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Testimony House Judiciary Committee

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H. 198: This bill proposes to limit judicial forfeiture proceedings to circumstances in which the person is convicted of the underlying criminal offense and to deposit all proceeds from the sale of forfeited property, after offset, into the General Fund.

Madam Chair and Judiciary Committee Members,

Thank you for the opportunity to present my bill today.

**What is civil forfeiture? According to Wikipedia:**

**“Civil forfeiture in the United States**, also called **civil asset forfeiture** or **civil judicial forfeiture**, is a process in which law enforcement officers take assets from persons suspected of involvement with crime or illegal activity without necessarily charging the owners with wrongdoing. While civil procedure, as opposed to criminal procedure, generally involves a dispute between two private citizens, civil forfeiture involves a dispute between law enforcement and *property* such as a pile of cash or a house or a boat, such that the thing is suspected of being involved in a crime. To get back the seized property, owners must prove it was not involved in criminal activity. Sometimes it can mean a threat to seize property as well as the act of seizure itself. Civil forfeiture is not considered to be an example of a criminal justice financial obligation.

Proponents see civil forfeiture as a powerful tool to thwart criminal organizations involved in the illegal drug trade, with \$12 billion annual profits, since it allows authorities to seize cash and other assets from suspected narcotics traffickers. They also argue that it is an efficient method since it allows law enforcement agencies to use these seized proceeds to further battle illegal activity, that is, directly converting value obtained for law enforcement purposes by harming suspected criminals economically while helping law enforcement financially.

Critics argue that innocent owners can become entangled in the process to the extent that their 4th Amendment and 5th Amendment rights are violated, in situations where they are presumed guilty instead of being presumed innocent. It has been described as unconstitutional by a judge in South Carolina.<sup>[4][5]</sup> Further, critics argue that the incentives lead to corruption and law enforcement misbehavior. There is consensus that abuses have happened but disagreement about their extent as well as whether the overall benefits to society are worth the cost of the instances of abuse.”

**The last time the legislature looked at forfeiture laws was in 2015.**

**Background:** In 2015, the legislature in passing a bill that addressed animal abuses, and forfeiture of the animals and expensive equipment, made changes in general to Vermont's forfeiture laws. This part of the bill was not highlighted and as a result. Vermont went from having good forfeiture protections to being rated poorly for the changes we made.

**Instead of proceeds from forfeiture going into the general fund, the law changed giving law enforcement a percentage of the money collected.** law enforcement shouldn't be able to profit from other people's property. **It's time to eliminate the profit motive.**

**The Center for Problem Policing states:** "forfeiture laws engender considerable controversy because many of them have sharing provisions. Federal law and most state laws provide that a certain amount of the forfeiture proceeds can go back to the policy agency that set the wheels in motion". state laws vary considerably how forfeited assets are to be disposed.

**ACLU VT newsletter 3/23/15:** "While Vermont often strikes off by itself, this time it's in the wrong direction. Everywhere else in the country, governments are looking to rein in what two former directors of the federal asset forfeiture program have called 'the heavy hand of government gone amok'.... Current Vermont law directs all forfeiture proceeds to the state's general fund; that's avoided the creation of a direct incentive for police depts to go after certain people for certain crimes." "in their Washington Post op-ed, John Yoder and Brad Cates said, "that over time, asset forfeiture "has turned into an evil itself, with the corruption it engendered among government and law enforcement coming to clearly outweigh any benefits', why you may wonder, would Vermont want to head in that direction?"

**Policing for a Profit:** In 2015, Vermont took one step forward and two steps back with its civil forfeiture laws, raising the government's standard of proof to forfeit property while also creating a new incentive for law enforcement agencies to police for profit. Vermont's laws, which earn a C grade, now require the government to provide clear and convincing evidence tying property to an owner's conviction in criminal court before the property may be forfeited. Unfortunately, the General Assembly did not reform Vermont's innocent owner burden—a third-party owner must still prove that she was not involved in the illegal use of her property to recover it. Finally, law enforcement can now retain 45 percent of forfeiture proceeds. Although this incentive is much lower than those in most other states, it is considerably worse than what Vermont had before: a statute mandating that all forfeiture proceeds be delivered to the state treasurer rather than to law enforcement coffers. **Vermont** earns a **C** for its civil forfeiture laws: Higher bar to forfeit property and conviction required – **A GOOD THING**

