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Austin Spillar

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## Civil Asset Forfeiture Reform: Is Chicago Making the Grade?

Austin Spillar

Civil asset forfeiture allows police to seize a person's cash and property without charging or convicting them of a crime, or even without making an arrest.<sup>1</sup> The police simply just have to suspect that the assets are tied to an illegal activity.<sup>2</sup> This leads some to call it "legal robbery," while law enforcement sees it as a tool to fight crime and supplement their budget.<sup>3</sup> This article will examine civil asset forfeiture and its proceeds, emerging efforts for reform, and recent data and case law on civil asset forfeiture in Chicago.

### ORIGINS OF CIVIL FORFEITURE

High-level drug dealers and white collar criminals were the original targets of civil asset forfeiture, but now it seems just about anyone can become prone to losing their cash and property.<sup>4</sup> Civil asset forfeiture is applicable to more than 200 federal crimes.<sup>5</sup> Chicagoans often find themselves victims of civil asset forfeiture through drug cases and DUI's, according to criminal defense attorney Darryl A. Goldberg.<sup>6</sup> Property owners have the burden of proving

<sup>1</sup> Michael Sallah, Robert O'Harrow Jr., Gabe Silverman, *Stop and seize: Aggressive police take hundreds of millions of dollars from motorists not charged with crimes*, THE WASHINGTON POST, Sept. 6, 2014, <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize>; See also Jesse Lava, Sarah Salon, *When Did 'To Serve & Protect' Become 'To Seize & Profit?'*, THE NATION, Oct. 29, 2013, <http://www.thenation.com/article/when-did-serve-protect-become-seize-profit>.

<sup>2</sup> Radley Balko, *Illinois Traffic Stop Of Star Trek Fans Raises Concerns About Drug Searches, Police Dogs, Bad Cops*, THE HUFFINGTON POST, Aug. 7, 2013, [http://www.huffingtonpost.com/2012/03/31/drug-search-trekkies-stopped-searched-illinois\\_n\\_1364087.html](http://www.huffingtonpost.com/2012/03/31/drug-search-trekkies-stopped-searched-illinois_n_1364087.html).

<sup>3</sup> James Pilcher, *Federal Seizure Program that Benefits Cops called 'legal robbery'*, Sept. 10, 2015, <http://www.cincinnati.com/story/news/your-watchdog/2015/09/10/federal-seizure-program-benefits-cops-called-legal-robbery/71995798/>; See also Michael Sallah, Robert O'Harrow Jr., Gabe Silverman, *supra* note 1.

<sup>4</sup> Michael Sallah, Robert O'Harrow Jr., Gabe Silverman, *supra* note 1.

<sup>5</sup> Jason Snead, Elijah Coryell, *This Is the Moment for Civil Asset Forfeiture Reform*, THE DAILY SIGNAL, June 11, 2015, <http://dailysignal.com/2015/06/11/this-is-the-moment-for-civil-asset-forfeiture-reform>.

<sup>6</sup> In-person interview with Darryl A. Goldberg, The Law Offices of Darryl A. Goldberg, Chicago, IL.

their property's innocence to get it back because the property is itself presumed "guilty."<sup>7</sup>

Goldberg explains further that low-income people often face special difficulties in defending their property.<sup>8</sup> Although they can petition for a waiver, as a general rule, a person must first pay to appear in forfeiture court and then must post bond to get their property back, all of which can be a significant time commitment.<sup>9</sup> "It's particularly frustrating for a lot of people whose vehicle is their primary mode of transportation to and from work," says Goldberg. "When they don't have that they can't go to work, and when they're not going to work they're not making money, and the issues continue to grow from there."<sup>10</sup>

Civil asset forfeiture also has a disparate impact on people of color. In a joint letter to the House of Representatives to support the Civil Asset Forfeiture Reform Act of 1999, the NAACP and ACLU illuminated "the connection between civil forfeiture and racial profiling":

[C]ivil forfeiture takes place in a variety of situations where minority people are targeted by police because of racial profiling. Traffic stops, airport searches and drug arrests are all cases where the government seizes property using civil forfeiture laws. There is a body of research that establishes that minorities are hardest hit in these cases.<sup>11</sup>

States that ban law enforcement from receiving forfeiture proceeds can have law enforcement agencies get around state law if they participate in a federal program referred to as "equitable sharing."<sup>12</sup> State and local law enforcement agencies can continue this controversial practice of civil asset forfeiture by cooperating with the federal government and asking that it "adopt" the seizure as if it had itself carried it out.<sup>13</sup> In return, the state or local police

<sup>7</sup> Snead & Coryell, *supra* note 5.

