

**HB-659**

Submitted on: 2/5/2021 7:12:52 PM

Testimony for JHA on 2/9/2021 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Carolyn Eaton	Individual	Support	No

Comments:

Aloha, my name is Carolyn Eaton and I strongly approve this measure.

Statement Before The  
**HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS**  
Tuesday, February 9, 2021  
2:00 PM  
Via Videoconference, Conference Room 325

in consideration of  
**HB 659**  
**RELATING TO PROPERTY FORFEITURE.**

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

Common Cause Hawaii provides comments on HB 659, which (1) restricts civil asset forfeiture to cases involving the commission of a felony offense where the property owner has been convicted of an underlying felony offense and (2) directs any forfeiture proceeds to the general fund.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to strengthening our 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 659 will permit civil asset forfeiture only after the property owner has been convicted of a felony. This will allow an individual, presumably, a full and fair day in court prior to forfeiture of assets. HB 659 will hopefully improve the criminal justice system and make it more fair and just and lessen civil asset forfeitures' impacts on persons from minorities and low-income communities.

Thank you for the opportunity to comment on HB 659. If you have further questions of me, please contact me at [sma@commoncause.org](mailto:sma@commoncause.org).

Very respectfully yours,

Sandy Ma  
Executive Director, Common Cause Hawaii



HAWAII

AMERICANS FOR DEMOCRATIC ACTION

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OFFICERS	DIRECTORS			MAILING ADDRESS
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Doug Pyle, Secretary	Stephanie Fitzpatrick	Dave Nagaji		

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Feb. 5, 2021

TO: Chair Nakashima and members of JUD Committee

RE: HB 659 Relating to Property Forfeiture

Support for hearing on Feb.9

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 659 as it would prohibit civil asset forfeiture unless the covered offense is a felony for which the property owner has been convicted. Seizing assets before a conviction is a violation of basic civil liberties.

Thank you for your favorable consideration.

Sincerely,  
John Bickel, President





**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTY- FIRST LEGISLATURE, 2021**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 659, RELATING TO PROPERTY FORFEITURE.

**BEFORE THE:**

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

**DATE:** Tuesday, February 9, 2021 **TIME:** 2:00 p.m.

**LOCATION:** State Capital, Via Videoconference

**TESTIFIER(S):** Clare E. Connors, Attorney General, or  
Michael S. Vincent or Gary K. Senaga, Deputy Attorneys General

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Chair Nakashima and Members of the Committee:

The Department of the Attorney General (Department) provides the following comments.

This bill proposes changes to the asset forfeiture program by requiring a felony conviction prior to the forfeiture of any property and changing the distribution of property and money from state and local governments to the state general fund. The bill, however, keeps intact the Department's responsibilities for receiving forfeited property, selling or destroying the forfeited property, compromising or paying valid claims, and making other dispositions authorized by law.

The bill's introduction references a finding in a 2018 State Auditor's report that twenty-six per cent of the asset forfeiture cases that were closed in 2015 were without corresponding criminal charges. The Department notes that the report is not clear on whether the corresponding charges include instances where the property owner was not charged, as in the case of a father who continuously allowed his offspring to borrow his car to transact drug deals, or where cases were resolved by mutual agreement prior to formal charges being filed, or charges that were subsequently dismissed due to lost witnesses or the suppression of evidence. The Department further notes that, as of November 2020, the State Auditor reported all but one of its recommendations have been implemented by the Department. The remaining recommendation requires that twenty per cent of the forfeiture funds be used for drug

education, prevention, and rehabilitation, and that has not yet been fully achieved because of remaining issues related to legal requirements and implementation.

Section 2 of the bill, at page 4, line 13, through page 5, line 7, would amend section 712A-5(2)(b), Hawaii Revised Statutes (HRS). It would amend paragraph (b)(i) to prevent the forfeiture of property unless the owner has been convicted of a felony. It would amend paragraph (b)(ii) to provide alternatively that no property shall be forfeited by any act or omission established to have been committed or omitted without the owner's consent. The interaction of paragraph (b)(i) with paragraph (b)(ii) creates an ambiguity because the former requires a conviction or plea, while the latter is based only on acts, omissions, or knowledge.

