

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2022**

ON THE FOLLOWING MEASURE:

H.B. NO. 1965, RELATING TO PROPERTY FORFEITURE.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Thursday, February 3, 2022 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General, or
Michael S. Vincent or Steve A. Bumanglag, Deputy Attorneys
General

Chair Nakashima and Members of the Committee:

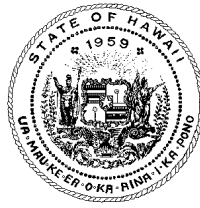
The Department of the Attorney General (Department) supports this bill.

The bill allows property to be subject to forfeiture only in circumstances where the person who committed the covered offense exercised some degree of control over the property, and the person is charged with a crime related to the offense. The bill also raises the standard of proof in judicial forfeiture proceedings from a preponderance of the evidence to clear and convincing evidence. The bill further allows for the transfer of certain property to certain government entities for use for a period of no longer than twelve months, before transferring it back to the Attorney General; directs forfeiture proceeds to certain state and local governments and to the general fund; and amends the allowable expenses for moneys in the criminal forfeiture fund. It also requires the Attorney General to adopt rules and amends the deadline for the Attorney General to report to the legislature on the use of the Hawaii omnibus criminal forfeiture act.

The Department agrees that property should be forfeitable only in circumstances where the person who committed the covered offense exercised some degree of control over the property and is charged with a crime related to the property. We also agree that a clear and convincing standard of proof is reasonable since it is the highest standard of proof used in civil proceedings.

We recommend that this measure be passed. Thank you for the opportunity to testify.

DAVID Y. IGE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY

919 Ala Moana Boulevard, 4th Floor
Honolulu, Hawaii 96814

MAX N. OTANI
DIRECTOR

Maria C. Cook
Deputy Director
Administration

Tommy Johnson
Deputy Director
Corrections

Jordan Lowe
Deputy Director
Law Enforcement

No. _____

**TESTIMONY ON HOUSE BILL 1965
RELATING TO PROPERTY FORFEITURE.**

by
Max N. Otani, Director
Department of Public Safety

House Committee on Judiciary and Hawaiian Affairs
Representative Mark M. Nakashima, Chair
Representative Scot Z. Matayoshi, Vice Chair

Thursday, February 3, 2022; 2:00 p.m.
State Capitol, Via Videoconference

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

The Department of Public Safety (PSD) opposes House Bill (HB) 1965, which would limit the use of civil asset forfeitures; and direct proceeds from civil asset forfeitures to be transferred into the General Fund.

PSD is concerned because civil asset forfeiture is a tool that serves to reduce criminal activity by denying offenders the profits from their crimes. HB 1965 would restrict civil asset forfeiture to cases in which the person exercising a degree of control over the property has been charged with the underlying covered offense, however, not all arrests or investigations result in criminal charges or convictions, despite overwhelming evidence. Restricting civil asset forfeitures to property of owners who are criminally charged or convicted does not serve justice or the community. This proposal would only mean that the ill-gotten gains of non-convicted narcotic traffickers, sex traffickers, gambling organizations, and other criminal elements will be retained by those property owners and likely be a source of funding for future criminal activity.

Criminal investigations often incur substantial expenses such as, in the use of electronic surveillance equipment, the use of confidential informants, and the purchase of evidence. These investigations are also labor intensive and costly. Maintaining the retention of civil asset forfeitures with the investigative agency as enabled by current law will offset some of the costs of investigations, allowing the agency to conduct further criminal investigations that may not be budgeted or that it may be otherwise unable to afford. It is further impractical to restrict the use of certain forfeited property for a limited time.

Thank you for the opportunity to provide this testimony.

STATE OF HAWAII

OFFICE OF THE PUBLIC DEFENDER

LATE

Testimony of the Office of the Public Defender,
State of Hawai'i to the House Committee on
Judiciary & Hawaiian Affairs

February 3, 2022

H.B. No. 1965: RELATING TO PROPERTY FORFEITURE

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

Property (or asset) forfeiture may have originally been intended to cripple drug trafficking organizations and organized crime; however, in practice, this is hardly the case. Rather, ordinary people, many with little or no connection to criminal activity, are frequently the targets of asset seizures. Most seizures involve small dollar amounts, not huge sums of cash seized from drug traffickers.

