

DAVID Y. IGE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the Senate Committee on
WAYS AND MEANS**

**Wednesday, April 3, 2019
10:20 AM
State Capitol, Conference Room 211**

**In consideration of
HOUSE BILL 748, HOUSE DRAFT 2, SENATE DRAFT 1
RELATING TO PROPERTY FORFEITURE**

House Bill 748, House Draft 2, Senate Draft 1 proposes to prohibit civil asset forfeiture by reason of the commission of a covered offense, to the extent of the property owner's interest, unless the covered offense is a felony for which the property owner has been convicted. It prohibits the forfeiture of an animal prior to the disposition of criminal charges. It also requires the Attorney General to distribute one half of all forfeited property and the sale proceeds thereof to the Hawaii law enforcement assisted diversion program, with the remaining half to be distributed to the state general fund. **The Department of Land and Natural Resources (Department) opposes this bill and offers the following comments.**

Asset forfeiture is a powerful enforcement tool used by the Department and the Division of Conservation and Resources Enforcement (DOCARE). Forfeiture provides additional teeth to the regulations enforced by DOCARE and without it, the deterrent effect of enforcement will be diminished. A vast majority of the rules enforced by DOCARE are misdemeanor or lesser level offenses. Restricting civil asset forfeiture to felony offenses will effectively eliminate it from DOCARE's enforcement toolbox.

Thank you for the opportunity to comment on this measure.

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Harry Kim
Mayor



Paul K. Ferreira
Police Chief

Kenneth Bugado Jr.
Deputy Police Chief

County of Hawai'i

POLICE DEPARTMENT

349 Kapi'olani Street • Hilo, Hawai'i 96720-3998
(808) 935-3311 • Fax (808) 961-2389

April 1, 2019

Senator Donovan M. Dela Cruz
Chairperson and Committee Members
Committee On Ways and Means
415 South Beretania Street, Room 211
Honolulu, Hawai'i 96813

RE: HOUSE BILL 748 HD2, SD1 RELATING TO FORFEITURE

Dear Senator Dela Cruz:

The Hawai'i Police Department **opposes House Bill 748 HD2, SD1**, with its purpose to prohibit civil asset forfeiture by reason of the commission of a covered offense, to the extent of the property owner's interest, unless the covered offense is a felony for which the property owner has been convicted.

Our concerns start from the onset of this proposed legislation with the opening sentence, "The legislature finds that civil asset forfeiture frequently leaves innocent citizens deprived of personal property without having ever been charged or convicted of any crime. This amounts to government sponsored theft." That preceding statement is devoid of any supporting evidence, in fact, there has been no presentation of facts supporting misuse/abuse of the Forfeiture program. Beyond that point, the forfeiture laws are used to ensure those items used to further criminal activity and/or the ill-gotten gains of such activity become items for seizure in accordance with prescribed civil procedures. Contrary to the misguided perception that has been bandied about, there certainly are prescribed civil procedures crafted to ensure fairness which are accompanied by attendant ownership rights of appeal.

The changes as proposed by this legislation would significantly compromise law enforcement's ability to combat those who profit from illegal activity through victimization of the community at large. Many of our forfeiture cases are the result of felony drug offenses and cater to those individuals who are involved in fatal traffic collisions, drug overdose deaths, as well as thefts, burglaries, robberies and other crimes committed in order to afford purchase of illicit narcotics.

Although often referred to as a law enforcement tool, I will digress and remind all that this tool is actually a community tool meant to discourage nefarious acts committed upon our populace.

It is for these reasons, we urge this committee to **not support this legislation**.

Thank you for allowing the Hawai'i Police Department to provide comments relating to House Bill 748 HD2, SD1.

Sincerely,


PAUL K. FERREIRA
POLICE CHIEF

HB-748-SD-1

Submitted on: 4/1/2019 7:34:58 AM

Testimony for WAM on 4/3/2019 10:20:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Victor K. Ramos	Testifying for Maui Police Department	Oppose	No

Comments:

HB-748-SD-1

Submitted on: 3/29/2019 6:55:52 PM

Testimony for WAM on 4/3/2019 10:20:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Michael Golojuch Jr	Testifying for LGBT Caucus of the Democratic Party of Hawaii	Support	Yes

Comments:

Aloha Senators,

The LGBT Caucus of the Democratic Party of Hawaii supports the passage of HB 748 HD 2 SD 1.

Mahalo for your consideration and for the opportunity to testify.