The requirement of the owner's felony conviction can also be problematic because a statutory forfeiture is a civil proceeding *in rem* and not a proceeding against any person. State v. Tuipuapua, 83 Hawai'i. 141, 147, 925 P.2d 311, 317 (1996). There are instances where the "owner" is not the "defendant" in a criminal case. For example, it is hard to arrest the owner of gambling machines seized because the owner is often absent at the gambling parlors where the arrest and seizure occur.

Additionally, the bill does not repeal other laws that allow for forfeiture in cases where the covered offense is not a felony. See, e.g., section 712-1230, HRS, (forfeiture of property used in gambling); section 710-1001, HRS, (forfeiture of bribery money or devices used in offenses against public administration or the obstruction of government operations); and section 329C-3, HRS, (forfeiture of imitation controlled substances that are used in the illegal manufacturing, distributing or possessing of these substances). Also many Department of Land and Natural Resources forfeitures are based on the commission of non-felony offenses. The amendments in the bill, therefore, would create inconsistencies with other sections in the statutes which could create conflict in our laws resulting in the need for clarifying legislation and/or judicial review.

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



**HB659**  
**RELATING TO PROPERTY FORFEITURE**

Ke Kōmike Hale o ka Ho‘okolokolo a me ke Kuleana Hawai‘i

Pepeluali 9, 2020

2:00 p.m.

Lumi 325

The Office of Hawaiian Affairs Beneficiary Advocacy and Empowerment Committee will recommend that the Board of Trustees **COMMENT** on HB659, which would prohibit the use of civil asset forfeiture unless the covered offense charged is a felony, and the property owner has been convicted of the covered offense.

Native Hawaiians may be disproportionately impacted by civil asset forfeiture, especially as it is applied in drug-related cases. In recent years, drug-related offenses have constituted the majority of the covered offenses that have triggered asset forfeiture.<sup>1</sup> Meanwhile, in its 2010 report on the disparate treatment of Native Hawaiians in the criminal justice system, OHA noted that Native Hawaiians may bear a disproportionate burden of our overwhelmingly punitive response to drug use: although Native Hawaiians do not use drugs at disproportionate rates than other ethnic groups, they are convicted for these offenses at much higher rates.<sup>2</sup> These data indicate that Native Hawaiians may be disproportionately targeted for drug-related enforcement, and therefore exposed to a much higher risk of drug-related asset seizure and forfeiture.

OHA accordingly does have an interest in ensuring that our asset forfeiture laws are administered in a fair, transparent, and accountable manner, which also considers the laws' potential impacts on the Native Hawaiian community in particular. Unfortunately, there is little evidence as to whether or not this is the case; OHA notes that a 2018 audit of the Attorney General's asset forfeiture program in fact found significant and longstanding deficiencies, including with regards to transparency and accountability, in the administration of our asset forfeiture laws generally. **Therefore, until clearer mechanisms are established to ensure fairness, transparency, and accountability in the administration of our asset forfeiture laws – including with regards to their potential exacerbation of the impacts our criminal justice system has on the Native Hawaiian community – statutory restrictions on the use of asset forfeiture may be a particularly prudent and important step for the legislature to take.**

Mahalo piha for the opportunity to testify on this measure.

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<sup>1</sup> From 2006 to 2015, drug related offenses composed 78 percent of the covered offenses resulting in forfeiture cases. OFFICE OF THE AUDITOR, STATE OF HAWAII, AUDIT OF THE DEPARTMENT OF THE ATTORNEY GENERAL'S ASSET FORFEITURE PROGRAM 14-15 (2018).

<sup>2</sup> THE OFFICE OF HAWAIIAN AFFAIRS, THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM 45 (2010), available at [http://www.oha.org/wp-content/uploads/2014/12/ir\\_final\\_web\\_rev.pdf](http://www.oha.org/wp-content/uploads/2014/12/ir_final_web_rev.pdf).

# COMMUNITY ALLIANCE ON PRISONS

P.O. Box 37158, Honolulu, HI 96837-0158

Phone/E-Mail: (808) 927-1214 / [kat.caphi@gmail.com](mailto:kat.caphi@gmail.com)



## COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Rep. Mark Nakashima, Chair

Rep. Scot Matayoshi, Vice Chair

Tuesday, February 9, 2021

2:00 PM

### STRONG SUPPORT FOR HB 659 - RE: PROPERTY FORFEITURE

Aloha Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai'i for more than two decades. This testimony is respectfully offered on behalf of the more than 4,100 Hawai'i individuals living behind bars or under the "care and custody" of the Department of Public Safety on any given day. We are always mindful that 1,000 of Hawai'i's imprisoned people are serving their sentences abroad thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

Community Alliance on Prisons is in strong support of this measure that upholds the 8<sup>th</sup> Amendment which states: "*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*" This measure restricts civil asset forfeiture to cases involving the commission of a felony offense where the property owner has been convicted of an underlying felony offense. It then directs any forfeiture proceeds to the general fund.

