

ARLINGTON CIVIC FEDERATION RESOLUTION ON CIVIL FORFEITURE
ADOPTED NOVEMBER 13, 2018
VOTE: 40 - 4 – 5

EXECUTIVE SUMMARY

During its September 23, 2018 meeting, the ACCF Legislation Committee unanimously decided to pursue a resolution on Virginia Forfeiture law. The reasons for pursuing such a resolution included:

- (1) Promotion of sound public policy that secures the civil liberties and property rights of individuals in Virginia;
- (2) Commitment to transparency in government, particularly as those relate to police powers;
- (3) Supporting sustainable budgeting practices so that law enforcement needs are not reliant on uncertain sources of income; and
- (4) Eliminating perverse incentives for law enforcement personnel.

The resolution was introduced to the membership at the Civic Federation meeting held on October 2, 2018 by Juliet Hiznay on behalf of the Legislation Committee. Feedback has been provided to members of the committee since that time. In developing the resolution, Committee members researched legislative history and reviewed a 2015 Virginia State Crime Commission report on the subject. Committee members sought and obtained additional information from the Commonwealth’s Attorney and the Arlington County Police Department. Committee members reviewed a training module meant to comply with limited state reforms undertaken since 2015. The Legislation Committee determined that a resolution on this issue is appropriate, and that the annual fiscal impact on Arlington County as a result of the recommended reforms would be minimal, if any, in light of the overall budget. The resolution, as revised and published in the ACCF newsletter, has the unanimous support of the Legislation Committee, which recommends its passage.

BACKGROUND

This resolution relates exclusively to reporting practices in Virginia and changes to state law, because this is where the committee believes the efforts can be most productive. Efforts to change federal law have recently failed and the United States Attorney General is rolling back recent reforms. Federal and state civil forfeiture law authorizes the seizure of cash and other property by law enforcement, without any prior court proceeding.

After the initial seizure of cash or other property, Virginia law requires a civil forfeiture action to determine who gets to keep the proceeds from cash or property sold at auction. The case is filed against the property itself. Notice by mail is made to an owner or lien holder, who can petition the court to become a party to the case. There is no right to a court appointed attorney, regardless of income, because the case is considered a civil matter. This practice is

authorized *in addition to fines and other punishment imposed in criminal court post-plea or post-conviction*.

Under Virginia law, no charge or finding of guilt is required prior to seizure or prior to transferring legal ownership to the government. In order to recover seized property in Virginia, an individual must appear in court in the civil case and prove that their property is exempt from forfeiture. Interestingly, the Eighth Amendment to the US Constitution makes it illegal to impose excessive fines and penalties on criminal defendants.¹ During the current US Supreme Court term, a case is pending against Indiana on the exact issue of whether Indiana state civil forfeiture runs afoul of the Eighth Amendment to the US Constitution.²

Civil forfeiture has been highlighted across the country as a practice with the potential for abuse. In particular, advocates from across the political spectrum have raised alarm about Virginia civil forfeiture being used without any criminal charges being filed and without any findings of guilt. Several Virginia law review articles in Virginia have focused on the issue. In 2015, the Virginia Crime Commission issued a report on civil forfeiture, and made several recommendations.³

Concerns about the seizing of cash and other property by law enforcement is hardly a new issue. During the 1850s, Virginia Governor Wise embarked on an effort aimed at curbing police corruption by requiring forfeited assets to be transferred to the Literary Fund, which to this day funds education in Virginia. *“Virginia’s Literary Fund”*, New York Times (October 2, 1857). However, in 1991, the Virginia Constitution was changed to permit any forfeited assets relating to drug offenses to be used for law enforcement activities.⁴ This essentially means that whatever drug-related forfeited assets are seized by law enforcement, they get to keep.

Situations Involving Seizures under Virginia Law

While the justification for civil forfeiture includes preventing the retention of ill-gotten gains from drug trafficking, the practice has expanded to other offenses. Among these are felony DUI offenses, prostitution, and cigarette trafficking, but until recently there has been no requirement to file reports on the seizures of non-drug cases. Typically, a seizure would occur when police encounter a person while walking or driving street, and take their property from them at that time. Typical examples of items seized include cash, jewelry, and automobiles. Ostensibly, this occurs only where the property is being used in association with a crime, however some individuals have complained that their property has been seized without any justification, including in Virginia. For example, in 2014, state troopers seized cash from church parish leaders Victor Guzman and Jose Sorto, which made headlines.⁵ The church leaders were carrying cash to pay for a down payment on land. Despite no drugs being found at the scene,

