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Challenging Disproportionate Forfeitures

Part One of a Two-Part Article

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In recent years, the U.S. Supreme Court has demonstrated a renewed willingness to police the boundaries of the law of asset forfeiture in order to make sure that defendants are treated fairly. In *Honeycutt v. United States*, 137 S. Ct. 1626 (2017) (http://bit.ly/2GKQ5so), the Supreme Court rejected the argument that a federal criminal forfeiture statute permits joint and several liability for criminal asset forfeiture judgments, thereby protecting defendants who were only marginally culpable for a larger offense. One year prior, in *Luis v. United States*, 136 S. Ct. 1083 (2016) (http://bit.ly/2GNBBYT), the Supreme Court held that pretrial restraint of legitimate, untainted assets violated the Sixth Amendment, when the government sought to secure the untainted property as substitute assets for eventual forfeiture or restitution. Last year, Justice Clarence Thomas even expressed an interest in the Court taking up the question of whether due process requires the government to prove its entitlement to civil forfeiture by clear and convincing evidence. *Leonard v. Texas*, 137 S. Ct. 847 (2017) (http://bit.ly/2IF3HWC) (Thomas, J., concurring).

It is sensible for the Supreme Court to focus on the fairness of asset forfeiture. As Justice Thomas explained: "[F]orfeiture has in recent decades become widespread and highly profitable." *Id.* at 848. Between 2007 and 2016, the U.S. Department of Justice (DOJ) disposed of more than $20 billion of forfeited property. U.S. Dep't of Justice, 10-yr Summary of Financial Report Data (http://bit.ly/2IE8RSF). State and local law enforcement officials have expanded their asset forfeiture programs to help finance their departments, attending seminars on how to seize the best "goodies" and allegedly spending the proceeds of those seizures to fund purchases with only a tenuous connection to their law enforcement missions, such as lawn equipment, fitness machines, and liquor for office parties. *See*, Shaila Dewan, "Police Use Department Wish List When Deciding Which Assets to Seize," *N.Y. Times* (Nov. 9, 2014) (https://nyti.ms/2IBuUcL); Richard D. Emery, "Who's Policing the Prosecutors," *N.Y. Times* (Dec. 10, 2014)(https://nyti.ms/2GNeGNk).

Despite these concerns, Attorney General Jeff Sessions issued new guidelines last year — over the objections of civil libertarians — that empower the Department of Justice to forfeit assets seized by state and local law enforcement whenever the conduct giving rise to the seizure violates federal law. *See*, U.S. Dep't of Justice, Memorandum of Deborah Connor, Acting Chief, MLARS (http://bit.ly/2GNJrSb); Rebecca Ruiz, "Justice Dept. Revives Criticized Policy Allowing Assets to Be Seized," *N.Y. Times* (Jul. 19, 2017) (https://nyti.ms/2IDUGgq). These guidelines reversed a decision in

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January 2015 by then-Attorney General Eric Holder to prohibit so-called "adoptive forfeitures," the practice where a state or local law enforcement agency seizes property pursuant to state law and requests that a federal agency take the seized asset and forfeit it under federal law, except in cases raising public safety concerns. Adoptive forfeitures have been criticized for allowing state and local authorities to seize assets in questionable circumstances, such as minor traffic stops, and rely on the often less-demanding federal requirements in forfeiting the assets. *See*, Christopher Ingraham, "Jeff Sessions's Justice Department Turns a $65 Million Asset Forfeiture Spigot Back On," *Washington Post* (July 19, 2017) (https://wapo.st/2GQFwnO); Katie Zavadski, "Cops Can No Longer Just Seize Your Money," *New York Magazine* (Jan. 16, 2015) (https://nym.ag/2GOA44y).

An increasing emphasis on revenue generation through forfeiture brings with it a heightened risk of inconsistent enforcement and disparate punishment. Decisions to target individuals for arrest and prosecution may be driven by the value of the assets to be seized, and the use of forfeiture to punish criminal behavior gives rise to the danger that individuals will be forced to pay penalties that are disproportionate to the gravity of their offenses.

In this article, we suggest that it is time for the Supreme Court to revisit a question that it has not addressed for many years: When is the property to be forfeited in a criminal or civil proceeding disproportionate to the underlying offense that gives rise to the forfeiture? In the landmark case of *United States v. Bajakajian*, 524 U.S. 321 (1998) (http://bit.ly/2IFwiuO), the Supreme Court outlined a standard of "gross disproportionality," but the decision is rarely invoked to block forfeiture. The lower courts that have addressed the issue in the years since *Bajakajian* have proposed a variety of different proportionality factors, resulting in what one scholar recently described as a "patchwork of inconsistent tests that have … only muddled the issue." David Pimentel, "Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures," 11 Harv. L. & Pol. Rev. 541, 543-44 (2017) (http://bit.ly/2GOLaH3) (Pimentel). We will review the current state of the law and suggest possible reforms that would hold the government to a more demanding standard with respect to proportionality.

