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THE NEED TO REFORM ASSET FORFEITURE

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WEDNESDAY, APRIL 15, 2015

United States Senate,
Committee on the Judiciary,
Washington, DC

The Committee met, pursuant to notice, at 10:06 a.m.,
Room 226, Dirksen Senate Office Building, Hon. Charles E.
Grassley, Chairman of the Committee, presiding.

Present: Senators Sessions, Lee, Flake, Perdue,
Tillis, Leahy, and Klobuchar.

1 OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S.
2 SENATOR FROM THE STATE OF IOWA, CHAIRMAN, COMMITTEE ON
3 THE JUDICIARY

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5 Chairman Grassley. Thanks to everybody for their
6 attendance.

7 Today the Senate Judiciary Committee will hold a
8 hearing on the need for asset forfeiture reform. The
9 issue is as old as the Constitution. As Madison remarked
10 in Federalist 51, in framing a government which is to be
11 administered by man over man, the great difficulty lies
12 in this: you must first enable the government to control
13 the governed and, in the next place, oblige it, meaning
14 the government, to control itself.

15 Law enforcement is a principal means by which
16 government is enabled to control the governed. Civil
17 asset forfeiture is an important and valuable tool for
18 law enforcement to seize property associated with
19 criminal activity.

20 Civil asset forfeiture allows the government to seize
21 and forfeit foreign-owned boats and planes that were used
22 to smuggle drugs. It can be used to seize assets
23 controlled by entities tied to foreign terrorist
24 organizations, and it can be used to forfeit the property
25 of a defendant who dies before conviction might occur.

1 The property that the government obtains through
2 civil asset forfeiture can be used to compensate victims
3 and otherwise deprive criminal organizations of funding.

4 So then we all recognize the value of civil asset
5 forfeiture.

6 Even in the midst of the current reform effort, no
7 bill before Congress would abolish civil asset forfeiture
8 and I would not support one if it were before the
9 Congress. But as asset forfeiture is currently
10 practiced, nothing is obliging the government to control
11 itself. Just the opposite. Civil asset forfeiture leads
12 government to exceed its just powers over the governed.
13 It encourages law enforcement to take shortcuts rather
14 than prosecute or even arrest.

15 Civil asset forfeiture enables government and law
16 enforcement to seize property without any proof of
17 wrongdoing, and the process creates perverse incentives.

18 Under adoption and equitable sharing, state and local
19 law enforcement can seize property and ask the Federal
20 Government to adopt the seizure as if it had been carried
21 out by Federal officials.

22 If this occurs, the state or locality receives 80
23 percent of the value of the very property that they
24 arrange to have forfeited. This incentivizes police to
25 seize particular property to obtain a direct financial

1 reward.

2 When this occurs without pursuing criminal conviction
3 or even an arrest, the chances rise that the rights of
4 innocent people will be violated.

5 A number of immediate reports have set forth a wide
6 range of instances in which individual rights have been
7 infringed, especially in cases like traffic stops or in
8 structuring cases, such as that of one of my
9 constituents, Carole Hinders from Iowa.

10 Some of the extensive reporting was done by the *Des*
11 *Moines Register* and the process of contesting forfeiture,
12 as it currently operates, is a trap to the unwary.

13 In 2000 Congress passed the Civil Asset Forfeiture
14 Reform Act. It made some improvements for innocent
15 owners and in establishing timeframes. But the most
16 important procedural reforms were gutted at the behest of
17 law enforcement.

18 So the abuses that existed in 2000 have grown.
19 Iowans have raised their concerns about asset forfeiture
20 with me. It is past time to take action to address it.

21 The Justice Department has issued policy guidance
22 that it believes will end equitable sharing and eliminate
23 forfeiture in structuring cases where there is no
24 evidence of any other underlying crime.

25 The Department of Justice is mistaken. Their

1 policies still have loopholes. Its policy would allow
2 equitable sharing for joint task forces. It contains a
3 so-called public policy exception for guns, ammunition
4 and child pornography.

5 So I disagree. When law enforcement encounters a
6 crime, it should make an arrest and begin prosecution.
7 It is unacceptable for the Federal Government to seize
8 and forfeit a gun as the Justice Department would allow
9 not only without a conviction, not only without a
10 prosecution, but not even with an arrest. And the
11 Justice Department's structuring policy would supposedly
12 prohibit civil asset forfeiture when there is evidence
13 only of structuring. It allows agents to presume there
14 is another underlying crime when they cannot find
15 evidence that there is not one.

16 I have been disappointed with law enforcement's
17 response to the call for reform. The Justice Department
18 was invited to testify today, but they declined, claiming
19 they could not be ready in time. But just 2 months ago,
20 they were ready and they were able to testify on this
21 very same subject before the other body. But they
22 demonstrated then that they were out of touch and
23 unprepared for legislative reform.

24 I am also troubled that the Fraternal Order of
25 Police's written statement similarly dismisses the need

1 for real reform and demonstrates the absurdity of a
2 system of justice in which some law enforcement appears
3 to value funding their own operations over protecting
4 civil rights.

5 No one in law enforcement has offered a constructive
6 legislative alternative and I hope to work with them to
7 change that environment because legislation is necessary.

8 It is necessary to end equitable sharing and its
9 perverse incentives to provide due process to individuals
10 whose assets have been taken to strengthen the burden of
11 proof, to codify the IRS' new structuring policy, and to
12 overturn a Supreme Court decision on criminal asset
13 forfeiture.

14 A group of bipartisan, bicameral legislators is
15 working to develop a bill to reform asset forfeiture.
16 But we should do so while recognizing the value of civil
17 asset forfeiture and we should continue to allow proceeds
18 to flow to law enforcement so long as there is no direct
19 connection between any particular asset that is seized
20 and the agency that seizes the asset.

21 It is that dynamic that inherently makes the process
22 flawed and that makes the government unable to control
23 itself to the detriment of the liberties of the American
24 citizen.

25 Beyond legislation, there are problems with the

1 administration's asset forfeiture. Time and again I have
2 received reports of agencies at all levels of government
3 spending asset forfeiture money at whims and with very
4 little oversight.

5 In the recent week, I heard from whistleblowers who
6 allege that the asset forfeiture division of the U.S.
7 Marshal's office is spending that money on lavish office
8 furnishings and facilities, like a \$22,000 conference
9 table and a \$1.8 million training facility that lies
10 unused nearly 11 months of the year.

11 Whistleblowers also allege that asset forfeiture
12 division resources have been used selectively to reward
13 friends of senior management with agency jobs and
14 lucrative contracting positions.

15 So this is a cavalier spending of money and it
16 indicates that it is out of control.

17 At this point, I would ask unanimous consent to
18 introduce into the record three letters. The first is a
19 letter from the ACLU in support of bipartisan, bicameral
20 asset reform; the second is from the Leadership
21 Conference on Civil and Human Rights supporting reform of
22 civil asset laws; the third is a letter from 24
23 organizations outlining a statement of principles for
24 achieving effective Federal forfeiture reform.

25 Senator Leahy. No objection.

1 Chairman Grassley. Thank you.
2 [The letters referred to follow:]
3 *****COMMITTEE INSERT*****
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1 Chairman Grassley. Those organizations include the
2 American Conservative Union and their foundation,
3 Americans for Tax Reform, the NAACP, the National LGBTQ
4 Task Force Action Fund.

5 That letter asks us to take such action as to
6 eliminate equitable sharing and advance due process in
7 forfeiture proceedings.

8 The Committee is fortunate to have knowledgeable
9 witnesses today and I look forward to their testimony.

10 [The prepared statement of Chairman Grassley appears
11 in the appendix.]

12 Chairman Grassley. And now it is time for my
13 friend, Senator Leahy, to speak.

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1 OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S.
2 SENATOR FROM THE STATE OF VERMONT

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4 Senator Leahy. Thank you, Mr. Chairman.

5 Asset forfeiture is a powerful tool for law
6 enforcement. It does allow the government to seize the
7 proceeds of crime or property that was used in the
8 commission of a crime.

9 Every day we know that law enforcement officers use
10 forfeiture to seize property associated with child
11 pornography, cars and large quantities of cash of major
12 drug traffickers, the bank accounts of those that defraud
13 and steal from innocent victims in the U.S. and around
14 the world.

15 When used appropriately, the tool deprives criminals
16 of their profits. It deters crime. Through its civil
17 asset forfeiture program, the Justice Department has
18 returned billions of dollars to crime victims. It has
19 put billions more to good use by supporting our Nation's
20 crime fighting efforts, including a number of what I feel
21 are very innovative public safety initiatives.

22 But the program has needed significant oversight and
23 improvements along the way. Fifteen years ago, the asset
24 forfeiture system was in need of repair. Innocent
25 property owners were not being afforded adequate due

1 process before their property was forfeited. They were
2 forced to -- they had to do this perfectly -- navigate a
3 bureaucratic labyrinth just to liberate property that
4 should have been presumptively theirs in the first place.

5 I cosponsored bipartisan Senate legislation that
6 sought to restore real due process rights for property
7 owners and help pave the way for reform and Congress
8 eventually came together to enact basic safeguards for
9 property owners. We passed the Civil Asset Forfeiture
10 Reform Act.

11 But despite these reforms, it is clear that some
12 abuses persist. We have all seen the troubling reports,
13 roadside stops that resemble shakedowns, seizures of bank
14 accounts when there is no criminal conduct other than the
15 owner's deposit history. And just a look at a story
16 about a dairy farm in today's paper will explain that.

17 In fact, there seems to be no reaction on the part of
18 the authorities to what has happened. Allegations of
19 policing for profit; reports of forfeiture funds devolved
20 into slush funds, something the Chairman referred to.

21 I expect we are going to hear these concerns today.
22 Now, I want to think these practices may not be the norm,
23 but the fact that they occur at all, that is a problem.
24 Asset forfeiture can be a powerful crime fighting tool.
25 I think we should know that. But Congress never intended

1 it to be a mere fundraising tool, certainly not in my
2 State and I suspect not in any other State.

3 The Justice Department is conducting comprehensive
4 review of its asset forfeiture program and doing this
5 with an eye toward reform. Attorney General Holder has
6 already limited the types of seizures the Federal
7 Government will adopt from local law enforcement.

8 Attorney General Holder also limited the
9 circumstances in which it will seize assets based on the
10 crime of structuring.