Hawai'i's civil asset forfeiture program has a shameful record as reported by the Institute for Justice:

- In 2010, Hawai'i received a grade of **D-** for Forfeiture Law; **C** for State Law and an overall grade of **D**.
- In 2015, the Institute of Justice graded states on their programs: **Hawaii earned a D-** for its civil forfeiture laws because of 1) **the low bar to forfeit and no conviction required**; 2) **the poor protections for innocent third-party property owners**; and 3) the fact that **100% of forfeiture proceeds go to law enforcement**. This only encourages corruption.
- **In 2020 Hawaii again earns a D-** for its civil forfeiture laws because of Hawai'i's

- **Low bar to forfeit:** Prosecutors must prove by preponderance of the evidence that property is connected to a crime.
- **Poor protections for the innocent:** Third-party owners must prove their own innocence to recover seized property.
- **Large profit incentive:** 100% of forfeiture proceeds go to law enforcement (up to a maximum of \$3 million per year, 25% to police, 25% to prosecutors and 50% to the attorney general for law enforcement projects.

Is it any wonder why the AG wrote an op-ed asserting that Hawai'i's state auditor examined the asset forfeiture program and found no abusive or unjust practices, when her office enjoys the spoils? This Op-Ed was published on January 17<sup>th</sup>, the day Queen Lili'uokalani was illegally overthrown by the United States 128 years ago. Eyes wide shut to the history of Hawai'i and the problems of a program from which her office benefits.

Here is what the Auditor's scathing report<sup>1</sup> concluded:

*"Hawai'i's asset forfeiture program is controversial, attracting criticism from lawmakers, the public, and the media. The statute gives the Attorney General broad power to take personal property from individuals without judicial oversight based on a relatively low standard of proof. Given the high profile of the program and the power bestowed on the Attorney General to administer it, it is crucial that the department manage the program with the highest degree of transparency and accountability. We found that is not the case..."*

To understand more about this issue, John Oliver did a great show looking into civil forfeiture across the U.S. that is worth watching. Here is the link:

<https://www.youtube.com/watch?v=3kEpZWGgJks>.

As trust in law enforcement is plummeting and in the interest of justice, Community Alliance on Prisons implores the committee to honor the oath you have all taken to protect and defend the Constitution. We, therefore, respectfully ask the committee to pass this important measure, affirm the Eighth Amendment, and emphasize that no one is above the law.

Mahalo for this opportunity to share our concerns.

**When the rights of the innocent can be so easily violated,  
no one's rights are safe.**

*Republican Party Platform 2016*

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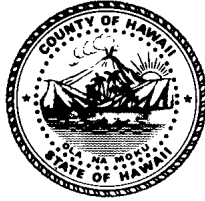
<sup>1</sup> Audit of the Department of the Attorney General's Asset Forfeiture Program, A Report to the Governor and the Legislature of the State of Hawai'i, Report No. 18-09, June 2018.

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





**Mitchell D. Roth**  
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) 961-8865

February 8, 2021

Representative Mark M. Nakashima  
Chairperson and Committee Members  
Committee on Judiciary & Hawaiian Affairs  
415 South Beretania Street, Room 325  
Honolulu, Hawai`i 96813

RE : HOUSE BILL 659, RELATING TO PROPERTY FORFEITURE  
HEARING DATE : FEBRUARY 9, 2020  
TIME : 2:00 P.M.

Dear Representative Nakashima:

The Hawai`i Police Department opposes House Bill 659, which seeks 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; as well as directing any forfeiture proceeds to the general fund.

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. Asset forfeiture can immediately remove the tools, equipment, cash flow, profit, and sometimes the product itself from the criminals and the criminal organization, rendering the criminal organization powerless to operate. These prescribed civil procedures 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 that cater to those individuals who are involved in fatal traffic collisions, drug overdose deaths, as well as thefts, burglaries, robberies and other crimes in order to afford purchase of illicit narcotics.