The Office of the Public Defender supports the intent of H.B. No. 1965, which seeks to attempt to make the State's asset forfeiture process more just. This measure's proposed amendments to the civil asset forfeiture law, however, does not go far enough to cure the flaws of our current asset forfeiture law.

This measure seeks to restrict civil asset forfeiture to "cases involving the commission of a covered offense where the person exercising some degree of control over the property is charged with an offense related to the property." A more just process is to restrict civil asset forfeiture *to cases involving the commission of a felony offense where the property owner has been convicted of an underlying felony offense*. What is troubling is that, according to the State Auditor report on civil forfeiture published in June 2018, in **26%** of the asset forfeiture cases, the property was forfeited without a corresponding criminal charge. *See* State of Hawai'i, Office of the Auditor, Audit of the Department of the Attorney General's Asset Forfeiture Program, Report No. 18-09 (June 2018). In other words, no criminal charges were filed in more than one-fourth of the property forfeiture cases. It should be noted that fifteen states now require a criminal conviction for most or all forfeiture cases.

Although the Legislature recognizes that "there is a great incentive for state and county law enforcement agencies to seize property for forfeiture, as these agencies are permitted to retain proceeds from the sale of property," (*see* page 1, lines 12-14), the measure nevertheless leaves intact the distribution of all forfeited property and

the sale proceeds thereof: *one quarter* is to be distributed to the state of local government whose officers or employees conducted the investigation and caused the arrest of the person whose property was forfeited or seizure of the property for forfeiture, and *one quarter* is to be distributed to the prosecuting attorney who instituted the action producing the forfeiture. True reform of the asset forfeiture law would direct any and all forfeiture proceeds to the State general fund. The Institute for Justice, a nonprofit civil liberties law firm, recommends the elimination of financial incentives for law enforcement to seize and keep forfeited property and, instead, direct any proceeds to either a general revenue fund or other neutral fund. Eight jurisdictions now prohibit law enforcement from keeping proceeds from forfeited property. It is unconscionable that a policing agency and a prosecuting agency directly profits from the taking of property. Law enforcement's only incentive to initiate asset forfeiture proceedings should be is to seize assets connected to a crime; allowing law enforcement to receive proceeds from taking of the property creates a perverse secondary incentive -- profit.

This measure recognizes that the current standard of proof is too low and raises the standard to "clear and convincing." The standard, however, should be equivalent to "beyond a reasonable doubt," which ten states have already adopted. Moreover, the government should be required to prove that owners consented to or possessed knowledge of the crime that led to the seizure of their property, thereby restoring the presumption of innocence used in criminal proceedings.

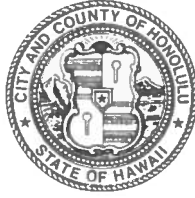
Prosecuting agencies may assert that this measure would create a time-consuming, expensive, and difficult process. However, the process should be difficult when the government is attempting to deprive personal property from its citizens.

Finally, the absurdity of the current state of our asset forfeiture laws in this country, including Hawai'i's law, is brilliantly lampooned in a segment on HBO's Last Week Tonight with John Oliver, which originally aired on October 5, 2014, and which can be viewed at <https://m.youtube.com/watch?v=3kEpZWGgJks> (viewer discretion advised).

Thank you for the opportunity to comment on H.B. No. 1965.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

801 SOUTH BERETANIA STREET · HONOLULU, HAWAII 96813
TELEPHONE: (808) 529-3111 · INTERNET www.honolulu.org



RADE K. VANIC
INTERIM CHIEF

RICK BLANGIARDI
MAYOR

OUR REFERENCE TN-GK

February 3, 2022

The Honorable Mark M. Nakashima, Chair
and Members
Committee on Judiciary
and Hawaiian Affairs
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Nakashima and Members:

SUBJECT: House Bill No. 1965, Relating to Property Forfeiture

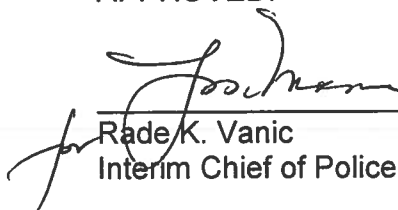
I am Captain Tate Nojima of the Narcotics/Vice Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD opposes House Bill No. 1965, Relating to Property Forfeiture.

