

# *Incentives Matter: The Not-So-Civil Side of Civil Forfeiture*

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**C**ivil forfeiture is one of the greatest threats to private property and due process in our nation today. This controversial law-enforcement tool not only strips people of their property and due-process rights, but also undermines the public's trust in law enforcement and the belief, so vital to our republic, that we are a nation ruled by laws and not by individuals.

“Civil forfeiture” is the government’s power to confiscate property suspected of being involved in a crime. Unlike criminal forfeiture, which requires a conviction, civil forfeiture permits the government to seize property *regardless* of the owner’s guilt or innocence.

The government’s aggressive use of civil forfeiture has been roundly condemned, offering easy fodder for comedians like John Oliver<sup>1</sup> and Jon Stewart.<sup>2</sup> The media has also cast a critical eye on the practice.<sup>3</sup> To date, 67 editorial boards across the country have denounced civil forfeiture and organizations across the political spectrum have called for comprehensive reform.<sup>4</sup>

Even those within government have criticized the practice. Members of the federal judiciary have cautioned that forfeiture can become “more like a roulette wheel employed to raise revenue from innocent but hapless owners . . . or a tool wielded to punish those who associate with criminals, than a component of a system of justice.”<sup>5</sup> Members of Congress have joined the chorus<sup>6</sup> and introduced reform measures like the Fifth Amendment Integrity Restoration (FAIR) Act.<sup>7</sup> The Department of Justice’s (DOJ) Office of the Inspector General has criticized how federal and state authorities have administered their forfeiture programs.<sup>8</sup> And former DOJ officials Jon Yoder and Brad Cates, who were involved in creating the current federal forfeiture regime, have called for it to be abolished, acknowledging that forfeiture has “turned into an evil itself with the corruption it engendered among government and law enforcement coming to clearly outweigh any benefits.”<sup>9</sup>

### The Origins of Civil Forfeiture

Civil forfeiture is based on an archaic legal fiction that the property itself is “guilty” of a crime.<sup>10</sup> Under this fiction, a proceeding is brought *in rem*, or against the property itself, instead of *in personam*, or against the owner.<sup>11</sup> That is why civil-forfeiture

cases have unusual names like *United States v. 434 Main Street, Tewksbury, Massachusetts*,<sup>12</sup> *State of Texas v. One 2004 Chevrolet Silverado*,<sup>13</sup> and *United States v. \$11,000 in U.S. Currency*.<sup>14</sup> Of course, inanimate property—like the motel, vehicle, and cash named in these cases—does not act or think and cannot be guilty of a crime.

In the United States, civil forfeiture traces its roots to the English Navigation Acts of the mid-17th century that required imports and exports from England to be carried on British ships.<sup>15</sup> If the acts were violated, the ships and the cargo on board could be seized and forfeited to the crown regardless of the guilt or innocence of the owner.<sup>16</sup> Using these statutes as a model, the first U.S. Congress passed civil forfeiture statutes to aid in the collection of customs duties, which provided 80 to 90 percent of the finances for the federal government during that time.<sup>17</sup> This power was upheld in early Supreme Court cases.<sup>18</sup>

The most important aspect of these early cases, however, is the very limited justification for applying civil forfeiture, even to innocent property owners. The Supreme Court held that civil forfeiture was closely tied to the practical *necessities* of enforcing admiralty, piracy, and customs laws.<sup>19</sup> *In rem* forfeiture permitted courts to obtain jurisdiction over property when it was virtually impossible to seek justice against owners who were outside their jurisdiction.<sup>20</sup>

Civil forfeiture remained a relative backwater in American law throughout most of the 20th century, with one exception. During Prohibition, the federal government expanded its forfeiture authority beyond contraband to include automobiles or other vehicles transporting illegal liquor.<sup>21</sup> However, the forfeiture provision of the National Prohibition Act was considered “incidental” to the primary purpose of destroying the contraband itself—“the forbidden liquor in transportation.”<sup>22</sup> Even then, the Supreme Court observed that these “forfeiture acts are exceedingly drastic,”<sup>23</sup> cautioning that “[f]orfeitures are not favored; they should be enforced only when within both the letter and spirit of the law.”<sup>24</sup>

As “drastic” as forfeiture laws may have appeared during Prohibition, they were quite limited in comparison to the forfeiture laws enforced today. Unmoored from the original justification, today’s civil-forfeiture laws exploded in the early 1980s as government at all levels stepped up the war on drugs.<sup>25</sup>

