

Support HB 593 – Better Protect Granite Staters’ Due Process Rights

Bill Summary: HB 593:

- Replaces civil forfeiture with criminal forfeiture—requiring a conviction as a prerequisite to the loss of property and ensuring access to counsel.
- Better protects innocent owners, likes spouses, friends, parents and neighbors of defendants.
- Ends low-value seizures of currency of less than \$1,000 and vehicles worth less than \$5,000.
- Protects against excessive forfeitures.
- Ends potential for roadside negotiations by police officers, but permits the waiver of property interests to an official authorized to prosecute the underlying criminal charge.
- Stops outsourcing forfeiture litigation to the Federal Government on seizures made alone by NH law enforcement.

Civil forfeiture has strayed from its original purpose. Since the early 1980’s, law enforcement proponents have advocated for civil forfeiture laws as a tool confiscate the ill-gotten gains of drug kingpins. In practice, however, drug kingpins are rarely the target. As the Institute for Justice found in 21 states, the median currency forfeiture only is \$1,276. In some states, that amount is much smaller. Half of Pennsylvania’s currency forfeitures are less than \$369.ⁱ In Connecticut, the median currency forfeiture is \$665. HB 593 begins to return forfeiture to its original purpose by prohibiting low-dollar seizures of \$1,000 in currency and motor vehicles worth less than \$5,000.

HB 593 is fairer and more efficient by uniting processes in criminal court. Under current NH law, the government must hold a criminal proceeding to prove the defendant committed a crime. Then, the forfeiture litigation takes place in a separate civil proceeding. HB 593 unites the two. By moving forfeiture into criminal court, the same attorneys and judge will be involved in both parts, thus saving judicial resources.

Civil forfeiture leaves NH’s most vulnerable with little recourse. Indigent property owners have no right to an attorney in their efforts to get back seized property. That’s because it is a civil process where public defenders cannot go. Thus, those who seek their property returned face the financial burden of hiring an attorney. By moving to a criminal forfeiture process, HB 593 ensures that the indigent keep their attorneys in the property-related litigation. While no one should bear the cost of having their lawfully obtained property returned, the most vulnerable who cannot afford an attorney are often left without any recourse. As the low dollar values in Pennsylvania and Connecticut suggest, too often property owners just walk away because the cost of an attorney exceeds the value of the property seized

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.ⁱⁱ Under federal law, NH agencies receive back up to 80% of proceeds under the federal equitable sharing program, which includes (a) joint tasks forces and (b) adoptions.ⁱⁱⁱ 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. HB 593 addresses this issue in various ways. First, as discussed above, it establishes minimum seizure amounts of \$1,000 currency and \$5,000 in value of motor vehicle seizures and forfeitures. Second, it ensures that people who cannot afford an attorney will get one. Third, it better protects innocent

property owners, such as spouses, friends, parents and neighbors by allowing them to go into court faster and flipping the burden of proof to the prosecutor. And fourth, as described next, it prohibits adoptions.

State and local law enforcement should not circumvent state law. In 2016, NH legislators took a step toward ending civil forfeiture by enacted 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.^{iv} Unfortunately, this has it flaws caused by property owners not engaging in civil litigation for the reasons described above. But additionally, the federal government has created a loophole that allows NH agencies to ignore that 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 losses title to property in civil forfeiture litigation in civil court.^v 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.^{vi} HB 593 ends closes the portion of the federal loopholes caused by federal adoptions.

Most federal forfeiture does 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. HB 593 does all it can to strengthen procedural protections by uniting the state forfeiture process with criminal prosecution and prohibiting adoptions.

It’s time to call forfeiture what it properly is—a criminal sanction against those convicted. HB 593 makes forfeiture, at least under NH law, part of the criminal prosecution. Only after a person is convicted beyond a reasonable doubt will his property be subject to forfeiture. And both processes will take place in the same court room in front of the same judge, and for some, with the help of a public defender.

Support HB 593

**Ensure Granite Staters get the process they are due.
First a *criminal* conviction, and then a *criminal* forfeiture process.**

ⁱ Institute for Justice, *Big-Time Criminals or Small-Time Forfeitures?*, available at <https://ij.org/report/policing-for-profit-3/pfp3content/forfeiture-is-lucrative-for-governments-nationwide/big-time-criminals-or-small-time-forfeitures/>.

ⁱⁱ RSA 318-B:17-b-V.

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.

^{iv} RSA 318-B:17-b.

^v 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>.

^{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.