



DAVID CRAIG

STATE SENATOR

Senate Committee on Committee on Labor and Regulatory Reform,
30 May 2017
Senate Bill 61
Senator David Craig, 28th Senate District

Chairman Nass and Committee Members,

Thank you for hearing testimony on Senate Bill 61. My testimony will focus on Substitute Amendment 1.

The Fifth Amendment of the Constitution states that no person shall "be deprived of life, liberty, or property, without due process of law". However, modern processes of civil asset forfeiture ignore due process rights by allowing forfeiture of property absent criminal conviction. Wisconsin statutes dictate that in forfeiture cases, the burden of proof need only be: "satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence that the property is subject to forfeiture" (961.555(3)) – a standard that falls far short of the standard needed to convict someone of a crime or even charge with wrongdoing.

To be clear, Senate Bill 61 does not abolish the forfeiture of property used in illegal activity. If a person has been convicted of wrongdoing, it is proper and just to punish them by forfeiting the property used to conduct that illegal activity. However, forfeitures absent convictions lead to widespread and well documented abuse in the criminal justice system and are clearly antithetical to the due process clause. Recently, Supreme Court Justice Clarence Thomas stated: "I am skeptical that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice . . ."

Substitute Amendment 1 requires criminal conviction prior to the forfeiture of property while maintaining the tools law enforcement needs to pursue criminal convictions. The substitute amendment would prevent forfeiture of property belonging to innocent owners – where the property owner is unaware of how another person (often a family member) is using property, codify current caselaw on proportionality to ensure that forfeitures are proportional to crime committed, raise the burden of proof in forfeiture cases to a "clear and convincing" standard, allow judges to award reasonable attorney fees to those who prevail against forfeiture actions, and require the return of property within 30 days of an acquittal or the dismissal of charges.

Additionally, the amendment would require that forfeiture funds returned to law enforcement agencies as part of the federal equitable sharing program be tied to a federal criminal conviction, allow law enforcement agencies to keep forfeited vehicles if a 30% of the vehicles value is paid to the Common School Fund, allow forfeiture proceedings to commence at the time of seizure but not conclude without a criminal conviction, and require forfeiture reporting to the Department of Administration. If reporting requirements are met, forfeiting agencies would be allowed to keep 50% of the actual forfeiture expenses of each forfeiture.

In recent years over a dozen states have reformed their civil asset forfeiture laws to restore constitutional protections and federal reform legislation has been introduced by Congressman Jim Sensenbrenner with bipartisan support. These common sense compromises will maintain tools needed by law enforcement to protect our communities while ensuring that constitutional rights are protected in Wisconsin. It is time for Wisconsin to move forward and fix forfeiture.

Again, I appreciate your hearing of this bill today and I look forward to answering any questions you may have.



GARY TAUCHEN

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TO: Chairman Nass and the Members of the Senate Committee on Labor and Regulatory Reform
FROM: Representative Gary Tauchen
DATE: May 30, 2017
RE: SB 61 Testimony

Good morning Chairman Nass and committee members, and thank you for hearing testimony on this important piece of legislation.

Civil Asset Forfeiture reform seeks to ensure Due Process protections remain in place, while allowing our justice system the opportunity to seek recourse from convicted criminals. State legislators across the country have enacted many common-sense reforms. Laws similar to Senate Bill 61 have passed and have been enacted in New Mexico, Nebraska, North Carolina, Maryland, Florida, Minnesota, Montana, Michigan, New Hampshire, Georgia, Virginia, and Mississippi while other proposals have been introduced across the nation. On a national level Congressman Jim Sensenbrenner has introduced a bill that would reform the process as well, drawing strong praise from both sides of the aisle.

I would like to focus my testimony on Senate Substitute Amendment 1 to SB 61. This amendment seeks to provide numerous safeguards to ensure due process, accessible data and reports, and property protections for Wisconsin citizens. Senate Substitute Amendment 1 also provides clear rules that allow for law enforcement to use the forfeiture process to hold individuals convicted of a crime accountable. These protections and procedures include the following:

Criminal Conviction: Senate Substitute Amendment 1 to SB 61 requires that a criminal conviction is required before a forfeiture proceeding can begin. The substitute amendment requires a higher threshold, moving from current law which "the state has the burden of satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence", to a standard of "clear and convincing". To provide more flexibility to law enforcement agencies, no criminal conviction is required for forfeiture only under the following circumstances: death of the defendant, deportation, granted immunity for testimony, defendant has fled the jurisdiction after a warrant has been issued, property is contraband, or property has remained unclaimed for two years.

Proportionality: Senate Substitute Amendment 1 to SB 61 allows for court proceedings to take into consideration the impact of the forfeiture of property on the owners and their families. In determining the proportionality standards the court shall consider four factors which have been established by state and federal case law- the seriousness of the offense, the purpose of the statute authorizing the forfeiture, the maximum fine for the offense, and the harm that actually resulted from the defendants conduct.

