

Asset Forfeiture in Utah

A Libertas Institute Policy Analysis



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Executive Summary

A 2000 citizen initiative that passed by 69% of the vote in Utah introduced substantial restrictions on asset forfeiture—the process whereby the government seizes a citizen’s property—but several key provisions were overturned unanimously by the legislature in 2013 after lawmakers were told that the bill was a simple “re-codification.”

The initiative was created in large measure to prevent law enforcement agencies from directly profiting from the property they seized, as this financial opportunity created an incentive to seize property. The legislature amended the law in 2004 introducing some minor changes, including allowing proceeds from seized property to be funneled back to the agencies through the Commission on Criminal and Juvenile Justice instead of being deposited in the Uniform School Fund.

In the 2013 legislative session, HB384 gutted many of the important protections introduced through the 2000 initiative, and left in place by the 2004 amendments. Sponsored by Representative Dee and Senator Bramble, the bill was pitched to colleagues as a simple “re-codification” of existing law—a “clean up bill” with little to no substantive changes being made. In the rush of the last days of the session, with likely few (if any) legislators reading over 50 pages comprised heavily of new text, and with the assurance of the bill being a re-codification, both chambers unanimously approved the bill.

As noted in the analysis below, HB384 actually altered forfeiture law in an alarming way—a fact that many legislators may be concerned about when they realize what they were led to vote for, and that many citizens may be enraged about when they realize that the will of the people, as expressed in the 2000 initiative, has effectively been overturned.

Introduction

John Locke wrote in 1689 that, “The great and chief end... of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property.” In the century that followed, agents of the British crown violated this fundamental tenet on a routine basis by using general warrants and writs of assistance to authorize their own arbitrary decisions to search or seize the property of colonists. The Revolutionary War was predicated, in part, upon the philosophical objection to this claim of authority. As the Constitution came into shape, this objection resulted in the 4th amendment which requires probable cause and a warrant to search or seize a person, his house, his paper, or his effects.

The last few decades have seen a steady erosion of this protection of property rights, due in large measure to the so-called “war on drugs.” Both federal and state laws have been increasingly enacted that augment the power of law enforcement agencies to seize a citizen’s property—often prior to any conviction and without due process. Most alarmingly, the Comprehensive Crime Control Act of 1984 allowed seized proceeds to flow directly to law enforcement agencies as opposed to a general budget. This was the case in Utah until an initiative passed in Utah in the year 2000.

With 69% of voters approving the measure, Initiative B became law in Utah. This initiative curtailed the financial incentive that existed for law enforcement officers to seize property and use the resulting funds for their own department budget. Other substantial changes were made, including placing the burden of proof on the government, eliminating the need for property owners to post a bond, and imposing strict procedural requirements upon the state, including time deadlines.

With the passage of the initiative, and with the loss of a revenue source, law enforcement agencies all but stopped forfeiture proceedings.

Senator Valentine sponsored legislation, drafted by Attorney General Shurtleff’s office, in the 2003 general session to repeal some of the restrictions enacted by the

initiative, allowing police to once again keep the property they seized. Proceeds would have been divided between drug court programs and a new grant program for police agencies overseen by the Attorney General's office. The bill would have also freed up nearly \$4 million in federal funds that had been earmarked for Utah police agencies but could not be awarded because federal law required that all shared forfeiture assets returned to states be given directly to law enforcement agencies, which the 2000 initiative prohibited.

Valentine withdrew his efforts after pushback from his constituents. Shurtleff, a strong opponent of the 2000 initiative, vowed to find another sponsor and accused Valentine of “giv[ing] in to a bunch of lies.”

Later that same year, the state auditor found that prosecutors in Salt Lake, Weber, Davis, Utah, and Emery counties were holding onto almost half a million dollars in seized assets that should have gone to public schools due to the initiative. As the auditor bluntly stated, “It’s the law [referring to Initiative B], and they are disregarding it.” A state judge ruled against the county attorneys and ordered them to turn over the forfeiture proceeds.

Senator Buttars sponsored SB175 for Shurtleff in 2004 that claimed to increase certain protections for property owners while once again allowing law enforcement agencies to financially benefit from state and federal forfeiture cases. Many backers of the previous initiative objected to the bill, claiming it effectively nullified their efforts and the will of the people as expressed in the 2000 vote. SB175 passed the Senate 16-9 and passed the House 46-27.

In 2013, HB384 was sponsored by Representative Dee and Senator Bramble, and was offered up to legislators as a “re-codification of current structure in statute”—effectively a “clean up bill.” Dee informed his colleagues of five key points relative to the bill:

1. HB384 “maintains the highest standard of proof in the country” for forfeiture;

2. HB384 “establishes a criteria of clear and convincing evidence in all civil cases, and beyond a reasonable doubt in criminal cases”;
3. HB384 “preserves protections of innocent owners of property”;
4. HB384 “does not allow vehicles to be forfeited or obtained based upon the simple possess of controlled substances”; and
5. HB384 “requires [that] the disposition of property used to facilitate criminal activity must be proportional to the crime.”