Mahalo,

Michael Golojuch, Jr.
Chair
LGBT Caucus of the Democratic Party of Hawaii



AMERICANS FOR DEMOCRATIC ACTION

OFFICERS	DIRECTORS			MAILING ADDRESS
John Bickel, President	Melodie Aduja	Ken Farm	Stephen O'Harrow	P.O. Box 23404
Alan Burdick, Vice President	Guy Archer	Chuck Huxel	Doug Pyle	Honolulu
Marsha Schweitzer, Treasurer	Juliet Begley	Jan Lubin		Hawai'i 96823
Dylan Armstrong, Secretary	Gloria Borland	Jenny Nomura		

March 31, 2019

TO: Honorable Chair Dela Cruz & WAM Committee Members

RE: HB 748 HD2 Relating to Property Forfeiture

Support for hearing on April 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 HB 748 HD2 as it would prohibit civil asset forfeiture unless the property owner has been convicted for a covered offense. Currently our forfeiture law allows for the use of an upside down civil process to seize people's assets after using the low "preponderance of the evidence" standard to establish a connection to an alleged crime, but it requires no ultimate conviction or charge to justify the forfeiture. Civil forfeitures involve too many conflicts of interest for law enforcement and are contrary to the principles of a just society in the manner in which they are currently implemented. They need to be radically overhauled. Thank you for your favorable consideration.

Sincerely,

John Bickel President





April 3, 2019
10:20 a.m.
Hawaii State Capitol
Conference Room 211

To: Senate Committee on Ways and Means
Sen. Donovan M. Dela Cruz, Chair
Sen. Gilbert S.C. Keith-Agaran, Vice Chair

From: Grassroot Institute of Hawaii
Joe Kent, Executive Vice President

Re: HB748 — RELATING TO PROPERTY FORFEITURE

Comments Only

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to offer its comments on House Bill 748, which would prohibit civil asset forfeiture unless the covered offense is a felony for which the property owner has been convicted.

The state of civil asset forfeiture in Hawaii has been the subject of criticism and concern. Thus, we commend the legislature for taking steps to address these problems and institute much needed reforms.

In a recent survey of civil asset forfeiture nationwide by the Institute of Justice,¹ Hawaii earned a D-minus and the dubious distinction of having some of the worst forfeiture laws in the country. Singled out for criticism was the low standard of proof required for the government to show the property is tied to a crime. In addition, the burden is placed on innocent owners to prove they weren't tied to the crime resulting in the forfeiture.

The result of these laws is a state forfeiture program open to abuse.

As the Hawaii state auditor wrote in a June 2018 report² on the asset forfeiture program, the program lacks clear rules and procedures, inadequately manages funds, and is badly in need of greater

¹ Dick M. Carpenter II, et al. "Policing for Profit: The Abuse of Civil Asset Forfeiture, 2nd Edition," Institute for Justice, November 2015. <https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf>

² <http://files.hawaii.gov/auditor/Reports/2018/18-09.pdf>.

transparency. More important, it is reasonable to believe that the current system preys on innocent property owners.

The audit found that in 26 percent of asset forfeiture cases closed during fiscal year 2015, property was forfeited without a corresponding criminal charge. In another 4 percent of cases, the property was forfeited even though the charge was dismissed. Moreover, of those whose property was forfeited, very few petitioned for remission or mitigation. The auditor speculated that most people may not know petition is an option because of the lack of transparency surrounding the forfeiture program.

By introducing a higher standard for forfeiture, this bill takes an important step in addressing many of the concerns raised in the audit. However, we suggest the committee also consider an amendment that would make it impossible for any agency or group to have a financial interest in asset forfeiture and direct 100 percent of the proceeds from the forfeiture program to the general fund.

Finally, in order to maintain the transparency of the program and boost public confidence, we suggest that the bill include language that would require more detailed reporting on the forfeiture program, especially regarding financial management and case data for specific property dispositions.

Thank you for the opportunity to submit our testimony.

Sincerely,

Joe Kent
Executive Vice President
Grassroot Institute of Hawaii



Dedicated to safe, responsible, humane and effective drug policies since 1993

TO: Senate Committee on Ways & Means
FROM: Carl Bergquist, Executive Director
HEARING DATE: April 3, 2019, 10:20AM
RE: HB748 HD2 SD1, Relating to Property Forfeiture, **SUPPORT WITH COMMENTS**

Dear Chair Dela Cruz, Vice Chair Keith-Agaran and Committee Members:

The Drug Policy Forum of Hawai'i (DPFH) **strongly supports** this measure to reform Hawaii's outdated civil asset forfeiture law. The law itself is a relic of the 1980s' War on Drugs, and [consigns Hawaii to the very bottom of a nationwide ranking of similar laws](#). In short, our forfeiture law allows for the use of an upside down civil process to seize people's assets after using the low "preponderance of the evidence" standard to establish a connection, but requiring no conviction or charge, to an alleged crime. Requiring a conviction related to the property seizure, as HB748 does, brings a modicum of justice into the process. We applaud that the bill seemingly removes the profit incentive from the arresting and prosecuting agencies as the Department of the Attorney General, and instead redirects one half of sale proceeds to the state general fund. While we are strong supporters of Law Enforcement Assisted Diversion (LEAD), we are leery of funding, even in part, this important program with forfeiture proceeds. We also suggest a few amendments to the bill.