It is our position that the current asset forfeiture program in Hawai`i is not being abused and we remain committed to the cause of ensuring that any property forfeited is within the interest of justice. 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 659.

Sincerely,

PAUL K. FERREIRA  
POLICE CHIEF

**HB-659**

Submitted on: 2/8/2021 11:16:42 AM

Testimony for JHA on 2/9/2021 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Raelyn Reyno Yeomans	Individual	Support	No

Comments:

Strong support!

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 House Committee on  
JUDICIARY & HAWAIIAN AFFAIRS**

**Tuesday, February 9, 2021  
2:00 PM**

**Via Video Conference, State Capitol, Conference Room 325**

**In consideration of  
HOUSE BILL 659  
RELATING TO PROPERTY FORFEITURE**

House Bill 294 proposes to restrict civil asset forfeiture to cases involving the commission of a felony offense for which the property owner has been convicted, and directs any forfeiture proceeds to the General Fund. **The Department of Land and Natural Resources (Department) opposes this measure.**

Asset forfeiture is an essential enforcement tool that has been used by the Department to effectively deter and halt criminal activity. The majority of the rules that the Department's Division of Conservation and Resources Enforcement (DOCARE) enforces are misdemeanor or petty misdemeanor offenses. Restricting civil asset forfeiture to felony offenses will effectually eliminate this critical tool from DOCARE's enforcement toolbox. The deterrent effect of civil forfeiture in promoting resource protection will be diminished.

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

**STATE OF HAWAI‘I**  
**OFFICE OF THE PUBLIC DEFENDER**

**Testimony of the Office of the Public Defender,  
State of Hawai‘i to the Senate Committee on  
Judiciary and Hawaiian Affairs**

February 9, 2021

H.B. No. 659: RELATING TO PROPERTY FORFEITURE

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

The Office of the Public Defender respectfully supports H.B. No. 659, which seeks to prohibit civil asset forfeiture unless the covered offense is a felony for which the property owner has been convicted.

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.

In property forfeiture proceedings, the property owner is presumed to be guilty until the owner proves that they are innocent and that the seized property therefore should not be forfeited. In other words, the owner must prove (1) that they were not involved in criminal activity and (2) that they either had no knowledge that the property was being used to facilitate the commission of a crime or that they took every reasonable step under the circumstances to terminate such use. Moreover, the proceedings are not before a neutral judge or arbitrator; forfeiture of personal property worth less than \$100,000, or forfeiture of any vehicle or conveyance, regardless of value is administratively processed. Finally, most forfeitures are unchallenged. Pragmatic property owners, however innocent, may reason that it is simply too cost prohibitive to challenge the seizure (primarily, due to the high cost of hiring an attorney) or that the cost far surpasses the value of the property.

What is appalling 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 one-fourth of the property forfeiture cases. SECTION 1 of this measure aptly described the process: “This amounts to government-sponsored theft.”

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. 659.

**HB-659**

Submitted on: 2/8/2021 12:23:49 PM

Testimony for JHA on 2/9/2021 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Ian Garrod	DLNR	Oppose	No

Comments:

I would like to provide oral testimony for DLNR. Please allow me Zoom access. Thank you!



## Hawai'i

Committee: Committee on Judiciary & Hawaiian Affairs  
Hearing Date/Time: Tuesday, February 9, 2021, 2:00 p.m.  
Place: Via Videoconference  
Re: Testimony of the ACLU of Hawai'i in Support of H.B. 659, Relating to Property Forfeiture

Dear Chair Nakashima, Vice Chair Matayoshi, and members of the Committee:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") writes in support of H.B. 659, which would reform Hawaii'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 net forfeiture proceeds to the general fund.

**Hawaii'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, the 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 Hawaii'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.

**Hawaii'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.<sup>1</sup> The report found that in fiscal year 2015, "**property was forfeited without a corresponding criminal charge in 26 percent of the asset forfeiture cases.**" This means that during this period, in over one quarter of all

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<sup>1</sup> 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](mailto:office@acluHawai'i.org)  
[www.acluHawai'i.org](http://www.acluHawai'i.org)



Chair Nakashima and Members of the Committee  
February 9, 2021  
Page 2 of 2

civil property forfeiture cases, not only was there no conviction, but *no criminal charges were even filed*.