### Civil Forfeiture Provides Poor Procedural Protections for Property Owners

Civil-forfeiture procedures are skewed against innocent property owners, making seizing and forfeiting property disconcertingly easy. First, the vast majority

of federal cases never see the inside of a courtroom. Most federal forfeitures are accomplished through administrative proceedings, meaning that the seizing agency itself acts as investigator, prosecutor, judge, and jury.<sup>26</sup> From 1997 to 2013, 88 percent of all forfeitures by the DOJ were administrative, while only 12 percent were judicial.<sup>27</sup>

But even judicial civil-forfeiture proceedings fail to provide adequate procedural protections. As a civil proceeding, property owners contesting civil forfeiture do not enjoy all the constitutional protections guaranteed to criminal defendants, such as the right to an attorney.

In particular, two aspects make it easier for the government to forfeit property through civil, rather than criminal forfeiture. First, the government enjoys a lower burden of proof than in the criminal context. Under federal law, the government must prove only by a preponderance of the evidence that the property was used in or is the proceeds of a crime.<sup>28</sup> This is a significantly lower burden than the “beyond a reasonable doubt” standard required for criminal convictions.

Second, after the government meets its burden to show that property is subject to forfeiture, the burden shifts to the property owner to affirmatively prove his innocence.<sup>29</sup> In this upside-down world, property is presumed “guilty” and owners must prove a negative—the absence of guilt—to recover what is rightfully theirs. This effectively turns the idea that Americans are innocent until proven guilty—a hallmark of our justice system—on its head.

In light of these evidentiary burdens, which stack the deck against property owners, it is no surprise that law enforcement pursues the easier avenue of civil forfeiture rather than the more difficult route of criminal forfeiture. Indeed, studies have shown that when the law makes forfeiture easier for government to pursue through lower standards of proof, law-enforcement officials engage in more of it.<sup>30</sup> But there is another reason why law enforcement makes heavy use of civil forfeiture.

### **Federal Forfeiture Law Incentivizes Seizing Property, Circumvents Legislative Oversight, and Violates the Constitution**

Current federal law allows law-enforcement agencies to keep all proceeds from the property they forfeit.<sup>31</sup>

This stands in stark contrast to most of American history, when the proceeds from civil forfeitures went to a general fund to benefit the public at large. This changed in 1984, when Congress amended parts of the Comprehensive Drug Abuse Prevention and Control Act of 1970 to allow federal law-enforcement agencies to retain forfeiture proceeds in a newly created Assets Forfeiture Fund.<sup>32</sup>

Under this self-funding mechanism, the federal government’s use of forfeiture has grown exponentially. In 1986, a little over a year after the Assets Forfeiture Fund was created, the Fund took in just \$93.7 million in deposits.<sup>33</sup> Twenty years later, annual deposits of forfeited cash and property regularly top \$1 billion.<sup>34</sup> And 2014 saw an intake of *\$4.4 billion*, the highest amount in the Fund’s history.<sup>35</sup> The Fund’s net assets—that is, money available for law enforcement purposes—has likewise grown from about half a billion dollars in 2000 to \$2.5 billion in 2014.<sup>36</sup>

In a time when governments at all levels face serious budget limitations, it is not surprising that civil forfeiture would become ever more attractive to law-enforcement officials, even those with the best intentions.

But there are serious constitutional problems with the federal civil-forfeiture regime. By creating self-financing agencies, civil-for-

feiture laws violate the separation of powers. George Mason warned about the dangers of combining the power to execute laws with the power of the purse.<sup>37</sup> But that is precisely what today’s civil-forfeiture laws do: The same law-enforcement agencies that wield tremendous discretion in bringing a forfeiture action are able to keep forfeited property and decide how to use it spend its proceeds. What is lacking is the crucial oversight provided by the legislative branch and the appropriations process.

Additionally, giving law enforcement a direct financial stake in property seizures violates the basic due-process requirement of impartiality. Impartiality in the administration of justice is a bedrock principle of the American legal system, enshrined in the Due Process Clauses of the Constitution. By allowing law enforcement to retain forfeiture proceeds, federal forfeiture law dangerously shifts law-enforcement priorities from fairly and impartially administering justice to generating revenue.

Worse, under a federal program called Equitable Sharing, state and local law enforcement can seize property and refer it to federal authorities to pursue federal forfeiture and, in exchange, receive up to 80 percent of the proceeds.<sup>38</sup> This violates principles of federalism, as embodied in the Tenth Amendment because—even where a state’s law might provide greater protections for property and its owners—state and local law enforcement can simply evade those protections by referring forfeitures to the federal government.

