

Written testimony on H. 533 (forfeiture reform)

House Committee on Judiciary, Hearing of February 18, 2022

STATEMENT OF DAN GREENBERG, CEI Senior Attorney

H. 533 will improve Vermont's justice system. The House Committee on Criminal Justice and Public Safety will consider this bill on February 18, 2022. I thank the Vermont General Assembly for allowing the public to express views about pending legislation, and I submit the following for the Committee's consideration.

Background on civil forfeiture

There is a fundamental tension between the government's use of civil forfeiture and the property and due process rights of its citizens. Civil forfeiture allows police officers to seize property, and that seizure only requires probable cause to believe that the property is related to crime; prosecutors then can shift ownership of the property to the government through litigation in civil court, even if the property owner never faced criminal conviction or even criminal charges. The danger that civil forfeiture poses to property rights and due process raises significant questions about fundamental fairness.

The median size of a cash seizure in America today is around a few hundred dollars to a little over a thousand dollars. (Medians vary by state.) It appears that Vermont's forfeiture proceeds come solely from federal equitable sharing that averages about \$800,000 yearly. I do not have data on Vermont forfeiture revenues under state law in which the federal government is uninvolved, but testimony by Evan Meenan, for the Department of State's Attorneys and Sheriffs, suggests that nearly all forfeiture is done under federal law. This is a problem because the state legislators of Vermont, not the federal government, are ultimately responsible for codifying crimes and establishing just punishment that reflects Vermont's values. To put it a different way, I would say to Vermont policymakers that the federal government, in coordination with state law enforcement agencies, is circumventing you.

H. 533 restores Vermont's control over its own justice system

H. 533 addresses the structural problem that springs from the dual sovereignty of state and federal government: namely, even if state governments address the problems described above by reforming law enforcement procedures within their borders, federal government operations regularly allow for "adoption" of cases involving forfeiture (namely, handing off enforcement and prosecution of forfeiture from state government to the federal government). The agreement typically delegates responsibility to the federal government for enforcement and prosecution while providing that state government will ultimately receive an 80% share of the forfeited property. Such federal-state agreements are especially hard on those who lack the means to fund litigation against the enormous resources and talents of the U.S. Department of Justice. More generally, there is a substantial danger that such adoptions will be

used to circumvent state law that is intended to safeguard the rights of its citizens – such as the bill’s conviction prerequisite.

Multiple states have chosen to pass anti-circumvention statutes that address this problem, and the passage of H. 533 would narrow this problem’s scope in Vermont.. In a nutshell, these statutes prevent the circumvention of state law protections by adoption. Eight states (Arizona, California, Colorado, Maine, Maryland, Nebraska, New Mexico, and Ohio) and the District of Columbia have passed anti-circumvention measures. H. 533 prevents circumvention unless the seized property includes cash over \$100,000 or it is the product of state-federal cooperation (i.e., “task forces”). This \$100,000 boundary requires state government agencies to respect the policy goals of the state legislature when prosecuting relatively small seizures; similarly, other boundaries in the bill completely protect the interests of ordinary citizens who, for one reason or another, sometimes need to carry relatively small amounts of cash. In my view, H. 533 could be improved by extending the \$100,000 threshold to apply to both adoptions and joint task forces; nonetheless, the current bill draft would establish significant advances in Vermont’s justice system.

H. 533 provides efficiency and fairness to Vermont litigants

H. 533 is also important because it ends Vermont’s two-track process of separate criminal prosecutions and civil forfeitures. The bill replaces this bifurcation with a streamlined one-track process of criminal forfeiture. This avoids the problem inherent in civil forfeiture – specifically, the extraordinarily high rate of default judgments in these matters. Around 80% of the owners of seized property never show up in court to contest the seizure, and their absence suggests a barrier to justice – or, in other words, a due process problem.

When Vermonters’ personal property is taken by the government, they face a one-two punch: they lose possession of their property through seizure, then they discover that they’ll have to pay for their own representation in order to recover it in civil court. When they discover that they must bear litigation costs that are larger than the value of the property seized, and when they consider the odds that they might fail, they often give up – in other words, there are many instances of seizure and forfeiture in which no rational litigant would pursue recovery.

Furthermore, the nature of seizure and forfeiture as it is practiced today is pockmarked with evidence that revenue concerns drive the behavior of law enforcement officers and other government agents – thus distracting them from focusing on public safety and crime control. Forcing law enforcement officers to serve as their own revenue collectors creates troublesome pressures and incentives that are likely to distract them from their central mission.

H. 533’s change from a two-track to a one-track procedure was discussed favorably by Mr. Meenan in the previous hearing referenced above. He testified on February 2 that his office “does not oppose the underlying principle of this bill,” which “would be to make civil forfeiture a criminal sanction ... moving from a two-track system to a one-track system – so simplifying the process and streamlining it seems like a wise move for the legislature to make.”

H. 533’s proposed changes to state law would treat property owners much more fairly. It would give them procedural protections that are similar to those of criminal defendants: more precisely, it would

require – in a single process – a criminal conviction of the property owner before forfeiture could occur. Although there are other improvements to the forfeiture process that Vermont might also make (such as directing all forfeiture proceeds to the state’s general fund, which would allow the General Assembly to include seized funds in its budget deliberations), substituting criminal forfeiture for Vermont’s current hybrid of staying civil forfeiture until after a criminal conviction would be a big step forward for fairness.

Four states now rely on criminal forfeiture proceedings (Nebraska, North Carolina, New Mexico, and nearby Maine), and the General Assembly can protect the rights of those in the Green Mountain State by making Vermont the fifth state to enact these reforms.

Conclusion

In short, the passage of H. 533 would increase efficiency for courts (by resolving more matters in fewer proceedings), increase respect for federalism (by requiring law enforcement agencies to abide by Vermont’s protections under the law in the event of seizure and forfeiture), and increase fairness for property-owning defendants (by ensuring that they have access to justice). Policymakers who share these values should favor this bill.

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