Attorney Fees: The bill allows a person prevailing in a forfeiture action to recover reasonable attorney fees from the state.

Transparency: Substitute Amendment 1 to SB 61 improves transparency of the forfeiture process to provide easily accessible, and itemized reports. To receive a portion of the forfeiture proceeds law enforcement is required to send itemized reports to the Department of Administration to be made available on the DOA website. If law enforcement provides an itemized report on the forfeiture, they would be entitled to no more than 50% of the proceeds with the remainder going directly to the school fund.

Federal Equitable Sharing Reform: Substitute Amendment 1 to SB 61 reforms the practice of "equitable sharing" between local law enforcement agencies and the federal government. To accept the federal proceeds the law enforcement agency must produce an itemized report to DOA, and must have a conviction. If a conviction is not reached, the law enforcement agency may not take any of the proceeds.

At the heart of this bi-partisan legislation is the issue of fairness. To protect the property rights of all Wisconsin residents' reforms like SB 61 must be enacted. This bill in no way impacts the ability of law enforcement to crack down on criminal activity. Substitute Amendment 1 reaches an important balance between Constitutional concerns and providing tools for law enforcement to do their job. I'd like to personally thank Senator Craig for his efforts in helping reform Civil Asset Forfeiture in Wisconsin.

Again, I appreciate the opportunity to testify this morning and I look forward to answering any questions you may have.



WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director

Jessica Karls-Ruplinger, Deputy Director

TO: SENATOR DAVID CRAIG

FROM: ^{MLS} Melissa Schmidt and ^{AH} Anna Henning, Senior Staff Attorneys

RE: 2017 Senate Bill 61 and Senate Substitute Amendment 1 to Senate Bill 61

DATE: May 26, 2017

This memorandum describes 2017 Senate Bill 61 ("the bill"), related to forfeiture of property seized in relation to a crime, and Senate Substitute Amendment 1 to the bill ("the substitute amendment").

Among other modifications to current law, the bill and the substitute amendment make various changes, described below, to two forfeiture statutes: (1) the forfeiture statute under the Controlled Substances Act, which governs the forfeiture of property seized in connection with a drug-related crime; and (2) the forfeiture statute under the sentencing laws, which relates to property seized in relation to other (non-drug-related) crimes.¹ Unless otherwise indicated, the changes described below apply to both of those statutes.

Very generally, state law provides that all property, real or personal, including money, may be subject to forfeiture if it was used in the course of, intended for use in the course of, or directly or indirectly derived from or realized through the commission of a crime. [ss. 961.55 (1) (f) and 973.075 (1) (a), Stats.] A forfeiture action may be commenced either as part of a criminal prosecution, by alleging the forfeiture in the criminal complaint (criminal forfeiture) or as a civil action, independent of a criminal case (civil forfeiture). In a civil forfeiture case, the court may enter a judgment "in rem" (against the property itself) or against a party personally, or both. Forfeitures commenced under the Controlled Substances Act are civil forfeitures; all other forfeitures may be commenced as either a civil forfeiture or a criminal forfeiture.

¹ The Controlled Substances Act forfeiture procedures are set forth in ss. 961.55 - 961.56, Stats. Forfeiture procedures for all other crimes are set forth in ss. 973.075 - 973.077, Stats.

CRIMINAL CONVICTION REQUIREMENT

Current Law

In a civil forfeiture proceeding, state law provides that the defendant may request that the forfeiture proceedings be adjourned until after the adjudication of any charge concerning a crime which was the basis for the seizure of the property. A court must grant this request. [ss. 961.555 (2) (a) and 973.076 (1) (b) 1., Stats.]

The Bill

The bill eliminates this process. Instead, the bill prohibits an item from being subject to forfeiture unless a person is convicted of the criminal offense that was the basis for the seizure of the item or that is related to the action for forfeiture. In a civil forfeiture action, the proceedings must be adjourned until after the defendant is convicted of any charge concerning a crime which was the basis for the seizure of the property. The bill provides that a court may waive this conviction requirement, upon a motion by the prosecuting attorney, if the prosecuting attorney shows by clear and convincing evidence that any of the following applies:

- The defendant has died.
- The defendant was deported by the U.S. government.
- The defendant has been granted immunity in exchange for testifying or otherwise assisting a law enforcement investigation or prosecution.
- The defendant fled the jurisdiction after being arrested, charged with a crime that includes the forfeiture of property, and released on bail.

The Substitute Amendment

The Substitute Amendment makes the following changes to the bill:

- Adds the following additional reasons for which the court may waive the conviction requirement:
 - The defendant fled the jurisdiction after an arrest warrant had been issued for a crime that includes the forfeiture of property.
 - The property has been unclaimed for a period of at least two years.
 - The property is contraband that is subject to forfeiture.
- Allows forfeiture actions to be commenced under the Controlled Substances Act as criminal forfeiture actions.