### **A Toxic Mix Leading to Widespread Abuse**

The relative ease of taking property combined with the financial incentive to do so creates a toxic mix that has led to widespread abuse, with law-enforcement agencies using forfeiture slush funds to buy margarita machines, Zambonis, a tanning salon, and trips to Disney World.<sup>39</sup> And the problem of civil forfeiture is not just a problem of a few bad apples making questionable purchases with an unaccountable stream of revenue. It is fundamentally a problem of a bad law systemically incentivizing bad behavior.

The stated rationale for civil forfeiture is to prevent criminals from committing and profiting from crime. Indeed, the motto of the DOJ’s Asset Forfeiture Program (and Attorney General Loretta Lynch’s stated defense of the program in her confirmation hearings) is to take the profit out of crime. But in reality, civil forfeiture is not being used to catch drug kingpins or real-life Walter and Skyler Whites. Instead, as these examples show, the victims of forfeiture abuse are far from being criminals:

- The Hirsch brothers run a convenience store. Federal prosecutors, under the supervision of Attorney General Lynch, seized over \$500,000—the store’s entire operating account—without ever bringing a civil forfeiture action, much less charging any of them with a crime. The government held onto the money for more than two years without ever holding a hearing.<sup>40</sup>
- For 38 years Carole Hinders owned and ran Mrs. Lady’s Mexican Food in Spirit Lake, Iowa. Because her restaurant only accepts cash, Hinders made frequent trips to the bank to avoid having large sums of money at the restaurant. In August 2013, the IRS and DOJ seized Hinders’ entire bank account (a total of \$33,000) for allegedly “structuring” her deposits in amounts less than \$10,000.<sup>41</sup>
- Charles Clarke was a 22-year-old college student who had saved \$11,000 over five years—most of it from documented Chapter 35 educational benefits he received because of his mother’s status

as a disabled veteran. A Drug Enforcement Administration Task Force seized the entire amount based on a drug-detection dog alert at the airport, despite not finding any drugs or contraband during a search of his baggage.<sup>42</sup>

- Russ Caswell owned and operated a no-frills budget motel in Tewksbury, Mass. The federal government sought to forfeit the mortgage-free \$1.5 million motel on the grounds that, over the course of 20 years, a handful of its guests engaged in illegal drug activity behind closed doors. There was no allegation that Caswell, his family, or his employees knew about or were involved in this drug activity.<sup>43</sup>

Unfortunately, these individuals are not alone. Under the Equitable Sharing Program, state and local police have seized over \$2.5 billion in property from almost 62,000 highway stops since September 2011—all without warrants or indictments.<sup>44</sup> And the IRS and DOJ have aggressively used forfeiture and the Bank Secrecy Act to seize bank accounts from thousands of small-business owners who were never charged with a crime.<sup>45</sup> Facing scrutiny, the DOJ and IRS have changed some of their policies, but more needs to be done to end abuses.

## Conclusion

Civil forfeiture should be abolished and replaced with criminal forfeiture. No one in America should lose their property without being convicted of a crime. Short of repealing civil forfeiture laws altogether, eliminating the profit incentive and heightening procedural protections would go a long way toward curbing abuse. Although Congress has worked on bipartisan and bicameral comprehensive reform, the DOJ—protective of its \$4 billion “slush fund”—has vigorously blocked any effort at reform. Until Congress acts, federal judges need to be engaged in legal challenges to civil forfeiture actions and cognizant of the inherent due process problems that they pose. ☺



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## Endnotes

<sup>1</sup>*Last Week Tonight with John Oliver* (HBO television broadcast Oct. 5, 2014), available at [www.hbo.com/last-week-tonight-with-john-oliver/episodes/01/20-october-5-2014/video/ep-20-clip-civil-forfeiture.html?autoplay=true](http://www.hbo.com/last-week-tonight-with-john-oliver/episodes/01/20-october-5-2014/video/ep-20-clip-civil-forfeiture.html?autoplay=true).

<sup>2</sup>*The Daily Show with Jon Stewart* (Comedy Central television broadcast July 22, 2014), available at [www.cc.com/video-clips/pjxlmr/the-daily-show-with-jon-stewart-highway-robbying-highway-patrolmen](http://www.cc.com/video-clips/pjxlmr/the-daily-show-with-jon-stewart-highway-robbying-highway-patrolmen).

