

Support HB 1101 – Close the Federal Civil Forfeiture Loophole

Bill Summary: HB 1101 would stop NH enforcement agencies from asking the federal government to “adopt” seizures and then have the U.S. Attorneys litigate forfeiture of property in federal court under the U.S. DOJ’s Equitable Sharing program. Instead, this bill would require that the forfeiture litigation be done by NH county attorneys under NH law in NH courts.

Background: NH law enforcement collaborates with the DEA and DOJ in two ways:

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| 1. Joint NH/Federal task forces | 25 per year totaling | \$146,000 |
| 2. Adoptions | 6 per year totaling | \$57,000 ⁱ |

Adoptions allow NH law enforcement officers to ask federal authorities (a) to take control of assets seized under state law by state officials—with no help from the DEA—and (b) have U.S. attorneys litigate the taking of title under the federal law in federal courts. That process provides law enforcement with an end run around NH law.

This legislation would not change the ability of state or local law enforcement agencies to participate in joint task forces with the federal government, nor prohibit the state of New Hampshire from receiving the distribution of forfeiture proceeds from that participation. But it would convert about six seizures annually from forfeiture litigation under federal law to litigation under NH law in NH courts.

Federal civil forfeiture allows the government to take and keep your property without even charging you with a crime. The federal government can litigate forfeitures—the transfer of title—by either (a) criminal forfeiture or (b) civil forfeiture. It prefers (b). About 85% of cases are litigated in civil court, independent of any criminal charge. Imagine that you’re driving down the road to buy a used car when you are pulled over by law enforcement. The officer discovers the \$600 in cash you’re carrying, alleges it is the product of a crime, and takes it. You, however, are not charged with a crime. If you want your money back, you’ll have to hire an attorney, go to federal court, and prove that it didn’t come from illegal activity against the resources of the U.S. government. And, if you cannot afford an attorney, you are not provided with one because it is a civil case. New Hampshire lawmakers must limit the ability of state and local law enforcement to abuse this program.

Although infrequent, NH law enforcement should not be allowed to circumvent state law. In 2016, NH legislators took a step toward ending civil forfeiture by passing legislation that stayed forfeiture litigation in civil court until after a conviction in criminal court. This required prosecutors to first charge and convict the property owner and, if successful, then prove the seized property is the product of the crime.ⁱⁱ Unfortunately, this has a flaw. The federal government has created a loophole that allows NH agencies to ignore those state law by asking the U.S. Attorney’s Office to “adopt” seizures. Adoptions send the seizure into the federal forfeiture process that mostly does not require a charge and conviction before a person loses title to property in civil forfeiture litigation in civil court.ⁱⁱⁱ And, under the federal program, the U.S. DOJ returns to the NH agency that seized the property up to 80 percent of the forfeiture proceeds—that’s more than the 45% distribution rate under state law.^{iv} HB 1101 closes the portion of the federal loopholes caused by federal adoptions.

Most federal forfeiture cases do not require a conviction of a person. A cornerstone of the American justice system is that one is innocent until proven guilty. Yet, because of the federal forfeiture loophole, NH agencies can seize based on probable cause that the property is the fruit or instrument of a crime.

Then, law enforcement can hand over the property to federal prosecutors whose work is made easier by a low civil standard of proof in civil court. U.S. attorneys only need to show by a preponderance of the evidence (51%) that the property has a connection to the alleged crime.

Civil forfeiture incentivizes the pursuit of profit over the fair administration of justice. Under NH law, the local or state government can keep up to 45% of forfeiture proceeds after reimbursements of litigation cost, liens, and a contribution to the police psychological stability screening fund.^v Under federal law, NH agencies receive back more—up to 80% of proceeds under the federal equitable sharing program, which includes (a) joint tasks forces and (b) adoptions.^{vi} Thus, law enforcement agencies have an incentive to seize as much property as possible and outsource the forfeiture litigation to U.S. Attorneys. Legislators should not put law enforcement in a position where agencies appear to be self-funding their budget by circumventing state law. This structure creates a perverse incentive to prioritize profit over justice.

Support HB 1101: Close the federal adoption loophole and ensure NH law is not circumvented

ⁱ The Department of Justice Consolidated Asset Tracking System (CATS) analyzed by the Institute for Justice.

ⁱⁱ RSA 318-B:17-b.

ⁱⁱⁱ Jennifer McDonald, *Civil Forfeiture, Crime Fighting and Safeguards for the Innocent: An Analysis of Department of Justice Forfeiture Data*, Institute for Justice, Dec. 2018, p.2, available at https://ij.org/wp-content/uploads/2018/11/Forfeiture-White-Paper_Final.pdf; see also Todd Bookman, 'Loophole' Helps N.H. Law Enforcement Net Millions Through Civil Asset Forfeiture, New Hampshire Public Radio, Mar. 5, 2018, available at <https://www.nhpr.org/nh-news/2018-03-05/loophole-helps-n-h-law-enforcement-net-millions-through-civil-asset-forfeiture>.

^{iv} Jennifer McDonald, *Civil Forfeiture, Crime Fighting and Safeguards for the Innocent: An Analysis of Department of Justice Forfeiture Data*, Institute for Justice, Dec. 2018, p.2, available at https://ij.org/wp-content/uploads/2018/11/Forfeiture-White-Paper_Final.pdf.

^v RSA 318-B:17-b-V.

^{vi} Jennifer McDonald, *Civil Forfeiture, Crime Fighting and Safeguards for the Innocent: An Analysis of Department of Justice Forfeiture Data*, Institute for Justice, Dec. 2018, p.2, available at https://ij.org/wp-content/uploads/2018/11/Forfeiture-White-Paper_Final.pdf.