PRETRIAL HEARING REGARDING THE RETURN OF SEIZED PROPERTY

Current Law

In general, current law authorizes any person claiming the right to possession of seized property to apply for its return to the court located in the county where the property was seized or where the search warrant was returned. If an application is filed, the court must hold a hearing to hear all claims to the seized property's ownership. The court may also commence a hearing on its own initiative. Before the hearing, the court must also order notice to the district attorney (DA) and all persons who may have an interest in the property.

With the exception of property that is contraband, a firearm, dangerous weapon, or ammunition, the court must order that the property be returned to the person who has proven the right to possession to the court's satisfaction if either of the following apply:²

- The property is not needed as evidence or, if needed, satisfactory arrangements can be made for its return for subsequent use as evidence.
- All proceedings and investigations in which it might be required have been completed.

[s. 968.20, Stats.]

The Bill

The bill creates a new pretrial hearing process governing court determinations regarding the validity of a seizure of property and provides that a person who has been subject to a seizure of property has the right to this pretrial hearing. The person may file a motion with the court that claims the right to possession of seized property at any time prior to 60 days before the trial for the crime that gave rise to the seizure. The court must hear the motion no more than 30 days after the motion is filed, except that either party may, by agreement or for good cause, move the court for one extension of no more than 10 days. The state must file an answer showing probable cause for the seizure at least 10 days before the hearing of the motion.

Following the hearing, the court must order the seized property to be returned if it finds any of the following:

- It is likely that the final judgment will be that the state must return the property to the person, and the property is not reasonably required to be held for investigatory reasons.
- The property is the only reasonable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding, and the property is not reasonably required to be held for investigatory reasons. If the court makes this

² Seized property may not be returned if it is contraband. Also, there are additional procedures set forth in the statutes that apply to a seized firearm, dangerous weapon, or ammunition.

finding, it may order the return of funds or property sufficient to obtain legal counsel but less than the total amount seized, and require an accounting.

If a court orders the property to be returned, the court must order the person to not sell, transfer, assign, or otherwise encumber the property until the court either orders the property to be returned to its rightful owner or orders the property to be forfeited. Also, if the person is subsequently convicted or found to have committed the offense, the court must order the person to surrender the returned property for the forfeiture proceedings.

The Substitute Amendment

Rather than create a new pretrial hearing process, the substitute amendment provides that a person who has been subject to a seizure of property has a right to a pretrial hearing and amends current law to incorporate provisions of the bill, discussed above. Specifically, the substitute amendment makes the following changes to the hearing under current law, described above:

- Requires that any person claiming the right to possession of seized property must file an application for its return under s. 968.20, Stats., within 120 days of the initial appearance, if an initial appearance is scheduled.
- Requires that if an application for a hearing on the return of seized property is filed, the hearing must occur no more than 30 days after a motion is filed, except that either party may, by agreement or for good cause, move the court for one extension of no more than 10 days.
- Modifies the timeline by which a court must order property to be returned to the person who has proven the right to possession to the court's satisfaction. Specifically, a court must order that the property be returned if any of the following apply:
 - It is likely that the final judgment will be that the state must return the property to the claimant and the property is not reasonably needed as evidence or for other investigatory reasons, or if needed, satisfactory arrangements can be made for its return.
 - The property is the only reasonable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding, the property is not likely to be needed for victim compensation, and the property is not reasonably needed as evidence or for other investigatory reasons. If the court makes this finding, it may order the return of funds or property sufficient to obtain legal counsel but less than the total amount seized and require an accounting.
 - All proceedings and investigations in which the property might be required have been completed.
- Requires that, if a court orders the property to be returned, the court must order the person to not sell, transfer, assign, or otherwise encumber the property until the court

either orders the property to be returned to its rightful owner or that the property be forfeited. Also, if the person is subsequently convicted or found to have committed the offense, the court must order the person to surrender the returned property for the forfeiture proceedings.

RETURN OF PROPERTY IN INSTANCES OF ACQUITTAL OR DISMISSAL OF CHARGES

Current Law

Current law does not specifically require a court to return property if there is an acquittal or dismissal of charges for the offense which was the basis of the forfeiture action.

The Bill

The bill requires a court to return any property subject to forfeiture within 30 days of an acquittal or dismissal of charges for the offense which was the basis of the forfeiture action.

The Substitute Amendment

The substitute amendment retains this requirement. The substitute amendment also does the following:

- Requires the court to order the return of any property subject to forfeiture six months after a seizure that was the basis of the forfeiture action if no charges have been issued and no extension has been granted.
- Provides that if the property is co-owned by two or more defendants in a criminal action, and one or more defendant co-owners are acquitted or the charges against the defendant or defendants are dismissed, the judge must have discretion to dispose of the co-owned property in accordance with the proportionality guidelines set forth in the bill as the judge deems appropriate.