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.<sup>2</sup> A low standard of proof 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.**

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

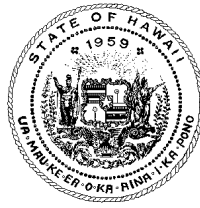
*The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private non-profit organization 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 over 50 years.*

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<sup>2</sup> Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 3rd Edition (December 2020) available at <https://ij.org/wp-content/themes/ijorg/images/pfp3/policing-for-profit-3-web.pdf>.

American Civil Liberties Union of Hawai'i  
P.O. Box 3410  
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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 659  
RELATING TO PROPERTY FORFEITURE.

By  
Max N. Otani, Director

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

Tuesday, February 9, 2021; 2:00 p.m.  
Via Video Conference

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

The Department of Public Safety (PSD) offers comments on House Bill (HB) 659, 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 659 would restrict civil asset forfeiture to cases in which the property owner has been convicted of an underlying felony offense, however, not all arrests or investigations result in criminal convictions, despite overwhelming evidence. Restricting civil asset forfeitures to property of owners who are criminally convicted does not serve justice or the community. This proposal would only mean that the ill-gotten gains 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.

Thank you for the opportunity to provide this testimony.

DEPARTMENT OF THE PROSECUTING ATTORNEY  
**CITY AND COUNTY OF HONOLULU**

ALII PLACE  
1060 RICHARDS STREET • HONOLULU, HAWAII 96813  
PHONE: (808) 768-7400 • FAX: (808) 768-7515

STEVEN S. ALM  
PROSECUTING ATTORNEY

THOMAS J. BRADY  
FIRST DEPUTY  
PROSECUTING ATTORNEY



**THE HONORABLE MARK M. NAKASHIMA, CHAIR**  
**HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS**  
**Thirty-first State Legislature**  
**Regular Session of 2021**  
**State of Hawai`i**

February 9, 2021

**RE: H.B. 659; RELATING TO PROPERTY FORFEITURE.**

Chair Nakashima, Vice-Chair Matayoshi and members of the House Committee on Judiciary & 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. 659.

This measure would prohibit civil proceedings for asset forfeiture unless the owner of the seized property is also criminally charged and convicted of a covered felony offense.

While the bill appears to have good intentions, it attempts to apply a criminal standard of proof (“beyond a reasonable doubt”) to civil proceedings, inferring 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 the prevailing standard of proof used in civil and administrative legal proceedings throughout Hawaii. **Every day, numerous bodies throughout the State make determinations on whether to deprive someone of their assets, property or even potentially their livelihoods, based on “preponderance of the evidence.”** 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.<sup>1</sup> Also, all adjudication hearings held before the Honolulu Liquor

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<sup>1</sup> See the definition of “Authority,” under Section 16-201-2, Hawaii Administrative Rules (“HAR”). See also HAR §16-201-21(d), which states:

Commission are decided based on preponderance of the evidence.<sup>2</sup> So too are hearings held before the Land Use Commission,<sup>3</sup> the Hawaiian Homes Commission,<sup>4</sup> and any number of other State bodies and agencies governed by HRS Chapter 91.<sup>5</sup>

Respectfully, the Department urges this Committee to defer H.B. 659, in recognition of the fact 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 it may feel odd to some, to have the Department involved in any proceeding that turns on a civil standard of proof, this is not the only instance; the Department also handles traffic infraction trials, which are based on a “preponderance of the evidence” standard.<sup>6</sup>

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(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](https://files.hawaii.gov/dcca/oah/forms/oah_oah_hearings_rules.pdf); last accessed February 1, 2021.

<sup>2</sup> See Section 3-85-91.5(d), Rules of the Liquor Commission, 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 [honolulu.gov/rep/site/bfslq/rules/LIQ\\_Rules\\_Website\\_Version\\_032717.pdf](http://honolulu.gov/rep/site/bfslq/rules/LIQ_Rules_Website_Version_032717.pdf); last accessed February 1, 2021.

<sup>3</sup> 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](http://www.hawaii.gov/hrcurrent/Vol04_Ch201-0257/HRS0205/HRS_0205-0004.htm) ; last accessed February 1, 2021.