11 I understand more changes are imminent and I am very
12 anxious to see them. I think we will give them full
13 consideration.

14 Seizing and forfeiting the tools used by criminals is
15 an effective means to combat crime. But -- but -- and
16 this is the major part -- innocent Americans deserve
17 protections from abusive asset forfeiture practices.

18 So I believe more reform is needed. I will work with
19 Chairman Grassley and the Justice Department and state
20 and local law enforcement and others to identify flaws
21 with our asset forfeiture program. It is something we
22 all have to be involved with, at the Congress level, at
23 the national level in law enforcement, the state level
24 and local level.

25 I hope we can come together on a basis to fix what is

1 broken. We should be able to get a bipartisan fix, which
2 means one that would actually pass, and ensure this
3 important law enforcement tool remains consistent with
4 our fundamental notions of due process, fair play, and
5 constitutional protections.

6 Thank you, Mr. Chairman. I apologize for the voice.

7 [The prepared statement of Senator Leahy appears in
8 the appendix.]

9 Chairman Grassley. Thank you, Senator Leahy.

10 Would Senator Paul come forward, please? And before
11 you speak, I want to compliment you on being involved
12 with this issue as a leader, as well, and, more
13 importantly, to say that you have brought to the
14 attention of the Congress and the Nation a lot of issues
15 or a lot of organizations that we do not communicate with
16 a lot. So I want to compliment you beyond just this
17 bill.

18 Would you proceed, please?

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1 STATEMENT OF HON. RAND PAUL, UNITED STATES SENATOR,
2 COMMONWEALTH OF KENTUCKY

3

4 Senator Paul. Thank you, Mr. Chairman and Ranking
5 Member Leahy and members of the Committee, for allowing
6 me to testify today on civil forfeiture reform.

7 This Committee has an opportunity to end an
8 injustice, an injustice that disproportionately affects
9 minorities and the poor, by reforming our civil asset
10 forfeiture laws.

11 According to the *Washington Post* review of seizures
12 done under Federal seizure laws, the majority of those
13 who have had their property taken were black, Hispanic or
14 other minority.

15 These laws were originally intended to disrupt
16 criminal networks, but they have increasingly been used
17 against innocent citizens to strip them of their property
18 without a lawyer to defend their rights, without a day in
19 court to hear the charges against them, and without due
20 process.

21 Civil forfeiture turns justice on its head. Our
22 current laws presume you are guilty until you can prove
23 your innocence. This is directly in contradiction to
24 what we should stand for as a republic.

25 Last year, in Philadelphia, Christos Sourovelis

1 watched his son get arrested for selling \$40 worth of
2 illegal drugs outside of his home. A month later, the
3 police were back, but not for the son -- for the house.

4 The Philadelphia district attorney dropped the case
5 after much scrutiny, but you can see where the potential
6 for abuse lies.

7 Not all victims are so lucky. There have been over
8 60,000 cash seizures made on highways since 2001, without
9 search warrants, without indictments, and without
10 convictions, totaling more than \$2.5 billion. These
11 seizures were done through the equitable sharing program.
12 This program provides a perverse incentive that
13 encourages government to confiscate property because
14 government officials get to keep up to 80 percent of the
15 proceeds.

16 Mandrel Stuart is just one of the people that had his
17 money seized as a part of this program. He owned a
18 barbecue restaurant called Smoking Roosters in Staunton,
19 Virginia. He was stopped for a minor traffic offense and
20 as the police were going through, they decided that they
21 would confiscate the money he had on hand that he was
22 going to use for supplies to buy for his restaurant.

23 They found no evidence of wrongdoing. He was never
24 charged with a crime, but they still took his money. The
25 prosecutor told him that they could have half his money

1 if he accepted a plea. Mr. Stewart refused and fought
2 for over a year, but by then he had lost his business.
3 He eventually got his money back and was never charged.

4 We have a big discussion now on who will be our next
5 attorney general. Loretta Lynch became famous for her
6 herculean confiscation of private property. She seized
7 over \$100 million in forfeited funds during her time as
8 U.S. Attorney and then skirted the reforms that were put
9 in place 15 years ago to protect the innocent by not
10 filing the paperwork that would have allowed those
11 reforms to kick in.

12 Lynch confiscated nearly \$1 million -- nearly \$0.5
13 million from the Hirsch brothers who owned a family-owned
14 business in New York and held the money for nearly 2
15 years. The Hirsch brothers were never charged with a
16 crime, much less convicted. Yet, it took years and
17 hundreds of thousands of dollars to get their money back.

18 When questioned about civil forfeiture, Loretta Lynch
19 seemed to be unconcerned with the need for reform.

20 I think no one who listens to these horrendous abuses
21 of our civil liberties should be not moved to think that
22 we really do need reform in our country.

23 So last year I introduced the Fifth Amendment
24 Integrity Restoration Act, the FAIR Act, with Senators
25 Lee and King. This has also been introduced in the

1 House.

2 Our bill would end equitable sharing and ensure that
3 state laws are being respected and not circumvented. It
4 will raise the burden of proof in civil forfeiture cases.
5 Our bill would ensure that government will provide you
6 representation if they take your property.

7 The bill would also place the burden of proof where
8 it belongs -- on the government, not the accused. It
9 would require a conviction before property is forfeited.

10 Many people have mentioned that the money can be used
11 for victims. I have no problem with that if you are
12 convicted of a crime. But in America, they should not
13 take your stuff without a conviction.

14 Most importantly, it will end the profit incentive by
15 requiring all forfeiture assets to be deposited in the
16 Treasury instead of a fund to be used by the agencies
17 that seize the property.

18 This act is bipartisan and bicameral and has support
19 from the Institute for Justice, the ACLU, the National
20 Association of Criminal Defense Lawyers, Americans for
21 Tax Reform.

22 My hope is as the Committee moves forward, that you
23 will use some of our ideas or include some of our ideas
24 in your deliberation. I think Americans from all walks
25 of life are ready for criminal justice reform and I hope

1 this is the year we get it done.

2 Thank you.

3 [The prepared statement of Senator Paul appears in
4 the appendix.]

5 Chairman Grassley. Thank you, Senator Paul.

6 I do not have any questions. Do any of my colleagues
7 have questions of our colleague?

8 Senator Leahy. I know he has a tough schedule.

9 Chairman Grassley. Thank you very much, Senator
10 Paul.

11 Senator Paul. Thank you.

12 Chairman Grassley. Now, I will call our next group
13 of witnesses. We have one panel. Darpana Sheth, an
14 attorney with the Institute for Justice. Come while I am
15 reading, please.

16 Her practice includes litigation to protect private
17 rights, including asset forfeiture cases. She is a
18 graduate of the University of Pennsylvania. She obtained
19 her law degree from Georgetown University Law School.

20 The next person is Russ Caswell. He is the former
21 owner of the Motel Caswell, Tewksbury, Massachusetts, the
22 Motel Caswell, which had been in the family since the
23 1950s; became the subject of a Federal forfeiture action.
24 The action was resolved in 2013 with the assistance of
25 the Institute of Justice.

1 Chuck Canterbury has been the National President of
2 the Fraternal Order of Police since 2003. Mr. Canterbury
3 began his policing career in 1978, Horry County Police
4 Department, Conway, South Carolina; serves on a number of
5 important boards and is treasurer of the International
6 Council of Police Representatives Association. Mr.
7 Canterbury received his BA degree from Coastal Carolina
8 University.

9 Jonathan Bach is a lawyer with Cooley in New York.
10 He is testifying on behalf of the New York Council of
11 Defense Lawyers. Mr. Bach filed an amicus brief in the
12 recent Supreme Court case, Kaley v. United States. The
13 Supreme Court discussed the brief in its decision.

14 Mr. Bach is a member of the American College of Trial
15 Lawyers and a graduate of Yale Law School.

16 We will go in the order that you were introduced.
17 So, Ms. Sheth, will you start out?

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1 STATEMENT OF DARPANA SHETH, ATTORNEY, INSTITUTE FOR
2 JUSTICE, ARLINGTON, VIRGINIA

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4 Ms. Sheth. Good morning, Chairman Grassley, Senator
5 Leahy and distinguished members of the Committee. Thank
6 you for inviting me to testify about the urgent need to
7 reform our Federal forfeiture laws.

8 Because of the overwhelming recognition across the
9 political spectrum on the need to reform these laws, I
10 will focus my remarks on two key defects that Congress
11 must address; first, the self-financing of law
12 enforcement agencies, which inherently distorts law
13 enforcement priorities; and, second, the inadequate
14 protection afforded to property owners.

15 Current Federal law incentivizes forfeiture by
16 allowing law enforcement agencies to keep 100 percent of
17 the proceeds. Even with the 2000 CAFRA reforms, Justice
18 Department forfeitures have skyrocketed to \$4.4 billion
19 last year, while Treasury Department forfeitures have
20 soared to \$1.6 billion in 2013.

21 Any legislation that fails to remove this direct
22 financial incentive will be ineffective in the long run.

23 Directing forfeiture proceeds back to the very
24 agencies responsible for forfeiture is antithetical to
25 our American constitutional system in three ways. First,

1 the self-funding of Executive Branch agencies violates
2 the separation of powers. The Constitution gives
3 Congress, the most representative branch of government,
4 the branch of government closest to the people, the power
5 of the purse. It is past time for Congress to reclaim
6 this power as an important check on the Executive Branch.

7 Second, it violates principles of federalism. Under
8 the equitable sharing program, state and local law
9 enforcement can bypass their own state forfeiture laws in
10 favor of more lax Federal rules and then receive up to 80
11 percent of forfeiture proceeds.

12 The DOJ's new policy does not cure this problem
13 because of three major loopholes. It only prohibits
14 adoptive seizures and even then carves out an exception
15 for public safety. It only provides vague standards of
16 what constitutes sufficient Federal involvement for joint
17 investigation seizures. And it does not apply if a
18 Federal warrant is obtained after the seizure. And this
19 policy could be reversed at any time with the stroke of a
20 pen.

21 Third, giving law enforcement a direct financial
22 interest in the seizure of property violates a central
23 command of due process. The administration of justice
24 must be impartial. This lack of impartiality is best
25 seen in the fact that almost two-thirds of all Federal

1 forfeitures are administrative, meaning that the process
2 is conducted by the seizing agency itself without any
3 judicial involvement.

