

# 2019-20

# LEGISLATOR'S GUIDE to the Issues

## Procedural Liberty and Asset Forfeiture

### The Issue

Our western criminal justice system is at its core one of laws, not of men. The supremacy of law is deliberate. Man's passions are fickle, prone to capricious reaction, and oftentimes unmeasured during times of stress and uncertainty. Steadfastness in the rule of law allows society to weather such perilous times rather than careen from one crisis to another.

The rule of law—and by proxy the legitimacy of the criminal justice system—is rooted firmly in unflinching adherence to the formal procedure as a manifestation of our founding principles. The presumption of innocence, entitlement to a jury of one's peers, the state bearing the high burden of proof, and the sanctity of property rights are representative of our revolutionary inheritance, direct responses to the atrocities endured at the orders of George III and Santa Anna. These procedural elements ensure that the end result of the criminal process is just.

Today, this legitimacy is threatened. Whether by laziness, fear, or emphasis on clearance over correctness, procedural “shortcuts” have cropped up in routine practice, divesting the system of the requisite safeguards to be considered a neutral arbiter of guilt.

One example of this is civil asset forfeiture. Under this practice, police and prosecutors can take your property without ever charging you with a crime. Further, the protections you would have if you are accused of a crime (such as a lawyer or a jury of your peers, just to name a few) are not due during forfeiture proceedings, because it is *the property itself* that is alleged to be guilty of the criminal offense.

Texans are not even made aware of how much civil forfeiture is being conducted in the state, as there are no requirements to post such numbers, only to inform the attorney general of the aggregate amount of property forfeited.

Further, the original intent of the Fourth Amendment was to allow for police officers to conduct reasonable detentions and searches, and to seize evidence to be later used in a criminal prosecution without a warrant. What it is not intended for is to, after a failure to produce any evidence of wrongdoing, allow the detention to be extended indefinitely until more invasive warrantless measures can be employed, such as a canine search. Such detention is permissible only if there is a reasonable suspicion of wrongdoing, said six of the U.S. Supreme Court justices in *Rodriguez vs. United States*, including the late Antonin Scalia.

Procedural soundness is not about helping the guilty go free. Those that would do harm to our families and communities must be duly punished under the law, and we must be certain that the punishment is delivered to the correct person. By ensuring that criminal procedure adheres to the intent of our founding documents, we can buttress the legitimacy of our criminal justice system.

### The Facts

- Texas law is amongst the most permissive of civil asset forfeiture, requiring only a preponderance of the evidence standard be met before the government can take property.
- Civil forfeiture is, more often than not, done without any representation of the interests of the property owner.
- In 2017 alone, over \$50 million was forfeited by agencies in Texas.
- Texas has a track record of enshrining procedural protections, such as with the codification of *Riley v. California* during the 84th Legislature.

### Recommendations

- Wholly eliminate civil asset forfeiture by requiring a conviction before property can be forfeited.
- Empower police and prosecutors by strengthening criminal forfeiture, allowing judges to declare property abandoned if the appropriate government entity has undertaken its due diligence in trying to locate the owner and if no one has come forward to claim the property, thereby bypassing the conviction requirement.
- Bolster the “innocent owner defense” for property owners, requiring the state to prove via clear and convincing evidence that the owner knew their property was being used for illegal activities.
- Divert forfeited cash and property to the purview of the jurisdiction's elected body, e.g., the city council or commissioners court—those with the authority to appropriate.
- Failing meaningful procedural reform, require forfeiting agencies to publicly report information on individual forfeiture proceedings including value of the property and whether a criminal conviction was obtained.
- Codify the standards established in *Rodriguez v. United States*, allowing Texas appellate courts to determine the legality of certain traffic stops under Texas law.

### Resources

[Rebutting Common Myths of Civil Asset Forfeiture](#) by Derek Cohen, Texas Public Policy Foundation (Dec. 2016).

[Asset Forfeiture by Texas Law Enforcement](#) by Derek Cohen, Texas Public Policy Foundation (April 2016).

[Without Due Process of Law: The Conservative Case for Civil Asset Forfeiture Reform](#) by Derek Cohen, Texas Public Policy Foundation (Sept. 2015).

[Taking Contraband Without Taking Our Liberties: Civil Asset Forfeiture Reform in Texas](#) by Derek Cohen, Texas Public Policy Foundation (March 2014).