<sup>8</sup> In-person Interview with Attorney Darryl Goldberg, The Law Offices of Darryl Goldberg, Chicago, IL.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Emily Gray Brosius, *Is Civil Asset Forfeiture the New Stop and Frisk?*, CHICAGO SUN-TIMES, Oct. 13, 2015, <http://extract.suntimes.com/news/10/153/4759/civil-asset-forfeiture-new-stop-frisk>.

<sup>12</sup> Nick Sibilia, *Civil Forfeiture Now Requires a Conviction in Montana and New Mexico*, FORBES, July 2, 2015, <http://www.forbes.com/sites/instituteofjustice/2015/07/02/civil-forfeiture-now-requires-a-criminal-conviction-in-montana-and-new-mexico>.

<sup>13</sup> Jordan Richardson, *Advocates Tell Congress: Reform Civil Asset Forfeiture Now*, THE DAILY SIGNAL, Apr. 17, 2015, <http://dailysignal.com/2015/04/17/advocates-tell-congress-reform-civil-asset-forfeiture-now/>.

department can keep 80% of the value of the property and cash seized under this equitable sharing program.<sup>14</sup>

### CHICAGO ASSET FORFEITURE AND PROCEEDS SCRUTINIZED IN COURT

The Chicago Police Department (CPD) has made 638 seizures since 2001, which has netted them \$8 million, according to a *Washington Post* investigation.<sup>15</sup> Anecdotal evidence, however, suggests that CPD does not always comply with civil asset forfeiture law. This non-compliance is fueled by militarized policing in Chicago's communities of color<sup>16</sup> and unlawful arrests and seizures, most infamously at CPD's "off the books" detention center Homan Square located on the city's West Side.<sup>17</sup>

CPD's civil forfeiture policies have been the subject of federal litigation. In 2010, a federal judge ruled that Chicago "does not adequately inform arrestees of the procedures to retrieve their money and thus does not comport with due process."<sup>18</sup> In that case, plaintiffs Elton Gates and Luster Nelson challenged the City's policies on returning seized funds after police officers had confiscated their cash upon arrest.<sup>19</sup> Judge Rovner held that the City's notice "did not inform arrestees of the internal police department procedures which appear to have actually governed the procedure" for returning seized property.<sup>20</sup>

<sup>14</sup> Lava & Salon, *supra* note 1.

<sup>15</sup> Michael Sallah, Robert O'Harrow, Steven Rich, Gabe Silverman, Stop and seize, *Washington Post*, Sept. 6, 2014, <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize>.

<sup>16</sup> We Charge Genocide, *Police Violence Against Chicago's Youth of Color* (Sept. 2014), available at <http://report.wechargegenocide.org/downloads/un-report-we-charge-genocide.pdf.zip> (shadow report prepared for the United States of America's Third Periodic Report to the United Nations Committee Against Torture) ("We're sitting in a house playing video games and we hear a banging on the door. Before we know it, the door is kicked down and there's five special-ops officers with their huge M16s drawn, pointed at us: Three 15 year olds playing video games. And they tell us get on the ground. They say if we move they are gonna kill us. 'Don't look at me, we'll f[\*\*\*\*\*]g kill you in a second!' Pointing their guns at us. Then they don't find anything. They let us all go, they laugh, try to joke with us, apologize, then leave out. And we're sitting there like, 'What just happened?' They tear up the house. They stole money.")

<sup>17</sup> Spencer Ackerman, Zach Stafford, *How Chicago Police Used Marijuana to Disappear Young People at Homan Square*, *THE GUARDIAN*, Mar. 11, 2015, <http://www.theguardian.com/us-news/2015/mar/11/homan-square-chicago-police-marijuana>.

<sup>18</sup> *Gates v. City of Chicago*, 623 F.3d 389, 400 (7th Cir. 2010)

<sup>19</sup> *Gates*, 623 F.3d at 391

<sup>20</sup> *Id.* at 400.

