

The Washington Post

May 20, 2012

By George F. Will

When the looter is the government

TEWKSBURY, Mass.—Russ Caswell, 68, is bewildered: “What country are we in?” He and his wife, Pat, are ensnared in a Kafkaesque nightmare unfolding in Orwellian language.

This town’s police department is conniving with the federal government to circumvent Massachusetts law — which is less permissive than federal law — to seize his livelihood and retirement asset. In the lawsuit titled *United States of America v. 434 Main Street, Tewksbury, Massachusetts*, the government is suing an inanimate object, the motel Caswell’s father built in 1955. The U.S. Department of Justice intends to seize it, sell it for perhaps \$1.5 million and give up to 80 percent of that to the Tewksbury Police Department, whose budget is just \$5.5 million. The Caswells have not been charged with, let alone convicted of, a crime. They are being persecuted by two governments eager to profit from what is antiseptically called the “equitable sharing” of the fruits of civil forfeiture, a process of government enrichment that often is indistinguishable from robbery.

The Merrimack River Valley near the New Hampshire border has had more downs than ups since the 19th century, when the nearby towns of Lowell and Lawrence were centers of America’s textile industry. In the 1960s the area briefly enjoyed a high-tech boom. Caswell’s “budget” motel, too, has seen better days, as when the touring Annette Funicello and the Mouseketeers checked in. In its sixth decade the motel hosts tourists, some workers on extended stays and some elderly people who call it home. The 56 rooms rent for \$56 a night or \$285 a week.

Since 1994, about 30 motel customers have been arrested on drug-dealing charges. Even if those police figures are accurate — the police have a substantial monetary incentive to exaggerate — these 30 episodes involved less than 5/100ths of 1 percent of the 125,000 rooms Caswell has rented over those more than 6,700 days. Yet this is the government’s excuse for impoverishing the Caswells by seizing this property, which is their only significant source of income and all of their retirement security.

The government says the rooms were used to “facilitate” a crime. It does not say the Caswells knew or even that they were supposed to know what was going on in all their rooms all the time. Civil forfeiture law treats citizens worse than criminals, requiring them to prove their innocence — to prove they did everything possible to prevent those rare crimes from occurring in a few of those rooms. What counts as possible remains vague. The Caswells voluntarily installed security cameras, they photocopy customers’ identifications and record their license plates, and they turn the information over to the police, who have never asked the Caswells to do more.

The Caswells are represented by the Institute for Justice, a libertarian public-interest law firm. IJ explains that civil forfeiture is a proceeding in which property is said to have acted wrongly. This was useful long ago against pirates, who might be out of reach but whose ill-gotten gains could be seized. The Caswells, however, are not pirates.

Rather, they are victims of two piratical governments that, IJ argues, are

violating the U.S. Constitution twice. They are violating the Eighth Amendment, which has been construed to forbid “excessive fines” that deprive individuals of their livelihoods. And the federal “equitable sharing” program violates the 10th Amendment by vitiating state law, thereby enabling Congress to compel the states to adopt Congress’s policies where states possess a reserved power and primary authority — in the definition and enforcement of the criminal law.

A federal drug agent operating in this region roots around in public records in search of targets — property with at least \$50,000 equity. Caswell thinks that if his motel “had a big mortgage, this would not be happening.”

“Equitable sharing” — the consensual splitting of ill-gotten loot by the looters — reeks of the moral hazard that exists in situations in which incentives are for perverse behavior. To see where this leads, read IJ’s scalding report “Policing for Profit: The Abuse of Civil Asset Forfeiture” (<http://ow.ly/aYME1>), a sickening litany of law enforcement agencies padding their budgets and financing boondoggles by, for example, smelling, or imagining to smell, or pretending to smell, marijuana in cars they covet.

None of this is surprising to Madisonians, which all sensible Americans are. James Madison warned (in *Federalist 48*) that government power “is of an encroaching nature.” If unresisted, it produces iniquitous sharing of other people’s property.

George F. Will is a syndicated columnist for *The Washington Post*