4 But even when courts are involved in civil
5 forfeitures, there are inadequate procedures to protect
6 property owners.

7 My written testimony details these gaps, including
8 the lack of counsel, the low burden of proof on the
9 government, and the absence of a prompt opportunity to
10 contest the seizure of currency.

11 But I also wanted to highlight how the process turns
12 the presumption of innocence on its head. In
13 administrative proceedings, the forfeiture is presumed
14 valid and the property owner must make the case for its
15 return. Even in judicial civil forfeiture proceedings,
16 property owners are presumed guilty until they prove
17 their innocence.

18 Once the government shows that the property is more
19 likely than not connected to a crime, the burden shifts
20 to property owners to affirmatively prove that they did
21 not know of illegal activity.

22 The absence of adequate process, married to the
23 perverse financial incentives, has led to widespread
24 abuse, with a disproportionate impact on minorities and
25 lower income individuals.

1 Civil forfeiture has treated countless ordinary
2 Americans, like Russ Caswell, worse than criminals.
3 Since 2011, civil forfeiture has resulted in more than
4 61,000 currency seizures totaling \$2.5 billion through
5 so-called highway interdiction, all without any search
6 warrants or indictments. And the IRS has abused
7 forfeiture to seize almost \$.25 billion from more than
8 2,500 individuals and small business owners under an
9 aggressive and misguided interpretation of banking laws.
10 In most of these cases, like Carole Hinders of Spirit
11 Lake, Iowa, there was no claim of any criminal activity
12 besides a series of cash transactions under \$10,000.

13 This is not about bad apples in law enforcement.
14 This is about fundamentally flawed incentives in the law.
15 The solution is not to better police the police through
16 temporary policy changes made by agencies. The solution
17 is to end policies that distort agency incentives by
18 changing the law.

19 Thank you for your time.

20 [The prepared statement of Ms. Sheth appears in the
21 appendix.]

22 Chairman Grassley. Thank you for being so on time,
23 as well.

24 Mr. Caswell?

25

1 STATEMENT OF RUSS CASWELL, TEWKSBURY, MASSACHUSETTS

2

3 Mr. Caswell. Thank you, Chairman Grassley, Ranking
4 Member Leahy, and members of the Committee, for the
5 opportunity to share my story and testify about the dire
6 need for asset forfeiture reform laws.

7 I was the owner of Motel Caswell in Tewksbury, Mass.
8 My father built the motel in 1955. Since taking over
9 from my father in 1984, I have strived to make Motel
10 Caswell an affordable, safe place.

11 I installed cameras, kept a do-not-rent list at the
12 front desk, regularly checked IDs and license plates, and
13 kept the property well lit. We always cooperated with
14 police. I have even given free rooms to them so they can
15 hold stakeouts and arrest any bad guys that may find
16 their way onto my property without my knowledge.

17 Unfortunately, none of this would matter when the
18 Federal agents came knocking in September of 2009. Just
19 as my wife and I had begun looking forward to a hard-
20 earned retirement, our world was turned upside down.

21 We received notice that the motel was being subject
22 to civil forfeiture. At that time, I had no idea what
23 that was or how exactly my motel was being sued and I was
24 not.

25 So began my journey into the strange world of civil

1 forfeiture, where I was now being asked to prove the
2 innocence of my property in crimes that I had nothing to
3 do with.

4 The Tewksbury Police Department, working with the
5 U.S. Attorney's Office, claimed that our motel
6 facilitated drug activity and there was a substantial
7 connection between the motel and the drug activity. This
8 came after years with working with law enforcement
9 officials to prevent and report crime on our property.

10 Over the course of 20 years, we rented out more than
11 125,000 rooms to guests. The government's lawsuit
12 identified 15 arrests over that period as a basis for the
13 forfeiture, 15 arrests out of 125 rooms rented. That
14 averages to less than one per year -- one arrest per
15 year.

16 I have never been charged with or convicted of a
17 crime in my entire life. No one in my family or any of
18 our employees has ever been involved in any of those
19 crimes at the motel.

20 The next few years could only be described as a
21 living nightmare brought to us courtesy of the U.S.
22 Government. Immediately, the lawsuit began to drive
23 customers away and our long-term tenants were worried
24 about where they may go to live.

25 The Tewksbury police and the U.S. Attorney's Office

1 thought this would be an easy target because we are a
2 mom-and-pop business and not some big corporation, like
3 Motel 6 or Walmart, which had similar crimes on their
4 property.

5 I also believe our commercially-zoned property with
6 no mortgage put a bull's eye on our backs in their eyes.
7 After borrowing \$60,000 to fight the forfeiture action, I
8 was at my financial and wit's end. My wife was not in
9 good health and watching our retirement dream slip away
10 began to take its toll.

11 It was at that time the Institute for Justice offered
12 to take the case pro bono. It is because of IJ that I am
13 able to say this story has a happy ending, unlike most
14 others.

15 After a 4-day trial in Federal court, we finally, in
16 January of 2013, received the news that we had won. The
17 judge agreed that we were innocent owners and that the
18 government's case had no legs to stand on.

19 Unfortunately, not everyone can have lawyers willing
20 to represent them free of charge. Too many Americans are
21 being swept up by civil forfeiture with no means to
22 defend themselves.

23 I am here today not only to share my story, but to
24 urge you to make real changes to the law to make sure
25 this can never happen again. As my case shows, when

1 there is profit incentive for the agencies doing the
2 forfeiture, justice is hard to find. This profit
3 incentive must end.

4 In addition, civil forfeiture turns the American
5 presumption of innocence on its head. Criminals are
6 presumed innocent until proven guilty and the government
7 must prove beyond a reasonable doubt that they are
8 guilty. But under civil forfeiture, I had to prove I was
9 innocent.

10 Our forfeiture laws are unjust, unAmerican, and
11 Congress has the power to prevent these abuses from
12 continuing.

13 I urge this Committee to address the serious flaws in
14 this current law.

15 Thank you again for the opportunity to testify.

16 [The prepared statement of Mr. Caswell appears in the
17 appendix.]

18 Chairman Grassley. Thank you, Mr. Caswell.

19 Now, Mr. Canterbury?
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1 STATEMENT OF CHUCK CANTERBURY, NATIONAL PRESIDENT,
2 FRATERNAL ORDER OF POLICE, WASHINGTON, DC

3

4 Mr. Canterbury. Good morning, Mr. Chairman, Senator
5 Leahy, other members of the Committee.

6 First, let me say thank you to this Committee for the
7 passage of two very important pieces of legislation to
8 the floor, the bulletproof vest program and the blue
9 alert.

10 We want to thank you, Chairman Grassley, for moving
11 that bill and those two bills mean a lot to the Fraternal
12 Order of Police and we thank this Committee for that
13 action.

14 The FOP does not disagree that there is a need for
15 civil asset forfeiture revision. We have been in regular
16 communications with the Justice Department regarding
17 their changes to the program, which were announced by
18 Attorney General Holder in January.

19 It is not a new issue for us and we are pleased that
20 the Chairman's staff reached out to us to share his draft
21 legislation.

22 Many of the provisions in the draft bill which would
23 create greater accountability, transparency and oversight
24 of the asset forfeiture program are good ones which the
25 FOP will ultimately support.

1 We are concerned, however, that the reduced
2 timeframes for civil asset forfeiture proceedings and
3 expansion of relief provisions may overburden the
4 existing system, and what we are looking for is
5 reassurance that that will not happen.

6 The draft legislation also proposes changes to the
7 burden of proof to a much higher standard. The FOP would
8 like to work with you, Senator Grassley, on this standard
9 so that we could come with a standard that we all agree
10 is reasonable.

11 However, our foremost concern in this draft bill
12 proposes the end to the equitable sharing program for
13 state and local law enforcement. Federal law enforcement
14 agencies would be able to continue to seize property, but
15 would be prohibited from sharing any of the assets with
16 local and state agencies, even if they were part of the
17 task force which carried out the seizure.

18 As you know, local law enforcement outnumbered Federal
19 law enforcement 8-to-1. The equitable sharing programs
20 are of great value to law enforcement and to public
21 safety and the communities in which these funds are
22 shared.

23 Like any government program, there can be found
24 instances of abuse and the FOP supports measures to
25 combat such abuses and to improve the integrity of the

1 program. However, to end a decades-long program with
2 documented success in deterring and fighting crime
3 without careful consideration is simply not sound public
4 policy.

5 We have been assured that the aim of this reform
6 legislation is not to penalize law enforcement or reduce
7 their access to resources. The draft bill does provide a
8 percentage of the asset forfeiture funds for the Edward
9 Byrne Memorial Justice Assisted Grant Program, as well as
10 \$200 million to joint local law enforcement operation
11 programs to encourage state and local agencies to
12 continue working on these task forces.

13 However, there is no guarantee that appropriators
14 will not use these funds to replace the existing funds.
15 In our view, the ending of the equitable sharing program
16 will result in yet another reduction in Federal
17 assistance to state and local law enforcement.

18 Loss of these funds will greatly reduce the ability
19 of state and local agencies to participate in joint
20 operations.

21 The changes announced earlier this year by the
22 Justice Department did represent significant reform. In
23 the view of the FOP, it makes more sense to allow these
24 reforms time to work and evaluate their impact before we
25 consider ending the entire program.

1 I would also like to ask that the members of the
2 Committee consider the interim report from the
3 President's Task Force on 21st Century Policing. It
4 contains 29 individual recommendations and a large number
5 of those call for new or additional Federal funds for
6 state and local law enforcement, but not one of those
7 recommendations recommended changes in the civil asset
8 forfeiture program.

9 Now, I understand this was not a comprehensive report
10 and they only had 90 days in which to present these
11 suggestions, but at no time did anyone on that Committee
12 recommend changing this program.

13 We can be sure of only one thing. If the draft bill
14 is enacted as written, there will be even fewer resources
15 and local law enforcement agencies will be able to
16 participate in Federal task forces to combat regional and
17 organized criminal threats, including domestic and
18 foreign terrorism.

19 Mr. Chairman, in conclusion, the FOP is ready to work
20 with the Committee on this asset forfeiture reform.
21 There are many areas which we believe there may be broad
22 agreement -- preventing abuse, increased transparency,
23 and improved due process. Nobody takes a backseat on due
24 process more -- nobody believes in due process any more
25 than the Fraternal Order of Police. Excuse me, Mr.