¹ <https://constitution.findlaw.com/amendment8.html#annotations>

² <http://www.scotusblog.com/case-files/cases/timbs-v-indiana/>

³ <http://vscc.virginia.gov/Asset%20Forfeiture-1.pdf>

⁴ <https://law.lis.virginia.gov/constitution/article8/section8/>

⁵ https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?utm_term=.fa63fac28b14

\$28,500 in cash was seized and eventually was returned by ICE. In another instance reported in 2015, Virginia Commonwealth University police seized \$1074 in cash from a Richmond man, which he later fought in court and his cash was returned months later.⁶

Virginia Crime Commission Report on Civil Forfeiture

In 2015, the Virginia Crime Commission issued a report on state civil forfeiture in response to efforts to reform state law. The Crime Commission summarized data reported in drug related cases. It reported that, in 2014, of 1476 items seized, 245 items were returned to the owner, 85 matters were dismissed, and 34 were released to the lienholder. In other words, 25% of the assets seized were NOT forfeited in state drug cases. See *Virginia State Crime Commission Report on Asset Forfeiture* (2015), pp 3, 24. This seems inordinately high. Further, the Virginia Crime Commission noted that there had been no reporting at all of seizures relating to offenses other than drug offenses, and inadequate reporting on the disposition of criminal cases, even for drug offenses. *Ibid at 3.*

Status of Reform Efforts and Local Practices

Repeated efforts have been made to pass state legislation in Virginia aimed at reform, with broad bipartisan support. However, major civil forfeiture reform bills that have passed the Virginia House of Delegates have been stopped by the Senate Finance Committee, most recently in 2018 with an 8-8 committee vote.⁷

As a general matter, for any government agency to discourage impropriety, civil rights abuses, and outright criminal conduct, written policies and practices need to be in place and consistently followed. Accounting oversight should be particularly strict since asset forfeiture usually involves handling cash. This is not an abstract concern. In 2016, a former Loudoun County Sheriff's deputy was convicted of embezzling \$229,000 in asset forfeiture funds, and sentenced to 3 years in prison.⁸

According to the Arlington County Police Department and the Commonwealth's Attorney's Office, there are no written policies or procedures in effect relating to the seizure of private property by local law enforcement in Arlington. Members of the Committee have been told that local practice is to require charges for any seizure, and that seizures below \$500 are not made because it is "not worth the effort." However, the Legislation Committee is unable to verify whether these "practices" are universal. Individual seizure records (998 Forms) requested by the Legislation Committee were withheld on the grounds that they involve criminal investigations and are exempt from mandatory disclosure under Va. Code Section 2.2-

⁶ <http://www.nbc12.com/story/32524031/man-says-vcu-police-unlawfully-took-money-under-civil-asset-forfeiture-law/>

⁷ <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=181&typ=bil&val=hb900>

⁸ https://www.washingtonpost.com/local/public-safety/former-loudoun-county-deputy-gets-three-year-sentence-for-embezzlement/2016/06/17/d1e87288-34a6-11e6-8ff7-7b6c1998b7a0_story.html?utm_term=.ea5f0c621d56

3706(B)(1).⁹ ACPD also declined to redact the records to remove any sensitive information. The \$500 threshold cited by ACPD appears to align with the threshold amount that triggers mandatory reporting to the Virginia Department of Criminal Justice Forfeited Asset Sharing Program. It is unknown to the Committee if there have been seizures in Arlington below that \$500 threshold, or if any such seizures have been documented in any way.

ACPD recently informed the Legislation Committee that written standards are being developed and will shortly be under review for adoption. This is welcome news.

Fiscal Impact of State Reform for Arlington County

According to the Arlington County Police Department annual filing reports, for the past three fiscal years, proceeds from state civil forfeiture amount to \$25,919 in FY 2016, \$9,509 in FY2017 and \$21,402 in FY2018. This indicates a very minimal impact on revenue from any reform efforts in relationship to the budget for the ACPD and the Commonwealth's Attorney's Office. The ACPD adopted annual budget in FY 2018 was in excess of \$65 million. It is unclear if the administrative costs of the program exceeds the revenues obtained.

