



INSTITUTE FOR JUSTICE

February 15, 2022

Representative Fred Patton
Chairman of the Judiciary Committee
House of Representatives
State of Kansas
300 SW 10th Avenue - Suite 519N
Topeka, KS 66612-1509

Re: Support of HB 2640.

Dear Chairman Patton and Members of the House Judiciary Committee:

Thank you for the opportunity to submit written testimony in support HB 2640. My colleagues at the Institute for Justice and I support this legislation for two reasons:

1. It uses the right process; and
2. It focuses on the property of ordinary Kansans, exempting them from the State's civil forfeiture process that was enacted to address the activity of organized crime, particularly those operating offshore.

1. The Right Process

Crime should not pay. It is a legitimate for Kansas to confiscate the fruit and instruments of crime.

HB 2640 agrees and answers the next question: How does Kansas take title to that property?

Under the bill, Kansas would take title the right way. ***HB 2640 uses the right process.***

The bill ends civil forfeiture for most seizures and replaces it with criminal forfeiture. That forfeiture process is part of and follows the criminal conviction. It occurs before the same judge in the same courtroom and uses much of the same evidence.

This streamlined process is fairer to Kansans than the State's current process of civil forfeiture.

Civil forfeiture is one of the greatest threats to due-process and private-property rights in Kansas. Prosecutors can litigate the transfer of title to property through civil litigation without charging a Kansan with a crime, let alone convicting him.

Civil forfeiture is premised on a separation of a suspect and his property. Police stop and arrest a person and seize his cash and vehicle. Prosecutors then send the person to criminal court and his property to civil court. There is no justification for this unnatural and unnecessary bifurcation other than it makes it easier for prosecutors to gain title to property in civil court.

Litigating in civil court is no simple task for property owners. Forfeiture laws turn a basic tenet of law on its head. In America, one is considered innocent until proven guilty. With civil forfeiture, finding the defendant guilty is not required.

It is worse for spouses, parents and other innocent owner claimants. They must prove they did not know or consent to the defendant's use of their property in the alleged crime. It is a complicated, time-consuming and costly process in which the burden of proof is on the innocent owner who is trying to get back her property.

Additionally, size is an issue. Law enforcement's common narrative overstates size. Most forfeitures are not tens of thousands of dollars wrapped in plastic and hidden in the panels of 18-wheelers. In Kansas, the median currency forfeiture is only \$2,591. That means that half the forfeitures in Kansas are below that amount. In 2019, prosecutors succeeded in forfeiting approximately \$1 million under state law; most of those forfeitures were for modest amounts, contrary to the narrative.

With this low amount of \$2,591, the biggest problem ordinary Kansans face is the cost of litigation in civil court. For many, the cost of hiring an attorney exceeds the value of the property seized. Moreover, indigent Kansans are not afforded counsel in civil court. Unfortunately, it too often is rational for Kansans to walk away from their property, even when they are innocent of any crime.

For too many Kansans, it makes sense to DEFAULT in civil court.

But there is a better way. As HB 2640 provides, the better way is to end civil forfeiture and replace it with criminal forfeiture. It balances (a) police and prosecutors' legitimate goals of confiscating the fruit and instruments of crime and (b) guaranteeing that defendants who are acquitted and innocent owners never lose their property.

Importantly, **HB 2640 does not end forfeiture**. It changes the process from a civil one to a criminal one. It employs the right process in the right court. And it includes pragmatic exceptions to the conviction requirement for when the defendant dies, flees, abandons the property, is deported, or turns state's evidence.

It also ensures that the hard working and good members of police agencies and prosecutors' offices maintain their reputations. It does this by (a) allocating forfeiture proceeds to pay only for non-personnel costs and (b) allocating the remaining funds—which in most cases will be few—to the general fund. No funds go to salaries or call into question the integrity of police officers and prosecutors.

2. The Right Size

The modern era of forfeiture started in the 1980s in response to concerns about illegal drug use. In 1984, the U.S. Comprehensive Crime Control Act empowered federal law enforcement to seize property used to facilitate drug offenses. On its website, the U.S. Drug Enforcement Agency now writes that it “uses forfeiture to attack the financial structure of drug trafficking and money laundering groups worldwide.”ⁱ

Reasonable policymakers may disagree over the efficacy of drug laws. HB 2640 takes no position regarding underlying criminal statutes.

The focus of HB 2640 is to return to the forfeiture law’s original intent and to protect ordinary Kansans. This legislation does this in the following two ways:

- (a) Kansas’ current civil forfeiture laws will continue to apply to seizures of property greater than \$100,000; and
- (b) State and local law enforcement agencies in Kansas may continue to participate in joint-task forces with the U.S Drug Enforcement Agency and federal prosecutors in the U.S. Attorney’s Offices in Kansas City, Topeka, Wichita and Washington D.C.

This means that HB 2640 is focused on the right size of seizures—the type that was never intended to be litigated. In doing so, the bill protects the due process rights of ordinary Kansans who have relatively modest amounts of property seized. This greater protection does not come from ending forfeiture but from shifting the Kansas’ forfeiture litigation from a civil process to a criminal process.

For these two reasons and others, my colleagues and I ask for your support of HB 2640. Thank you.

Sincerely,



Lee U. McGrath
Senior Legislative Counsel
c: (612) 963-0296
e: Lmcgrath@ij.org

ⁱ United States Drug Enforcement Agency, *DEA Asset Forfeiture*, <https://www.dea.gov/operations/asset-forfeiture> (last accessed Feb. 15, 2022).