1 Chairman.

2 But in the end, equitable sharing completely, without
3 ending it, would completely, without measuring the impact
4 on recent reforms, is simply not the way to do this.

5 We thank you for having us here today and we commit
6 to working with this Committee to come up with equitable
7 sharing programs that are not based on lack of due
8 process.

9 [The prepared statement of Mr. Canterbury appears in
10 the appendix.]

11 Chairman Grassley. Thank you, Mr. Canterbury.

12 Now, Mr. Bach?

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1 STATEMENT OF JONATHAN BACH, COOLEY LLP, NEW YORK, NEW
2 YORK

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4 Mr. Bach. Chairman Grassley, Senator Leahy,
5 distinguished members of this Committee, thank you very
6 much for inviting me today.

7 Under our current laws, the government has a right to
8 freeze and restrain a criminal defendant's assets at the
9 very beginning of a case when it believes those assets
10 are fruits or instrumentalities of a crime.

11 These restraints serve the government's interest in
12 preserving property for restitution of victims and other
13 law enforcement purposes. But because they restrain
14 funds, they often make it impossible for the individual
15 accused of a crime to hire the lawyer that he or she
16 wishes to have represent them in the ongoing criminal
17 case.

18 I am not here today to raise any question about the
19 government's right to restrain assets. I am here to
20 question whether such restraints can be imposed without
21 permitting the individual accused of a crime an
22 opportunity to be heard on the question of whether such
23 restraints are valid and justifiable in his or her
24 particular case.

25 Our current law limits the ability of individuals

1 accused of a crime to obtain a meaningful hearing on this
2 very important issue. Our current law also limits the
3 ability of judges and courts to review the propriety of
4 such restraints in individual cases.

5 The Supreme Court, in a recent case of Kaley v.
6 United States, declined to find that a criminal defendant
7 has a right to a hearing to challenge asset restraints
8 other than a hearing on the limited question of whether
9 the particular assets under restraint can be traced back
10 to the crimes charged.

11 Over the past 25 years, courts the second circuit,
12 where I practice, have granted individuals whose assets
13 have been restrained far broader hearing rights. The
14 experience in the second circuit has shown that
15 relatively broad pretrial hearing rights can be
16 meaningfully accommodated within the judicial system
17 without resulting in overload of court dockets or other
18 abuse of the system.

19 Throughout the quarter of a century during which the
20 second circuit has recognized a broad hearing right,
21 there have been fewer than 30 reported cases at the
22 district court level in which defendants have challenged
23 pretrial asset restraints.

24 One explanation for this low number is that defense
25 attorneys representing clients with restrained assets

1 and, thus, with limited, if any, ability to pay
2 attorney's fees are unlikely to devote the time and
3 effort needed to pursue a hearing unless they believe
4 there is a genuine possibility that they will prevail.
5 In other words, they refrain from seeking such hearings
6 where the government can easily make its case.

7 A separate reason for the infrequency of these
8 hearings is that district courts have required defendants
9 seeking a hearing to first establish that, in fact, they
10 have a genuine need for the restrained funds to hire the
11 lawyer of their choice.

12 District courts have also allowed the government to
13 proceed at these hearings by presenting only a single
14 witness, typically the law enforcement agent assigned to
15 the case who summarizes the anticipated testimony of
16 other witnesses in hearsay form. That mechanism has also
17 helped courts limit the scope of these hearings and keep
18 them within meaningful limits.

19 Recognition of a criminal defendant's right to a
20 pretrial hearing in the second circuit has also had the
21 beneficial result of encouraging lawyers to reach
22 resolution by mutual agreement, often making any hearing
23 unnecessary.

24 A hearing limited solely to the question of whether
25 the assets under restraint can be traced back to the

1 crime charged serves little or no purpose in many cases
2 where there is no dispute that the defendant engaged in
3 the conduct in issue, but only a dispute as to whether
4 the conduct constitutes a crime.

5 Many defendants admit conduct, but contend that they
6 did not have the requisite state of mind to make it a
7 crime. Other defendants admit conduct, but argue that
8 the prosecution is barred by the statute of limitations.
9 Still other defendants admit conduct, but contend that
10 the criminal statute under which they were charged is too
11 vague to put them on notice that their conduct was a
12 crime.

13 Many cases in which conduct is conceded, but the
14 defense turns on a different legal concept or principal,
15 often present the greatest need for skilled and
16 experienced lawyers capable of presenting the nuances of
17 such arguments.

18 It is, therefore, critical that defendants with
19 apparently strong arguments to make on such grounds not
20 be stripped of their assets or deprived of counsel of
21 their choice.

22 Chairman Grassley, others, thank you very much for
23 inviting me to testify here today.

24 [The prepared statement of Mr. Bach appears in the
25 appendix.]

1 Chairman Grassley. I thank all of our witnesses. I
2 am going to start with questions, and then Senator Leahy.

3 Mr. Canterbury, I am going to give a commentary on
4 your testimony. Before I do that, though, at the end of
5 the commentary, I was going to ask you this question that
6 I think you have answered in your testimony twice. But
7 maybe after my commentary, you will want to say more.

8 The question was are you willing to engage in
9 constructive efforts to develop legislation that would
10 fix the problems and that you could support. I think you
11 said twice in your testimony that you would do that.

12 Mr. Canterbury. Absolutely, Chairman Grassley.

13 Chairman Grassley. This is a commentary I have on
14 your testimony.

15 Asset seizure abuses are not anecdotes. They have
16 formed the basis for successful lawsuits and they are
17 inherent in perverse incentives of equitable sharing.

18 I think most Americans would be offended by the
19 suggestion that if equitable sharing funding is not
20 replaced dollar-for-dollar, quote, "fewer state and local
21 law enforcement agencies will be able to participate in
22 Federal task forces to combat regional organized criminal
23 threats, including domestic and foreign terrorist
24 threats," end of quote.

25 The people rightfully expect that police officers

1 will always and unconditionally protect them from
2 organized crime and terrorism, period, and they expect
3 that all police officers would value their civil rights
4 more than Federal funding.

5 I expect that law enforcement would be able to
6 successfully seek replacement funding if equitable
7 sharing were eliminated, unless perhaps these were the
8 kinds of arguments being advocated.

9 Equitable sharing allows police to end run the
10 requirements that states have enacted to protect their
11 citizens from very real abuses, including bounty hunting.

12 We have 15 years of experience documenting what
13 happens when Federal legislation to prevent abuse is not
14 enacted. So I do not think we have to wait for more
15 abuses for justification of the legislation.

16 Now, this Committee has been very supportive of law
17 enforcement. You recognized this in your opening
18 statement about two bills of importance to police
19 officers. But the public is becoming increasingly
20 discontent with the record of law enforcement in civil
21 rights.

22 Already members of both parties are pushing for
23 hearings and even legislation on police brutality and
24 killings.

25 So from me, a bit of advice. I think this is the

1 wrong time for law enforcement to display any kind of a
2 tin ear and oppose needed reforms.

3 Now, you have said you were willing to work for
4 reforms and work with us and I appreciate that very much
5 and I have told you my other side of the story. And if
6 you want a few seconds to respond, I would be glad to.
7 Otherwise, I am going to ask Ms. Sheth a question.

8 Mr. Canterbury. Senator Grassley, I think as the
9 practitioners, rank-and-file officers, the appropriations
10 of funds are way beyond our capabilities. But I will tel
11 you, from the field level, we are almost down 100,000
12 officers of where we were in 1994. Crime levels are on
13 the rise everywhere and it is just a fact of life.

14 If there is not adequate funding for state and local
15 law enforcement, then our abilities to perform are going
16 to be reduced, and we see that all over the country. And
17 the biggest problem in law enforcement right now is the
18 lack of training funds.

19 And we do agree that there are implementation
20 problems with money, that it is not appropriated properly
21 within the agencies, but that is way beyond the level of
22 the rank-and-file police officers in this country.

23 But we will gladly work with you to improve that. We
24 believe that some reforms are needed and we would be glad
25 to work with your staff on that.

1 Chairman Grassley. Ms. Sheth, do you have any
2 reaction to the testimony of law enforcement today?

3 Ms. Sheth. Yes. Thank you, Chairman Grassley. I
4 agree that it is simply almost offensive to call these
5 stories anecdotes -- 62,000 cases of currency seizures on
6 our highways are not anecdotes.

7 More than 2,500 cases of structuring seizures are not
8 anecdotes. They are statistics that show the deeply
9 entrenched financial interests of law enforcement and
10 agencies and in the systemic abuse.

11 Mr. Canterbury is right that our state and local law
12 enforcement should be adequately funded, but that funding
13 should not come from this unaccountable revenue stream
14 that forfeiture provides.

15 As Ranking Member Leahy accurately described, these
16 are slush funds. And as the Washington Post reported,
17 since 2008, 298 police departments and 210 task forces
18 have seized the equivalent of 20 percent or more of their
19 annual budgets through forfeiture. This is a slush fund
20 that needs to be stopped.

21 And I would like to correct the record because
22 equitable sharing is not what is allowing -- it is a
23 windfall for state and local law enforcement. It is not
24 a replacement for their budget.

25 Deputy Sheriff in Kane County, Illinois has

1 characterized this as a tax liberating goldmine. Law
2 enforcement agencies at all levels have relied on these
3 forfeiture funds to pad their budgets.

4 Current law under the asset forfeiture fund allows
5 state and local law enforcement to recoup their expenses
6 in any joint investigation and task forces. So the
7 equitable sharing proceeds, the 80 percent they receive
8 is on top of that.

9 Chairman Grassley. Senator Leahy?

10 Senator Leahy. Thank you.

11 Mr. Canterbury, one, I want to thank you. I think
12 everybody would join this. You and Mr. Pasco have been a
13 huge help to this Committee certainly over the years I
14 have been a member and I appreciate that.

15 I also know of your own practical experience as a law
16 enforcement officer. I think you would probably agree
17 with me that if laws are being abused, that is wrong.
18 And some changes are needed. I think these changes have
19 to be done carefully.

20 We have to understand the importance of asset
21 forfeiture funds, assuming they are taken appropriately,
22 now they support joint task forces and Federal, state and
23 local law enforcement.

24 I think of the Vermont task force. We have a surge
25 in heroin trafficking in our state and we could only

1 attack it through this joint task force.

2 If you lose all asset forfeitures, what would that do
3 to joint task forces, not just in my state, but in all
4 our states?