INNOCENT OWNER PROTECTIONS

Current Law

Under current law, all forfeiture actions must be made with due provision for the rights of innocent persons. [ss. 961.55 (3) and 973.075 (5), Stats.] For example, no vehicle may be subject to forfeiture for any act or omission that the owner establishes occurred without the owner's knowledge or consent. Likewise, property that is encumbered by a bona fide security interest perfected before the date of the commission of the crime may not be required to be forfeited if the holder of the security interest neither had knowledge of nor consented to the commission of the violation. In this instance, current law requires that the holder of the security interest be paid from the proceeds of the forfeiture.

The Bill

The bill expressly prohibits the property of an innocent owner from being forfeited and provides a mechanism by which property subject to forfeiture may be returned to an innocent owner. The bill also provides that when a person claims to be the innocent owner of seized property, the person has the burden to prove by clear and convincing evidence that he or she has a legal right, title, or interest in the seized property when claiming he or she is an innocent owner. If this burden is met, then the state has the burden to prove by clear and convincing evidence that the person is not innocent. Specifically, the state has the burden of proving the following by clear and convincing evidence:

- If the person acquired an ownership interest before the conduct giving rise to the property being subject to forfeiture occurred, that the person had actual or constructive knowledge of the underlying crime giving rise to the forfeiture in order to proceed with a forfeiture action against the property.
- If the person acquired an ownership interest after the conduct giving rise to the property being subject to forfeiture occurred, that either: (1) the person had actual or constructive knowledge that the property was subject to forfeiture; or (2) that the person was not a bona fide purchaser without notice of any defect in title and for valuable consideration.

If the state does not meet its burden of proof, the court must find that the property is the property of an innocent owner and is not subject to forfeiture. The court must order the state to relinquish all claims of title to the property.

The bill also provides that the defendant or convicted offender may invoke the right against self-incrimination or the marital privilege during the forfeiture-related stage of the prosecution. The bill authorizes the trier of fact at the hearing to draw an adverse inference from the invocation of the right or privilege.

The Substitute Amendment

The substitute amendment retains these provisions of the bill, described above. The substitute amendment also clarifies that a person who claims to be an innocent owner of property that is subject to forfeiture may petition the court at any time for the return of his or her seized property.

DISPOSITION OF FORFEITED PROPERTY UNDER THE CONTROLLED SUBSTANCES ACT

Current Law

Current law authorizes a law enforcement agency to take one of the following actions with respect to property seized by the agency's officer or employee under the Controlled Substances Act:

- Retain it for official use.
- Sell that which is not required to be destroyed by law and which is not harmful to the public and use 50% of the amount received from the sale for "forfeiture expenses."³ (The remaining amount must be deposited in the school fund.)
- Require the sheriff of the county in which the property was seized to take custody of the property and remove it for disposition in accordance with the law.
- Forward it to the Wisconsin State Crime Laboratory Bureau for disposition.
- If the forfeited property is money, retain 70% of the first \$2,000, plus 50% of the remaining amount, for the payment of forfeiture expenses. (The remaining amount must be deposited in the school fund.)

[s. 961.55 (5), Stats.]

The Bill

The bill repeals the authority to retain property forfeited under the Controlled Substances Act for official use or to pay for agency expenses. Specifically, under the bill, a law enforcement agency is authorized to take one of the following actions with respect to property seized by the agency's officer or employee under the Controlled Substances Act:

- Sell that which is not required to be destroyed by law and which is not harmful to the public and deposit all proceeds in the school fund.
- Require the sheriff of the county in which the property was seized to take custody of the property and remove it for disposition in accordance with the law.
- Forward it to the Wisconsin State Crime Laboratory Bureau for disposition.

The bill requires the agency to deposit any forfeited money in the school fund.

The Substitute Amendment

The substitute amendment also narrows current law regarding an agency's range of options for disposing of property subject to forfeiture under the Controlled Substances Act, but, unlike the bill, the substitute amendment authorizes an agency to retain property for official use or to pay for expenses in limited circumstances.

Under the substitute amendment, an agency is authorized to take one of the following actions with respect to property seized by the agency's officer or employee under the Controlled Substances Act:

³ In this context, "forfeiture expenses" includes all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs and the costs of investigation and prosecution reasonably incurred. [s. 961.55 (5) (b), Stats.]