ARLINGTON CIVIC FEDERATION RESOLUTION ON CIVIL FORFEITURE

WHEREAS, asset forfeiture involves a civil lawsuit brought *in rem* against the property, and no criminal charge against the owner is required;¹⁰

WHEREAS, Virginia asset forfeiture permits law enforcement to summarily seize assets such as currency, motor vehicles, and other items of value from persons in Virginia;¹¹

WHEREAS, Virginia law allows lawsuits against the property to proceed and assets to be transferred to government agencies without requiring a criminal charge or a finding of guilt against the owner;¹²

WHEREAS, civil forfeiture is authorized under state and federal law for a broad range of alleged offenses, and is not limited to drug trafficking or organized crime;

WHEREAS, Virginia civil forfeiture law places a burden on individuals to prove in a court of law that they own the seized assets, before they can recover them;¹³

WHEREAS, Virginia civil forfeiture law requires an owner to prove their "innocence" in court in order to recover assets.¹⁴

WHEREAS, the cost of valuing and maintaining assets seized is deducted from any sale proceeds, resulting in a loss of asset value to owners if their asset is eventually returned or cash proceeds reimbursed following the sale of property at auction;

WHEREAS, challenging a seizure in court is stressful and typically would be more expensive than the value of the assets seized;

⁹ <https://law.lis.virginia.gov/vacode/title2.2/chapter37/section2.2-3706/>

¹⁰ *Virginia State Crime Commission Report on Asset Forfeiture* (2015); VA Code § 19.2-386.1 *et seq.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

WHEREAS, bills that reform civil asset forfeiture by requiring a criminal conviction have been brought repeatedly, and have twice passed the Virginia House of Delegates with bipartisan support only to fail in the Virginia Senate Finance Committee¹⁵;

WHEREAS, civil forfeiture law creates an improper financial dependence on the part of federal, state, and local government on the seizing of property belonging to individuals;

WHEREAS, there is strong bipartisan support for the reform of civil asset forfeiture;¹⁶

NOW THEREFORE, THE ARLINGTON CIVIC FEDERATION requests the support of all members of our state delegation for the following reforms during the 2019 General Assembly:

1. Require a criminal charge be brought in association with any seizure of property under VA Code § 19.2-386.1 *et seq.* alleging the property is associated with criminal activity. Otherwise, the property must be returned to its owner within 21 days of being seized.
2. Require a finding of guilt of a criminal offense before property can be deemed forfeited under VA Code § 19.2-386.1 *et seq.*
3. To ensure that ownership of seized property is documented, require an inventory of assets to be provided to the person from whom items are seized *at the time of seizure*, with a copy to be included in any associated criminal case file maintained by the Clerk of Court;
4. Improve transparency and accountability by law enforcement to report in a timely manner all assets seized in the Commonwealth of Virginia to the Virginia Department of Criminal Justice, regardless of estimated worth, or whether it is part of the state or federal asset sharing program.¹⁷
5. Require the Virginia Department of Criminal Justice to make public their reports on civil asset forfeiture, based upon annual certification reports and other reported data for each locality regarding the value and disposition of assets seized (i.e., forfeited post-conviction, returned, or abandoned).
6. Ensure that those from whom items are seized receive notice of their rights, including any deadlines to claim their seized property. If proof of notice cannot be shown, no waiver of ownership rights should apply.
7. If no finding of guilt is made, ensure that owners have an automatic right to claim their property without the burden of defending or filing a lawsuit, and without imposing upon them the burden of proof other than providing positive identification at the time the property is returned.

¹⁵ House Bill 1287 (2015) <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=151&typ=bil&val=hb1287>; House Bill 900 (2018); <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=181&typ=bil&val=hb900>

¹⁶Civil Asset Forfeiture reforms, including requiring a criminal conviction, is supported by a number of non-profit organizations that focus on liberty interests, including the American Civil Liberties Union, the American Legislative Exchange Council, and the Institute for Justice.

¹⁷In 2018, new reporting requirements were passed into law. Senate Bill 813 (2018). <http://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+SB813>. However, the Virginia Department of Criminal Justice training module does not require reporting of assets seized if they are less than an estimated \$500 in worth unless they are reported with another asset worth \$500 or more. https://www.dcjs.virginia.gov/fasp/fasp-training/story_html5.html

8. Ensure that co-owners and lienholders have standing to challenge seizure of property subject to forfeiture.
9. Consider what steps should be taken if a law enforcement agency fails to file reports required by the Virginia Department of Criminal Justice, such as losing the benefit of related asset disposition or requiring an internal affairs investigation.