Limitations on Grossly Disproportionate Forfeitures

In *Bajakajian*, the Supreme Court located a constitutional limit on asset forfeitures in the Excessive Fines Clause of the Eighth Amendment. U.S. Const. amend. VIII. There, the defendant pleaded guilty to failing to file a report that he was transporting more than $10,000 in currency out of the country, in violation of 31 U.S.C. §5316(a). The district court imposed an order of criminal forfeiture pursuant to 18 U.S.C. §982(a)(1) in the amount of the entire sum of money the defendant was transporting — $357,144.

The Supreme Court reversed, finding that this forfeiture was unduly punitive under the Excessive Fines Clause. The Court first explained that an order of forfeiture constituted a "fine" within the meaning of the Eighth Amendment whenever the forfeiture functions as the punishment for an offense — *i.e.*, where the forfeiture is imposed "at the culmination of a criminal proceeding and requires conviction of an underlying felony." *Id*. at 328. The Court discussed the constitutional boundaries limiting such forfeitures, stating that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality …." *Id*. at 334. Therefore, "[t]he amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id*. The Court rejected a strict proportionality requirement and instead borrowed from its Cruel and Unusual Punishments Clause jurisprudence to hold that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id*.

The Supreme Court did not set forth a list of mandatory factors to assist lower courts but identified some relevant considerations. First: "In considering an offense's gravity, the other penalties that the Legislature has authorized are

certainly relevant evidence." *Id*. at 339 n.14. Thus, the Court looked to the maximum fine and guidelines sentence for the offense as a part of its analysis, finding that the proposed forfeiture was larger "by many orders of magnitude" than the statutory fine for the offense. *Id*. at 340. The Court also considered the nature of the defendant's offense, whether the offense was related to other criminal activities, whether the defendant fit into the class of persons for whom the statute was principally designed, and the nature of the harm caused by the defendant's conduct in evaluating the proportionality of the forfeiture. The Court noted that the crime at issue was a mere "reporting offense" unrelated to any other unlawful activity; the money forfeited was the proceeds of legal activity and was being transported to satisfy a lawful debt. *Id*. at 337–38. Based on this analysis, the Court concluded that forfeiture of the full sum of $357,144 violated the Excessive Fines Clause. *Id*. at 344.

The Proportionality Test After *Bajakajian*

Bajakajian was the first instance in which the Supreme Court struck down a criminal forfeiture as excessive under the Eighth Amendment, *id*. (Kennedy, J., dissenting), and in the 15 years after the *Bajakajian* decision, only four courts of appeals have found a forfeiture to be excessive, despite the civil forfeiture statute's requirement that federal courts "reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution." 18 U.S.C. §983(g); *see also*, Yan Slavinskiy, "Protecting the Family Home by Reunderstanding *United States v. Bajakajian*," 35 Cardozo L. Rev. 1619, 1634 n.117, 1637 (2014) (http://bit.ly/2IF5KtM). More recently, the Seventh Circuit expressed "serious doubts" about a forfeiture of an entire home based on the defendant's single illegal act of structuring, unconnected to other criminal activity, but remanded the case for retrial on other grounds and therefore did not decide the *Bajakajian* issue. *See*, *United States v. Abair*, 746 F.3d 260, 268 (7th Cir. 2014) (http://bit.ly/2GNpCdw). Overall, the enforcement of the Excessive Fines Clause in forfeiture matters has been nearly limited to the facts of *Bajakajian*.

Without a specific standard, the circuit courts have been left to their own devices and have applied inconsistent or overlapping tests when conducting the analysis envisioned by *Bajakajian*. Some courts have applied a four-factor test closely based on the types of factors identified in *Bajakajian*. *See*, *e.g.*, *United States v. George*, 779 F.3d 113, 122 (2d Cir. 2015) (http://bit.ly/2IEzarP) ("(1) the essence of the crime of the defendant and its relation to other criminal activity, (2) whether the defendant fits into the class of persons for whom the statute was principally designed, (3) the maximum sentence and fine that could have been imposed, and (4) the nature of the harm caused by the defendant's conduct." (internal citations and quotation marks omitted)). Others have employed a three-factor test. *See*, *e.g.*, *United States v. Browne*, 505 F.3d 1229, 1281 (11th Cir. 2007) (http://bit.ly/2IEagbT) ("(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant"). Still others have added several factors to those identified in *Bajakajian*, to create broader and more complicated multi-factor tests. *See*, *e.g.*, *United States v. Wagoner Cty. Real Estate*, 278 F.3d 1091, 1101 (10th Cir. 2002) (http://bit.ly/2GM1KXO). But whatever the particular formulation, the result seems to be the same: The challenge fails.

Next month we will explore several proposals for reforms that might curb the imposition of forfeitures disproportionate to alleged crimes.

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