<sup>4</sup> 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](http://www.courts.state.hi.us/docs/opin_ord/ica/2015/May/CAAP-12-0000572mopada.pdf); last accessed February 1, 2021.

<sup>5</sup> 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](http://www.capitol.hawaii.gov/hrcurrent/Vol01_Ch0046-0115/HRS009/HRS_0091-0010.htm); last accessed February 1, 2021.

<sup>6</sup> See HRS §291D-13(b), which states:

(b) “At the time of trial, the State shall be represented by a prosecuting attorney of the county in which the infraction occurred. The prosecuting attorney shall orally recite the charged civil traffic

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](https://files.hawaii.gov/auditor/Reports/2018/18-09.pdf)). In that report, the Auditor made specific recommendations for Hawaii's civil asset forfeiture program, most of which have already been, and one of which is in the process of being, implemented by the Department of the Attorney General.

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, much like civil lawsuits, administrative proceedings, and criminal charges can proceed independently from each other in many other circumstances. Concerns about "innocent owners" being deprived of their property or "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. 659, and asks that the measure be deferred. Thank for you the opportunity to testify on this matter.

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infraction in court prior to commencement of the trial. Proof of the defendant's commission of the traffic infraction shall be by a preponderance of the evidence."

**HB-659**

Submitted on: 2/8/2021 1:49:06 PM

Testimony for JHA on 2/9/2021 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Diana Bethel	Individual	Support	No

Comments:

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

I am writing in strong support of HB 659 which provides that civil asset forfeiture be allowed only in cases where there is a felony conviction, and that property will not be seized from owners who had no knowledge of the crime. HB 659 also stipulates that any proceeds from the sale of the asset be directed to the general fund.

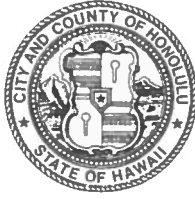
This seems more fair than the current practice and avoids the appearance of outright theft by the Attorney General's office and law enforcement. HB 659 would help restore trust in law enforcement. Please pass HB 659.

Mahalo,

Diana Bethel

POLICE DEPARTMENT  
CITY AND COUNTY OF HONOLULU

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RICK BLANGIARDI  
MAYOR

SUSAN BALLARD  
CHIEF

JOHN D. MCCARTHY  
AARON TAKASAKI-YOUNG  
DEPUTY CHIEFS

OUR REFERENCE PJ-GK

February 9, 2021

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. 659, Relating to Property Forfeiture

I am Major Phillip Johnson of the Narcotics/Vice Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD opposes House Bill No. 659, Relating to Property Forfeiture.

While waiting for the outcome of a criminal proceeding, this bill causes undue delays for the public, law enforcement agencies, and the defendant themselves from efficiently and effectively adjudicating the case. Tremendous amounts of resources are expended by law enforcement for these investigations. Delaying or eliminating the local investigating law enforcement agency from the proceeds of the forfeited property resulting from illegal activities would have a direct impact on the services that the HPD provides to the community.

The HPD urges you to oppose House Bill No. 659, Relating to Property Forfeiture, and thanks you for the opportunity to testify.

APPROVED:

Handwritten signature of Susan Ballard in black ink.

Susan Ballard  
Chief of Police

Sincerely,

Handwritten signature of Phillip Johnson in black ink.

Phillip Johnson, Major  
Narcotics/Vice Division



February 9, 2021

2:00 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: HB659 — RELATING TO PROPERTY FORFEITURE

***Comments Only***

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to offer its comments on HB 659, which would significantly 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 and pressing for much needed reforms.

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

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.

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<sup>1</sup> 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>.

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.<sup>2</sup>

The result is a system that is able to prey on innocent property owners.

The audit found that in 26% of asset forfeiture cases closed during fiscal year 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 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. It is shocking that citizens can lose their property without being convicted — or even charged with a crime.

This bill also deserves praise for eliminating incentives that can arise from the practice of asset forfeiture. By directing the proceeds from the forfeiture program to the general fund, this bill would prevent any agency or group from having a financial interest in asset forfeiture.

Finally, there is one more reform that could improve the state asset forfeiture program. In order to maintain transparency 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

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<sup>2</sup> “Audit of the Department of the Attorney General’s Asset Forfeiture Program,” Office of the Auditor, State of Hawaii, June 2018, <http://files.hawaii.gov/auditor/Reports/2018/18-09.pdf>.