5 Mr. Canterbury. I think it would be devastating and
6 it is just the lack of state and local money to continue
7 to fund officers that are doing county or statewide task
8 forces where they would be retained in their own local
9 jurisdictions.

10 For instance, in my state, our criminal law does not
11 allow joint use facilities in -- I do not have arrest
12 powers outside of my county, and it is only normally
13 through Federal task forces that we are able to work
14 large chunks of territory in our state and supplement
15 those small sheriff departments that could not afford a
16 narcotics or criminal investigation division to do
17 organized crime.

18 Senator Leahy. We also find that they are used to
19 help victims of crime.

20 Mr. Canterbury. Well, a number of cases. For
21 instance, in New Jersey, the 21 prosecutors there use
22 asset forfeiture money to supply law enforcement agencies
23 with NARCAN. Over 800 lives have been saved with that
24 money in New Jersey. They have also used that money for
25 drug education programs. Same thing in Florida, in

1 Broward County. They built 10 Scholastic Family and
2 Community Reading Oases to promote literacy. And a lot
3 of those funds are used in lower economic areas to help
4 with education programs, especially in the area of drug
5 resistance.

6 Senator Leahy. Thank you.

7 Now, Ms. Sheth, I listened to what Mr. Caswell said
8 about property being seized and I referenced an article
9 in today's press of another situation in Maryland.

10 If property is going to be seized, just as though
11 somebody is going to be fined or sent to prison or
12 anything else, you have got to have due process. I think
13 we would both agree on that.

14 You testified about the need to address the
15 inadequate procedural safeguards of protecting innocent
16 owners.

17 What is the single most important -- you have had
18 experience in this, so I ask you this. What is the
19 single most important procedural reform we could provide
20 in civil asset forfeiture cases?

21 Ms. Sheth. The single most effective way in terms
22 of procedure would be to restore the presumption of
23 innocence. Currently, as I said in my testimony,
24 property owners are presumed guilty and this is true at
25 the administrative level.

1 So I can walk through basically how a seizure works
2 and all the different hurdles property owners have to
3 overcome. The deck is really stacked against property
4 owners.

5 First, they are not guaranteed counsel and so
6 property owners would have to hire counsel to get back
7 property that is often worth less than the cost of legal
8 fees it would to get their property back.

9 Secondly, once the property is taken, it immediately
10 goes to an administrative proceeding and there the
11 property -- once property has been administratively
12 forfeited, it is presumed valid. Property owners have
13 the burden to file a claim timely and if they miss that
14 deadline by a single day, their property is automatically
15 forfeited. And even when they get to court -- so even if
16 they do timely file a claim, it gets out of the
17 administrative procedures and into court, the burden is
18 on them to show that they affirmatively did not know
19 about the illegal activity or did not consent to it.

20 So these procedures are all stacked against property
21 owners to the benefit of the government, and that is not
22 the way it should be when we are talking about innocent
23 property owners.

24 Senator Leahy. Thank you. I think, Mr. Chairman,
25 both you and I would agree that we want to balance the

1 appropriate needs of law enforcement, but also the basic
2 rights of people. I think that can be done, but I will
3 work with you on this.

4 Chairman Grassley. And we know in the Senate if we
5 do not get some bipartisan agreement, nothing is going to
6 happen. So we will have to continue to talk.

7 Senator Leahy. Thank you.

8 Chairman Grassley. Senator Lee?

9 Senator Lee. Thank you, Chairman Grassley, for
10 organizing this hearing on this very important topic.

11 Thanks to each of you for coming to talk to us about
12 it today.

13 The Constitution says that no person shall be
14 deprived of life, liberty or property without due process
15 of law. Despite this protection that we have in our
16 Constitution, the testimony today and recent news reports
17 indicate that due process is often ignored when it comes
18 to civil asset forfeiture.

19 While we all agree that crime should not pay, Federal
20 forfeiture laws have enabled and even, in some cases,
21 incentivized law enforcement practices that have great
22 potential to threaten our liberty.

23 That is why I am a cosponsor of the FAIR Act, along
24 with my colleague, Senator Rand Paul. I look forward to
25 working with my fellow legislators to eliminate the

1 profit incentive that forfeiture creates and to adopt
2 procedures that have a greater capacity to protect our
3 constitutional rights.

4 Ms. Sheth, I wanted to ask you a few questions. The
5 Department of Justice recently announced changes to its
6 equitable sharing program and you have described how
7 exceptions to that policy still allow equitable sharing
8 with the states.

9 But what about the Federal system? To what extent is
10 the profit incentive a problem within the Federal system
11 itself and do you think we need to reform the ability of
12 Federal agencies to keep the money and the property that
13 they seize in civil asset forfeiture?

14 Ms. Sheth. Yes. Absolutely, yes. Any reform that
15 does not target that profit incentive at the Federal
16 level will be ineffective. That was the problem with the
17 CAFRA reform back in 2000 and that will continue to be a
18 problem until it is addressed.

19 It is what is driving and fueling the abuse that we
20 see. Before 1985, proceeds from civil forfeitures went
21 to a general fund where Congress had control over how
22 that money was spent. But in 1985, the law was changed
23 to create the asset forfeiture fund, giving the Justice
24 Department direct control, what Chairman Grassley
25 referred to as that direct connection between forfeiture

1 proceeds and how it is spent.

2 And since that time, the funds have grown
3 exponentially. In 1986, after the forfeiture fund was
4 created, there was only \$93.7 million in deposits.
5 Twenty years later, annual deposits regularly top over \$1
6 billion. And the same is true with the Treasury
7 forfeiture fund.

8 It is not enough to simply end equitable sharing.
9 Congress needs to reclaim its control and oversight over
10 this unaccountable funding stream.

11 Senator Lee. So you are talking about a very sharp
12 departure, a very sharp shift that happened. You had
13 pre-1985 and you had post-1985 and you saw roughly a
14 tenfold increase.

15 Ms. Sheth. Exactly.

16 Senator Lee. Or more as a result of that change.
17 That is fascinating. These things, I take it, you do not
18 regard as coincidental.

19 Ms. Sheth. No. I think there is a direct
20 correlation. It is a financial incentive. People
21 respond to incentives.

22 Senator Lee. Now, many of the problematic
23 forfeitures tend to arise in the context of structuring
24 and the Department of Justice and IRS recently announced
25 new policies regarding structuring forfeitures.

1 Are these policies adequate, in your opinion, and if
2 not, what additional reforms do you think ought to be
3 made?

4 Ms. Sheth. No. Again, these policy changes are not
5 adequate. Again, they could be reversible by the next
6 commissioner or the next administration. They need to be
7 codified. But even these policy changes contain
8 loopholes for exceptional cases.

9 For example, the IRS Commissioner himself testified
10 that those exceptional cases could include repeated
11 instances. So we could have someone like Carole Hinders,
12 again, still fall under that same trap.

13 And to give you an idea of the scope of the problem,
14 annual seizures have increased fivefold over the 8 years
15 from 2005 to 2012. In at least one-third of those cases,
16 there is no claim of any criminal activity besides a
17 series of cash transactions under \$10,000. And 80
18 percent of those structuring cases done by the IRS are
19 civil, not criminal.

20 So that is certainly something that needs to be
21 addressed.

22 In addition, those policy changes are not retroactive
23 to pending cases. So people who currently already had
24 the injustice done to them have no resource.

25 The heart of the problem really is to clarify the

1 standard of intent that is required. To be guilty of a
2 crime, a person has to have a guilty mind or a mens rea
3 and right now under current law that is not there.

4 The law needs to be changed to show that willfully
5 evading the reporting requirements by structuring
6 transactions is what is a felony.

7 Senator Lee. My time has expired. But if we get
8 another round or if you have an opportunity in response
9 to questions from my other colleagues, I want to talk to
10 you more later, if we get the chance, about what we can
11 do to undo the problem that you describe in which people
12 are effectively deemed guilty until proven innocent and
13 what we need to do to shift that burden of proof back
14 around.

15 Thank you, Mr. Chairman.

16 Chairman Grassley. I think we will have time for a
17 second round, if you want a second round.

18 Senator Tillis?

19 Senator Tillis. Thank you, Mr. Chair.

20 To kind of follow-up on the discussion that Senator
21 Lee was having of pre-1985 and post-1985, I just want to
22 make sure I have got the numbers right. I think asset
23 forfeitures in the 1986 timeframe was about \$93 million,
24 \$94 million. By 2008, it was \$1 billion. And by 2010,
25 it was \$2.5 billion. There has been a real escalation.

1 Ms. Sheth. And currently that is \$4.4 billion
2 annually in this last year.

3 Senator Tillis. Mr. Canterbury, I just wanted to
4 get your sense as to the Fraternal Order of Police. Are
5 they really making a judgment about the fairness and the
6 appropriateness of seizures or are they concerned with
7 the funding risk that would come from refining it and
8 bending that curve in the other direction?

9 In other words, is there a strong ideological bias
10 towards the way we do it today or is it really a concern
11 of making sure law enforcement officers have adequate
12 funding?

13 Mr. Canterbury. Well, I think it is adequate
14 funding is always one of our number one issues. And we
15 do not disagree that there can be due process issues that
16 need to be resolved or strengthened. We do not want
17 innocent people to lose their money, Senator Tillis.

18 Senator Tillis. Probably this question is either
19 for Ms. Sheth -- is that the correct pronunciation?

20 Ms. Sheth. Yes.

21 Senator Tillis. Or for Mr. Bach. And it has to do
22 more with -- you know, we talk about the standard of
23 proof and discussion about how we should look at reforms
24 there.

25 But what about earlier in the cycle? In other words,

1 what kind of discussions or recommendations are there
2 with respect to before the seizure decision gets made?

3 In other words, when you are out there and there is
4 someone about to make a decision based on a relatively
5 low standard or a standard that certainly biases someone
6 who is in a position to make a seizure decision, has
7 there been discussion about moving further up into the
8 chain there so you have fewer cases like Mr. Caswell's
9 case that you are actually adjudicating? Any current
10 recommendations or focus on that?

11 Ms. Sheth. Certainly, the problem is that the
12 standard is probable cause to seize and police officers
13 and law enforcement community and the courts have thought
14 that simply carrying too much money can be probable cause
15 of a crime, even when it is not connected to anything
16 else, even when no drugs are found or drug paraphernalia,
17 and that is a huge problem.

