The Plain Dealer | Page E06 Sunday, 21 September 2014

It's time to end tactic that leads to corruption

Last week, The Washington Post published a series of in-depth articles about the abuses spawned by the law enforcement practice known as civil asset forfeiture. As two people who were heavily involved in the creation of the asset forfeiture initiative at the Justice Department in the 1980s, we find it particularly painful to watch as the heavy hand of government goes amok. The program began with good intentions, but now, having failed in both purpose and execution, it should be abolished.

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

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

Then, in 1986, the concept was expanded to include not only cash earned illegally but also purchases or investments made with that money, creating a whole scheme of new crimes that could be prosecuted as ''money laundering.'' The property eligible for seizure was further expanded to include ''instrumentalities'' in the trafficking of drugs, such as cars or even jewelry. Eventually, more than 200 crimes beyond drugs came to be included in the forfeiture scheme.

This all may have been fine in theory, but in the real world it went badly astray. First, many states adopted their own forfeiture laws, creating programs with less monitoring than those at the federal level. Second, state law enforcement agencies and prosecutors started using the property — and finally even to provide basic funding for their departments.

Even at the outset, the use of seized property was an issue. Drug Enforcement Administration agents, for example, might see a suspected dealer in a car they wanted for undercover work and seize it. But if the car had an outstanding loan, the DEA could not keep it without paying the lien. This led to distorted enforcement decisions, with agents choosing whom to pursue based on irrelevant factors such as whether the target owed money on his car.

As time went on and states got into the forfeiture game, the uses became more personally rewarding for law enforcement. Maintaining an undercover identity was often no longer even part of the justification for seizures.

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

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

The Asset Forfeiture Reform Act was enacted in 2000 to rein in abuses, but virtually

nothing has changed. This is because civil forfeiture is fundamentally at odds with our judicial system and notions of fairness. It is unreformable.

In America, it is often said that it is better that nine guilty people go free than one innocent person be wrongly convicted. But our forfeiture laws turn our traditional concept of guilt upside down. Civil forfeiture laws presume someone's personal property to be tainted, placing on the owner the burden of proving it ''innocent.'' What of the Fourth Amendment requirement that a warrant to seize or search requires the showing of probable cause of a specific violation?

Defendants should be charged with the crimes they commit. Charge someone with drug dealing if it can be proved, but don't invent a second offense of ''money laundering'' to use as a backup or a pretext to seize cash. Valid, time-tested methods exist to allow law enforcement to seize contraband, profits and instrumentalities via legitimate criminal prosecution.

Civil asset forfeiture and moneylaundering laws are gross perversions of the status of government amid a free citizenry. The individual is the font of sovereignty in our constitutional republic, and it is unacceptable that a citizen should have to ''prove'' anything to the government. If the government has probable cause of a violation of law, then let a warrant be issued. And if the government has proof beyond a reasonable doubt of guilt, let that guilt be proclaimed by 12 peers.*Yoder was director of the Justice Department's Asset Forfeiture Office from 1983 to 1985. Cates was the director of the office from 1985 to 1989. This was written for The Washington Post.*