Asset forfeiture is an essential enforcement tool used by the HPD to take the profit out of crime, deter criminality, and protect the community. The restrictions created by this bill will greatly diminish the criminal deterrent of civil asset forfeiture. In addition, while waiting for adjudication of a criminal case, this bill causes undue delays for the public, law enforcement agencies, as well as the criminal defendant. Lastly, a tremendous amount of resources are utilized by law enforcement for these investigations. Delaying or eliminating the local investigating law enforcement agency from the proceeds of property forfeited from illegal activities will have a direct impact on the services that the HPD provides to the community.

The HPD urges you to oppose House Bill No. 1965, Relating to Property Forfeiture, and thanks you for the opportunity to testify.

APPROVED:


Rade K. Vanic
Interim Chief of Police

Sincerely,



Tate Nojima, Captain
Narcotics/Vice Division

Rebecca Like
Acting Prosecuting Attorney

Jennifer S. Winn
Acting First Deputy

Leon J. C. Davenport, III
Acting Second Deputy



Diana Gausepohl-White
Victim/Witness Program Director

Theresa Koki
Life's Choices Kaua'i Program
Prevention Services Coordinator

OFFICE OF THE PROSECUTING ATTORNEY

County of Kaua'i, State of Hawai'i

3990 Ka'ana Street, Suite 210, Līhu'e, Hawai'i 96766
808-241-1888 ~ FAX 808-241-1758
Victim/Witness Program 808-241-1898 or 800-668-5734

February 2, 2022

RE: H.B. 1965; RELATING TO PROPERTY FORFEITURE.

Chair Nakashima, Vice-Chair Matayoshi and members of the House Committee on Judiciary and Hawaiian Affairs, the Office of the Prosecuting Attorney for the County of Kaua'i submits the following testimony **IN OPPOSITION to H.B. 1965**, while also recognizing the concerns of some legislators for asset forfeiture reform. Thank you for the opportunity to be heard on this matter.

OPA Kaua'i office is generally opposed to H.B. 1965.

Asset forfeiture legislation was originally adopted as a needed law enforcement tool: to immediately disrupt the criminal enterprise, by taking away key property from the enterprise: vehicles, firearms, cash, etc. The preponderance of the evidence standard is the applicable standard for civil cases in American jurisprudence. It should remain the standard in our civil asset forfeiture cases under HRS Chapter 712A. If the legislature elevates the standard of proof for asset forfeiture cases, it will erode law enforcement's ability to effectively combat criminal enterprises. If legislators are concerned primarily about overreaching by the government,¹ OPA Kaua'i suggests that they propose legislation tailored to their specific concerns. For example, our office does not oppose a reform such as amending HRS Chapter 712A so that vehicles are not subject to forfeiture if they are used solely to commit a drug possession offense (as opposed to drug distribution).

¹ Importantly, very recently, in Alm v. Eleven Products (December 20, 2021), the Hawai'i Supreme Court adopted stricter standards for police departments retaining property in contemplation of filing a forfeiture petition. Our Hawai'i appellate courts continue to prevent government overreaching.

In addition, here are OPA Kaua'i's specific concerns re: H.B. 1965:

1. Our office is generally opposed to conditioning a forfeiture petition upon the existence of a criminal case, as it will very likely create procedural problems and confusion. For example, if an asset forfeiture petition is granted (ordering the forfeiture of property), and subsequently, the person's criminal charge is dismissed or his or her conviction is vacated on appeal – this bill does not address whether those rulings in the criminal case would negate the previously-filed forfeiture petition/judgment? Would the government have to return property to the owner after the forfeiture petition has been granted (because of a future disposition in the criminal case)?