At the very latest, the revelations in the Auditor's Report "Audit of the Department of the Attorney General's Asset Forfeiture Program" (18-09) amply highlighted the degree to which forfeiture had been shrouded in a lack of accountability and injustice.¹ *There were no administrative rules, no policies or procedures and no responsible manager in place for a program that oversaw the seizure and sale of innocent people's assets.* **Orwellian** is an apt term here. Further, **the guidance for property owners to recover**

¹ <http://files.hawaii.gov/auditor/Overviews/2018/18-09AuditorSummary.pdf>

property lost was completely insufficient. For many people, even one day without a vehicle unjustly seized can mean the loss of a job with resulting devastation for a family. At this point, we must remind ourselves that this program nominally exists to tackle crime and target drug kingpins. The innocent here are not just collateral damage of a possibly unconstitutional policy, but of a dereliction of duty of their own highest law enforcement officer, the Department of the Attorney General.

DPFH was recently party to an amicus brief filed in the U.S. Supreme Court in a case involving forfeiture, [Timbs v. Indiana](#).² On February 20th, the Court issued its ruling and decided that the Excessive Fines Clause of the Eight Amendment of the US Constitution applies to the states. At its core, however, *Timbs* involved a forfeiture case of vehicle worth far more than the crime at issue. In the amicus, we ensured that the Hawai'i Auditor's report was referenced, highlighting that a whopping 85% of forfeiture cases were uncontested between 2006 and 2015.³ One day the Court may return to the broader issue of forfeiture laws like Indiana's or Hawaii's, and strike them down. If HB748 is adopted by the Legislature, we may partly nip that issue in the bud.

SUGGESTED AMENDMENTS:

- Introduction of a “beyond a reasonable doubt” standard of proof replacing the current “preponderance of the evidence” standard, see [SB1467 SD1](#) (Section 3);
- Termination of the use of administrative proceedings to handle forfeiture cases, replacing them with judicial proceedings, see [SB1467 SD1](#) (Section 7);;
- **Narrowing the list of covered offenses in HRS §712A-4 to felonies, exempting small amount drug possession, “promoting a dangerous drugs in the third degree” (§712-1243);**
- Inserting a prohibition of Hawai'i law enforcement agencies participating in “equitable sharing” operations with federal law enforcement. *Without such a prohibition, local police could circumvent the intent of this bill, and be party to the deprivation of Hawai'i residents property without a charge or conviction and profit*

² *Timbs v. Indiana*, Docket Nr 17-1091, argued November 28, 2018. Decision expected by June 2019.

³ <http://www.drugpolicy.org/press-release/2018/09/dpa-files-amicus-brief-supreme-court-case-arguing-excessive-fines-clause>.

off such forfeitures. California and other states have successfully reigned in this practice, which was curtailed by the Obama Administration but now has been expanded by the Trump Administration⁴;

- Distributing all proceeds to the State General Fund. It is our hope that fewer forfeitures will be conducted as a result of this bill, and as such we would not want an important program like LEAD to be dependent on a unstable, shrinking revenue stream. We suggest looking at [SB1467 SD1](#) for tighter language regarding the distribution of forfeiture proceeds.

Mahalo for the opportunity to testify.

⁴ <https://harvardlawreview.org/2018/06/how-crime-pays-the-unconstitutionality-of-modern-civil-asset-forfeiture-as-a-tool-of-criminal-law-enforcement/>.



Hawai'i

Committee: Committee on Ways and Means
Hearing Date/Time: Wednesday, April 3, 2019, 10:20 a.m.
Place: Conference Room 211
Re: Testimony of the ACLU of Hawai'i in Support of H.B. 748, H.D. 2, S.D. 1, Relating to Property Forfeiture

Dear Chair Dela Cruz, Vice Chair Keith-Agaran, and Members of the Committee on Ways and Means:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") writes in support of, with one suggested amendment to, H.B. 748, H.D. 2, S.D. 1, which would reform Hawai'i's civil asset forfeiture law by prohibiting forfeiture except in cases where the property owner has been convicted of a covered felony offense, and by reducing the profit incentive to seize property by directing half of all forfeiture proceeds to the general fund. In order to completely eliminate the profit incentive to seize property, however, we respectfully request that the Committee amend this bill to direct 100 percent of proceeds to the general fund, rather than tying forfeiture proceeds to a particular program.