18 In terms of moving things up in the timeline, even
19 after it is seized, there should be a prompt opportunity
20 to contest that seizure, and that is something that the
21 Federal courts in New York, in DC, in Chicago have all
22 enacted, that the due process clause requires a prompt
23 opportunity for people like Mr. Caswell or innocent
24 property owners to show that even if the police had on-
25 the-ground probable cause determination, there is other

1 evidence out there that shows I am innocent.

2 Senator Tillis. Mr. Bach, why do you not go ahead
3 and respond? I have got another point.

4 Mr. Bach. [Off microphone] very process which
5 proceeds with just the prosecution. The defense, the
6 defendant did not have an opportunity to participate in
7 the determination or even a right to be heard.

8 So a determination of probable cause is made behind
9 closed doors, in secret by a grand jury, that is the way
10 our process works, and then the restraint is imposed as a
11 result of that determination and only then do we get to
12 the question of whether the defendant can have any say.
13 And now the Supreme Court has said they can only have say
14 on a very limited aspect of that, but not more.

15 Senator Tillis. By the way, Mr. Canterbury, when I
16 am thinking about these seizures, I am not only thinking
17 about a man or woman in uniform making this decision, I
18 am thinking about IRS, I am thinking about, at least in
19 one case in North Carolina where EPA and Homeland
20 Security did a joint raid on a couple about an hour from
21 my home. So I am thinking more broadly, not just in
22 terms of the area that you would focus.

23 In Mr. Caswell's case, once you have gotten to the
24 point to where you are trying to seek relief, what kinds
25 of things could we do to expedite the process or make it

1 less burdensome for someone who was in Mr. Caswell's
2 position in terms of direction of reforms?

3 Ms. Sheth. Certainly, providing counsel would be a
4 huge step. Beyond that, it would be to shorten the
5 timeframe. The government has a significant amount of
6 time to file a forfeiture action after property has been
7 seized or restrained and to shorten that timeframe while
8 providing counsel so that it does not burden the property
9 owner to try to comply with those timelines.

10 In addition, Mr. Caswell's case is a great example of
11 how even the current law has been undermined by judicial
12 interpretation. So under current law, forfeitures are
13 very broad. They consider all sorts of facilitating
14 property.

15 CAFRA was intended to mean that facilitation would be
16 instrumentalities. So the house that is used to store
17 drugs, the place that is used to manufacture drugs, not
18 simply incidental use of the property, for example, by
19 third-party renters. And under current law, that was a
20 very difficult thing to prove.

21 That substantial connection needs to be clarified and
22 we would recommend codifying the decision in Caswell into
23 current law.

24 Senator Tillis. Thank you. Thank you, Mr. Chair.
25 Chairman Grassley. Senator Sessions?

1 Senator Sessions. Thank you, Mr. Chairman.

2 There have been concerns about forfeiture and I think
3 we should listen to those concerns. But, colleagues, it
4 is unthinkable that we would make it harder for the
5 government to take money from a drug dealer than it is
6 for a businessperson to defend themselves in a lawsuit.

7 It is probably cause, if you are sued for \$1 million
8 in a business, that is the standard. So the standard of
9 proof, I think, is appropriate for forfeiture cases and
10 would certainly argue against that.

11 It is perfectly appropriate, as you try to deter
12 illegal behavior, to take the profit out of it. Criminal
13 violators ought not to be able to keep their ill gotten
14 gains.

15 I mean, you catch somebody with \$200,000 and a dope
16 dealer, he should not keep the money. He should not be
17 able to use the money to hire a lawyer with anymore than
18 a bank robber gets to use the money he got from the bank
19 to pay for his lawyer or give to his children or anything
20 else he might like to do with the ill gotten gains.

21 It is a historic part of American and English law
22 before America was founded that the action -- you can use
23 actions against the thing. It is not a criminal case.
24 It is not an action to put somebody in jail. It is an
25 action in rem against the product; in this case, the

1 product of the illegal transactions.

2 And the way the cases work, colleagues, so often is
3 that individuals whose money is stolen or money they may
4 have stolen or taken by the Federal officers, that money,
5 you make a claim against it. Do you not, Ms. Sheth, Mr.
6 Bach? You make a claim to get your money returned.

7 Ms. Sheth. To correct the record, actually, the
8 standard is preponderance of the evidence, not probable
9 cause. But what you are describing, when the drug dealer
10 is actually convicted, that is fine. Once you actually
11 get a conviction, that it is, in fact, a drug dealer,
12 then that is great and it is preponderance of the
13 evidence.

14 Senator Sessions. Well, you would agree that it is
15 a separate action.

16 Ms. Sheth. It is a separate action.

17 Senator Sessions. You have got two things. One
18 thing is are you trying to put -- or you have the proof
19 to put somebody in jail. Another thing is an action in
20 rem against the cash that may have been seized and as a
21 result of that, you get a court hearing.

22 Ms. Sheth. So if I could just explain the origins
23 of this, because I think there is a little bit of a
24 misunderstanding.

25 These are archaic laws that are based on the legal

1 fiction that property itself is guilty. At the time of
2 our founding, they were limiting to enforcing customs
3 duties because they provided 80 to 90 percent of our
4 revenue.

5 Senator Sessions. But it is the same principle,
6 absolutely the same principle of ancient origin.

7 Ms. Sheth. It is the same principle that --

8 Senator Sessions. You are correct. And you are not
9 taking somebody's liberty and the person, all they have
10 to do is to make a claim for the property and if they can
11 prove it is a lawful source, it is produced from a lawful
12 source or otherwise, they get to keep it. If they cannot
13 prove that, then they do not.

14 That is what happens. And what happens so often in
15 the cases is -- Chief, I am sure you have seen it -- the
16 person with the money never shows up to even claim the
17 money. Is that not correct?

18 Mr. Canterbury. A lot of these cases are that way
19 and/or they cede the money over in the investigation.

20 Senator Sessions. And the reason is because they do
21 not have any basis to show it was anything other than
22 dope money. That is the problem and 95 percent of the
23 cases, I would suggest, are cash seized in drug-related
24 transactions. A large percentage of them are not
25 contested because they have produce documents to say

1 where they got it.

2 Well, I got it from the lottery. Well, what lottery?
3 Your name is on a check. Let us see a copy of the check.
4 What bank did you deposit it to? Who cashed the check?
5 They do not have an answer for that. They have done
6 nothing in their lives but sell dope and they made a
7 bunch of money from it.

8 What is wrong, Chief -- once the money is forfeited,
9 you do not give it back to the person to purchase the
10 drugs. That would not make good sense. So the
11 government takes the money. And what is wrong with
12 having the law enforcement officers who did the
13 investigations and expended taxpayers' money to prove the
14 case and seized this illegal drug money, what is wrong
15 with them keeping the money?

16 Mr. Canterbury. We do not see anything wrong with
17 it.

18 Senator Sessions. I do not either. Now, this
19 Administration -- is my time up? The Administration has
20 even stopped adopting cases that are products of state
21 officers' work. A Federal prosecutor, as I was, has
22 interstate subpoena power. They have trained prosecutors
23 who are skilled at handling these cases.

24 They go before Federal judges who do not cheat people
25 and they are able handle the case where a busy district

1 attorney with a murder case on his docket tomorrow is not
2 often able to do.

3 I think it makes no sense to say that the Federal
4 Government cannot prosecute the case and share some of
5 the proceeds with the local police officer who helped
6 maybe interdict a major drug dealer.

7 Chairman Grassley. Senator Flake?

8 Senator Flake. Thank you, Mr. Chairman. Thank you
9 all. I apologize for not being here earlier and I
10 apologize if I am plowing old ground here, as well.

11 I wanted to first make a comment. I think we all
12 understand that, you are probably right, about 95 percent
13 of this is maybe dope money or whatever else and they
14 never come to claim it because they cannot prove a lawful
15 source, but I think we are all concerned or ought to be
16 concerned about the other 5 percent and I think that we
17 need to make sure that their rights are protected and
18 sometimes I think they get swept up into this and go
19 through a process they should not have to go through in
20 order to get their lawful property back.

21 But in January of 2015, DOJ had announced its revised
22 position on adoptive seizures and this policy included a
23 public safety exemption for items such as firearms,
24 ammunition and explosives. I want to just better
25 understand this a little bit.

1 So if I could just understand, of the overall
2 adoptive seizures, do you know how many of these involved
3 items included in the public safety exemption? We will
4 start on the left.

5 Ms. Sheth. Unfortunately, no. But we do know that
6 most of the seizures are not actually adoptive seizures
7 under equitable sharing. Most of them are what are known
8 as joint investigative seizures and those are about 80
9 percent.

10 So even under the new policy, though, to address the
11 public safety exception, the reason it is not
12 satisfactory is because even beyond those four non-
13 exhaustive categories of firearms, ammunition, explosives
14 and property related to child pornography, the policy
15 gives the Assistant Attorney General of the Criminal
16 Division sole discretion to authorize exceptions in
17 public safety beyond those categories.

18 So there is no real standard of how that should be
19 enforced. And since it just was announced, it is too
20 early to say how it is going to be enforced.

21 Senator Flake. Criminal forfeiture, is that
22 sufficient to take care of these contraband items?

23 Ms. Sheth. Exactly. Criminal forfeiture would be
24 sufficient and there is no need for the public safety
25 exemption for adoptive seizures.

1 Senator Flake. And are you aware of any state that
2 does not allow for civil asset forfeiture of public
3 safety items like this?

4 Ms. Sheth. North Carolina does not allow for civil
5 forfeiture, period, and many states are now engaged in
6 comprehensive reform, including the District of Columbia,
7 to reverse this trend of the abuse of civil forfeiture.

8 Senator Flake. Mr. Canterbury, you mentioned in
9 your testimony that you are ready to work with this
10 Committee on this issue, specifically improving due
11 process.

12 One such proposed reform is increasing the burden, as
13 we have talked about here, from preponderance of the
14 evidence to clear and convincing. But you testified that
15 FOP does not support increasing this standard at this
16 time.

17 Does that mean at some point we can get to it or what
18 is your feeling there?

19 Mr. Canterbury. We would like to have further
20 discussions and we would also like to separate the
21 criminal asset forfeiture funds from civil asset where
22 there is no criminal activity involved at all, and we
23 would also like to see what the DOJ changes actually do
24 before we jump to any conclusions.