Concluding this summary of his bill on the floor, Representative Dee stated, “Those are the only changes in the re-codification of quite a few pages.”

This is not true.

In the Senate, Senator Bramble introduced HB384 by saying that it “moves all of the provisions regarding forfeiture that are currently found throughout Utah code into one place” and “clarifies that property may only be forfeited if the property has been used to facilitate the commission of a state or federal crime, or if the property is the proceeds from a criminal activity.

This, too, is a profoundly inaccurate characterization of the bill.

As we explain in this document, several alarming changes were made by HB384—a bill that unanimously passed through both chambers, presumably due to the assurances made by sponsors that it was merely a “re-codification.” No questions were asked during floor time in the House or Senate, and thus no discussion was offered surrounding the meat of this lengthy and complex bill.

We surmise that many legislators may be frustrated to learn that they voted for a bill that gutted many important protections that were previously in place (and overturned key portions of the 2000 initiative), based on assurances made by the sponsors regarding the supposed simplicity of HB384. In the next section, we highlight and summarize some of these changes.

Key Changes Made by HB384 in 2013

Change in state court oversight

To preclude law enforcement from “policing for profit,” the 2000 initiative funneled all forfeiture proceeds into the Uniform School Fund so that police officers would focus on public safety concerns rather than budget-boosting drug busts to increase department revenue. The 2004 amendments repealed this provision, instead allowing the seized property to be kept once again by the agency. Proceeds were sent to the Commission on Criminal and Juvenile Justice which then disbursed grants to law enforcement agencies. In effect, agencies were once again able to profit from forfeiture, albeit indirectly.

Finances were a large concern in the initiative, and so it also directly addressed the federal “equitable sharing” program whereby state law enforcement agencies receive up to 80% of proceeds if the forfeiture is handled in federal court. (This is the source of the \$4 million in available federal funds mentioned in the introduction.) Taking a proposed forfeiture into federal court is a much preferred route for law enforcement officers because of this large revenue potential, providing a seemingly irresistible incentive to take state cases to federal prosecutors.¹

The 2000 initiative substantially reduced such transfers by requiring the approval of a state court judge prior to transfer. Any proceeding to consider transfer to the federal government required notice to all potential claimants who were also provided the right to participate and object to the transfer.

¹ In addition, the rules and standards in federal proceedings favor the government over the citizen claimant. For instance, the claimant has the burden of proof in an innocent owner case as opposed to the government (18 U.S.C. § 983(d)(1)). Federal prosecutors are only required to show that property is subject to forfeiture by a “preponderance of the evidence”—a lower standard than “clear and convincing evidence” or “beyond reasonable doubt” (18 U.S.C. § 983(c)(1)). Disproportional forfeitures are allowed under federal law; a property owner must prove that the forfeiture is “grossly disproportional” for relief (18 U.S.C. § 983(g)(3)). Also, federal law allows informants and witnesses to be paid with proceeds from forfeited property (28 U.S.C. § 524(c)(1)(C)).

The initiative further restricted the ability of a state court judge to allow such a transfer by requiring that the state prosecutor satisfy the court that:

1. the activity giving rise to the investigation or seizure is interstate in nature and sufficiently complex to justify such transfer;
2. the seized property may only be forfeited under federal law; or
3. pursuing forfeiture under state law would unduly burden prosecuting attorneys or state law enforcement agencies.

Further, the initiative allowed the court to refuse an order to transfer forfeiture proceedings “if such transfer would circumvent the protections of the Utah Constitution” or state law as enacted by the initiative. And, finally, prior to granting the order, the 2000 initiative stated that “the court must give any owner the right to be heard with regard to the transfer,” thereby increasing due process and accountability.

The 2004 amendments left this restriction intact, with only minor technical changes made. The 2013 amendments, however, fundamentally changed this process. While a court previously was required to enter an order authorizing the transfer to the federal government, under the new law it appears that seizing agencies or prosecuting attorneys are left to police themselves. The citizen whose property has been seized is not notified and has no ability to contest such a transfer.

Critically, the 2013 amendments entirely eliminated the requirement that the transfer could not occur if the result was circumvention of the Utah constitution or of Utah law.

Change in definition of a claimant, disclaiming now allowed

A troubling incentive is created when a law enforcement officer is aware that his agency gets to keep 80% of the property they seize. In Utah and other states, a dangerous practice has emerged wherein a suspect in custody is offered release and the potential for never being charged in exchange for signing away all claims to their property. One of the risks of such a practice is that rather than investigating

criminal conduct, it is much easier to get the money while ignoring the alleged criminal activity behind it. While such a practice is an effective means of obtaining more funding, it also creates a disincentive to investigate and ferret out the underlying criminal conduct.