Hawai'i's current civil asset forfeiture law is based on the legal fiction that property can be guilty. Civil asset forfeiture is a civil action initiated by the government against a piece of property on the basis that the property was used in the commission of a covered criminal offense. Due to the way that the current law is written, government can seize (and profit from) property without obtaining a criminal conviction in connection with the property. Although this practice is often justified as a way to incapacitate large-scale criminal operations, it has been used to create revenue for law enforcement with little restriction or accountability. Critics often call this practice "policing for profit," because, under Hawai'i's law, the seizing agency (usually a county police department) keeps 25 percent of the profits from forfeited property; the prosecuting attorney's office keeps another 25 percent, and the remaining 50 percent goes into the criminal forfeiture fund, which finances the asset forfeiture division within the Department of the Attorney General, the agency charged with adjudicating the vast majority of forfeiture cases (rather than the courts). At every step of the process, there exists a clear profit motive to a) seize property, and b) ensure that seized property is successfully forfeited and auctioned by the state.

Hawai'i's law enforcement is abusing the current system. The Hawai'i State Auditor conducted a study of civil asset forfeiture in Hawai'i, which was published in June 2018.¹ The report found that in fiscal year 2015, "**property was forfeited without a corresponding criminal charge in 26**

¹ 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).

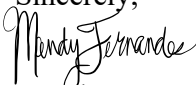
American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: 808.522-5900
F: 808.522-5909
E: office@acluHawai'i.org
www.acluHawai'i.org

percent of the asset forfeiture cases.” This means that during this period, in over one quarter of all civil property forfeiture cases, not only was there no conviction, but *there were not even criminal charges filed.*²

It comes as no surprise that Hawaii’s civil asset forfeiture law is regarded among the worst in the nation, receiving a grade of D- by the Institute for Justice.³ A low standard of proof and a lack of administrative rules governing forfeitures means that property can be seized when it has only a tenuous connection to the alleged underlying offense, and property may be forfeited even when there have been **no criminal charges filed. This is often a substantial burden on the property owner,** who may lose their job or home because the state seized their means of transportation or money needed to pay rent. While the law contains a provision intended to protect innocent property owners, this provision is inadequate and the burden placed on property owners seeking to challenge a forfeiture makes it nearly impossible in most cases for innocent people to recover their property.

This legislation is necessary to rectify the harms caused by our current system and to prevent its continued abuse. **This bill still allows property to be seized — but not forfeited — prior to conviction, which achieves the purported objective of stopping criminal operations.** To eliminate the profit motive that law enforcement may have to target innocent property owners, we respectfully request that the measure be amended to direct *all* proceeds to the general fund.

For the above reasons, we urge the Committee to support this measure. Thank you for the opportunity to testify.

Sincerely,

Mandy Fernandes
Policy Director
ACLU of Hawai‘i

The mission of the ACLU of Hawai‘i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai‘i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai‘i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai‘i has been serving Hawai‘i for 50 years.

² This creates a possible scenario in which the prosecutor’s office petitions the Department of the Attorney General to forfeit property on the basis that the property was used in the commission of a criminal offense *without ever even alleging* that an actual person committed the offense that is at the center of the forfeiture.

³ Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 2nd Edition (November 2015) available at <https://ij.org/report/policing-for-profit>.

HB-748-SD-1

Submitted on: 3/31/2019 11:16:48 AM

Testimony for WAM on 4/3/2019 10:20:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Michael J DeWeert	Individual	Support	No

Comments:

I strongly support HB748 and urge its passage, for the reasons cited in the bill itself:

“civil asset forfeiture frequently leaves innocent citizens deprived of personal property without having ever been charged or convicted of any crime. This amounts to government-sponsored theft. The fair administration of justice means ensuring that not a single innocent individual's personal property is permanently seized without just cause and conviction, or compensation.

An injustice anywhere is a threat to justice everywhere, and the purpose of this Act is to end civil asset forfeiture without conviction, which undermines the fair administration of justice and the rule of law. “

Aloha and Regards,

Michael J DeWeert

KAneohe, HI

HB-748-SD-1

Submitted on: 4/1/2019 10:49:01 PM

Testimony for WAM on 4/3/2019 10:20:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Wendy Gibson	Individual	Support	No

Comments:

Aloha Chair Dela Cruz, Vice Chair Keith-Agaran and Committee Members,

I support this bill because I believe that we need to END civiil asset forfeiture in its present form. I believe that seizing someone's property and freezing their bank accounts without accusing or convicting them of a crime FIRST equates to EXCESSIVE FINES-- which is unconstitutional according to the 8th Amendment of the Constitution.

Please support this bill as it requires that a person be convicted of a Felony before civil asset forefeiture is allowed. Seems that this is the proper order of things.

Thank you this opportunity to submit testimony,

Wendy Gibson R.N.