- If the property is a vehicle, retain the property for official use, after depositing 30% of the value of the vehicle, as determined by the Department of Revenue (DOR), into the school fund.⁴
- Sell that which is not required to be destroyed by law and which is not harmful to the public and use a portion, not to exceed 50%, of the amount received from the sale for "forfeiture expenses," if the agency produces an itemized report of actual forfeiture expenses and submits the report to the Department of Administration (DOA) to make it available on DOA's website.⁵ (The remaining amount must be deposited in the school fund.)
- Require the sheriff of the county in which the property was seized to take custody of the property and remove it for disposition in accordance with the law.
- Forward it to the Wisconsin State Crime Laboratory Bureau for disposition.
- If the forfeited property is money, retain a portion, not to exceed 50%, of the amount received for the payment of forfeiture expenses, if the agency produces an itemized report of actual forfeiture expenses and submits the report to DOA to make it available on DOA's website. (The remaining amount must be deposited in the school fund.)

DISPOSITION OF PROPERTY FORFEITED IN CONNECTION WITH NON-DRUG-RELATED CRIMES

Current Law

For forfeitures to which the Controlled Substances Act does not apply, current law authorizes a law enforcement agency that seizes property to do any of the following:

- Sell the forfeited property that is not required by law to be destroyed or transferred to another agency and use 50% of the amount received from the sale for administrative expenses of seizure, maintenance of custody, advertising and court costs, and the costs of investigation and prosecution reasonably incurred. (The remaining amount must be deposited in the school fund.)
- Retain any forfeited vehicle for official use or sell the vehicle and handle the proceeds the same as proceeds from the sale of other property.

Current law requires any forfeited money to be deposited in the school fund.

⁴ If an agency later sells a vehicle for an amount that exceeds the estimated value, the substitute amendment also requires the agency to deposit that excess amount in the school fund.

⁵ In this context, "forfeiture expenses" includes all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs and the costs of investigation and prosecution reasonably incurred. [s. 961.55 (5) (b), Stats.]

The Bill

The bill removes the authority to retain a forfeited vehicle for official use. In addition, the bill removes the authority to deduct 50% of the amount received from the sale of forfeited property for agency expenses. Instead, the bill requires agencies to deposit all proceeds from the sale of forfeitures in the school fund.

The Substitute Amendment

The substitute amendment retains the authority for a law enforcement agency that seizes property to use certain proceeds from the sale of forfeited property for agency expenses. Specifically, it authorizes an agency to retain a portion, not to exceed 50%, of the amount received from the sale of forfeited property for the types of administrative expenses described above, if the agency produces an itemized report of actual forfeiture expenses and submits the report to DOA to make it available on DOA's website.

In addition, the substitute amendment retains the authority under current law to retain a vehicle for official use, but it requires an agency to deposit 30% of the value of the vehicle, as determined by DOR, into the school fund.⁶

LIMITATIONS ON ASSISTANCE IN FEDERAL FOREITURE PROCEEDINGS

Current Law

Current law does not prohibit state and local law enforcement agencies from transferring seized property to a federal agency for the purposes of forfeiture litigation. Rather, a state or law enforcement agency may conduct joint investigations with federal agencies to enforce federal criminal laws. Alternatively, if a state or local law enforcement agency seizes property, it may request that a federal agency participating in a federal asset forfeiture program adopt the seizure and proceed with a federal forfeiture action.⁷

Under the U.S. Department of Justice Asset Forfeiture Program, any state or local law enforcement agency, including a prosecutorial office (e.g., a DA's office), that directly participates in an investigation or prosecution resulting in a federal forfeiture may receive an equitable share of the net proceeds of the forfeiture by entering into an "equitable sharing agreement" with the federal seizing agency. For example, in adoptive cases where 100% of the pre-seizure activity was performed by a state or local law enforcement agency, the state or local agency's share will generally be 80% of the net proceeds.⁸

⁶ If an agency later sells a vehicle for an amount that exceeds the estimated value, the substitute amendment also requires the agency to deposit that excess amount in the school fund.

⁷ U.S. Department of Justice, *Guide to Equitable Sharing for State and Local Law Enforcement Agencies* (April 2009), www.justice.gov/criminal-afmls/file/794696/download, at pages 1, 3, and 6.

⁸ *Id.*, at page 12.

The Bill

With respect to both drug crimes and general crimes, the bill prohibits state and local employees and agencies from entering into an agreement to transfer property to a federal agency for the purposes of forfeiture litigation, unless one of the following situations applies:

- The seized property includes more than \$50,000 of U.S. currency.
- The property may be forfeited only under federal law.

Unless one of the above criterion applies, the bill requires law enforcement agencies to refer seized property to the appropriate state prosecuting attorney for forfeiture proceedings under state law.

However, the bill specifies that the bill must not be construed to restrict a law enforcement officer or agency from collaborating with a federal agency to seize contraband or property that the law enforcement agency has probable cause to believe is subject to forfeiture through an intergovernmental joint task force.

The Substitute Amendment

The substitute amendment generally does not limit a state or local law enforcement agency's authority to enter agreements or transfer property as part of the federal asset forfeiture program. However, the substitute amendment requires a state or local law enforcement agency that refers seized property to a federal agency to produce an itemized report of actual forfeiture expenses and submit the report to DOA to make it available on DOA's website.