Also, since the standard to file a criminal charge is probable cause, requiring a criminal charge as a condition of a final forfeiture order does not enhance the reliability of those forfeiture orders (currently, the standard for the issuance of a final forfeiture order is probable cause).

2. On page 5, the proposed amendment to HRS §712A-5(2)(b) is very confusing. It could be read to prohibit the seizure of property before a charge is filed (the bill seems intended to require the filing of a charge before entry of a final order for final forfeiture of property, rather than requiring a charge before property is initially seized for forfeiture). This should be clarified in the last sentence to read that it does not prevent the seizure of property before the filing of a charge or conviction.

3. Re: the elevation of the standard of proof (for contested administrative petitions and for all judicial petitions) - our office opposes the elevation of the standard of proof from probable cause to clear and convincing, for challenged administrative petitions and for all judicial petitions. Also, the bill is confusing in that if the legal standard is increased to “clear and convincing” (again, for contested administrative petitions and for all judicial petitions), this creates an issue as to whether HRS §712A-9(1) must also be amended to delete reference to it being “probable” (which seems to refer to “probable cause”) that the property is subject to forfeiture, as a condition for filing either an administrative or a judicial petition.

4. On page 15, the proposed amendment to HRS §712A-10(10) will make it substantially more difficult for prosecutors to file asset forfeiture petitions in drug cases. Unless it's amended, HRS §712A-9 will still allow prosecutors to file an administrative forfeiture petition where it is “probable” (again, suggesting the probable cause standard) that the property is subject to forfeiture. In drug cases, prosecutors can rely on immediate, presumptive test results to establish probable cause that a substance is an illegal drug. But, if an owner files a claim to an administrative petition, and the prosecutor wishes to thereafter proceed with a judicial petition, if the clear and convincing standard applies, the prosecutor will now have to get lab test results in the

time frame statutorily-mandated (45 days after the claim is filed). HRS §712A-10(9). In our experience, we are not likely to reliably obtain lab results for drugs within 45 days; often lab results take 2-4 months.

For the foregoing reasons, the Office of the Prosecuting Attorney for the County of Kauaʻi opposes the passage of H.B. 1965, as currently drafted. Thank you for the opportunity to testify on this matter.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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STEVEN S. ALM
PROSECUTING ATTORNEY

THOMAS J. BRADY
FIRST DEPUTY
PROSECUTING ATTORNEY



THE HONORABLE MARK M. NAKASHIMA, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-first State Legislature
Regular Session of 2022
State of Hawai'i

February 3, 2022

RE: H.B. 1965; RELATING TO CRIMINAL PRETRIAL REFORM.

Chair Nakashima, Vice-Chair Matayoshi and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in opposition to H.B. 1965.

While this bill appears to have good intentions, it attempts to apply criminal standards of proof to civil proceedings, indicating that people should never be penalized if their culpability is only proven by "preponderance of the evidence." However, this ignores the fact that "preponderance of the evidence" is in fact the prevailing standard of proof and due process used in civil and administrative legal proceedings throughout Hawaii; this standard is actually used every day to decide matters affecting people's assets, property and livelihoods. For example, the standard used by the Department of Commerce and Consumer Affairs, Commissioner of Securities, Insurance Commissioner, Commissioner of Financial Institutions, and any board or commission attached for administrative purposes to the Department of Commerce and Consumer Affairs with rulemaking, decision making, or adjudicatory powers, is preponderance of the evidence.¹ Also, all adjudication hearings held before the Honolulu Liquor Commission are decided based on preponderance of the evidence.² So too are hearings held before the Land Use

¹ See the definition of "Authority," under Section 16-201-2, Hawaii Administrative Rules ("HAR"). See also HAR §16-201-21(d), which states:

(d) Except as otherwise provided by law, the burden of proof, including the burden of producing the evidence and the burden of persuasion, shall be upon the party initiating the proceeding. Proof of a matter shall be by a preponderance of the evidence.

Available online at https://files.hawaii.gov/dcca/oah/forms/oah_oah_hearings_rules.pdf; last accessed February 1, 2021.