## What Problems is this Bill Trying to Address:

- **Civil asset forfeiture generally affords no right to counsel, whereas criminal forfeiture generally does. Heritage Foundation**

In a criminal forfeiture case, an indigent defendant has a right to appointed counsel under the Criminal Justice Act (CJA), but an indigent third party who wishes to contest a criminal forfeiture in an “ancillary proceeding” under 21 U.S.C. § 853(n) has no right to appointed counsel. Further, if the third-party claimant prevails against the government, CAFRA does not authorize a fee award for the third party. In a civil forfeiture case, an indigent property owner generally has no statutory right to appointed counsel except in one narrowly defined situation: where the government is seeking to forfeit the owner’s “primary residence.” A court has discretion to appoint an attorney already representing a criminal defendant under the CJA to be counsel in a related civil forfeiture case under section 983(b)(1). The courts appear to exercise this authority only seldom, perhaps because defense counsel commonly is unaware of the statutory provision in question and therefore fail to ask for such an appointment. The court may also appoint *pro bono* counsel for an indigent claimant under 28 U.S.C. § 1915(d), but few claimants are aware of this statutory provision, and courts have rarely used it in civil forfeiture cases.

Under 28 U.S.C. § 2465(b)(1), if the claimant prevails against the government, CAFRA requires that the government pay the “reasonable” attorney fees of the claimant. This fee-shifting provision is no substitute for appointed counsel—a critical reform provided in the House-passed CAFRA bill in 1999 that was removed from the final Senate bill to obtain passage by unanimous consent of both houses in 2000.

**Civil forfeiture encourages policing for a profit**, according to analysis of national data, by Williams, Holcomb and Kovandzic. One finding was that it encouraged agencies to pursue forfeiture to boost their budgets. They found that when state laws make forfeiture more difficult and less rewarding, law enforcement takes advantage of federal forfeiture laws which are more generous in equitable sharing.

**CATO Institute: Perverse incentives: Vermont has one of the better asset forfeiture laws, but it was weakened in 2015 and equitable sharing provides an easy path to circumvention.**

## Transparency/Accountability:

Vermont law requires law enforcement agencies to file reports of their controlled substances forfeitures with the state treasurer. When the Institute for Justice submitted a Vermont Public Records Law request to the Office of the State Treasurer to obtain forfeiture reports from 2009 to 2014, the treasurer's office replied: "No such records, reports, or funds were sent to the Office of the State Treasurer during those years." It was unclear at press time whether agencies failed to report because no forfeitures had occurred under state law or because agencies were out of compliance with reporting requirements.

- When we looked back in 2015, this money was not part of SA budgets, and was used for extras.
- One of our former committee members, a former law enforcement officer, shared some horror stories of cars that people wanted to get and raffling them off at the holiday parties.
- 2020 study found that the [median](#) cash forfeiture in 21 states which track such data was \$1,300.

## Research shows that Forfeiture laws don't work.

**Hot off the press-** Across the country, law enforcement agencies use forfeiture to take billions of dollars in cash, cars, and homes under the guise of fighting crime. Yet a new study released today by the Institute for Justice (IJ), "[Does Forfeiture Work?](#)," demonstrates that state forfeiture programs do not help police fight crime. Instead, the study indicates that police use forfeiture to boost revenue—in other words, to police for profit. The study uses a newly assembled set of forfeiture data from five states that use forfeiture extensively—Arizona, Hawaii, Iowa, Michigan, and Minnesota—as well as detailed state and local crime, drug use and economic data. Specifically, the new study finds:

- More forfeiture proceeds do not help police solve more crimes—and they may, perversely, make police less effective at solving violent crimes.
- More forfeiture proceeds do not lead to less drug use, even though forfeiture proponents have long cited fighting the illicit drug trade—and the reduction of drug use—as a primary purpose of forfeiture.
- When local budgets are squeezed, police respond by increasing their reliance on forfeiture. A one percentage point increase in unemployment—a common measure of economic health—is associated with an 11% to 12% increase in forfeiture activity.