In addition, under the substitute amendment, a state or local law enforcement agency may accept all proceeds if there is a federal criminal conviction for the crime that was the basis for the seizure but may not accept any proceeds if there is no federal conviction.

BURDEN OF PROOF

Current Law

In forfeiture proceedings, current law provides that the state has the burden of satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence that property is subject to forfeiture.

The Bill

Instead, the bill requires the state to prove that the property is subject to forfeiture by clear and convincing evidence.

The Substitute Amendment

The substitute amendment does not modify the provisions of the bill relating to burden of proof.

EXCESSIVE FINES PROPORTIONALITY TEST

Current Law

The Eighth Amendment to the U.S. Constitution prohibits government imposition of excessive fines.⁹ [U.S. Const. amend. VIII.] Currently, Wisconsin courts apply a multi-factor "proportionality test," articulated by the U.S. Supreme Court in *U.S. v. Bajakajian*, 524 U.S. 321 (1998), to determine whether a civil forfeiture constitutes an unconstitutionally excessive fine. [*State v. Boyd*, 2000 WI App 208.] Under that test, the amount of a forfeiture must bear some relationship to the gravity of the offense it is designed to punish. The following factors are considered:

- The nature of the offense.
- The purpose for enacting the statute.
- The fine commonly imposed upon similarly situated offenders.
- The harm resulting from the defendant's conduct.

Current law does not impose additional statutory requirements relating to determinations regarding whether a forfeiture is excessive.

The Bill

The bill creates new statutory requirements governing court determinations regarding whether a civil forfeiture is excessive. Under the bill, a court may not order the forfeiture of property if the court finds that the forfeiture is either of the following:

- Grossly disproportional to the crime for which the person whose property was seized was convicted.
- Unconstitutionally excessive under the U.S. or Wisconsin Constitutions.

In addition, the bill provides that a person alleging that a forfeiture does not satisfy the above requirements has the burden of satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence that the forfeiture does not meet those requirements.

The bill requires a court to consider the following factors in determining whether a forfeiture satisfies the requirements listed above:

- The seriousness of the offense and its impact on the community, including the duration of the activity and the harm caused by the person.
- The extent to which the person participated in the offense.
- The extent to which the property was used in committing the offense.

⁹ Wisconsin courts have assumed that the Eighth Amendment applies to the states. [*State v. Hammad*, 569 N.W.2d 68, 70 (Wis. Ct. App. 1997).]

- The sentence imposed on the person for the offense.
- Whether the person completed or attempted to complete the offense.
- The fair market value of the property.
- The value of the property to the person, including the hardship to the person if the property is forfeited.
- The hardship to the person's family members if the property is forfeited.

Finally, the bill prohibits a court from considering the value of the property to the state when making that determination.

The Substitute Amendment

The substitute amendment generally retains the provisions of the bill relating to court evaluation of forfeitures. However, it replaces the list of eight factors that a court must consider with the following list of four factors, which are similar to the factors established in state and federal case law:

- The seriousness of the offense.
- The purpose of the statute authorizing the forfeiture.
- The maximum fine for the offense.
- The harm that actually resulted from the defendant's conduct.

ATTORNEY FEES

Current Law

Current law does not specifically provide for attorney fees in forfeiture proceedings.

The Bill

The bill provides that a person who prevails in an action to return property subject to forfeiture must be awarded reasonable attorney fees by the state. For this purpose, the bill specifies that a person "prevails" if they recover more than 50%, by value, of the money or other property that is claimed.

The Substitute Amendment

The substitute amendment retains the provisions of the bill relating to attorney fees, without modification.

If you have any questions, please feel free to contact us directly at the Legislative Council staff offices.

MS:AH:jal



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

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PREPARED TESTIMONY OF ATTORNEY GENERAL BRAD D. SCHIMEL

Testimony on Senate Bill 61
Senate Committee on Labor and Regulatory Reform
Tuesday May 30, 2017

Dear Chairman Nass and Committee Members:

Thank you for the opportunity to submit testimony regarding SB 61 and Substitute Amendment 1. As Wisconsin's Attorney General, I have two major priorities with regard to this significant reform: giving law enforcement the tools it needs to keep our families safe, and protecting our cherished civil liberties.

While Wisconsin's current civil asset forfeiture laws are relatively effective and protective of civil liberties, there are opportunities for improvement. While I am opposed to the original bill as I believe it unnecessarily impedes the critical work of our law enforcement partners, Substitute Amendment 1 moves much closer to striking that important balance between law enforcement's needs and a strong protection of property owners' due process rights.

I sincerely appreciate Senator Craig's and Representative Tauchen's recognition of the value of civil asset forfeiture for investigatory purposes and protecting our community from bad actors. I also understand and agree with the intent to strengthen due process protections, and I embrace the laudable goal of tying most forfeitures to criminal convictions when possible.