<sup>3</sup>See, e.g., Sarah Stillman, *Taken*, *NEW YORKER*, Aug. 12 & 19, 2013, available at [www.newyorker.com/magazine/2013/08/12/taken](http://www.newyorker.com/magazine/2013/08/12/taken).

<sup>4</sup>See Letter from Am. Civ. Liberties Union et al. to Hon. Chuck Grassley et al., Statement of Principles Necessary for Achieving Effective Federal Forfeiture Reform (Apr. 14, 2015), available at [endforfeiture.com/wp-content/uploads/2015/06/CoalitionLetterForfeitureReform.pdf](http://endforfeiture.com/wp-content/uploads/2015/06/CoalitionLetterForfeitureReform.pdf).

<sup>5</sup>*Bennis v. Michigan*, 517 U.S. 1163 (1996) (Thomas, J., concurring).

<sup>6</sup>See, e.g., Marco Rubio, *Wanted: An Attorney General Committed to the Constitution*, *WASH. TIMES*, Oct. 2, 2014, available at [www.washingtontimes.com/news/2014/oct/2/rubio-wanted-an-attorney-general-committed-to-the-/](http://www.washingtontimes.com/news/2014/oct/2/rubio-wanted-an-attorney-general-committed-to-the-/) (“While broad proposals to reform [civil forfeiture] laws have been made and will be debated, an immediate first step should be to prevent the DOJ or other law-enforcement agencies from keeping these proceeds for themselves. If there is a valid law-enforcement purpose to forfeiture, the judgment of government agencies should not be warped by self-interest.”).  
<sup>7</sup>See S.255, 114th Cong. (2015).

<sup>8</sup>Office of Inspector Gen., U.S. Dep’t of Justice, *Review of the Drug Enforcement Administration’s Use of Cold Consent Encounters at Mass Transportation Facilities* (2015), available at [www.justice.gov/oig/reports/2015/e153.pdf](http://www.justice.gov/oig/reports/2015/e153.pdf); Office of Inspector Gen., U.S. Dep’t of Justice, *Audit of the City of Sunrise Police Departments’ Equitable Sharing Program Activities: Sunrise, Florida* (2014), available at [www.justice.gov/oig/reports/2014/g4015003.pdf](http://www.justice.gov/oig/reports/2014/g4015003.pdf); Office of Inspector Gen., U.S. Dep’t of Justice, *Audit of the Oklahoma Highway Patrol’s Equitable Sharing Program Activities* (2013), available at [www.justice.gov/oig/reports/2013/g6013014.pdf](http://www.justice.gov/oig/reports/2013/g6013014.pdf).

<sup>9</sup>John Yoder & Brad Cates, *Government Self-Interest Corrupted a Crime-Fighting Tool into an Evil*, *WASH. POST*, Sept. 18, 2014, available at [www.washingtonpost.com/opinions/abolish-the-civil-asset-forfeiture-program-we-helped-create/2014/09/18/72f089ac-3d02-11e4-b0ea-8141703bbf6f\\_story.html](http://www.washingtonpost.com/opinions/abolish-the-civil-asset-forfeiture-program-we-helped-create/2014/09/18/72f089ac-3d02-11e4-b0ea-8141703bbf6f_story.html).

<sup>10</sup>See *United States v. Bajakajian*, 524 U.S. 321, 330 (1998); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–86 (1974) (discussing history of forfeiture). This doctrine originally arose from the medieval law of deodand, under which chattel that caused death was forfeit to the king. *Austin v. United States*, 509 U.S. 602, 611 (1993). Deodand was premised on the superstitious belief that objects acted independently to cause death. *J.W. Goldsmith Jr.-Grant Co. v. United States*, 254 U.S. 505, 510–511 (1921).

<sup>11</sup>*Bajakajian*, 524 U.S. at 330.  
<sup>12</sup>Civ. A. No. 09-11635 (D. Mass. Jan. 24, 2013), available at [ij.org/wp-content/uploads/2011/10/caswellopinion-1-24-13.pdf](http://ij.org/wp-content/uploads/2011/10/caswellopinion-1-24-13.pdf).  
<sup>13</sup>*Texas Civil Forfeiture*, Inst. for Justice, [ij.org/case/state-of-texas-v-one-2004-chevrolet-silverado/](http://ij.org/case/state-of-texas-v-one-2004-chevrolet-silverado/) (last visited June 5, 2016).  
<sup>14</sup>No. 2:14-CV-00125 (E.D. Ky.). For more information on this ongoing case, brought by the Institute for Justice, see *Ordinary Americans Are Victims of Policing for Profit in Our Nation’s Airports*, Inst. for Justice, [ij.org/case/kentucky-civil-forfeiture/](http://ij.org/case/kentucky-civil-forfeiture/) (last visited June 5, 2016).