The 2013 amendments legitimized and legalized this practice. Under the prior law any person or entity asserting ownership of the seized property could file a claim in the state court forfeiture proceeding. The changes made in 2013 significantly narrowed who could file, but also precluded any filing by an person or entity that had disclaimed, in writing, ownership of or interest in the property. The result is that once the document is signed, coerced or not, there is no recourse.

Now, officers may effectively extort a detained individual, telling them that they won't be arrested if they sign a document renouncing their claim to the seized property. Individuals who sign this document, whether due to intimidation or ignorance, lose any legal standing to file claim or otherwise assert their fifth amendment rights to due process prior to seizure of their property.

Change in time limits

Imagine that the state seizes your car as evidence for a case they're working on. Would you be concerned if the state could keep your property as long as it wanted? Would it seem fair if during that time you had no ability to get into court and challenge the seizure?

One of the key elements of the 2000 initiative was a requirement that the state had to file a complaint setting out the basis for their taking the property within 90 days of seizure. The primary reason for this requirement was to timely provide a forum for the citizen to submit an objection to the government action. Under this prior law the government was allowed to continue to hold the property after the complaint was filed, however because the case had to be filed in 90 days there would be a forum in which the citizen could present his objections. The 2004 amendments lowered this time period to 60 days. The 2013 amendments returned

the time limit to 90 days but even more critically they eliminated the consequence for non-compliance.

Consequence eliminated for a prosecutor failing to timely file

Under both the 2000 and 2004 versions of the law the consequence for the government's failure to timely file was that the agency was required to promptly return the property and the prosecutor was required to take no further action. The 2013 amendments gutted this by now merely suggesting that "the prosecuting attorney *may elect* to file a complaint within 90 days." Because the filing is optional, no consequence is imposed for not doing so.

Under the 2013 version of the law a prosecutor can seize and hold the property for months—even years—without consequence. The government is allowed to file whenever they get around to it. Meanwhile, the owner of the property is wholly at the mercy of the government and has no forum in which to contest the seizure until someone decides it might be time to file.

Attorney fees awarded to the state

The 2000 initiative provided that "the court shall award a prevailing owner reasonable attorneys' fees and other costs of suit reasonably incurred by the owner." In other words, a claimant whose property was wrongfully seized by government agents would not only be able to sue for its release, but in those cases where there was no legal basis for the taking, the court could order the government to pay for the citizen's costs in getting it back. Indeed, it would be unfair in those cases where the court finds the seizure to be unlawful to have a citizen bankrupted by the burden of fighting the state. When the court determines the citizen was in the right, he should be made whole.

The 2004 amendments made minor technical changes to this provision but left the substance intact. The 2013 amendments, with very slight changes in wording, completely altered the playing field. The amended law now allows for both sides to be held liable for attorneys fees. In other words, current law now allows the judge to award legal fees to the prosecuting attorney where a claimant unsuccessfully sues

for a return of his or her seized property. This introduces substantial risk into the process, as a claimant must now consider that if the judge decides in the government's favor, he may be additionally liable to pay the government for the costs it incurred while seeking to justify its seizure of the property in question.

Law enforcement has jumped on this fact and now uses an asset seizure notification form that reads: "If you contest the forfeiture proceeding and lose, you, or your property, may be held liable for all costs associated with the legal proceeding, including costs of maintaining and storing the property, pending the final outcome."

Further, the 2013 amendments changed the "shall" to "may," providing the option of the award while no longer requiring it. This introduces additional risk; whereas successful claimants in the past could win their property back as well as be compensated for legal costs, now a claimant can win the battle and lose the war. Though the state may be found in the wrong, and the property returned back to its owner, the owner's attorney fees may exceed the value of the property that was wrongfully taken.

Conclusion

Law enforcement officers and their supportive legislators may have had legitimate complaints against the 2000 initiative and 2004 amendments. Clearly, there are many Utahns who would object to their desired policy changes. Whatever the end result, what's absolutely clear is that the process used in 2013 to implement certain changes was a complete failure at best, and frightening deception at worst. If forfeiture law that was enacted by a citizen referendum is to be made less restrictive, or substantially altered in any way, then it should only be done through a transparent process including open debate between interested parties.

Given the direct vote of Utahns in 2000 making clear their intent in altering the law, we believe that any changes to that initiative must be done in good faith—something that the 2013 amendments cannot claim. As such, we recommend rolling back the key changes outlined in our analysis to restore what the public, and legislators, understood forfeiture law to be. Once reverted, those who desire to introduce these or other changes in the law may make their case and determine whether sufficient support exists once all parties are informed and hear all sides of the debate.