Because I believe we share these same good intentions, I am hopeful that we may have future conversations about provisions in the bill that need to be addressed. These include clarifying the criminal conviction exceptions for both state proceedings and federal adoption; eliminating the provision allowing attorney fees for lawsuits against our law enforcement partners; and ensuring that money and property subject to forfeiture is not spent on attorneys for criminal defendants when that money may be needed to pay fines or restitution to victims.

With these changes, my outstanding concerns would be addressed and I would no longer stand opposed.

Thank you for your consideration and I ask that this committee withhold any action on this bill until these provisions are addressed.

Testimony Before the Wisconsin Senate Committee on Labor and Regulatory Reform
Jesse Hathaway, Research Fellow, The Heartland Institute
Tuesday, May 30, 2017

Chairperson Nass and members of the committee, thank you for giving me the opportunity to testify today.

My name is Jesse Hathaway. I am a research fellow for the Center on Budgets and Taxes at The Heartland Institute, a 32-year-old national nonprofit research and education organization. Our mission is to discover, develop, and promote free-market solutions to social and economic problems. The Heartland Institute is headquartered in Illinois and focuses on providing national, state, and local elected officials with reliable and timely research and analyses on important policy issues.

Civil asset forfeiture is an issue an increasingly larger number of people across the country are becoming aware of. Civil asset forfeiture, also called civil judicial forfeiture, is a controversial legal fiction, in which law-enforcement agencies take ownership of personal assets from individuals or groups suspected of a crime or illegal activity. In some cases, this can be done without bringing criminal charges against those whose assets are taken.

Between 2000 and 2013, about \$51.2 million in assets and money seized from Wisconsin residents, or about \$3.6 million each year, was laundered back to Wisconsin local and state police departments and government agencies from the U.S. Department of Justice's Equitable Sharing Program, a federal program many have criticized as a program circumventing state property-rights protections by treating local crimes as national incidents requiring federal assistance.

Proponents of forfeiture argue it allows law-enforcement agencies to use seized assets toward their enforcement efforts, transforming property illicitly gained by criminals into resources to be used for public benefit. Critics of the process note it gives government agencies economic incentives to take property, corrupting them and penalizing innocent property owners. Many states impose no penalties on law-enforcement agencies for wrongful seizures, and when property is deemed to have been taken illegally, taxpayers usually have to pay for the returned assets.

The standard of proof used to determine whether a seizure may occur differs from state to state. In civil forfeitures in Wisconsin, property owners are presumed guilty and lose their property unless they contest the forfeiture and prove they were not aware their property was being used illegally. Unless an owner actively works to recover his or her property, it will be lost.

Property owners are often given very little opportunity to challenge seizures, and when they do challenge, the process is expensive for those whose property is seized, as they must pay for attorneys and legal fees to prove their innocence. In many instances, property owners must meet with prosecutors, not a judge or jury, to regain their property.

Wisconsin's burden of proof is very low—"reasonable certainty," which is equivalent to "a preponderance of the evidence"—but regardless of the standard, the cost of violating citizens' civil liberties is still too high.

Ideally, Wisconsin would fully move to a criminal asset forfeiture system, requiring criminal convictions for all forfeiture proceedings, but the substitute amendment is a good incremental step toward that goal. The substituted bill would increase the standard to "clear and convincing evidence," a standard many courts use for civil lawsuits involving non-monetary issues, such as restraining orders and probate cases.

The "clear and convincing" standard means the evidence is highly and substantially more likely to be true than untrue, as it was stated clearly in *Colorado v. New Mexico*, a 1984 U.S. Supreme Court case.

Civil asset forfeiture reform is not about punishing law-enforcement officers. In fact, its goal is the opposite: By removing the economic incentives that now exist, we can help ensure citizens trust the current system, leading to improved community-police relations.

It is your responsibility as lawmakers to defend the rights of the citizenry against harm. Although the intentions of civil asset forfeiture may have originated with a principled purpose, we can help ensure that "crime does not pay" without violating due process and private property rights. Narrowing the government's forfeiture powers and requiring greater transparency and data collection are great ways to help fix the problem at hand.

Wisconsin lawmakers should continue to implement reforms that will remove incentives for police to seize assets and require clear evidence a person has committed a crime before property is taken.

Civil asset forfeiture reform, including the substitute amendment under consideration today, will help Wisconsin lead the nation in criminal justice reform, setting an example that other states can use to implement similar reforms.

Thank you for your time today.



**AMERICANS FOR
PROSPERITY**
WISCONSIN

Memorandum

TO: Honorable Members of the Senate Committee on Labor and Regulatory Reform

**FROM: Eric Bott, State Director
Americans for Prosperity-Wisconsin**

DATE: May 30th, 2017

RE: Support Senate Bill 61, Civil Asset Forfeiture Reform

On behalf of more than 130,000 Americans for Prosperity activists in Wisconsin, I would like to thank you Chairman Nass and members of the committee for holding a hearing on Senate Bill 61 (SB 61) and Senate Substitute Amendment 1 (SSA 1), civil asset forfeiture reform.

