Expert Analysis

Civil Forfeiture Abuse Is A Challenge To Civil Rights

By **Alexander Klein**
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In recent weeks, the case of Rustem Kazazi has garnered renewed interest in the peaks and valleys of our nation's civil forfeiture laws. Kazazi, a middle-aged Ohioan and immigrant, planned a visit to his home country with his family last October. During the trip, he intended to distribute money to various family members, to go property-hunting and to reinvest in a home he still owned there.

So to avoid international bank fees, he withdrew a large amount of cash and brought it with him to the airport. There, however, federal agents spotted the cash, thought it meant he had committed a crime, strip-searched him and seized his money — $58,100 — without formally charging him with a single criminal offense. Last month, Kazazi filed a lawsuit in an Ohio federal court against U.S. Customs and Border Protection over the incident.

His experience is an example of the seize-first, investigate-later attitude that marks the civil forfeiture regime now prevailing in the United States of America. Under this regime, government agents get to accuse people of crimes while circumventing ordinary protections afforded to criminal defendants — like the right against people's silence being used against them, or the burden of proving their guilt beyond a reasonable doubt.

This loophole emerges through the fiction that prosecutors bring these claims against property rather than human beings, and that the cases can thus proceed in civil court rather than criminal court. The U.S. Supreme Court should reconsider this regime's constitutionality, and strike it down because it violates the due process guarantees enshrined in the Fifth and Fourteenth Amendments.

In colonial times, the English crown executed "writs of assistance" enabling government officials to enter people's homes to seize anything they deemed to be contraband. Legal scholars have recognized these writs to be central motivations for the Revolutionary War. The American Bill of Rights emerging from that Revolution offered a barrier against this practice: Not only would unreasonable searches and seizures be unconstitutional, as expressed in the Fourth Amendment, but, as expressed in the Bill of Rights' next provision, "No person [would] ... be deprived of life, liberty, or property, without due process of law[.]"

The lessons from the colonial era began to fade by the early 19th century. In 1827, for instance, the Supreme Court issued its landmark Palmyra decision. Through this case, the court permitted the forfeiture of a vessel that had allegedly attacked a United States warship, despite the absence of a criminal conviction of any person. This did not violate the common law principle that an "offender's right ... not [be] devastated until the conviction," said Justice Joseph Story, because "[t]he thing is here primarily considered as the offender,

or rather the offence is attached primarily to the thing[.]"

With this emphasis on "the thing," as Justice Clarence Thomas described last year in a denial of certiorari in Leonard v. Texas, forfeiture suits proceeded civilly rather than criminally. But even then, he acknowledged, early forfeiture practices were limited to subject matters like "customs and piracy."

As the barriers against civil forfeiture were eroded over time, it became more and more popular as a vehicle for taking people's property without the ordinary difficulties of prosecuting them for crime. Just since 2010, for instance, the government has deposited more than $19 billion in connection with civil forfeiture, as reported to Congress by the U.S. Department of Justice.

This practice makes sense not just from a tactical standpoint, given that the burdens of proof in civil cases are lower than in criminal ones; but it also makes sense from a monetary perspective. As Justice Thomas recognized, "the law enforcement entity responsible for seizing the property often keeps it. ..." With this troubling foundation, civil forfeiture has proven to be a vehicle used in a wide variety of cases — many of which go unchallenged in court.

The issues surrounding civil forfeiture are of course two-sided. Law enforcement brings many civil forfeiture proceedings against property owned by individuals who indeed committed crimes. For these individuals, civil forfeiture might be the only penalty the government can exact — which many view as a better option than no remedy at all. After all, members of law enforcement in this country are often world-class at their jobs, so when they pursue criminal suspects — in criminal or civil proceedings — their instincts are frequently correct.

However, the same justification could be made for letting the government search people's homes without a warrant, wiretap their phones without a court order or even prosecute them without a right of cross-examination. Because the law enforcement community is sophisticated, the targets of such behavior would often include individuals engaged in wrongdoing.

But for civil rights in this country to be meaningful for any person, they must apply to every person. Indeed, this fault line is precisely the type of constitutional protection that separates the United States from the overbearing government it rebelled from nearly 250 years ago.

Overall, the underlying process of accusing people of crimes in civil court through the fiction of prosecuting inanimate objects — and where one's silence can thus be used against them — remains supported by Supreme Court precedent, which revisited the interplay between forfeiture and due process as recently as 1996. But it is not supported by the guarantees the founders sculpted into the Constitution. Nor is it supported by sound public policy, where experience has shown civil forfeiture to be an expansionary menace entangling too many claimants to property.

If the Kazazi case has any silver lining, it is that he and his family stood up against the government and defended his rights to the fullest extent of the law. While many in his position waive their rights altogether, Kazazi has already secured the return of nearly all of

his money — by filing a claim to the funds and enabling various forfeiture rules to work for him rather than against him. So while the pursuit of Supreme Court intervention will take time, in the meanwhile parties with interests in civil forfeiture proceedings should be emboldened by Kazazi's example.

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[1] See generally, Kazazi, et al. v. U.S. Customs and Border Protection, et al., Docket No. 18MC0051 (N.D. Ohio, 2018), Electronic Case Filing Entry #1 (Rule 41(g) Motion for the Return of Property).

[2] See Sarah Stillman, Taken, The New Yorker (August 2013), http://www.newyorker.com/magazine/2013/08/12/taken.

[3] See U.S. Const., Amend V.

[4] 25 U.S. 1 (1827).

[5] Id.

[6] Leonard v. Texas, 2017 WL 863675, at *2 (2017) (Thomas, J.) (Statement respecting the denial of certiorari).

[7] Department of Justice, Reports to Congress, https://www.justice.gov/afp/reports-0(providing yearly deposit figures).

[8] Leonard, 2017 WL at *2.

[9] Bennis v. Michigan, 516 U.S. 442 (1996) (finding that a civil forfeiture order did not offend due process).

[10] See generally, Kazazi et al. v. U.S. Customs and Border Protection, et al., Docket No. 18MC0051 (N.D. Ohio, 2018), Electronic Case Filing Entry #1 (Rule 41(g) Motion for the Return of Property, arguing that the government violated timeliness provisions for bringing a civil forfeiture action); see also unnumbered Electronic Case Filing Entry on June 7, 2018 (describing that the government was "beginning the process of tendering a check to Petitioner Kazazi in the amount of $57,330 plus interest").