² See Section 3-85-91.5(d), Rules of the Liquor Commission, which states:

Commission,³ the Hawaiian Homes Commission,⁴ and any number of other State bodies and agencies governed by HRS Chapter 91.⁵

Respectfully, the Department urges this Committee to defer H.B. 1965, based upon recognition that our legal system includes two different tracks—civil and criminal—with two completely different standards of proof, and those tracks often run parallel to one another. This can be true of a liquor license owner who not only stands to lose their liquor license, but could be subject to criminal prosecution; or the drunk driver who loses their driver’s license administratively, is criminally prosecuted, then held civilly liable by a victim’s family, through entirely separate proceedings, based on entirely separate standards of proof. Each set of parallel proceedings could stem from a single wrongful act, which carries separate repercussions, ordered in separate proceedings, based on separate standards of proof.

While we understand a few other states have taken drastic measures to merge their civil and criminal standards of proof in asset forfeiture proceedings, the Department strongly urges the Legislature not to make such far-reaching and premature steps against Hawaii’s well-conceived program, particularly in light of the State Auditor’s recommendations, published June 2018 (available at files.hawaii.gov/auditor/Reports/2018/18-09.pdf). In that report, the Auditor made specific recommendations for Hawaii’s civil asset forfeiture program, nearly all of which have already been (and one of which is in the process of being) implemented by the Department of the Attorney General.

Civil asset forfeiture laws are used to immediately and effectively disrupt the infrastructure of criminal activity and protect the community. This is a civil legal process that operates independently from any related criminal cases, in the same way that civil lawsuits, administrative proceedings, and criminal charges can proceed independently from each other in other circumstances. Concerns about “innocent owners” being deprived of their property or

(d) Except as otherwise provided by law, the burden of proof, including the burden of producing the evidence and the burden of persuasion, shall be upon the party initiating the proceeding. Proof of a matter shall be by a preponderance of the evidence.

Available online at honolulu.gov/rep/site/bfsliq/rules/LIQ_Rules_Website_Version_032717.pdf; last accessed February 1, 2021.

³ See HRS §205-4(h) and (i), which state that all land use boundary decisions by the commission, and upon judicial review, shall be found “upon the clear preponderance of the evidence.” Available online at www.hawaii.gov/hrcurrent/Vol04_Ch201-0257/HRS0205/HRS_0205-0004.htm ; last accessed February 1, 2021.

⁴ See *Lui-Dyball v. Hawaiian Homes Commission*, Memorandum Opinion issued May 29, 2015, at page 7, which states in relevant part, “The degree or quantum of proof Section 91-10, HRS, establishes that the burden of proof in matters such as this is ‘by a preponderance of the evidence.’...not ‘beyond a reasonable doubt.’” Available online at www.courts.state.hi.us/docs/opin_ord/ica/2015/May/CAAP-12-0000572mopada.pdf; last accessed February 1, 2021.

⁵ See HRS §91-10(5), which states:

(d) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing the evidence as well as the burden of persuasion. The degree or quantum of proof shall be by a preponderance of the evidence.

Available online at www.capitol.hawaii.gov/hrcurrent/Vol01_Ch0046-0115/HRS009/HRS_0091-0010.htm; last accessed February 1, 2021.

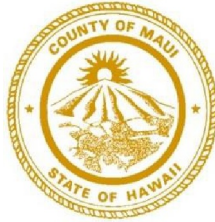
“policing for profit” are unfounded, as Hawaii’s forfeiture laws provide due process for the protection of property owners’ rights, and numerous safeguards are already codified in the statute. **If the concern is that the civil asset forfeiture process should be more simple, transparent or accessible for the public or those impacted by its proceedings, that can and should be addressed in other ways.**

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes H.B. 1965, and asks that the measure be deferred. Thank for you the opportunity to testify on this matter.