Palolo Resident

HB-748-SD-1

Submitted on: 4/2/2019 2:22:59 AM

Testimony for WAM on 4/3/2019 10:20:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Susan Jaworowski	Individual	Support	No

Comments:

Please support this bill, which will restrain unfair civil asset forfeiture that takes assets from people who are not found guilty of a crime or in some cases are never even charged with a crime. While it can be applied to criminal who are convicted, it also applies to those never convicted. The present law casts too wide a net and takes cars, homes, or any other property from people without due process of law. The present law is unjust. Please let Hawaii join the growing number of states who do not steal from their innocent citizens.

From: [Tatiana Labore](#)
To: [WAM Testimony](#)
Subject: Support for HB748 HD2 SD1
Date: Tuesday, April 2, 2019 7:24:47 PM

Dear Chair Dela Cruz, Vice Chair Keith-Agaran, Committee Members: Please pass this important bill to reign in the civil asset forfeiture program. Police should never be able to forfeit and profit from an innocent person's property. This bill requires a conviction before that can happen. Mahalo for the opportunity to testify.

From: [melanie.wills](#)
To: [WAM Testimony](#)
Subject: Support for HB748 HD2 SD1
Date: Tuesday, April 2, 2019 6:50:01 PM

Dear Chair Dela Cruz, Vice Chair Keith-Agaran, Committee Members:

Please pass this important bill to reign in the civil asset forfeiture program.

Police should never be able to forfeit and profit from an innocent person's property. This bill requires a conviction before that can happen.

Mahalo for the opportunity to testify.

M Wills

Sent from my iPhone

From: [Nanea Lo](#)
To: [WAM Testimony](#)
Subject: Support for HB748 HD2 SD1
Date: Tuesday, April 2, 2019 11:33:20 AM

Dear Chair Dela Cruz, Vice Chair Keith-Agaran, Committee Members:

Please pass this important bill to reign in the civil asset forfeiture program.

Police should never be able to forfeit and profit from an innocent person's property. This bill requires a conviction before that can happen.

Mahalo for the opportunity to testify.

--

Nanea Lo
Phone: (808)454-3504
[Email: naneaclo@gmail.com](mailto:naneaclo@gmail.com)

Some people say that Hawai'i will be a better place when Hawaiians no longer stand in the way of progress. But even these people must know that at this point, this will no longer be Hawai'i. - Jonathan Kay Kamakawiwo'ole Osorio. The Value of Hawai'i

From: [JL How](#)
To: [WAM Testimony](#)
Subject: Support for HB748 HD2 SD1
Date: Tuesday, April 2, 2019 9:13:21 AM

Dear Chair Dela Cruz, Vice Chair Keith-Agaran, Committee Members:

Please pass this important bill to reign in the civil asset forfeiture program.

Police should never be able to forfeit and profit from an innocent person's property. This bill requires a conviction before that can happen.

Mahalo for the opportunity to testify.

From: [Waioni Dickison](#)
To: [WAM Testimony](#)
Subject: Support for HB748 HD2 SD1
Date: Tuesday, April 2, 2019 5:50:54 AM

Dear Chair Dela Cruz, Vice Chair Keith-Agaran, Committee Members:

Please pass this important bill to reign in the civil asset forfeiture program.

Police should never be able to forfeit and profit from an innocent person's property. This bill requires a conviction before that can happen.

Mahalo for the opportunity to testify.

Waioni Dickison

LATE

HB-748-SD-1

Submitted on: 4/2/2019 11:34:59 AM

Testimony for WAM on 4/3/2019 10:20:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Nanea Lo	Individual	Support	No

Comments:

Hello,

I'm writing in support of this bill.

Thank you,

Nanea Lo



HB-748-SD-1

Submitted on: 4/2/2019 3:26:03 PM
Testimony for WAM on 4/3/2019 10:20:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Marcella Alohalani Boido	Individual	Support	No

Comments:

Chair Dela Cruz, Vice-chair Keith-Agaran, and Committee Members:

Thank you for hearing this bill. I earnestly hope that you will pass this important reform to our justice system.

I have reviewed the testimony. My support echoes the concerns articulated by the ACLU, the ADA, the Grassroot Institute of Hawaii, the Drug Policy Forum of Hawaii, the LGBT Caucus of the Democratic Party of Hawaii, and several individuals.

We need to remove the financial incentives currently built into the law. All proceeds should go to the State General Fund. To do otherwise is to invite the abuse of the civil forfeiture process.

Please pass this bill. Thank you.

Marcella Alohalani Boido, M.A.

