

KNOW YOUR RIGHTS CIVIL ASSET FORFEITURE

CONSTITUTIONAL IMPLICATIONS AND RECOMMENDATIONS FOR REFORM

What is Civil Asset Forfeiture?

Originally, civil asset forfeiture laws targeted organized crime, large-scale drug dealers, and white-collar criminals.¹ These laws allow law enforcement to seize personal property such as money, vehicles, real estate, and contraband when they suspect that property was used to facilitate a crime or is itself the proceeds of a crime.² If an individual does not challenge a seizure, or if law enforcement successfully defends a challenged seizure, the law enforcement agency often sells the seized property and uses the money to fund department programs and initiatives.³

What are the constitutional implications of this practice?

When an asset is seized through civil asset forfeiture, and the property owner challenges the seizure, the government must defend the seizure in court. Because the seizure action is against the property itself rather than the property owner, the property owner does not retain the same rights in court that they would if the action was against them as an individual. Importantly, an individual does not need to be arrested, charged, or convicted of any crime to have their property seized, and law enforcement has a lower standard of proof to seize and retain the property than would be required in criminal cases.⁴

For these reasons, civil asset forfeiture laws raise several concerns. Its increased use in recent years combined with the lower standard of proof resulted in, “policing for profit.” This means law enforcement agencies are motivated to improve their bottom line rather than focus on public safety priorities with these property seizures. Regular individuals in small-dollar seizures are targeted more frequently than large criminal enterprises, which calls into question whether law enforcement implements the law in a way that comports with legislative intent. And unlike in criminal proceedings where an individual is guaranteed the right to an attorney, property seized in civil asset forfeiture cases does not have a right to counsel.⁷

¹ Asset Forfeiture Abuse, ACLU, <https://www.aclu.org/issues/criminal-law-reform/reforming-police/asset-forfeiture-abuse>; Asset Forfeiture, FEDERAL BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/white-collar-crime/asset-forfeiture>.

² Asset Forfeiture Abuse, *supra* note 1; Connor Simpson, The Booming Business of Civil Forfeitures, THE ATLANTIC (Aug. 5, 2013), <https://www.theatlantic.com/national/archive/2013/08/booming-business-civil-forfeitures/312532/>.

³ Asset Forfeiture Abuse, *supra* note 1.

⁴ Asset Forfeiture Abuse, *supra* note 1; Simpson, *supra* note 2.

⁵ *Id.*

⁶ Simpson, *supra* note 2.

⁷ Defining What’s Excessive in Police Property Seizures Remains Tricky, NATIONAL PUBLIC RADIO (Apr. 9, 2019), <https://www.npr.org/2019/04/09/710456736/defining-whats-excessive-in-police-property-seizures-remains-tricky>.

These practices raise constitutional concerns. For example, civil asset forfeiture may implicate the following constitutional protections:

- **Fourth Amendment:** The Fourth Amendment protects individuals from unreasonable searches and seizures by requiring law enforcement to obtain a warrant to search property in most circumstances.⁸ The Supreme Court has determined that civil asset forfeitures do not require a warrant, and that seizures of property under civil asset forfeiture laws do not violate an individual's Fourth Amendment rights so long as there is probable cause that the property itself is contraband.⁹
- **Fifth Amendment:** The Fifth Amendment guarantees that no person shall be deprived of their property without due process of the law, and the government will not take private property from its owner without just compensation.¹⁰ The Supreme Court has consistently held that a property owner's Fifth Amendment rights are not violated if the government seizes the property when that property has been used in illegal acts, even if the owner was unaware.¹¹ It has further ruled that the takings clause is not implicated in forfeiture cases because property is lawfully obtained through an alternative governmental authority and not through eminent domain.¹²
- **Eighth Amendment:** The Eighth Amendment protects individuals against excessive fines imposed by government.¹³ In 2019 the United States Supreme Court sided with civil asset forfeiture opponents in *Timbs v. Indiana* by confirming the excessive fines clause applied to civil asset forfeiture. But it declined to define what would make a fine excessive.¹⁴ It remains to be seen how much protection the Eighth Amendment truly offers to property owners whose property is seized under state or federal forfeiture laws.

Despite these rulings, recent developments may show a shifting tide. In 2018, the Kansas legislature amended the State's civil asset forfeiture law, which improved transparency by requiring law enforcement to publicly report information about what it seizes and who it targets in these seizures.¹⁵ And, as stated above, in *Timbs*, the United States Supreme Court ruled that a civil asset forfeiture case could involve a seizure so disproportionate to the alleged wrongdoing that it violates the Eighth Amendment.¹⁶ These actions show clear signs of an evolving view of civil asset forfeiture in society.

Challenges to civil asset forfeiture practices have not yet led to system-wide change. However, public sentiment appears to be shifting the conversation, and recent developments

⁸U.S. Const. amend IV.

⁹*Florida v. White*, 526 U.S. 559, 565 (1999).

¹⁰U.S. Const. amend. V.

¹¹*Bennis v. Michigan*, 516 U.S. 442, 446 (1996).

¹²*Id.* at 452.

¹³U.S. Const. amend. VIII.

¹⁴*Timbs v. Indiana*, 139 S. Ct. 682, 691; Emma Andersson, *The Supreme Court Didn't Put the Nail in Civil Asset Forfeiture's Coffin*, American Civil Liberties Union (Mar. 15, 2019), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/supreme-court-didnt-put-nail-civil-asset-forfeitures>.

¹⁵Kan. Stat. Ann. § 60-4107 (2021).

¹⁶*Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019).

inspire optimism. Moving forward it will be key for groups like the ACLU, policymakers, activists, and the public as a whole, to remain focused on law enforcement's use of civil asset forfeiture, developments in the law, and opportunities to challenge existing laws and drive change.

What can we do to reform civil asset forfeiture in Kansas?

While the ACLU believes Kansas (and other states) should abandon the practice of civil asset forfeiture altogether, we also support meaningful reform efforts that incorporate due process principles. We want to see the profit incentive driving forfeiture eliminated, procedural protections for those subjected to seizures and forfeiture proceedings, and government transparency in how the laws are used. To that end, the ACLU of KS supports the following reforms to Kansas law:

- **Require the return of property** if no criminal charges are filed; prosecution is declined; the charges are dismissed; or the person is acquitted.
- **Raise the burden of proof** from a “preponderance of the evidence” standard to a “clear and convincing” standard.
- **Ensure that the property owner has adequate notice, the right to counsel, and the opportunity to contest the seizure** for any civil asset forfeiture proceedings.
- **Prohibit forfeiture of property belonging to third parties.**
- **Shift the burden of proof to the prosecution** to show that the property seized was involved in or the product of the commission of a crime, and that the owner of the property was implicated (i.e., remove the ability to seize property from innocent third parties).
- **Require law enforcement agencies to log and securely maintain all seized property** so that it may be returned; require that seized evidence be audited regularly for compliance.
- **End the financial incentive for law enforcement agencies** by requiring all seized assets be distributed to a general fund rather than a law enforcement specific fund.
- **Prohibit Kansas law enforcement from participating in the Equitable Sharing program with federal law enforcement.**

Data downloads, visualizations, and reports about civil asset forfeiture are available at Kansas Asset Seizure and Forfeiture Repository: <https://kasfr.kbi.ks.gov/>