25 They have only been in existence a few months. When

1 they came into existence, we had very little to say about
2 them and I think you would have expected, if we were
3 concerned about them, not adopting our criminal cases, we
4 would have been here raising that issue.

5 But we do not think they have been around long enough
6 to really demonstrate whether they are going to work and
7 we believe some of those changes are going to slow down
8 innocent victims from having their assets taken.

9 Senator Flake. Thank you, Mr. Chairman.

10 Chairman Grassley. We will do a second round and I
11 have just a couple of questions that I want to ask. I am
12 going to start with Mr. Caswell.

13 Of course, I express sorry for all the trouble you
14 had to go through because of law enforcement overreach.
15 Could you give us the reasons why you think your property
16 was targeted for asset seizure perhaps compared to any
17 other properties you might know something about?

18 Mr. Caswell. Well, there is a DEA agent that
19 testified that they will not go after a property unless
20 the owner has at least \$50,000 worth of equity in it.
21 Now, the motel was paid off and I just sold it for \$2.1
22 million, and that is what they were after.

23 Right up the street from us there is as Motel 6 and a
24 Home Depot that have had more problems than we have had
25 and they did not go after them. They gave the Motel 6 a

1 warning. They never gave us a warning. They never came
2 to me and said I ought to be doing anything different or
3 all that.

4 They just saw us as a soft target with a big
5 financial gain for themselves and that is why I feel they
6 went after us instead of any other businesses there. It
7 was all about money. It was not about drugs.

8 Chairman Grassley. And for you, Mr. Bach, did the
9 hearing process that the second circuit provided before
10 Kaley work efficiently?

11 Mr. Bach. It works every efficiently. Often, there
12 is no need for a court to get involved. Just the
13 prospect of a hearing encourages the defense lawyer and
14 the prosecutor to talk to each other, figure out what is
15 reasonable in a given case, and work it out without
16 having to take any of the court's time.

17 So it is very efficient.

18 Chairman Grassley. I think that I should call on
19 Senator Perdue, because you have not had your first
20 chance to ask questions.

21 Senator Perdue, are you ready to go? We were doing a
22 second round, but since you were not here for the first
23 round, I ought to let you in.

24 Senator Perdue. I am, Mr. Chairman. Thank you so
25 much for the forbearance.

1 First, thank you all for being here. I apologize I
2 missed your opening testimony.

3 Am I correct, Ms. Sheth, that in understanding from
4 your testimony that you want to see not only the
5 elimination of the equitable sharing program, but also
6 all forms of civil asset forfeiture at the Federal level?
7 Would you speak to that, please?

8 Ms. Sheth. No. Ideally, that would be great to get
9 rid of civil forfeiture entirely, but no. What we are
10 proposing is to get rid of the funding, restore
11 congressional control over forfeitures both in criminal
12 and civil. So that proceeds from forfeiture go directly
13 back to Congress, for this body and the House of
14 Representatives to decide how that money should be spent,
15 not the Department of Justice or Treasury.

16 Senator Perdue. So if it comes off the table or is
17 reduced dramatically, what are the top two or three
18 reforms that you would see to the current system for the
19 Institute for Justice that you guys would like to see?

20 Ms. Sheth. Most significantly is to eliminate that
21 profit incentive and the ability of the DOJ and the
22 Treasury Department to self-finance, by requiring
23 proceeds to go to the general fund, and to abolish
24 equitable sharing.

25 Equitable sharing was enacted back in 1985 and at

1 that time, state and local law enforcement did not have
2 their own state forfeiture laws. So there is no reason
3 why they need to rely on Federal laws to do an end run
4 around their own state laws.

5 Additionally, we should restore the presumption of
6 innocence by placing the burden of proof on the
7 government to show that the property owner actually was
8 guilty or was a drug dealer or was somehow involved in a
9 crime.

10 We should also provide a right to counsel, especially
11 for those who cannot afford counsel. Without the
12 assistance of counsel, Mr. Caswell might have thrown in
13 the towel and settled that forfeiture action.

14 And finally, we need to raise the burden of proof on
15 the government from preponderance of the evidence to at
16 least clear and convincing, which is the highest standard
17 under civil proceedings.

18 And finally, to clarify the men rea requirement for
19 structuring and also provide for a prompt hearing, not
20 just for criminal forfeitures in the context of Kaley,
21 but also in civil forfeitures so that property owners
22 have an opportunity to contest the seizure of their
23 property.

24 Finally, we should also do some transparency and beef
25 up the reporting requirements so we understand how the

1 money is being spent and how forfeiture is being used by
2 both the Department of Justice and Treasury.

3 Senator Perdue. Would you give us your observations
4 on the Kaley decision from the Supreme Court last year,
5 as well, briefly?

6 Ms. Sheth. Sure. I agree completely with Mr. Bach
7 that it was wrongly decided. And I will go one step
8 further, because it is not just the right to counsel that
9 is at stake in those situations.

10 We are talking very much about punishing people
11 before trial. They have not been judged to be guilty by
12 a jury and their assets are being taken, property is
13 being taken from them without that finding of guilt, and
14 they have no opportunity to contest that.

15 And so beyond just they should have an opportunity to
16 contest the seizure, when that money is needed to provide
17 counsel, what about the person that needs that money to
18 pay their rent, that needs that money to pay their
19 utilities or pay their mortgage? Are they supposed to be
20 penalized without any sort of opportunity?

21 So Kaley should have been decided in terms of the
22 Sixth Amendment right to counsel, but also, more
23 importantly, the Fifth Amendment right to process to
24 protect property.

25 Senator Perdue. My time is about up. Mr.

1 Canterbury, could you give us a brief -- discuss the
2 FOP's position on recent policy changes made by the
3 Attorney General?

4 Mr. Canterbury. Sir, we are waiting to see what
5 happens with them. I mean, they have been put in place.
6 They have only been there since January and we really do
7 not have any anecdotal information to determine whether
8 or not they are going to assist in the problem.

9 So we just think they need to be there a little bit
10 longer so we can see what the results are.

11 Senator Perdue. In your organization's view,
12 though, what is the right way to find the balance here?

13 Mr. Canterbury. As far as the equitable sharing, it
14 is a funding issue for law enforcement. And we are asked
15 to do a tremendous number of things that would normally
16 be either Federal or state responsibility and without the
17 funds that are derived from equitable sharing, a lot of
18 those things are going to slip through the cracks.

19 Senator Perdue. I see. My time is up, Mr.
20 Chairman. Thank you.

21 Chairman Grassley. [Off microphone] 1:30
22 appointment. So it will be Senator Lee and then Senator
23 Sessions and then Senator Flake, if all of you want to
24 ask questions. Go ahead, Senator Lee.

25 Senator Lee. Ms. Sheth, I would like to kind of

1 pick up where we left off before and just talk about what
2 we need to do to solve the problem of burden shifting.
3 What would be the ideal kind of legislation, as you would
4 envision it, and how would it change the burden?

5 Ms. Sheth. Sure. At initial step, the
6 administrative forfeitures should be wholesale revised.
7 The burden should not be on property owners from the
8 beginning to respond to an agency with a direct financial
9 interest in the outcome of this.

10 When property is taken, it should be the burden of
11 the government to file -- at least take the initial step
12 and show -- file a complaint in Federal court, just like
13 all other civil proceedings.

14 Beyond that, once the government -- the standard of
15 proof in civil proceedings should be elevated from mere
16 preponderance of the evidence to clear and convincing,
17 and then the government should also bear the burden of
18 showing that the property owner knew about or consented
19 to the illegal activity.

20 Under this regime, there would still be an
21 affirmative defense for innocent property owners like Mr.
22 Caswell to show that they took all reasonable measures to
23 mitigate that or to stop the illegal use of their
24 property, but the burden should not be on them to prove a
25 negative that they did not know about something.

1 Senator Lee. So under the status quo as it
2 operates, in your experience, how hard is it generally
3 for an innocent person to get his or her property back
4 once it has been seized in a civil asset forfeiture
5 proceeding?

6 Ms. Sheth. It is very difficult. It is extremely
7 hard because, as I testified before, the deck is stacked
8 against property owners. You are not guarantee counsel
9 and often the property is worth less than the amount of
10 legal fees.

11 The agency will immediately start administrative
12 forfeitures and the burden is on property owners to
13 timely file a claim.

14 There have been numerous reports of even the notices
15 that property owners get are unclear. People do not know
16 what agency of all the -- between the state and local
17 that seize their property, where are they supposed to
18 file this claim. And there is no good cause exception.
19 If the property owner misses that deadline by a single
20 day or even just minutes late from the filing deadline,
21 it is administratively forfeited and that is it.

22 If they are lucky enough to survive all these
23 loopholes and make it to Federal court by timely filing a
24 claim, then, again, these burdens are still stacked
25 against property owners.

1 And even in the end, they might be able to recover
2 attorney's fees, but that provision has also been gutted.
3 And so very frequently property owners do not actually
4 get -- recover their attorney's fees under CAFRA.

5 So it is a system that is stacked against property
6 owners and that needs to change.

7 Senator Lee. And just to be clear, you do not, I
8 take it, have an problem with the government seizing
9 property that was involved in a crime, seizing property
10 from someone who was involved in a crime and where guilt
11 is adequately proven.

12 Ms. Sheth. Right. And that is criminal forfeiture
13 and nothing that we are talking about today or that the
14 Institute for Justice recommends is changing criminal
15 forfeiture. This is al pursuant to civil forfeiture,
16 this archaic legal fiction that property itself that
17 cannot act or think is somehow guilty.

18 Senator Lee. Right. My understanding is that some
19 trace the civil forfeiture laws that we have today back
20 to what was known at common law as the Deodand, which was
21 based on a theory that the object -- an object that was
22 used in killing somebody, sometimes by accident, needed
23 to be forfeited and seized, in part, because of a
24 superstition that it was evil, the thing itself was evil.

25 Do you share that view that that is sort of where it

1 came from?

2 Ms. Sheth. Yes. That is exactly where it came
3 from. It was the medieval origins, the superstitious
4 belief that objects independently acted to commit crimes.

5 In the U.S., civil forfeiture traces its origins to
6 the practical necessity of obtaining jurisdiction over
7 property when the owner was overseas or was not available
8 to have jurisdiction over, and that justification is no
9 longer true.