LATE

TO: Senate Committee on Ways & Means
FROM: Theshia Naidoo, Legal Director, Criminal Justice
HEARING DATE: April 3, 2019, 10:20AM
RE: HB748 HD2 SD1, Relating to Property Forfeiture, **SUPPORT**

**We are
the Drug
Policy
Alliance.**

Dear Chair Dela Cruz, Vice Chair Keith-Agaran and Committee Members:

On behalf of the Drug Policy Alliance, a national advocate for drug policies that are grounded in science, compassion, health, and human rights, we write in support of HB748, a bill that in part requires a conviction as a prerequisite to asset forfeiture in the state.

While there are other provisions of civil forfeiture law in Hawaii that are in need of reforms, requiring that a defendant be convicted of an underlying crime before cash or property can be permanently forfeited would help reestablish the most basic tenets of Constitutional law and values. It would ensure due process rights are upheld before the permanent deprivation of property.

This bill ensures that before law enforcement agencies could permanently confiscate property that is allegedly connected to a crime, they must first establish that a crime has in fact been committed. This is an important protection for property owners and would help ensure the fundamental fairness of the asset forfeiture system in Hawaii.

There is a growing bipartisan consensus that civil asset forfeiture reform is urgently needed to protect common people from unconstitutional overreach. Civil asset forfeiture was originally conceived as a way to drain resources away from drug 'kingpins', but these programs have been perverted into an ongoing attack on low-income individuals and families who are unable to afford to fight the government in civil court to get their property back.

In an editorial by John Yoder and Brad Cate, former US Department of Justice officials appointed during the Reagan Administration, they wrote:

“As two people who were heavily involved in the creation of the asset forfeiture initiative at the Justice Department in the 1980s, we find it particularly painful to watch as the heavy hand of government goes amok. The program began with good intentions, but now, having failed in both purpose and execution, it should be abolished.”

We agree that law enforcement and all professionals who put themselves in harm's way to protect the public must receive and secure appropriate levels of funding through the appropriate channels; arbitrary seizure of assets taken from potentially innocent citizens who are never convicted of a crime, however, is no way to fund public safety. It is an egregious violation of the public trust and must come to an end.

Board Members
Christine Downton
Jodie Evans
James E. Ferguson, II
Jason Flom
Ira Glasser
Kenneth Hertz
David C. Lewis, MD
Pamela Lichty
Angela Pacheco
Josiah Rich, MD
Rev. Edwin Sanders
George Soros
Ilona Szabó de Carvalho

Mahalo for the opportunity to testify.

ⁱ Yoder, J., Cates, B. September 18, 2014. "Government self-interest corrupted a crime-fighting tool into an evil." [Washington Post](#). John Yoder was director of the Justice Department's Asset Forfeiture Office from 1983 to 1985. Brad Cates was the director of the office from 1985 to 1989.



O'ahu County Democrats
oahudemocrats.org



Aloha Chair Dela Cruz, Vice Chair Keith-Agaran, and Members of the Committee on Ways and Means,

LATE

RE: HB748 HD2 SD1, Relating to Asset Forfeiture.

The O'ahu County Democrats write in support of House Bill 748, House Draft 2, Senate Draft 1. This measure would prohibit civil asset forfeiture unless the covered offense is a felony for which the property owner has been convicted. Additionally, its provisions require the state, through the Attorney General, to distribute one half of all forfeit property and/or its sale revenue to the Hawaii law enforcement assisted diversion program. The remainder half would enter the general fund.

Our Platform states that we O'ahu Democrats "support and expect ethics in government" including criminal justice reform, and affords consistency with supporting this measure.¹ Currently, no conviction is required to justify forfeiture. There are many ethical problems with the current law and procedure. As Americans for Democratic Action president John Bickel previously testified, "[c]ivil forfeitures involve too many conflicts of interest for law enforcement and are contrary to the principles of a just society in the manner in which they are currently implemented."

Programmatic Audit findings under the Attorney General included recommendations of: 1) clearer Administrative Rules, 2) policies and procedures to allow for speedy disposition of seized assets, and 3) thorough accounting of assets and estimated future revenues for the purposes of total, reasonable transparency and accountability.² While this measure is a proposed statute change, it parallels the recommendations. Indeed, the lack of corrective action within state and local bureaucracy to prevent misuse of asset forfeiture has perhaps necessitated this measure.

The common theme of the Audit's recommendations is that current conditions are ripe for abuse, and should be balanced with heavier responsibilities to protect the property of individuals accused of crime, and further, to protect the public interest when that property is disposed. The O'ahu County Democrats agree, and hope the Committee will advance this measure.

Therefore, we ask that you please vote in support of HB748 HD2 SD1.