CPD's civil forfeiture policies came before the Supreme Court in 2009.<sup>21</sup> In *Alvarez v. Smith*, Cook County State's Attorney Anita Alvarez appealed a decision from the Seventh Circuit Court of Appeals holding that Chermane Smith and five other respondents had their procedural due process violated by the police, which "entitled [them] to specific post-seizure hearings to determine whether their property should be released or subjected to forfeiture" under the Drug Asset Forfeiture Procedure Act (DAFPA), Illinois' civil asset forfeiture law.<sup>22</sup> However, the Court found that the matter was moot on the theory that there was "no longer any actual controversy between the parties about ownership or possession of the underlying property."<sup>23</sup>

CPD has used cell-site simulators like the stingray to eavesdrop on protestors at the 2012 NATO summit and Black Lives Matter demonstrations in 2015.<sup>24</sup> Cell-site simulators are used to intercept calls and text messages.<sup>25</sup> The City of Chicago purchased Digital Receiver Technology (DRT) equipment in 2005 using funds collected in asset forfeiture cases.<sup>26</sup> The DRT is a stingray-like device that captures voice content, call recipient information, and data that is exchanged between the parties.<sup>27</sup>

Recently, CPD'S asset-forfeiture-amassed surveillance program came under scrutiny. In a January 2016 opinion, Cook County Circuit Judge Kennedy denied the City of Chicago's motion to dismiss. This allowed Chicago activist Freddy Martinez to move his case forward in obtaining documents requested under the Freedom of Information Act, which would fully reveal the extent of the Chicago Police Department's use of surveillance equipment.<sup>28</sup> Judge Kennedy noted that the CPD's use of an affidavit written by an FBI special agent who advocated withholding stingray documents was called

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<sup>21</sup> *Alvarez v. Smith*, 558 U.S. 87 (2009); See also Nicholas A. Loyal, *Bills to Pay and Mouths to Feed: Forfeiture and Due Process Concerns after Alvarez v. Smith*, 55 St. Louis U. L.J. 1143 (2011).

<sup>22</sup> Loyal, *supra* note 21.

<sup>23</sup> *Smith*, 558 U.S. at 92.

<sup>24</sup> Ali Winston, *Chicago and Los Angeles have used 'dirt box' surveillance for a decade*, REVEAL, Aug. 7, 2015, <https://www.revealnews.org/article/chicago-and-los-angeles-have-used-dirt-box-surveillance-for-a-decade>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Cyrus Farivar, *Chicago police must finally produce stingray records, judge orders*, (January 11, 2016), <http://arstechnica.com/tech-policy/2016/01/chicago-police-must-finally-produce-stingray-records-judge-orders/>

“the very type of affidavit that is insufficient to prove an exemption by clear and convincing evidence.”<sup>29</sup>

### CONCLUSION

It is time for the residents of Illinois to stand up to our lawmakers and demand change. Not only has Illinois received some of the worst grades in the nation for protecting people’s property rights, but there is also a lack of evidence to suggest that civil asset forfeiture is actually reducing crime.<sup>30</sup> Seizing people’s property without a conviction is not the answer for salvaging the important bond between a community and its police. While the Department of Justice’s ongoing investigation into the Chicago Police Department will focus on racial disparities in the use of force, no call has been made to also examine CPD’s civil asset forfeiture policies.<sup>31</sup>

Illinois should require a conviction and end the equitable sharing loopholes that are used to bypass state laws. Instead, it should put all proceeds in a general fund that can be invested in things that are actually proven to reduce crime: education, jobs programs, adequate food, universal housing, mental health clinics, and social services.

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<sup>29</sup> Cyrus Farivar, *Chicago police must finally produce stingray records, judge orders*, (January 11, 2016), <http://arstechnica.com/tech-policy/2016/01/chicago-police-must-finally-produce-sting-ray-records-judge-orders/>

<sup>30</sup> Brian Costin, *Illinois Gets “D” Grade on Civil Forfeiture Laws*, ILLINOIS POLICY, Aug. 2, 2010, <https://www.illinoispolicy.org/illinois-gets-d-grade-on-civil-forfeiture-laws/>; See also John L. Worrall, *Asset Forfeiture Response Guide No. 7* (2008), CENTER FOR PROBLEM ORIENTED POLICING, [http://www.popcenter.org/Responses/asset\\_forfeiture/print/](http://www.popcenter.org/Responses/asset_forfeiture/print/).

<sup>31</sup> *Justice Department Opens Pattern or Practice Investigation into the Chicago Police Department*, U.S. DEPARTMENT OF JUSTICE, Dec. 7, 2015, <http://www.justice.gov/opa/pr/justice-department-opens-pattern-or-practice-investigation-chicago-police-department>