Americans for Prosperity exists to recruit, educate and mobilize citizens in support of the policies and goals of a free society at the local, state, and federal level, helping every American live their dream – especially the least fortunate. Two policies foundational to any free society are robust private property rights and due process of law. Civil asset forfeiture conflicts with these principles.

We believe that the average member of the public would be appalled if they were aware of the extent to which the private property of American citizens can and is routinely seized and forfeited to the state absent a criminal conviction. This practice runs in direct contradiction to the 5th Amendment to the US Constitution, which states that no person, “be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.”

As in most matters of public policy there is a balancing test at play. Civil asset forfeiture fails that test. Opportunities for constitutional abuses are too great. Examples of the rights of innocent citizens being abused are too common and the burden citizens face when challenging forfeiture is too high. No matter the public good created by civil asset forfeiture, it does not justify the trampling of fundamental constitutional liberties.

It goes without saying that we appreciate the difficult tasks society asks of law enforcement. We recognize that they require certain tools to maintain public safety and order. We are grateful for their work.

To this end, we support SSA 1 to SB 61. With this substitute amendment, we believe the authors are working to address legitimate concerns raised by law enforcement regarding the bill while maintaining the core goals of the legislation.

Under SSA 1, a criminal conviction would still be required with limited exceptions for the state to forfeit property. The amendment maintains important provisions improving the proportionality

of forfeitures by codifying case law so that forfeitures are relative to the crime committed. It also sets a more appropriate burden of proof for the state and provides additional protections for innocent owners who are roped into forfeiture scenarios without their knowledge or participation in any wrong doing.

However, SSA 1 makes several important concessions to law enforcement. These include the creation of a criminal asset forfeiture process for narcotics crimes and provisions allowing agencies to purchase forfeited vehicles at steep discounts from the common school fund. These changes set up a criminal asset forfeiture law in Wisconsin that is far more desirable than the civil process currently in place.

The committee should vote to adopt the amendment, making SB 61 a stronger, balanced bill and recommend passage by the full Senate.

Again, we wish to thank Senator Nass as well as Senator Craig for authoring this proposal. We also wish to thank Senators Nass, Wirch, and Lasee for co-sponsoring this bill. We respectfully request that you recommend passage of SB 61 at your earliest possible convenience.

For more information, please contact Eric Bott at ebott@afphq.org.



**Senate Committee on Labor and Regulatory Reform
Testimony on Senate Bill 61
May 30, 2017**

Thank you Senator Nass and members of the Senate Committee on Labor and Regulatory Reform for allowing me to testify on Senate Bill 61. SB 61 provides important reforms to civil asset forfeiture that protect individual property rights and ensures compliance with the state constitution.

The state taking your property is a serious event. To be free from government seizure of property is a right that dates to the earliest days of the republic. The founders were clear in writing the 4th Amendment people are to be free from unreasonable seizures. To further emphasize the importance of property rights, the founders included in the 5th Amendment a right to not be deprived property without due process. Wisconsin's constitution contains the same rights. Over the past several centuries, thousands of pages have been written by the courts outlining what these rights mean and how they should be protected.

However, the courts' job is merely to provide the bare minimum protection of those rights. The legislature has a responsibility too to write the processes and the rules that respect property rights to the best of their ability. The substitute amendment to SB 61 takes this responsibility seriously by ensuring seizing of property alleged to be criminal in nature is connected to a crime. To that end, the substitute amendment requires a criminal conviction related to the seized item in nearly all situations before the forfeiture can occur. The substitute amendment also clarifies and strengthens the rights of owners, innocent or otherwise, with a simplified process for pre-adjudication release.

Clarifying the provisions for asset forfeiture is helpful to the protection of property rights. In instances where the value of the seized asset is not great, the cost of obtaining an attorney can be prohibitive. Making the process straightforward helps people understand their rights and how to contest the hearings.

This is particularly true for innocent owners. Current law allows for a passive right for innocent owners to reclaim their property. The substitute amendment, by expressly prohibiting the forfeiture of innocent owners' property, requires the court to examine the question before making a final decision. Further, the substitute amendment codifies the

common law test for an excessive forfeiture. The end result is a cleaner process that more fully respects property rights.

Finally, the substitute amendment makes an important clarification to current law. The Wisconsin constitution requires the clear proceeds of asset forfeitures be deposited into the school fund. Current law permits the seizing agency to withhold up to fifty percent for expenses. The substitute amendment requires an itemization of the actual expenses accrued in the process of seizing the asset. This requirement provides the enforcement mechanism needed to make sure our constitution is complied with.