



KANSAS JUSTICE INSTITUTE

2023 Special Committee on Civil Asset Forfeiture

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Chairman Owens and Members of the Committee:

There are at least four core problems with Kansas’ asset forfeiture regime. First, the law incentivizes profit-based policing. Second, the law disregards property rights and due process considerations. Third, it facilitates government overreach and abuse. Fourth, it doesn’t afford a jury trial.

Reform opponents will probably argue that civil forfeiture reform will increase crime—the data does not bear this out; that forfeiture is only a problem in other states—media reports and cases suggest otherwise; and criminals should not profit from their crimes—which *is* true, of course, but is not a sufficient justification for keeping in place the *current* asset forfeiture regime. If forfeiture’s goal is to disrupt *criminal* enterprises and *criminal* activity, requiring a *criminal* conviction seems eminently reasonable.

As one scholar put it, the “Kansas Forfeiture Act as it currently stands is unjust and perverse. It incentivizes law enforcement agencies to take property from innocent persons, fails to reflect the basic purpose and intent of civil forfeiture, fails to protect innocent owners, fails to reflect the values and interests of society, is ripe for abuse, and does nothing to prevent law enforcement agencies from bypassing the protections required by Kansas law through equitable sharing.” Elyssa R. Ellis, *The Silent War on Individual Property Rights: The Necessary Reform of the Kansas Standard Asset Seizure and Forfeiture Act*, 59 Washburn L.J. 103, 135 (2020) (cleaned up).

In short, Kansas Justice Institute¹ strongly supports substantive asset forfeiture reform.

1. Asset Forfeiture Is Problematic: A Broad Overview.

Civil forfeiture “proceedings often enable the government to seize the property ... even when the owner is personally innocent.” *Leonard v. Texas*, 137 S. Ct. 847 (2017) (Thomas, J., respecting denial of certiorari). The forfeiture system “has led to egregious and well-chronicled abuses.” *Id.* at 848. “[F]orfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. Perversely, these same groups are often the most burdened by forfeiture. They are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture. And they are more likely to suffer in their

¹ Kansas Justice Institute (KJI) is a non-profit, public-interest litigation firm committed to defending against government overreach and abuse. It is part of Kansas Policy Institute. KJI believes the government’s ability and propensity to seize and forfeit a person’s property without a criminal conviction poses a serious risk to our constitutional rights.

daily lives while they litigate for the return of a critical item of property, such as a car or a home.” *Id.* (cleaned up).

The “numerous horror stories of property owners caught in the web of government’s enormous forfeiture power has spawned distrust of the government’s aggressive use of broad civil forfeiture statutes.” Brief of *Amicus Curiae Institute for Justice in Support of Petitioner* at 12, *Bennis v. Michigan*, 516 U.S. 442 (1996) (No. 94-8729) 1995 WL 782840, at *6 (cleaned up).

Former United States Representative Henry Hyde warned Congress “our civil asset-forfeiture laws are being used in terribly unjust ways.” Alexandra D. Rogin, *Dollars for Collars: Civil Asset Forfeiture and the Breakdown of Constitutional Rights*, 7 *Drexel L. Rev.* 45, 52 (2014). Representative Deborah Pryce of Ohio “recognized that civil asset forfeiture laws, at their core, deny basic due process, and the American people have reason to be offended and concerned by the abuse[.]” *Id.* at 61 (cleaned up).

In recent decades, civil forfeiture has “become widespread and highly profitable.” *Leonard*, 137 S. Ct. at 848. The government’s forfeiture “practice has become a veritable addiction for federal, state, and local officials across the country[.]” Roger Pilon & Trevor Burrus, *Cato Handbook for Policymakers* 116 (8th ed. 2017). There are even “reports of police departments creating wish lists of assets they want and choosing raid targets accordingly.” David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 *Harv. L. & Pol’y Rev.* 541, 550 (2017).

The United States Supreme Court has recognized the government has “a direct pecuniary interest in the outcome” of forfeiture proceedings. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993).

A few examples illustrating the practical problems associated with defending against government forfeitures.

- In 2011, the government seized \$2,400 from Mr. Lee. Mr. Lee hired an attorney who successfully recouped Mr. Lee’s cash. “But the attorney took about half as his fee and costs, \$1,269.44, leaving Lee with only \$1,130.56.” Robert O’Harrow Jr., et al., *They Fought the Law. Who Won?* THE WASH. POST (Sept. 8, 2014).
- In 2017, a sheriff’s deputy seized \$8,000 from Johnnie Grant, a musician. Mr. Grant hired a lawyer who “made a deal with prosecutors,” letting them keep \$500 of the \$8,000. Mike Ellis, *Atlanta Rapper Fought the Law and Won*, THE GREENVILLE NEWS (Jan. 27, 2019). At first blush, the settlement appears quite favorable. Not so, upon further reflection. Mr. Grant estimated losing “\$4,000 to \$5,000” because of attorney’s fees, court appearances, and lost work opportunities. *Id.*
- In May 2010, a sheriff’s deputy seized \$32,934 from Vincent Costello. Robert O’Harrow Jr., et al., *They Fought the Law. Who Won?* THE WASH. POST (Sept. 8, 2014). Mr. Costello hired an attorney. *Id.* “After making a few calls, the lawyer told him to accept a deal from the government for half of the money. Costello agreed. But his legal fees were \$9,000—leaving him with only about \$7,000.” *Id.*
- Police conducting cash seizures understand the practical problems too. A police officer was recorded telling the person from whom he took cash, “[g]ood luck

proving [your innocence]. You'll burn it up in attorney fees before we give it back to you." David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 Harv. L. & Pol'y Rev. 541, 551 (2017).

