



Massachusetts Advisory Committee Civil Asset Forfeiture – April 2022

In March 2022, the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights (Committee) voted to examine civil asset forfeiture in the Commonwealth. On April 27, 2022, the Committee held a briefing to hear about the practice in Massachusetts. There are two bills to reform civil forfeiture laws in Massachusetts currently pending before the Senate Ways & Means Committee.

The Massachusetts Committee has deemed it appropriate to issue an interim memorandum to the Commission due to the time-sensitive nature of this pending legislation. The first bill is Massachusetts Senate Bill S.2105 “An Act relative to civil asset forfeiture data reporting.”¹ The second bill is Massachusetts Senate Bill S.2671 “An Act relative to forfeiture reform.”²

As proposed, S.2105 would create more robust reporting requirements for seized property. S.2105 would require the attorney general, each district attorney, and each police department to file an annual report with the state treasurer regarding all assets seized through civil forfeiture. The laws would also require a report of the expenditures of such funds. Finally, the proposal would require the state treasurer to file an annual report on the aggregate deposits, expenditures, and balances of funds related to civil forfeiture, while also maintaining a “case tracking system” and searchable public website that contains details about seized property.

The second bill, S.2671, would ensure that all forfeitures are sent to a general fund, forfeitures under \$250 would be made illegal, and the owner of civilly forfeited property would be entitled to public counsel representation.

The Committee supports both pieces of legislation as a first step in remedying the injustices of civil asset forfeiture and would like to draw the Commission’s attention to this legislation before the Legislature adjourns.

Background:

The civil forfeiture laws in Massachusetts are some of the most outdated in the country with some statutes dating back over 230 years.³ The Commonwealth holds the distinction as having the lowest burden of proof of any state for police and prosecutors to confiscate the property of

¹ S.2105, 192nd Gen. Ct. (Mass 2022).

² S.2671, 192nd Gen. Ct. (Mass 2022).

³ *See, e.g.*, G.L. c. 90§ 24W (forfeiture of motor vehicle owned by certain drunk driving offenders); G.L. c. 94C§ 47 (forfeiture of property); G.L. c. 257 ss. 1-15 (seizure and libelling (*sic*) of forfeited property); G.L. c. 265§ 56 (property subject to seizure for violations of human trafficking offenses); G.L. c. 267A§ 4 (forfeiture of money instruments or other property for violation of money laundering offenses).

individuals.⁴ From 2018-2020, the 11 district attorneys and attorney general seized over \$11,000,000 of total assets through civil forfeiture programs.⁵ Such funds are allocated to the Law Enforcement Trust Fund, which is used for other law enforcement purposes, protracted investigations, and distributions to police.⁶ Law enforcement agencies keep up to 100 percent of asset forfeiture proceeds.⁷ In certain instances, civil forfeiture funds allow local police departments to purchase equipment without approval from the public, circumventing disclosure and democratic accountability.⁸ As concerning, innocent third-party owners bear the burden of proving their own innocence to recover their property.⁹

These outdated civil forfeiture laws have a human cost. For example, ProPublica and WBUR report on individuals like 21-year-old college student, Devantee Jones-Bernier, whose phone and ninety-five dollars were taken by police because he happened to be in an apartment where police found marijuana.¹⁰ Although Jones-Bernier had no connection to the drugs and charges against him were later dismissed, he never recovered his iPhone or money.¹¹ Even more stark, was Laura Wojcechowicz, who had \$4,800 dollars confiscated by police because her husband had been charged with drug dealing.¹² The judge presiding over her husband's case refused to sentence Wojcechowicz's husband before resolving the civil forfeiture issue, which caused Wojcechowicz to give up the \$4,800 that she would never recover.¹³

Echoing the problems identified in the WBUR/ProPublica piece, Attorney Joseph Hennessey included several examples in his testimony in which innocent individuals in Worcester, MA lost property to civil forfeiture. In one instance, the wife of an alleged drug dealer was forced to forfeit \$6,409 after her husband accepted a probation offer when a small amount of cocaine was discovered in their apartment.¹⁴ In another example, after stopping a woman for driving with a suspended license, police confiscated \$4300; the woman was traveling from Connecticut to Massachusetts with cash to make the final payment on her car.¹⁵ While Attorney Hennessey took

⁴ See Saurabh Datar & Shannon Dooling, *It's Easy For Police to Seize Money. Worcester's District Attorney Makes It Hard To Get It Back*, WBUR (Aug. 18, 2021), <https://www.wbur.org/news/2021/08/18/civil-forfeiture-police-money-massachusetts-worcester-joseph-early>

⁵ COMMONWEALTH OF MASS., SPECIAL COMM'N TO STUDY CIV. ASSET FORFEITURE POL'Y AND PRAC. IN THE COMMONWEALTH, FINAL REPORT (2021); see also Dan Alban, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, Apr. 27, 2022, transcript, p. X (noting that more than half the seizures between 2017-2019 were less than \$500)

⁶ *Id.* at 11.

⁷ Alban testimony, Apr. 27 Briefing Transcript, p. 6 (noting that there is a 50/50 split between the District Attorney/Attorney General and police departments).

⁸ See, e.g., Shannon Dooling & Christine Willmsen, *Boston police bought spy tech with a pot of money hidden from the public*, WBUR (Dec. 17, 2021) <https://www.wbur.org/news/2021/12/17/massachusetts-cell-site-simulator-civil-forfeitures> (uncovering the purchase of a \$627,000 "stingray" surveillance machine that the Boston Police Department purchased without Boston City Council approval because the money came from a civil forfeiture fund).