LATE

**HB-659**

Submitted on: 2/8/2021 6:14:15 PM

Testimony for JHA on 2/9/2021 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Courtney Mrowczynski	Individual	Support	No

Comments:

I strongly **support** HB659. Hawai'i's civil asset forfeiture program has a shameful record as reported by the Institute for Justice, as well as, the scathing 2018 Audit of the Hawai'i Department of the Attorney General's Asset Forfeiture Program. This measure upholds the 8th Amendment of the US Constitution and I respectfully ask the committee to pass this important bill.



LATE

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

## TESTIMONY IN SUPPORT OF HB 659

TO: Chair Nakashima, Vice Chair Matayoshi & Members of the House Judiciary & Hawaiian Affairs Committee

FROM: Nikos Leverenz  
DPFH Board President

DATE: February 9, 2021 (2:00 PM)

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Drug Policy Forum of Hawai'i (DPFH) **strongly supports** HB 659, which would reform Hawai'i's civil asset forfeiture law to require a felony conviction before property is permanently forfeited.

As evinced by legislative efforts and significant media coverage of this issue in recent years, the need for reform is clear to most everyone but those executive agencies who have effectively operated without meaningful legislative oversight, clear operational parameters, or any reporting requirements for over three decades.

A [2018 report by the Hawai'i State Auditor](#) noted that about 85 percent of administrative forfeiture cases went uncontested during FY2006-FY2015. Current state law erects high barriers for an innocent owner to recoup their seized property, including the requirement to post bond. The auditor further noted that transparency and accountability have been lacking:

The Attorney General [has] broad power to take personal property from individuals without judicial oversight based on a relatively low standard of proof. Given the high profile of the program and the power bestowed on the Attorney General to administer it, it is crucial that the department manage the program with the highest degree of transparency and accountability.

Beyond the lack of administrative oversight, Hawai'i law and current practices do not adequately protect the rights of innocent owners to be secure in their property. Institute for Justice (IJ), a national non-profit public interest law firm, [calls Hawai'i's civil forfeiture laws "among the nation's worst" in assigning it a grade of "D-."](#) IJ also noted the wide disparity between the standard of proof required of state actors and that required of private individuals:

State law has a low standard of proof, requiring only that the government show by a preponderance of the evidence that property is tied to a crime. Furthermore, innocent owners bear the burden of proving that they had nothing to do with the alleged crime giving rise to the forfeiture. Most troubling, law enforcement has a large financial stake in forfeiture, receiving 100 percent of civil forfeiture proceeds: 25 percent goes to police, 25 percent to prosecuting attorneys and 50 percent to the attorney general.

When I served as an advocate to help reform California's civil asset forfeiture law in 2015, it was my pleasure to facilitate meetings between Senate Republican members, IJ Staff Attorney Lee McGrath, and Brad Cates, Director of the Justice Department's Asset Forfeiture Office from 1985 to 1989. Their message and their presence were very well-received, even among those conservative Republicans who were not typically inclined to support reforms to the criminal legal system.

Cates, who spearheaded successful efforts in New Mexico to abolish civil asset forfeiture entirely with a Republican governor and Republican majorities in both houses, [wrote a penetrating opinion editorial in \*The Washington Post\*](#) with his immediate predecessor John Yoder calling for its national abolition. They noted the how the practice of asset forfeiture turns the law on its head:

In America, it is often said that it is better that nine guilty people go free than one innocent person be wrongly convicted. But our forfeiture laws turn our traditional concept of guilt upside down. Civil forfeiture laws presume someone's personal property to be tainted, placing the burden of proving it "innocent" on the owner. What of the Fourth Amendment requirement that a warrant to seize or search requires the showing of probable cause of a specific violation?

Defendants should be charged with the crimes they commit. Charge someone with drug dealing if it can be proved, but don't invent a second offense of "money laundering" to use as a backup or a pretext to seize cash. Valid, time-tested methods exist to allow law enforcement to seize contraband, profits and instrumentalities via legitimate criminal prosecution.

Since 2014, 34 states and the District of Columbia have reformed their civil forfeiture laws. 16 states require a conviction in criminal court to forfeit most or all types of property in civil court, and three states (New Mexico, Nebraska, and North Carolina) have abolished civil forfeiture entirely.

Hawai'i should join them.

Thank you for the opportunity to testify on this critical reform measure.