MICHAEL P. VICTORINO
Mayor

ANDREW H. MARTIN
Prosecuting Attorney

MICHAEL S. KAGAMI
First Deputy Prosecuting Attorney



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TESTIMONY
ON
H.B. 1965 RELATING TO
PROPERTY FORFEITURE

February 3, 2022

The Honorable Mark M. Nakashima
Chair
The Honorable Scot Z. Matayoshi
Vice Chair
and Members of the Committee on Judiciary & Hawaiian Affairs

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui respectfully submits the following comments concerning H.B. 1965, Relating to Property Forfeiture. Specifically, we would like to express our opposition to the bill in its current form and request that it be deferred, although we do appreciate the legislature's efforts to address the issue of asset forfeiture reform.

We generally share the Office of the Prosecuting Attorney for the County of Kaua'i concerns regarding the effects of this bill in its current form. We also have the following specific concerns:

First, this bill appears to prohibit forfeiture for any property unless a covered offense is charged first, the person charged with the covered offense has exercised some degree of control over the property, and the charge is related to the property. The change would link initiation of a forfeiture action to the initiation of a related criminal case, which in theory would create more, not less, of an incentive for criminal charges to be filed¹. Furthermore, this change would appear to prevent forfeiture in cases where there is insufficient evidence to charge a particular person criminally, but there is clear and convincing evidence that the property was the proceeds of criminal activity (e.g. \$15,240.00 in cash found in an abandoned backpack with drug sale notes and substantial amounts of drugs packaged for street sale, where the amount of cash recovered matches the amounts listed in the drug sale notes).

¹In saying this, we want to make it very clear that prosecutorial ethics bar us from initiating criminal cases as a means to pursue asset forfeiture proceedings. It is our understanding that preventing this conflict is part of the reason why the two proceedings are initiated independently of each other.

Second, requiring that non-currency property be returned to the Attorney General after a year may require additional expenses and resources by both County and State agencies that cannot be fully estimated in advance. There is also the question of whether the Attorney General would have the resources necessary to handle additional property transfers, such as transporting forfeited vehicles between the outer islands and Oahu, on a consistent and yearly basis.

For these reasons, the Department of the Prosecuting Attorney, County of Maui requests that H.B. 1965 be deferred. Please feel free to contact our office at (808) 270-7777 if you have any questions or inquiries.

Thank you very much for the opportunity to provide testimony on this bill.



HAWAII

AMERICANS FOR DEMOCRATIC ACTION

OFFICERS	DIRECTORS		MAILING ADDRESS	
John Bickel, President	Melodie Aduja	Jan Lubin	Bill South	P.O. Box 23404
Alan Burdick, Vice President	Keola Akana	John Miller	Zahava Zaidoff	Honolulu
Dave Nagajji, Treasurer	Juliet Begley	Jenny Nomura		Hawaii 96823
Doug Pyle, Secretary	Stephanie Fitzpatrick	Stephen O'Harrow		

February 1, 2022

TO: Chair Nakashima and Members of the JHA Committee

RE: HB 1965 Relating to Property Forfeiture

Support for hearing on February 3

Americans for Democratic Action is an organization founded in the 1950s by leading supporters of the New Deal and led by Patsy Mink in the 1970s. We are devoted to the promotion of progressive public policies.

We support this bill as it would restrict civil asset forfeiture to cases involving the commission of a covered offense where the person exercising some degree of control over the property is charged with an offense related to the property and would raise the State's standard for forfeiture to clear and convincing evidence. Seizing assets before a conviction is a violation of basic civil liberties. We would like to see the bill amended to end civil forfeiture.

Thank you for your favorable consideration.

Sincerely,

John Bickel, President

Statement Before The
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Thursday, February 3, 2022

2:00 PM

Via Video Conference and Conference Room 325

in consideration of
HB 1965
RELATING TO PROPERTY FORFEITURE.

Chair NAKASHIMA, Vice Chair MATAYOSHI, and Members of the House Judiciary & Hawaiian Affair Committee

Common Cause Hawaii supports HB 1965, which (1) restricts civil asset forfeiture to cases involving the commission of a covered offense where the person exercising some degree of control over the property is charged with an offense related to the property, (2) raises the State's standard for forfeiture to clear and convincing evidence, (3) authorizes the use of certain forfeited property by local or state agencies for a limited time, (4) directs forfeiture proceeds to certain involved state and local governments and to the general fund, (5) amends the allowable expenses for moneys in the criminal forfeiture fund, and (6) amends the requirements for the attorney general to adopt rules and report on the Hawaii omnibus criminal forfeiture act

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to strengthening our representative democracy. A strong democracy requires protecting everyone's constitutional rights and ensuring equal access to our courts and judicial system. The ability to access our courts and judicial system is one of the foundations of democracy.

