

The Watch

# How much civil asset forfeiture will Holder's new policy actually prevent?

By **Radley Balko** January 20

When a federal agency announces a significant new policy, it isn't always clear what actual effects that policy will have in practice. It takes some time to sift through the language and figure out how it will apply in the real world. And, of course, many times we won't know for sure until it has been in effect for a while and we can analyze the results. [I've already](#) put up [a couple of posts](#) praising Attorney General Eric Holder's new policy on civil asset forfeiture, but I've also expressed concern about its limitations, as have other critics of forfeiture. Unfortunately, the more scrutiny the policy gets, the less significant it seems to be.

Part of the confusion lies in the different terms the federal government uses to describe the different ways it works with state and local police agencies to seize assets. "Equitable sharing" is the broad term the government uses any time the feds and local police use federal forfeiture law to split up the assets seized in a joint investigation. "Adoption" cases are a subset of cases within the equitable sharing program. Adoption cases have minimal federal involvement. They are cases in which a local police agency simply calls up a field office of the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco, Firearms and Explosives or other federal law enforcement agency to sign some papers so that the case gets kicked up to federal court, where it will be governed by the less restrictive federal

forfeiture laws.

[Over at Reason](#), Jacob Sullum notes that Holder's new policy will apply only to adoption cases. And using the Department of Justice's own data, he points out that adoption cases make up only a small percentage of the larger equitable sharing program.

“Over the last six years,” the DOJ says in the [press release](#) announcing Holder's new policy, “adoptions accounted for roughly three percent of the value of forfeitures in the Department of Justice Asset Forfeiture Program.” By comparison, the program's [reports](#) to Congress indicate that “equitable sharing” payments to state and local agencies accounted for about 22 percent of total deposits during those six years. That means adoptions, which the DOJ says represented about 3 percent of deposits, accounted for less than 14 percent of equitable sharing. In other words, something like 86 percent of the loot that state and local law enforcement agencies receive through federal forfeitures will be unaffected by Holder's new policy.

Sullum points out that this is a far different picture from that portrayed by media reports of the new policy (including reports here at The Washington Post). For example, [this New York magazine post](#) on Holder's announcement ran under the headline “Cops can no longer just seize your money.” The post itself was a bit more circumspect, but even there the effects of the new policy were grossly exaggerated.

The outgoing attorney general (he will step down whenever his successor is confirmed) prohibited Equitable Sharing, a program that allowed local police departments to use federal law to seize cash and other assets in the name of justice. . . .

Of course, local police can still seize property without a trial through state-based civil forfeiture laws, but those tend to be more restrictive about both

the standard of proof necessary, and where the seized funds go.

But again, Holder prohibited only adoption, which makes up only 14 percent of the equitable sharing program, which itself only makes up 22 percent of overall federal forfeiture receipts. Using the six-year figures, the new policy at most will restrict about 3 percent of all federal forfeiture revenue.

The New York magazine post is also mistaken about state laws. It's true that some states have tried to pass laws putting more restrictions on civil asset forfeiture. And it is, of course, in those states that the equitable sharing program is an attractive option for law enforcement agencies. But many states have *less* restrictive laws than the federal government. For example, [according to the Institute for Justice](#), 14 states have a lower standard of proof in forfeiture cases than the *preponderance of the evidence* standard required by federal law. In 26 states, law enforcement agencies get 100 percent of the profits from civil forfeitures, instead of the 80 percent they'd get under the equitable sharing program. There are lots of other ways that state and federal law can differ, such as whether the state grants an "innocent owner defense" for people who can show they had no knowledge that their property was being used in a crime, or how long the government can keep the property before granting the owner a hearing.

In states where police agencies weren't bothering to involve the feds because the state laws are more favorable to police, Holder's policy will have no effect at all. If we want to calculate what percentage of all forfeitures nationwide will be prevented by this new policy, we'd need to know what percentage of overall civil forfeitures are conducted by state and local police with no involvement from the federal government at all.

Unfortunately, that number is difficult to calculate. For one, the states have widely varying requirements on reporting forfeitures, and there's plenty of evidence that those laws are poorly enforced. That is, even in states with reporting requirements, media and watchdog investigations have found that police agencies often underreport forfeiture receipts.

Second, some states might have more permissive forfeiture laws when it comes to, say, the

burden of proof, but more restrictive laws about the percentage of the proceeds that goes back to the police. Whether or not a police agency in those states takes advantage of the now restricted federal adoption program probably depends on the facts of each individual case.

So where does that leave us with respect to the question posed in the headline? As Sullum points out, over the past six years, adoption comprised only 3 percent of total federal forfeitures. But that includes all federal forfeitures, including criminal. Criminal forfeitures are less troubling, because they require an actual conviction in order to seize property. [According to Department of Justice data from 2013](#), in terms of value, the department seized slightly more assets in criminal cases than in civil cases, but they were pretty close, \$1.5 billion to \$1.1 billion. If we figure then that a little less than half the value of Department of Justice forfeitures come from civil cases, we could estimate that 5.5 to 6 percent of federal civil forfeiture cases could be affected by the new policy. (If you look at the number of overall cases, in fiscal year 2012 there were about twice as many federal criminal cases as federal civil cases.)

These are very rough estimates, of course. The point is that the new policy comes nowhere near ending civil forfeiture at the federal level. At best, it nibbles around the edges. As to what percentage of civil forfeitures the new policy will prevent overall at every level of government, it's hard to say for sure. But it's safe to say that figure will be significantly less than 6 percent.

Finally, it's worth noting that Congress could well render Holder's policy moot. There seems to be broad bipartisan support for significantly reforming how civil forfeiture is carried out, both in Congress and in the state legislatures. I asked David Smith what he makes of Holder's policy. Smith is an attorney in Alexandria who has written case books on forfeiture law.

"The jury is out on how this will actually play out in practice." Smith says the exceptions to

the new policy — such as the loophole that allows adoption in cases where officials can secure a federal seizure warrant — could easily be exploited by federal prosecutors to circumvent Holder’s intent. “I have little faith in the federal judges to look at these requests with much scrutiny,” Smith says. “The prosecutors can say just about anything to get what they want, and there’s usually no record of what’s actually said at the hearings.”

Smith says the other problem is the lack of accountability at the Department of Justice. If there are no consequences for violating the new policy, it isn’t going to have much of an effect. “It’s always been that way, not just in this administration. There are just no consequences when federal prosecutors violate the rules or break the law.”

But Smith isn’t completely cynical. He points to widespread support for reform among lawmakers, both in Congress and in the state legislatures. “If the new policy causes Congress stop taking an interest in reform, I’d be worried,” Smith says. “But that doesn’t appear to be the case. What Congress does is more important. For example, if they were to end civil forfeiture at the federal level entirely, that would make much of this speculation pointless.” Smith adds that any complete eradication of the policy is unlikely, but that Congress could do a number of things that would make Holder’s policy much less ambiguous.

I wrote [in my original post](#) that Holder’s announcement was a “big deal.” I still think that’s the case. Smith points out that even if the new policy eliminates only a small percentage of federal forfeitures, adoption cases are often the most egregious miscarriages of justice. That’s important. It’s also symbolically important for the U.S. attorney general to acknowledge the injustices the policy encourages. The AG is the country’s highest-ranking law enforcement official. For him to acknowledge that this policy encourages injustices is significant. But there’s still a long way to go.

America's Police Forces."

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