

Written testimony on amendment to HB 593 (forfeiture reform)

House Committee on Criminal Justice and Public Safety, General Court of New Hampshire

STATEMENT OF DAN GREENBERG, COMPETITIVE ENTERPRISE INSTITUTE

In the statement below, I discuss several ways that **the proposed amendment to HB 593** will improve New Hampshire's justice system. The House Committee on Criminal Justice and Public Safety is currently scheduled to consider this amendment later this week (February 9, 2023). I would like to express my appreciation to the General Court of New Hampshire for the measures it has taken to allow the public to express views about legislative matters.

This amendment would address several deep problems of New Hampshire's justice system. Below, I describe those problems, how the amended version of the legislation would address them, and the other legislative changes that the General Court has recently made in this area. I also discuss the impact (or lack of impact) of civil forfeiture reform in another state, New Mexico, on crime rates there.

There is a fundamental tension between the government's use of civil forfeiture and the property 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 a crime; prosecutors then can shift the 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 forfeiture 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.) 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 – suggests barriers to access to justice. There are three substantial concerns about fairness that arise here.

First, property owners 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 realize that they must bear litigation costs that are larger than the value of the property seized from them in order to win, 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.

Second, many Americans know that proof of criminal liability requires the showing of guilt beyond a reasonable doubt. Indeed, the heavy burden that prosecutors shoulder is often understood as a device that furthers important moral values in the criminal justice system – more precisely, the requirement of proof beyond a reasonable doubt is seen as protecting innocent parties who for one reason or another become ensnared in the criminal justice system. In contrast, the low standard of proof (typically “more

likely than not,” or greater than 50%) with which wrongdoing is proven in civil court – even though that proof is the trigger for what appears to be punishment for criminal acts – strikes many as unfair.

Third, the nature of seizure and forfeiture as it is practiced today is riddled 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 missions: crime control and the maintenance of order.

In 2016, New Hampshire legislators passed SB 522 into law: that measure attempted to address some of the problems described above. SB 522 temporarily suspended civil forfeiture litigation by delaying it until after criminal prosecution occurred. But this change in litigation timing was a flawed solution. The policy of SB 522 still requires multiple forums of litigation, which translates to more court procedures and prohibitive litigation expenses borne by property owners. Furthermore, because those owners are still likely to default in civil court due to litigation expenses, SB 522 leaves property owners without the benefit of the higher standard of proof that defendants in criminal procedures face. I would add that New Hampshire deserves credit for what it did two years later in enacting SB 498, which significantly improved the transparency requirements of the forfeiture process.

When other state legislatures have considered replacing civil forfeiture with criminal forfeiture, opponents of this policy have made dire predictions that this reform could cause higher crime rates. The case of New Mexico, which replaced civil forfeiture with criminal forfeiture in 2015, demonstrates that such fears were groundless. In the half-decade after passage of the reform, there was no significant increase in crime rates in New Mexico. When New Mexico’s crime rates are compared to the control group of Colorado and Texas along five different dimensions both before and after 2015 (as measured by crimes committed, overall arrests, arrests for DUI, drug possession arrests, and drug sales arrests), the overall trend is that the arc of New Mexico’s crime rates appears slightly flatter than those in neighboring states.

In short, the amended version of HB 593 will transform civil forfeiture proceedings into criminal forfeiture proceedings. It will thereby give property owners the same procedural protections that criminal defendants have. This change would almost completely eliminate the failures of public policy that are described above. Although there are other improvements to the forfeiture process that New Hampshire might also make (such as directing all forfeiture proceeds to the state’s general fund, which would allow the General Court to include seized funds in its budget deliberations), substituting criminal forfeiture for civil forfeiture would be a giant step forward for fairness. Three states now rely on criminal forfeiture proceedings (North Carolina, New Mexico, and neighboring Maine), and the General Court can protect the rights of the Granite State’s property owners by making New Hampshire the fourth state to enact these reforms.

Dan Greenberg, general counsel of the Competitive Enterprise Institute (CEI), is a former state legislator and the author of [Five Myths of Civil Forfeiture](#). He is reachable at dan.greenberg@cei.org or (202) 331-2263. CEI is a nonprofit organization that promotes free markets and limited government.

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