Mahalo nui loa,

DYLAN P. ARMSTRONG, VICE CHAIR
O'AHU COUNTY COMMITTEE, O'AHU COUNTY DEMOCRATS

1. Platform of the O'ahu County Democrats. <https://www.oahudemocrats.org/oahuplatform.htm>

2. Audit of the Department of the Attorney General's Asset Forfeiture Program. 2018. <http://files.hawaii.gov/auditor/Reports/2018/18-09.p>

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

LATE

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 547-7400 • FAX: (808) 547-7515

DWIGHT K. NADAMOTO
ACTING PROSECUTING ATTORNEY



ACTING FIRST DEPUTY
PROSECUTING ATTORNEY

THE HONORABLE DONOVAN M. DELA CRUZ, CHAIR
SENATE COMMITTEE ON WAYS AND MEANS
Thirtieth State Legislature
Regular Session of 2019
State of Hawai'i

April 3, 2019

RE: H.B. 748, H.D. 2, S.D. 1; RELATING TO PROPERTY FORFEITURE.

Chair Dela Cruz, Vice-Chair Keith-Agaran and members of the Senate Committee on Ways and Means, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in opposition to H.B. 748, H.D. 2, S.D. 1.

The purpose of this bill is to prohibit civil asset forfeiture unless the State proves various matters “beyond a reasonable doubt” (a standard of proof often used in criminal law). While the bill appears to have good intentions, it also appears to be based upon the premise that “everyone is innocent until proven guilty,” which is certainly a true statement, but misses the point of civil asset forfeiture. At its core, civil asset forfeiture is primarily about the “innocence” of the property itself, not the guilt or innocence of its owner. The only time a property owner’s “innocence” is relevant, is to assess the owner’s knowledge and (express or implied) consent to the act or omission (that their property was connected to). For example, if a father allows his drug-dealing daughter to use his car, knowing that the daughter occasionally delivers drugs using his car, then the father’s car could be subject to forfeiture under certain circumstances, even if the father is never charged with a crime.

As clearly stated by our Hawaii Supreme Court in State v. Tuipuapua, “[a] statutory forfeiture ‘is a proceeding *in rem*.’ *It is not a proceeding against any person.*”¹ It has nothing to do with whether a property owner is the one criminally charged with the commission of a crime. Thus, it makes sense that our civil asset forfeiture statutes go into great detail about what property is subject to forfeiture (see HRS §712A-5), based on the property’s connection to an offense, with absolutely no requirement that the property be connected to any particular individual (such as a defendant in a criminal case).²

¹ State v. Tuipuapua, 925 P.2d 311, 83 Haw 141 (1996), citing U.S. v. Baird, 63 F.3d 1213, 1219; U.S. v. Arreola-Ramos, 60 F.3d 192-93 (emphasis in original).

² HRS §712A-5 states in relevant part: (1) The following is subject to forfeiture:

- (a) Property described in a statute authorizing forfeiture;
- (b) Property used or intended for use in the commission of, attempt to commit, or conspiracy to commit a covered offense, or which facilitated or assisted such activity;

While our statutes do not require that the property be connected to a person, they do require that the property be connected to a violation of law, or “covered offense.” Indeed, in State v. Ten Thousand Four Hundred Forty-Seven Dollars in U.S. Currency (\$10,447.00), the Hawaii Supreme Court ordered that a certain portion of monies recovered in connection with an illegal gambling operation be returned to its owner, as “the State must prove the existence of a substantial connection [a.k.a. sufficient nexus] between the currency being forfeited and the illegal activity.”³ As stated by the Court, “[g]iven that this is an *in rem*...forfeiture proceeding, the State must prove that the defendant—the subject currency, not [the currency’s owner]—was connected to illegal activity.”⁴

Naturally, our courts and statutes recognize that property generally belongs to someone (a person or entity), and thus our statutes also state that property, which would otherwise be subject to forfeiture, cannot actually be forfeited (to the extent of an owner’s property interest) “by reason of any act...committed...without the knowledge and consent of that owner.”⁵ To this end, our civil asset forfeiture laws contain extensive procedural mandates, standards and safeguards, to ensure that everyone—including the father in the hypothetical example mentioned previously—is given due process, every step of the way. This includes statutes prohibiting “excessive forfeiture”⁶; consideration of “extenuating circumstances”—such as a language or cultural barrier, or physical or mental abnormalities⁷—and even mechanisms to return all or part of the property (or property value) in question, despite the owner’s knowledge and consent to the act or omission.