10 There are many cases the people that we are talking
11 about are right there. Courts have jurisdiction over the
12 person and can bring a criminal forfeiture action.

13 Even during prohibition, which expanded forfeiture,
14 it was limited to instrumentality, so the vehicle that
15 was transporting illegal liquor. It was not this catch-
16 all of all property, no matter how tenuously connected to
17 a crime. And the Supreme Court has made clear over and
18 over again that forfeiture is drastic. It is not
19 favored. In fact, is a draconian method.

20 So we do need to rein it in from the 1980s and this
21 constant expansion and proliferation.

22 Senator Lee. Thank you. I do not know who is next.

23 Senator Sessions. I am next, right?

24 Well, look, Chief, I am very unhappy. You need not
25 to be defensive about this. What has been going on with

1 taking and seizing and forfeiting through a government
2 judicial process, illegal gains from criminal
3 enterprises, is not wrong and it should not have a burden
4 of proof higher than a normal civil case and should not
5 have a burden of proof higher than probably cause, which
6 is what you can indict somebody and put them in jail for
7 murder on.

8 It should not be a higher standard than a police
9 officer can arrest a person, take them to the jailhouse
10 and lock them up on probable cause.

11 I am amazed that the Department of Justice would say
12 they won't adopt these cases anymore. This is going to
13 fix something? So you have a local district attorney and
14 a local police officer in a small town, they catch a guy
15 hauling drugs and he has got frequently \$.5 million or \$1
16 million in cash.

17 He is coming from Texas or Miami. The local DA is
18 going to be facing a big town lawyer. He does not have
19 the ability to issue subpoenas to Miami or Laredo or
20 Phoenix or New York. So the case goes to a Federal
21 court.

22 The money is taken. The claim is made to the Federal
23 officials. It goes before a Federal judge and you have a
24 case and they have Federal prosecutors using Federal law
25 and there is no problem with dual jurisdictions.

1 Federal law and state law compliment each other all
2 the time. And so the case goes up and if the guy can
3 prove that he took it out of his bank account, prove it
4 was a bonus from his work, prove it is his saving
5 account, he gets the money back.

6 The Department of Justice has stopped having Federal
7 prosecutors take these cases over, leaving it oftentimes
8 on overworked local police officers and prosecutors,
9 local county attorneys. And there is nothing wrong with
10 -- once the forfeiture is being accomplished, I think
11 then that the money be given to the officers who helped
12 develop the case.

13 You can say that creates an incentive, it does. And,
14 Mr. Caswell, I am not saying there cannot be abuses in
15 this system. Humanity runs systems and we have had
16 examples of police officers shooting people without
17 justification. We have seen that in the news. So things
18 do happen. But that does not mean you eliminate the
19 ability to of police officers to arrest somebody.

20 All right. Mr. Caswell, I think we should be open
21 about this. We have a letter from the Alabama Law
22 Enforcement Agency, Spencer Collier, who is the head of
23 that agency, strongly supporting continuing the law and
24 pointing out the moneys that are often seized from these
25 people.

1 He said in his letter to me, to Senator Grassley, in
2 just the past 2 weeks, state law enforcement officers --
3 this means the state troopers -- initiated stops that led
4 to \$750,000 in seizures. Most people do not carry
5 \$750,000 in their car.

6 So I have that letter. I would offer it to the
7 record. And a letter from the Major City Chiefs
8 Association, the Major County Sheriffs Association, the
9 International Association of Chiefs of Police, the
10 National Sheriffs Association, the National District
11 Attorneys Association, the Association of State Criminal
12 Investigative Agencies, and others will be, I am sure,
13 commenting once they find out the dramatic actions that
14 would be taken that would undermine, I think, a good
15 procedure.

16 [The letters referred to follow:]

17 *****COMMITTEE INSERT*****

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1 Senator Sessions. Now, I do think our colleagues
2 are correct to say are there problems. Structuring can
3 be abused. I think it has always been complained about
4 and people have made some valid points about it.

5 The IRS has great powers and maybe that is necessary.
6 The very concept of -- if a hotel owner is using the
7 hotel or his house, a homeowner, to move drugs, it is
8 forfeitable. Now, if the house or the motel has no
9 equity or it is being rented, then you are not going to
10 have a forfeiture action, obviously, undertaken because
11 there is no equity to receive, to obtain. There is
12 nothing, I think, wrong with that.

13 So I would say we -- and, Ms. Sheth, on the standard
14 or proof, I think you are correct. Probable cause to
15 arrest someone or to indict someone is the standard.
16 Preponderance of the evidence is a higher standard than
17 that. You have to have that to prevail in a forfeiture
18 case, right?

19 Ms. Sheth. Only when it is in court and most of
20 these are done administratively without any judicial
21 supervision. In fact, that is 64 percent of cases.

22 Senator Sessions. Well, they end there, but they
23 can appeal to court, can they not?

24 Ms. Sheth. No. In fact, no. If they have missed
25 the deadline --

1 Senator Sessions. Well, if they miss the deadline.

2 Ms. Sheth. Because they do not have counsel and
3 they do not know --

4 Senator Sessions. If you miss the deadline you are
5 out. Surely you know that. You can get the court on
6 your cases and clear and convincing is an extraordinarily
7 high standard and I think should not be adopted, when
8 Senator Perdue's business can be sued on a probable cause
9 standard.

10 Thank you.

11 Senator Flake. Thank you. Just one quick question.
12 In 1999, the total value of asset forfeiture recoveries
13 by the Department of Justice was approximately \$535
14 million. Then in 2000, when the Reform Act was passed,
15 that number dropped to \$312 million. So \$535 million to
16 \$312 million, a decrease of about 40 percent.

17 In 2001, total asset forfeiture by DOJ was under \$200
18 million, a decrease of 36.3 percent. However, in 2008,
19 asset forfeiture recoveries surpassed \$1 billion. Based
20 on those numbers, it looks like reforms were initially
21 successful, but then it ramped up again.

22 Mr. Bach, do you have any explanation for that or why
23 has it gone this way?

24 Mr. Bach. That is not something that I have studied
25 in particular. Maybe Ms. Sheth can shed some light on

1 that.

2 Senator Flake. Ms. Sheth?

3 Ms. Sheth. Yes. It is precisely because of this
4 profit incentive. With all due respect, the problem with
5 law enforcement receiving this money directly is because
6 it skews law enforcement priorities from pursuing justice
7 and pursuing criminals to padding their own budget, and
8 this is best seen perhaps by an investigation that
9 Tennessee did of its local law enforcement and the drug
10 task forces.

11 It found that officers in the drug task force were 10
12 times more likely to patrol the westbound lanes of I-40
13 rather than the eastbound lanes. And why is that? It is
14 because the illegal drugs from Mexico were being
15 transported into Nashville on the eastbound lanes and it
16 was only on the westbound lanes that the money was
17 flowing.

18 So these civil forfeiture laws are actually skewing
19 law enforcement objectives from curtailing the influx of
20 drugs to pursuing cash. And it is my opinion and I think
21 the opinion of most Americans that we should be enforcing
22 both sides of that highway, stopping drugs, as well as
23 stopping the money and disarming criminals.

24 It is probably no surprise then that there are low
25 clearance rates for violent crimes because instead of

1 pursuing solving these kinds of violent crimes like
2 murders, instead we are focusing on a drug trade, but
3 even not for drug kingpins, for low level activity, and
4 that needs to stop by disincentivizing the profit
5 incentive.

6 Senator Flake. Mr. Canterbury, do you dispute the
7 findings of that study?

8 Mr. Canterbury. Senator, we are just trying to
9 catch criminals. Whether they have got the money or the
10 cash or the drugs, if they involved in criminal activity,
11 as far as we are concerned, they are criminals. And I
12 think eastbound-westbound does not matter. We are trying
13 to get both off the street. If you have got the money,
14 you are keeping more drugs off the street, as well.

15 And I disagree with the violent crime. I think law
16 enforcement in this country has done a great job on
17 violent crime. Those stats are down. Larceny crimes are
18 up, burglaries are up, but violent crime has been down.

19 So I think that is quite a stretch.

20 Senator Flake. But this study showing 10 times more
21 likely to patrol westbound lanes as opposed to eastbound
22 lanes, do you think there are problems with the
23 methodology of the study?

24 Mr. Canterbury. I have not seen the study, but it
25 sounds to me like there would be. It does not sound like

1 something that local law enforcement would be engaged in.
2 When you are doing highway interdictions to look for
3 money or drugs, it is the exact same criminal
4 characteristics. We do not smell money if it drives by.

5 Senator Flake. Ms. Sheth, you support that study.

6 Ms. Sheth. Yes. I stand by this study. I would
7 also like to note the hypocrisy that basically carrying
8 too much cash has become a crime and if people cannot
9 document the way they spent it or the way they have
10 received it, it can be seized by the government.

11 Yet, the Treasury Department and the Justice
12 Department have not kept good of their own record-keeping
13 of how they are spending forfeiture funds, and that kind
14 of hypocrisy shows the abuse of civil forfeiture laws and
15 there needs to be more transparency in reporting so we do
16 know exactly how the money is being spent and how
17 highways are being enforced.

18 Senator Flake. Thank you. Back to you, Senator
19 Sessions.

20 Senator Sessions. Thank you. I think we should
21 listen to the concerns that have been raised. I do not
22 say that no change should be done in this process, but
23 police officers go where the criminals are. If they are
24 on the west lane hauling dope money by the millions of
25 dollars, I do not see anything wrong with somebody making

1 that choice that this is an avenue drug dealers use a
2 lot.

3 So we will listen. I know Senator Grassley is
4 serious about this issue. Members of the Committee care
5 about it and want to make sure that this area is properly
6 and professionally handled. But we will have to make
7 some big decisions. Are we going to end sharing? I
8 think that would be a huge detriment to law enforcement.

9 I think it is a big mistake not to allow the Federal
10 Government to adopt cases where they can assist their
11 local law enforcement brothers.

12 We take gun cases in Federal court. If it is a
13 violation of state law or Federal law, Federal court
14 cases have mandatory sentences and many of those are
15 adopted in Federal court. We are not going to stop that.
16 I do not think it is wrong for the Federal Government to
17 adopt state cases.

18 Thank you all. We will keep the record open for 1
19 week for further questions.

20 We are adjourned.

21 [Whereupon, at 11:46 a.m., the hearing was
22 concluded.]

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