"Law enforcement representatives have argued that any civil liberties intrusions from forfeiture are justified because the revenue helps fight crime, but the evidence does not support this", said Dr. Brian Kelly, associate professor of economics Seattle University's [Albers School of](#)

[Business and Economics](#) and the study's author. "In fact, the focus on bringing in revenue may well detract from efforts to fight serious, violent crimes. "This work builds on a [2019 nationwide study](#) that considered whether the federal government's equitable sharing forfeiture program was effective in fighting crime. Similarly, that study showed that forfeiture failed to fight crime but is used to raise revenue.

## **Additionally, the landscape changed since 2015.**

### **In 2019:**

- Civil forfeitures are subject to the "excessive fines" clause of the [U.S. Constitution's 8th amendment](#), both at a federal level and, as determined by the 2019 Supreme Court case, *Timbs v. Indiana*, at the state and local level.<sup>1</sup>This 9-0 decision stated that the Eighth Amendment's protections against excessive fines and fees applied to the states. The case, *Timbs v. Indiana*, challenged the seizure of a \$42,000 Land Rover—four times the maximum fine for the drug crime that resulted in the seizure.

Scott Lemieux, political science teaching professor, University of Washington, and co-author, "Judicial Review and Democratic Theory":

Civil forfeiture is sometimes a perfectly legitimate practice: Thieves do not have a right to keep the property they've stolen, for example. But the state's power to compel the transfer of property from suspected criminal to the state has become a major tool in the War on [Some Classes of People Who Use Some] Drugs and, as with so much of this war, has become rife with abuse and arbitrary exercises of state power.

[The case of Tyson Timbs](#) is a good example of this abuse with which the system has become rife. Timbs was charged and ultimately convicted of selling a small amount of heroin to an undercover police officer. In addition to a suspended six-year sentence, the state seized Timbs's \$42,000 Land Rover — even though he could prove that the vehicle was purchased with money received from a life insurance policy and not the proceeds of his low-level criminal enterprise. So, while \$10,000 is the maximum fine under Indiana Law for the offense of which he was convicted, he was effectively fined much more than that amount when the state seized his car. The Supreme Court, though, may have just curtailed the abuse of this practice.

- The Arkansas legislature unanimously passed S.B. 308, a significant asset forfeiture reform bill that will require police and prosecutors to obtain a criminal conviction in most cases before they can seize someone's property. The new law would require prosecutors to obtain a criminal conviction to forfeit property. There is a list of exceptions, however, including if the property owner is deceased, deported, flees the jurisdiction or fails to challenge the forfeiture, or if the property is abandoned.
- Arkansas will join four other states—North Carolina, New Mexico, and Nebraska—that have severely curtailed or abolished asset forfeiture.

- Since 2010, 35 states and the District of Columbia have enacted forfeiture reforms. Seven states and the District have restricted equitable sharing, limiting law enforcement's ability to receive funding through the program and making it harder for law enforcement to circumvent state civil forfeiture laws. And in 2015, New Mexico abolished civil forfeiture, replacing it with criminal forfeiture and requiring that all forfeiture proceeds be deposited in the state's general fund. In 2019,
- IJI secured a landmark victory in *Timbs v. Indiana*, where the U.S. Supreme Court unanimously ruled that state civil forfeiture cases are bound by the Eighth Amendment's ban on "excessive fines."



My proposed solutions:

1. **Ideally, it's time to eliminate civil forfeiture.**
  - People should not lose their property if they were not convicted of a crime.
  - Law enforcement should not be able to profit off other people's property.

This time, I am introducing a short form, with my recommendations as follows:

- **Civil forfeiture revenue should** be place in a neutral fund such as one for education or drug treatment, or **more desirably, in the general revenue fund of the county or state government.**
- **"provide more public accountability"** "require all agencies to track and report forfeiture revenue and distributions and make that information readily available to the public".

**Look at the research and the recent supreme court ruling:**

- **close equitable sharing loophole. Respect federalism principles by abolishing sharing agreements with the federal government. If a state has decided to end the practice of** policing for profit, officials in that state should not be allowed to do an end-run around those procedures by teaming up with the federal government to forfeit property." "states need to consider adoption when developing forfeiture reforms. Requirements can be placed on turnover orders.... The circumvention of state forfeiture law by equitable sharing needs to come to an end...."