<sup>15</sup>Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 *SAN DIEGO L. REV.* 79, 135 (1996); Michael Schechter, *Fear and Loathing and the Forfeiture Laws*, 75 *CORNELL L. REV.* 1150, 1151–1183 (1990); James R. Maxeiner, Note, *Bane of American Forfeiture Law: Banished at Last?*, 62 *CORNELL L. REV.* 768, 802 (1977).  
<sup>16</sup>*Austin*, 509 U.S. at 612 (“The statute was construed so that the act of an individual seaman, undertaken without the knowledge of the master or owner, could result in forfeiture of the entire ship.”).  
<sup>17</sup>Maxeiner, 62 *CORNELL L. REV.* at 782, n. 86.

<sup>18</sup>E.g., *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827); *United States v. The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844).  
<sup>19</sup>*The Brig Malek Adhel*, 43 U.S. (2 How.) at 233 (“[T]his is done

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from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or [e]nsuring an indemnity to the injured party.”).

<sup>20</sup>*See, e.g., The Brig Malek Adhel*, 43 U.S. (2 How.) at 233 (justifying forfeiture of an innocent owner’s vessel under piracy and admiralty laws because of “the necessity of the case, as the only adequate means of suppressing the offence or wrong”); *The Palmyra*, 25 U.S. (12 Wheat.) at 14 (concerning revenue laws); *United States v. The Schooner Little Charles*, 1 Brock. 347, 354 (C.C.D. Va. 1818) (per Marshall, C.J.) (concerning embargo laws).

<sup>21</sup>*Boudreaux & Pritchard*, 33 SAN DIEGO L. REV. at 101.

<sup>22</sup>*Carroll v. United States*, 267 U.S. 132, 155 (1925).

<sup>23</sup>*United States v. One 1936 Model Ford V-8 De Luxe Coach, Commercial Credit Co.*, 307 U.S. 219, 236 (1939).

<sup>24</sup>*Id.* at 226.

<sup>25</sup>Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 42–45 (1998).

<sup>26</sup>*See Federal Asset Forfeiture: Uses and Reforms: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of David B. Smith, Smith & Zimmerman, PLLC),

available at [judiciary.house.gov/wp-content/uploads/2016/02/Smith-Testimony.pdf](http://judiciary.house.gov/wp-content/uploads/2016/02/Smith-Testimony.pdf).

<sup>27</sup>Dick M. Carpenter et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 12–13 & Fig. 4 (2d ed. 2015). The Institute for Justice published this second edition of its landmark comprehensive study evaluating each jurisdiction’s forfeiture laws.

<sup>28</sup>18 U.S.C. § 983(c)(1). *See also* Carpenter et al., *supra* note 16 (noting that this is the standard for 31 states as well).

<sup>29</sup>*Id.* at 20 (noting that this is also true for 35 states).

<sup>30</sup>*Id.* at 12; *see also* Jefferson E. Holcomb et al., *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273 (2011).

<sup>31</sup>*See, e.g.*, 28 U.S.C. § 524(c)(1) (establishing the DOJ Assets Forfeiture Fund, which allows forfeiture proceeds to be used for a variety of law-enforcement purposes); 31 U.S.C. § 9705 (establishing the Department of the Treasury Forfeiture Fund).

<sup>32</sup>Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

<sup>33</sup>Carpenter et al., *supra* note 10.

<sup>34</sup>U.S. Dep’t of Justice, *FY 2013 Total Net Deposits to the Fund by State of Deposit as of Sept. 30, 2013*, available at [www.justice.gov/jmd/afp/02fundreport/2013affr/report1.htm](http://www.justice.gov/jmd/afp/02fundreport/2013affr/report1.htm).

<sup>35</sup>Carpenter et al., *supra* note 10.

<sup>36</sup>*Id.*

<sup>37</sup>George Mason, Fairfax County Freeholders’ Address and Instructions to Their General Assembly Delegates (May 30, 1978), in JEFF BROADWATER, *GEORGE MASON: FORGOTTEN FOUNDER* 153 (2006).

