

May 24, 2016



The Honorable F. James Sensenbrenner  
United States House of Representatives  
2449 Rayburn House Office Building  
Washington, D.C. 20515

Dear Representative Sensenbrenner:

The Drug Policy Alliance writes to thank you and House Judiciary Committee Chairman Bob Goodlatte, Ranking Member John Conyers, Crime Subcommittee Ranking Member Sheila Jackson Lee, Representative Tim Walberg and Representative Peter Roskam for introducing H.R. 5283, the “Deterring Undue Enforcement by Protecting Rights of Citizens from Excessive Searches and Seizures (DUE PROCESS) Act of 2016.” H.R. 5283 provides new protections for innocent owners who may otherwise have no recourse to challenge a wrongful seizure. These reforms are sorely needed for many Americans who find that the cost of challenging civil asset forfeiture can exceed the value of the property seized.

At the height of the federal government’s escalation of the war on drugs in the 1980s, Congress gave law enforcement agencies expansive powers to seize property from citizens suspected of being involved in illegal drug activity. As a result, American citizens who are merely suspected of drug law violations can have their property and other assets seized by police without being convicted, or even charged with a crime. Just as the war on drugs is disproportionately waged on people of color, evidence strongly suggests that people of color are more likely to experience civil asset forfeiture.

Reclaiming property is difficult and often requires legal expertise, but in most cases there is no guaranteed access to counsel, placing the most vulnerable at an automatic disadvantage. Perplexingly, property owners must prove their own innocence to get their property back. In order to keep seized property the government only needs to issue a notice that property was seized, wait 30 days for someone to claim the property, and if no one does, collect the proceeds without having to file a case. Even if a claim is filed, the government only needs to establish by a “preponderance of the evidence” that the property was involved in the commission of a crime, a lower evidentiary threshold than is required in criminal cases. Moreover, there is no presumption of innocence and no right to an attorney, and it falls to the claimant to mount an affirmative defense.

When property owners decide to fight seizures, they enter into a complicated web of procedural bureaucracy. If the government demonstrates by a “preponderance of the evidence” that the seized asset was being used for an illegal purpose, owners can try to win their property back by raising an “innocent owner” defense – proving he was innocent of alleged criminal activity, or unaware of and unconsenting to the unlawful use of his property, and did everything that was reasonably possible to prevent its unlawful use. These are difficult claims to win because owners must prove what they did not do or know.

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There is often minimal return for fighting property loss under civil asset forfeiture. If a citizen were to lose property worth \$500, and employ an attorney with an hourly rate of \$200 to fight the seizure, it would take only 3 hours of legal fees to negate the benefit of reclaiming the property. In reality, due to the complex nature of forfeiture cases, fees can amount to much more, with some estimates placing legal costs at \$20,000. When property of relatively minor value is seized the only rational response is to walk away, because of the infeasibility of getting your money back.

Yet another factor to dissuade property owners from fighting forfeitures is the lack of right of access to counsel. Because proceedings are not criminal in nature, indigent claimants are not automatically appointed counsel if they cannot afford one of their own choice. There are only a few narrow exemptions. Few claimants, especially low-income individuals, can meet the financial burdens of hiring an attorney on their own to challenge a seizure. Lack of access to counsel is particularly troubling when considering the disproportional effect of civil forfeitures on low-income and communities of color.

The DUE PROCESS Act makes important procedural reforms that will help give property owners fighting a federal forfeiture action greater leverage to contest a government seizure. The DUE PROCESS Act amends existing federal forfeiture laws to improve a property owner's ability to fight a federal forfeiture action in court. The DUE PROCESS Act specifies a property owner's right to a prompt initial hearing before a judge to challenge a seizure or claim undue hardship. The legislation crucially provides a right to legal representation to indigent property owners at all civil forfeiture proceedings and protects a defendant's right to hire counsel of their choice.

The DUE PROCESS Act also increases the federal government's burden of proof in civil forfeiture proceedings. Currently, federal law allows for *preponderance of the evidence*, which is the lowest standard of proof in a court of law. The DUE PROCESS Act would require *clear and convincing evidence* in civil asset forfeiture cases. This legislation also strengthens the "innocent owner defense" by requiring the government to prove that there is a substantial connection between seized property and alleged criminal activity, and that the property owner was aware that property was being used in the alleged criminal activity.

The DUE PROCESS Act also strengthens due process rights for property owners who are faced with the daunting task of contesting a federal forfeiture. The legislation requires the government to comply with certain administrative timeframes and notification procedures that benefit property owners, gives property owners more flexibility when filing a claim, and requires the government to notify a property owner of their right to counsel. Also, in cases where the government freezes a criminal defendant's financial assets prior to trial, the DUE PROCESS Act entitles the defendant to a hearing with a judge to determine whether seized assets can be modified to pay for legal counsel. Judges also receive greater latitude to reduce a federal forfeiture in consideration of the value of the seized property and other factors. H.R. 5283 also allows in certain circumstances the recovery of attorney's fees when civil forfeiture cases are resolved through settlement.

The DUE PROCESS Act also requires greater transparency of federal forfeiture proceedings, including the establishment of publically accessible databases cataloguing forfeiture cases. Finally, H.R. 5283 codifies existing Department of Treasury policy that civil forfeiture may be used for structuring only when property is derived from an illegal source or used to conceal illegal activity.

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As currently formulated, the DUE PROCESS Act will help innocent property owners defend against warrantless government seizures. However, these warrantless government seizures will almost certainly continue unchecked until the profit incentives to pursue civil forfeitures are also addressed through legislation.

The DUE PROCESS Act should be amended to eliminate the Department of Justice's Equitable Sharing Program. This federal program enables state and local law enforcement agencies to take property from people not convicted, charged, or even arrested of any criminal wrongdoing, and transfer the property to the Department of Justice in circumvention of the laws of the state in which the seizure occurred. As much as 80 percent of the proceeds from forfeited property are returned by this federal program to state and local law enforcement for their own operations, which creates a financial incentive for law enforcement to seize property. A growing number of states are reforming their forfeiture laws in the interest of protecting the rights of property owners and eliminating perverse incentives like those perpetuated by the Equitable Sharing Program. The DUE PROCESS Act should also be amended to require the deposit of all federal forfeiture proceeds into the Department of Treasury's general fund.

In 2000, a coalition of concerned civil rights and conservative groups was able to push modest reforms to federal forfeiture laws through Congress, but not the level of reforms sought by advocates at that time or now. Strong bipartisan support currently exists for the DUE PROCESS Act. Congress should also take on the perverse incentives that federal forfeiture laws give police to seize property from Americans.

The Drug Policy Alliance urges Members of Congress to support this critically important legislation.

Sincerely,



Bill Piper  
Senior Director, Office of National Affairs  
Drug Policy Alliance

**We are  
the Drug  
Policy  
Alliance.**

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