Indiana's

police and prosecutors have identified no crime they think the Cheng's company committed. But they're still trying to keep the money, over \$40,000. So at IJ, we were all pleased when, after a nearly 30 year wait, the Supreme Court finally took up another civil forfeiture case.

Chief Justice Roberts: We'll hear argument this morning case 22-585, *Culley v. Marshall*.

John: In the case of [Culley v. Marshall](#), Halima Culley, the petitioner, bought a 2015 Nissan Altima for her son to use at college. It was seized in Alabama after he was arrested for marijuana possession. And like Tina Bennis, Ms. Culley did not know about or consent to the car being used for any illegal activity. But her claims before the Supreme Court were different. She argued that the year and a half she had to wait in order to get a hearing before a judge was too long and that due process requires a prompt post-seizure hearing. Truly, this was a very small ask. It is not an enormous burden on the government to simply tell a judge why it thinks a seizure was justified within a few weeks. And we know this because several jurisdictions already do such hearings without any problems. At oral argument, several of the justices shared their misgivings with current forfeiture practices.

Justice Gorsuch: I'm not accusing Alabama of this to be very clear. ... But there are arguments to be made that there are attempts to create processes that are deeply unfair, and obviously so, in order to retain the property for the coffers of the state.

Justice Sotomayor: We know there are abuses of the forfeiture system. We know it because it's been documented throughout the country repeatedly.

John: Another thing you might notice if you listen carefully to the oral argument in *Culley*, and I promise I don't mention this to be coy, is that it's possible to discern some Freudian slips.

Justice Sotomayor: I mean, Barker, a defendant comes in -- not a defendant -- a Petitioner comes in, makes a motion

Justice Alito: Alright, if the state creates that, could it allocate the burden of proof to the defendant -- to the owner of the car?

John: That is, the justices, when speaking conversationally, slip into calling the property owner the defendant. Because that's what they are. A criminal penalty is being visited upon them without a conviction. And that doesn't just happen at the Supreme Court. Here's an 11th Circuit judge at oral argument in an IJ case earlier this month.

Judge Rosenbaum: Is it your position then that in every CAFRA case where the government dismisses with prejudice the defendant -- the owner of the property -- is entitled to fees?

John: In any case, I'm sorry to say that earlier this year, in *Culley*, the Supreme Court ruled against the property owner and in favor of the government. The majority said that a prompt post-seizure hearing was not required at the Founding as a matter of due process. It did say, however, the overall forfeiture process must happen in a timely fashion, which may yet give some relief to petitioners in other cases in the future. At IJ, we are certainly bringing claims that will give courts an opportunity to try and flesh out what it means for a forfeiture to be timely. But that disappointing result aside, the decision also gave some hope that a majority of the Court does want to put some meaningful limits on civil forfeiture. In a concurrence, Justice Gorsuch

wrote that quote: “In this Nation, the right to a jury trial before the government may take life, liberty, or property has always been the rule. Yes, some exceptions exist. But perhaps it is past time for this Court to examine more fully whether and to what degree contemporary civil forfeiture practices align with that rule and those exceptions.” His concurrence was joined by Justice Thomas, a long-time critic of civil forfeiture who has repeatedly raised concerns that [quote](#): “forfeiture operations frequently target the poor and other groups least able to defend their interests.” Groups who are, quote: “more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home.” And together with the three justices who dissented in *Culley*, that’s five votes for a major rethink. It may be that the Court ultimately says that property owners are due more of the protections that are due to criminal defendants – whether it’s the right to a jury trial or the right to a lawyer if the property owner can’t afford one. Or the Court may just say that you can’t forfeit without a conviction – with perhaps a few historically rooted exceptions. And it’s not only the Supreme Court that can rein in forfeiture. Congress can as well, and legislation that would end equitable sharing and make other meaningful changes has been kicking around for a few years now and is still on the table. And of course, so can state courts. At IJ, we’re bringing a variety of state constitutional claims as well. Last year for instance, we won a big victory at the [Indiana Supreme Court](#), which ruled that under the Indiana Constitution and in accordance with the state’s legal history and tradition, property owners have a right to a jury trial in civil forfeiture cases. In Nevada, we’re arguing that state highway patrol officers who seized our client’s life savings at a roadside stop without any justification whatsoever violated the state constitution, and moreover that turning the money over to the federal government under the equitable sharing program also violated state law. In 2022, in a sort of companion case, we argued and won a ruling at the [Nevada Supreme Court](#) that says that state officers in Nevada can be sued for constitutional violations—which was sadly in dispute—and also that qualified immunity is categorically unavailable in those constitutional lawsuits.

Rep. Hyde: Under our jurisprudence, the burden of proof should be with the government. If you are guilty of anything, then prove it. ... So what we are asking is to turn justice right side up.

John: This is Bound By Oath. Thanks for listening. More episodes on property rights, the Constitution, and freedom are coming your way soon.

Credits: Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Kais Ali and Charles Lipper at Volubility Podcasting. The theme music is by Patrick Jaicomo. With research help from Drew Carlson and editorial assistance from Bert Gall, Anthony Sanders, and Robert Johnson. And a big, extra special thanks to Jaimie Cavanaugh for finding Tina Bennis.