<sup>38</sup>For statutes authorizing equitable sharing, see 21 U.S.C. §§ 881(e)(1)(A) and (e)(3), 18 U.S.C. § 981(e)(2), and 19 U.S.C. § 1616a.

<sup>39</sup>Nick Sibilla, *The 14 Most Ridiculous Things Police Bought With Asset Forfeiture* (June 24, 2013), [www.buzzfeed.com/nicks29/the-14-most-ridiculous-things-police-bought-with-a-4y3w](http://www.buzzfeed.com/nicks29/the-14-most-ridiculous-things-police-bought-with-a-4y3w).

<sup>40</sup>For more information on the Hirsch brothers, visit [ij.org/case/long-island-forfeiture/](http://ij.org/case/long-island-forfeiture/).

<sup>41</sup>For more information on Carole Hinders, visit [ij.org/case/iowa-forfeiture/](http://ij.org/case/iowa-forfeiture/).

<sup>42</sup>For more information on Charles Clarke, visit [ij.org/case/kentucky-civil-forfeiture/](http://ij.org/case/kentucky-civil-forfeiture/).

<sup>43</sup>For more information on Russ Caswell, visit [ij.org/case/massachusetts-civil-forfeiture/](http://ij.org/case/massachusetts-civil-forfeiture/).

<sup>44</sup>Michael Sallah et al., *Stop and Seize*, WASH. POST, Sept. 6, 2014, available at [www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/](http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/).

<sup>45</sup>*See* Shaila Dewan, *Law Lets IRS Seize Accounts on Suspicion, No Crime Required*, N.Y. TIMES, Oct. 25, 2014, at A1, available at [www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html?\\_r=0](http://www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html?_r=0).

base of phone records without real judicial oversight. That’s unacceptable.” SLATE (June 21, 2013), available at [www.slate.com/articles/technology/technology/2013/06/warrantless\\_searches\\_the\\_court\\_oversight\\_of\\_nsa\\_phone\\_surveillance\\_is\\_a.html](http://www.slate.com/articles/technology/technology/2013/06/warrantless_searches_the_court_oversight_of_nsa_phone_surveillance_is_a.html).

<sup>57</sup>“Liberty and Security in a Changing World,” REPORT AND RECOMMENDATIONS OF THE PRESIDENT’S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES, available at [https://www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf).

<sup>58</sup>The phrase “three hops,” which comes from NSA honcho John Inglis’ testimony to the House Judiciary Committee in July, means that the agency can look at the communications of the person it’s targeting, plus the communications of that person’s contacts (one hop), plus the communications of those people’s contacts (two hops), plus the communications of those people’s contacts

(three hops). Each hop widens the net exponentially, so that if the average person has 40 contacts, a single terrorism suspect could theoretically lead to records being collected on 2.5 million people.

<sup>59</sup>“Since the (current) chief justice began making assignments in 2005, 86 percent of his choices have been Republican appointees, and 50 percent have been former executive branch officials.” Scott Horton, “The G.O.P.’s Surveillance Judiciary,” HARPER’S MAGAZINE (July 29, 2013), available at <http://harpers.org/blog/2013/07/the-gops-surveillance-judiciary>.

<sup>60</sup>“About the Board,” PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, available at [www.pclab.gov/about-us.html](http://www.pclab.gov/about-us.html) (last visited May 27, 2016).

<sup>61</sup>*United States v. Edward Snowden*, No. 13-cr-265 (CMH) (E.D. Va.), Criminal Complaint (filed June 14, 2013), available at <http://apps.washingtonpost.com/g/docu->

[ments/world/us-vs-edward-j-snowden-criminal-complaint/496](http://www.washingtonpost.com/g/docu-ments/world/us-vs-edward-j-snowden-criminal-complaint/496).

<sup>62</sup>“Pardon Edward Snowden,” WE THE PEOPLE, YOUR VOICE IN THE WHITE HOUSE, available at <https://petitions.whitehouse.gov/petition/pardon-edward-snowden> (last visited May 27, 2016).

<sup>63</sup>Kate Knibbs, “White House Responds to Petition to Pardon Snowden With a Hard Pass,” GIZMODO (July 29, 2015), available at <http://gizmodo.com/white-house-responds-to-petition-to-pardon-snowden-with-1720831190>.

<sup>64</sup>“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Hon. Louis Brandeis, “Other People’s Money,” NATIONAL HOME LIBRARY FOUNDATION, 62 (1933).