HB 1965 will permit civil asset forfeiture only in cases in which the covered offense is chargeable as a felony offense under state law and no property may be forfeited unless a person has some degree of control over the property is charged with an offense related to the property. HB 1965 will hopefully improve the criminal justice system and make it more fair and just and lessen civil asset forfeitures' impacts on persons from minority and low-income communities.

Thank you for the opportunity to testify in support of HB 1965. If you have questions for me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii



February 3, 2022

2 p.m.

Via Videoconference

Conference Room 325

To: House Committee on Judiciary & Hawaiian Affairs

Rep. Mark M. Nakashima, Chair

Rep. Scot Z. Matayoshi, Vice Chair

From: Grassroot Institute of Hawaii

Joe Kent, Executive Vice President

Re: HB1965 — RELATING TO PROPERTY FORFEITURE

Comments Only

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to offer its comments on HB1965, which attempts to reform the practice of asset forfeiture in the state.

Civil asset forfeiture in Hawaii has been the subject of criticism and concern. Thus, we commend the Legislature for continuing to address these problems.

In a survey of civil asset forfeiture nationwide by the Institute of Justice, Hawaii earned a D- and the dubious distinction of having some of the worst forfeiture laws in the country.¹

Singled out for criticism was the state's low standard of proof for showing how the property is tied to a crime.

In addition, Hawaii places the burden on innocent owners to prove they weren't tied to the crime resulting in the forfeiture.

The result is a state forfeiture program open to abuse and able to prey on innocent property owners.

¹ Dick M. Carpenter II, et al., ["Policing for Profit: The Abuse of Civil Asset Forfeiture, 2nd Edition,"](#) Institute for Justice, November 2015.

As the Hawaii state auditor wrote in a June 2018 report, Hawaii’s asset-forfeiture program lacks clear rules and procedures, inadequately manages funds and is badly in need of greater transparency.²

The audit found that:

>> In 26% of asset forfeiture cases closed during fiscal 2015, property was forfeited without a corresponding criminal charge.

>> In another 4% of cases, the property was forfeited even though the charge was dismissed. Of those whose property was forfeited, very few petitioned for remission or mitigation. The state auditor speculated that most people might not know petition is an option because of the lack of transparency surrounding the forfeiture program.

This bill would raise the standard of proof required for forfeiture, from a “preponderance of the evidence” to “clear and convincing evidence.” But while this would be an improvement, the intent to help protect innocent owners is undermined by the fact that the bill would allow for forfeiture when a person is charged with an offense related to the property — not when that person is convicted.

Without the requirement of conviction, innocent owners would remain subject to the threat of an unjust forfeiture.

It is shocking that Hawaii residents can lose their property without being convicted of a crime. Given that many of those subject to forfeiture lack the knowledge, assets or ability to challenge the seizure, this makes the forfeiture program especially threatening to vulnerable populations.

There is one additional concern that should be addressed to mitigate the flaws of Hawaii’s forfeiture program: Currently, it allows a portion of the forfeiture proceeds to go to the agencies that initiated the forfeiture. This gives the local agencies a perverse financial incentive to pursue asset forfeiture.

We suggest amending the bill so that all forfeiture proceeds go to the general fund, thereby eliminating economic incentives associated with pursuing forfeiture.

This bill is a step in the right direction, but it does not go far enough to raise Hawaii’s dismal grade for unjust forfeiture laws. With a few changes, we could become a nationwide model for forfeiture reform.

Thank you for the opportunity to submit our testimony.

Sincerely,

Joe Kent
Executive Vice President
Grassroot Institute of Hawaii

² [“Audit of the Department of the Attorney General’s Asset Forfeiture Program.”](#) Office of the Auditor, State of Hawaii, June 2018.