



# KANSAS JUSTICE INSTITUTE

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## Testimony to the House Committee on Judiciary

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HB 2380: “Requiring a criminal conviction for civil asset forfeiture, remitting proceeds from civil asset forfeiture to the state general fund, increasing the burden of proof required to forfeit property, making certain property ineligible for forfeiture, providing persons involved in forfeiture proceedings representation by counsel and the ability to demand a jury trial and allowing a person to request a hearing on whether forfeiture is excessive.”

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Chairman Patton 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. HB 2380 attempts to address each of these concerns in a reasonable fashion.

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.

Kansas Justice Institute<sup>1</sup> supports HB 2380. It is but one approach to curbing the many problems with Kansas’ forfeiture laws—and a solid one, worthy of this Committee’s attention.

### 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. 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,

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<sup>1</sup> 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.

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.*

Kansas-specific examples of problematic forfeiture issues:

- In a Johnson County case where KJI participated as *amicus*, Kansas officials sought to destroy a classic car even though government acknowledged the owner was innocent.<sup>2</sup>

CIVIL ASSET FORFEITURE

## Although the State of Kansas Admits This Guy Is Innocent, It Still Wants To Destroy His 1959 Corvette

Richard Martinez lost his dream car because of VIN-plate issues prosecutors admit he was "not aware of."

- 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).
- According to data from the KBI, it appears that Kansas is not targeting drug kingpins or cartel leaders. Instead, it appears that 60% of seizures have a total value of \$5,000 or less, and a significant number of interactions have never resulted in criminal charges or convictions.<sup>3</sup>
- 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).<sup>4</sup>

### 3. Law Enforcement's Concerns

Law enforcement will undoubtedly raise concerns about HB 2380—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 this bill foster more crime?

HB 2380 is a good-faith attempt to strengthen common-sense protections for everyday-Kansans while minimizing the potential for government overreach and abuse. By removing the profit incentive, HB 2380 will ultimately foster even greater respect for law enforcement.

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<sup>2</sup> Article available here: <https://reason.com/2021/10/18/although-the-state-of-kansas-admits-this-guy-is-innocent-it-still-wants-to-destroy-his-1959-corvette/>

<sup>3</sup> <https://americansforprosperity.org/wp-content/uploads/2022/05/Americans-for-Prosperty-Foundation-Kansas-civil-asset-forfeiture-report-2022.pdf>

<sup>4</sup> Article available here: <https://kansasreflector.com/2022/04/17/kansas-law-enforcement-routinely-produces-error-filled-reports-on-seized-cash-and-property/>

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.

#### **5. Conclusion**

This bill is a good-faith attempt at increasing governmental accountability, strengthening protections for innocent Kansans from potential government overreach, and minimizing asset forfeiture’s biggest problems.