As previously stated, we believe that H.B. 748, H.D. 2, S.D. 1, has good intentions, but is based on a misunderstanding of the nature and intent of civil asset forfeiture. Current forfeiture laws are used to immediately and effectively disrupt the infrastructure of criminal activity and protect the community, by removing the property used in the commission of such activity, and/or proceeds gained from such activity. As civil proceedings deal only with the potential loss of property, and not a potential loss of liberty (i.e. incarceration), civil asset forfeiture is intentionally designed to function independently from any criminal proceedings, using civil standards of proof, in much the same way

-
- (c) Any firearm which is subject to forfeiture under any other subsection of this section or which is carried during, visible, or used in furtherance of the commission, attempt to commit, or conspiracy to commit a covered offense, or any firearm found in proximity to contraband or to instrumentalities of an offense;
 - (d) Contraband or untaxed cigarettes in violation of chapter 245, shall be seized and summarily forfeited to the State without regard to the procedures set forth in this chapter;
 - (e) Any proceeds or other property acquired, maintained, or produced by means of or as a result of the commission of the covered offense;
 - (f) Any property derived from any proceeds which were obtained directly or indirectly from the commission of a covered offense;
 - (g) Any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which has been established, participated in, operated, controlled, or conducted in order to commit a covered offense;
 - (h) All books, records, bank statements, accounting records, microfilms, tapes, computer data, or other data which are used, intended for use, or which facilitated or assisted in the commission of a covered offense, or which document the use of the proceeds of a covered offense.

³ State v. Ten Thousand Four Hundred Forty-Seven Dollars in U.S. Currency (\$10,447.00), 104 Haw 323, 337, 89 P.3d 823, 837 (2004) (regarding money properly seized pursuant to search warrant, but ultimately not subject to forfeiture).

⁴ *Id.*, at 336, 836.

⁵ See Section 712A-5(2)(b), Hawaii Revised Statutes (“HRS”).

⁶ See HRS §712A-5.5. Additionally, we note that the issue of excessive forfeiture was recently discussed in a U.S. Supreme Court case, Timbs v. Indiana, 139 S.Ct 682 (February 20, 2019)—originating from a state that does not have a statute like HRS §712A-5.5—where the Court held that civil asset forfeiture judgements cannot be excessive.

⁷ See HRS §712A-10(6).

that a crime victim is permitted to file a lawsuit against their perpetrator—and the perpetrator may be held civilly liable—regardless of whether the perpetrator is ever convicted or even charged in a criminal case.

While civil asset forfeiture inherently involves the forfeiture of property, which most likely belongs to someone, this is completely separate and apart from any criminal proceedings; there is no requirement that the property owner committed a crime for the property to be forfeited, and forfeiture is not a criminal punishment.⁸ Indeed, the Court in Tuipupua noted that civil asset forfeiture “serves important nonpunitive goals...[such as encouraging] property owners ‘to take care in managing their property’ and tends to ensure ‘that they will not permit that property to be used for illegal purposes.’”⁹

To the extent the Legislature is concerned that civil asset forfeiture is being abused by the administering agencies, as a means of generating inappropriate revenue, the Department can only speak for itself in stating that it has never viewed civil asset forfeiture in such a light, has never gotten the impression that any other administering agencies in Hawaii view it in such a light. The Department greatly appreciates the valuable training that its deputies have received for drug-related cases, as provided by the civil asset forfeiture fund, but understands that it is within the purview of the Legislature to establish where and how the proceeds of this or any other state-mandated program are utilized. We do note, however, that it makes sense for the proceeds from civil asset forfeiture to at least cover the full administrative costs of the program, before it is distributed elsewhere.

To the extent that the Legislature is alarmed by complaints that a certain amount of property is never returned to owners—even when criminal charges are never brought against the owner—the Department would reiterate its earlier example of the father who continues to allow his drug-dealing daughter to borrow his car, but is never prosecuted criminally. Moreover, please keep in mind that any “illegal” items seized by law enforcement—such as illicit drugs, illicit drug-manufacturing equipment, gambling devices, and so forth—are never be returned to people, as a matter of public policy, so retention of such items may also skew “statistics” in a confusing manner.

Rather than forcing such a far-reaching and premature overhaul of Hawaii’s well-conceived program, the Department urges the Legislature to consider the State Auditor’s recommendations, published in June 2018 (available at files.hawaii.gov/auditor/Reports/2018/18-09.pdf), which are already in the process of being implemented. If the Legislature truly believes that change are needed to this program, further discussion and review should take place, at a minimum, to study its impact on law enforcement and the safety of the public. In 2016, the Legislature considered a bill (S.B. 2149) to require that the Department of the Attorney General establish a working group to review and discuss Hawaii's forfeiture laws and make recommendations to improve these laws, including identifying any areas of concern or abuse. While we firmly believe that Hawaii’s asset forfeiture program is generally well-conceived and well-operated, we understand that “nothing is perfect,” and are open to being part of a process to evaluate all areas of the program.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes the passage of H.B. 748, H.D. 2, S.D. 1. Thank for you the opportunity to testify on this matter.

⁸ Tuipupua at 323, 153.

⁹ *Id.*