2. Asset Forfeiture is a Problem in Kansas too.

Kansas' forfeiture act "disregards a property owner's constitutional rights and allows for substantial governmental abuse and overreach." Amelia Selph, *Kansas Standard Asset Seizure and Forfeiture Act: An Ancient and Failing Approach*, 66 Kan. Law. R. 717, 718 (2018). The "most substantial issue [with the Act] is that it allows law enforcement to keep the profits from the forfeitures that law enforcement effectuate." *Id.* at 740. "By allowing law enforcement agencies to keep the proceeds of forfeitures they initiate, the Kansas Legislature created a 'policing for profit' system." *Id.*

As another scholar put it, the "Kansas Act is problematic because (1) it incentivizes law enforcement agencies to take property from law-abiding citizens, not just criminal defendants; (2) it fails to reflect the basic purpose and intent of civil forfeiture; (3) it does little to protect innocent property owners; (4) it promotes monetary gain for law enforcement agencies; (5) it uses the 'War on Drugs' political theme as an excuse for the overbroad law; and (6) the Act fails to prevent law enforcement agencies from bypassing the protections required by Kansas law because the agencies use equitable sharing." Ellis, *supra* at 108.

Moreover, the "Act fails to provide *real protection* for innocent owners." Ellis at 132 (emphasis added).

Kansas-specific forfeiture and forfeiture-related issues worth considering:

- "The Act, under many circumstances, places pro se parties in a difficult situation." *Cnty. of Jackson v. \$591.00 U.S. Currency*, No. 112522, 2015 WL 4879207, at *3 (Kan. Ct. App. Aug. 7, 2015). "Whether it is bad public policy to place the filing requirements on someone," the Court said, "that question is properly addressed to the legislature, not to this court." *Id.*
- It took nearly 25 years and legislative action for one Kansan to get back *less* money than what the government seized. Peter Hancock, *Civil Liberties Advocates, Law Enforcement Clash Over Asset Forfeiture Bill*, LAWRENCE JOURNAL-WORLD (Jan. 24, 2017); Tim Carpenter, *Years Can't Tame Political Drama of KHP's Hefty Cash Seizure from Topeka Woman*, THE TOPEKA CAPITAL JOURNAL (May 26, 2018).
- The default rate is extraordinarily high.
- According to data from the KBI, it appears that Kansas is not targeting drug kingpins or cartel leaders. Instead, it appears that "half of all seizures" have a "value of \$3,000 or less;" and "62% of the seizures have a total value of \$5,000 or less."²

² https://americansforprosperity.org/wp-content/uploads/2023/08/2023.08-Kansas-Civil-Asset-Forfeiture-1_pager.pdf

- According to the Kansas Reflector, there are significant accounting discrepancies involving Kansas forfeitures. Duane Schrag, *Kansas law enforcement routinely produces error-filled reports on seized cash and property*, KANSAS REFLECTOR (April 17, 2022).³

3. Law Enforcement’s Concerns

Law enforcement will undoubtedly raise concerns about forfeiture reform—and those concerns should be taken seriously. Will this hamper law enforcement? Will the “bad guy” get away with their crimes? Will drug mules target Kansas? Will forfeiture reform increase crime?

HB 2380 was a good-faith attempt to strengthen common-sense protections for everyday-Kansans while minimizing the potential for government overreach and abuse.

While law enforcement’s concerns are serious—and should be considered as such—the data does not support the position that asset forfeiture reforms increase crime. *See, e.g.*, Lisa Knepper, et al., Institute for Justice, *Policing for Profit* (3d ed. 2020).

“Bad guys” and “drug mules” are not getting a free pass either. The government will still have the ability to seize and forfeit their ill-gotten gains. It might be nominally harder, but Kansas prosecutors and Kansas law enforcement officers are well-trained and up to the task.

4. Jury Trial

Currently, the forfeiture act prohibits jury trials in *all* forfeiture cases. KSA § 60-4113(h). In our view, this is an unconstitutional infringement of Kansas Constitution Bill of Rights Section 5.

In Kansas, the “right of trial by jury shall be inviolate.” Kan. Const. Bill of Rights § 5. “Section 5 preserves the jury trial right as it historically existed at common law when our state’s constitution came into existence.” *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509, 514 (Kan. 2019) (cleaned up). “The language of Section 5 is uncompromising. Section 5 imposes clear, precise and definite limitation upon the powers of the legislature. It was chosen precisely because the people recognized that the right to jury trial required protection from legislative efforts to modify it in ways that destroy the substance of that right.” *Id.* at 515 (cleaned up).

In other words, if the right to a jury trial in matters involving forfeitures existed at the time the Kansas Constitution was adopted, it exists now, and the Legislature cannot abolish it.

Based upon the historical record, the right to a jury trial involving forfeiture proceedings existed at the time the Kansas Constitution was adopted. Therefore, the Act’s bench trial requirement violates § 5 of the Kansas Constitution Bill of Rights.

Separately, in our view, it makes good sense to allow a person to be judged by a jury of one’s peers.

³ Article available here: <https://kansasreflector.com/2022/04/17/kansas-law-enforcement-routinely-produces-error-filled-reports-on-seized-cash-and-property/>

5. Conclusion

Forfeiture reform is necessary to increasing governmental accountability, strengthening protections for innocent Kansans from potential government overreach, and minimizing asset forfeiture's biggest problems.