⁹ Alban testimony, Apr. 27 Briefing Transcript, p. 3.

¹⁰ See Datar & Dooling, *supra* note 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Joseph Hennessey, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, Apr. 27, 2022, transcript, p. 13-16 (although the police seized the \$6,409, there was no evidence that money was in any way connected to the sale of drugs).

¹⁵ *Id.* at 15.

the case pro bono and recovered the \$4300, it took *six months* to recover the money, during which the dealership repossessed the vehicle.¹⁶

As discussed below, Massachusetts’s civil forfeiture laws have come under increasing scrutiny in recent years at the federal and state level. During a meeting of the U.S. House of Representatives Subcommittee on Civil Rights and Civil Liberties, Representative Ayanna Pressley (MA) noted that “civil asset forfeiture laws have been weaponized by police and prosecutors... [and] amount to little more than theft.”¹⁷ The Boston Globe’s Editorial Board has described civil forfeiture as “a perverse system that cries out to be ended.”¹⁸ The ACLU of Massachusetts notes that civil forfeiture represents an “alarming threat to due process, made even more startling by the lack of transparency and accountability.”¹⁹ More recently, other local news outlets and individuals in the legal community have publicly denounced the practice of civil forfeiture.²⁰

Massachusetts lawmakers responded to this public scrutiny, creating a 2019 commission to study civil asset forfeiture practices in the Commonwealth and to examine the practice in other states.²¹ The Special Commission to Study Civil Asset Forfeiture Policies and Practices in the Commonwealth’s findings were initially delayed, but ultimately the Special Commission completed its report on civil forfeiture in July 2021. The comprehensive report researched seven dimensions of civil forfeiture,²² ultimately making a series of six recommendations to the legislature: (1) Raise prosecutors’ burden of proof, (2) Improve reporting requirements, (3) Stay of proceedings during the pendency of the criminal case, (4) Establish a minimum threshold value of property subject to seizure, (5) CPCS representation (6) Divert forfeiture funds to the general fund or specific funding areas rather than law enforcement and prosecutors.²³

Preliminary Observations and Recommendations:

It is important to note that these areas of inquiry are preliminary in nature. The Committee intends to convene a second briefing at the State House to hear from additional panelists. At the conclusion of this examination, the Committee will submit a more comprehensive report to the Commission, including formal findings and recommendations. However, due to the time-

¹⁶ *Id.*

¹⁷ See *Forfeiting Our Rights: The Urgent Need for Civil Asset Forfeiture Reform*, 117th Cong. (2021), <https://oversight.house.gov/legislation/hearings/forfeiting-our-rights-the-urgent-need-for-civil-asset-forfeiture-reform>

¹⁸ The Editorial Board, *In Mass., authorities can take your money. Or your car. Or your shoes.*, THE BOSTON GLOBE (Dec. 8, 2021), https://www.bostonglobe.com/2021/12/08/opinion/mass-authorities-can-take-your-money-or-your-car-or-your-shoes/?p1=Article_Feed_ContentQuery

¹⁹ Rahsaan Hall, *District Attorneys and Civil Asset Forfeiture*, ACLU OF MA (Apr. 2, 2018), <https://www.aclum.org/en/news/district-attorneys-and-civil-asset-forfeiture>

²⁰ See, e.g., Board of Editors, *Time to revisit state civil forfeiture law*, MASS LAWYERS WEEKLY (Nov. 14, 2019), <https://masslawyersweekly.com/2019/11/14/time-to-revisit-state-civil-forfeiture-law/>

²¹ See COMMONWEALTH OF MASS., SPECIAL COMM’N TO STUDY CIV. ASSET FORFEITURE POL’Y AND PRAC. IN THE COMMONWEALTH, *supra* note 3 at 6.

²² *Id.* at 5.

²³ *Id.* at 15-18.

sensitive nature of this issue, the Committee advises the Commission of the importance of this proposed legislation.

Before making these recommendations, the Committee notes that Congress is looking into the matter as well. The Subcommittee on the Constitution and Civil Rights and Civil Liberties, House Oversight Subcommittee for the USCCR, held a hearing on the topic, “Forfeiting our Rights: The Urgent Need for Civil Asset Forfeiture Reform” in December 2021.²⁴

The proposed Massachusetts legislation is a constructive step toward reforming civil asset forfeiture and creating transparency, oversight, and accountability to allow legislators to better evaluate civil asset forfeiture in the Commonwealth. The pending legislation, however, does not currently provide enough protection. Therefore, the Advisory Committee recommends that legislation include:

1. Building in due process protections for the seizure of private property.
2. Shifting the burden of proof to the government, with notice requirements.
3. Limiting seizures to admissible evidence.
4. Including an innocent owner defense.
5. Providing Eighth Amendment excessive fines protections.
6. Reimbursing of attorney fees to the prevailing party.
7. Providing the right to a jury trial and suppressing illegally seized evidence.
8. Requiring that the collection of data includes race, national origin, ethnicity, and other identity characteristics.
9. Require prompt and timely conduct and notice to property owner of forfeiture procedures.

This memo was approved unanimously by the Committee at its April 27, 2022, meeting.

²⁴ See Forfeiting Our Rights: The Urgent Need for Civil Asset Forfeiture Reform, 117th Cong. (2021), <https://oversight.house.gov/legislation/hearings/forfeiting-our-rights-the-urgent-need-for-civil-asset-forfeiture-reform>.

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