



EXECUTIVE CHAMBERS
HONOLULU

DAVID Y. IGE
GOVERNOR

July 9, 2019

GOV. MSG. NO. 1377

The Honorable Ronald D. Kouchi,
President
and Members of the Senate
Thirtieth State Legislature
State Capitol, Room 409
Honolulu, Hawai'i 96813

The Honorable Scott K. Saiki,
Speaker and Members of the
House of Representatives
Thirtieth State Legislature
State Capitol, Room 431
Honolulu, Hawai'i 96813

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

I am transmitting herewith HB748 HD2 SD2, without my approval and with the statement of objections relating to the measure.

HB748 HD2 SD2

RELATING TO PROPERTY FORFEITURE

Sincerely,

DAVID Y. IGE
Governor, State of Hawai'i

EXECUTIVE CHAMBERS

HONOLULU

July 9, 2019

STATEMENT OF OBJECTIONS TO HOUSE BILL NO. 748

Honorable Members
Thirtieth Legislature
State of Hawai'i

Pursuant to Section 16 of Article III of the Constitution of the State of Hawai'i, I am returning herewith, without my approval, House Bill No. 748, entitled "A Bill for an Act Relating to Property Forfeiture."

The purpose of the bill is to prohibit civil asset forfeiture except when the owner of the asset has been convicted of a felony. The bill also changes the distribution of forfeited property, or sales proceeds from forfeited property, to the state general fund. Presently, forfeited property and/or sales proceeds are distributed to the state and local law enforcement agencies and the forfeiture fund.

At the outset, we note that there are distinctions between criminal and civil forfeiture proceedings. A criminal forfeiture is an *in personam* proceeding against an individual. The individual is charged with crimes that authorize the forfeiture of proceeds, or money or property involved in, or used to facilitate, an offense. The forfeiture becomes a component of the criminal sentence; it is not a separate criminal offense. See Carlisle v. One (1) Boat, 119 Haw. 245, 261 (2008) ("[T]he forfeiture of property is a part, or at least a consequence, of the judgment of conviction.") (citation omitted). A civil forfeiture, by contrast, "is entirely separate from the judgment of conviction," and is not considered punishment for an offense. Id. Rather, the property itself is "primarily considered as the offender[.]" The Court has also explained that such a proceeding "is a proceeding *in rem*," and "not a proceeding against any person." State v. Tuipuapua, 83 Haw. 141, 147 (1996).

This bill is objectionable because it eliminates civil forfeiture as an effective and critically important law enforcement tool. The Hawai'i Supreme Court has explained that the civil forfeiture law serves important non-punitive goals such as

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“encouragement” of property owners “to take care in managing their property,” and that it tends to ensure “they will not permit that property to be used for illegal purposes.” State v. Tuipuapua, Id. at 153 (1996) (quoting U.S. v. Usery, 518 U.S. 267, 289 (1996)). See also Carlisle v. \$10,447.00 in U.S. Currency, 104 Haw. 323, 336 (2004) (asset forfeiture statute is “designed to ensure that the economic benefits of committing a crime do not outweigh the consequential criminal penalties; otherwise, without the forfeiture statute, an individual might determine that the money gained from gambling activities outweighs the costs associated with criminal convictions.”). While the language of the bill characterizes asset forfeiture as “government-sponsored theft,” in reality, civil asset forfeiture is used only when a crime is committed and only for the purposes of stopping ongoing criminal activity and deterring further crimes. Moreover, while the seizure of property and proceeds of a crime can occur at the outset of the related criminal matter, the sale of any proceeds often does not occur until after a conviction.

In addition to the mischaracterization of the use and purpose of civil asset forfeiture, problems with the bill also include the following:

First, the felony conviction requirement in the bill is problematic because it misunderstands the distinct nature of a civil asset forfeiture proceeding. An asset forfeiture is usually *not* a proceeding against a person (unlike a criminal prosecution) but rather is a civil proceeding *in rem* (i.e., against the property used in the commission of a crime or obtained as proceeds from the commission of a crime). See State v. Tuipuapua, at 147. Requiring the owner to be convicted of a crime before his or her assets are forfeited misses the point of asset forfeiture, which seeks to prevent *property* from being used in the commission of criminal conduct. Often, the owner of the property is not the defendant in the criminal case. For example, if a landlord knowingly allows his tenant to use a residence to manufacture or sell drugs, the residence may be forfeited, even if the landlord does not commit a criminal offense. To be clear, the law presently applies to property owners who *knowingly* and *blatantly* allow their property to

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be used in the commission of a crime. To stop ongoing criminal activity, the property of such individuals should continue to be subject to the civil asset forfeiture proceeding.

Second, the bill's requirement of a felony conviction conflicts with other provisions in chapter 712A, Hawaii Revised Statutes (HRS), and the Penal Code of the HRS. For example, section 712A-11(6), HRS, states, "[a]n acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this chapter." Thus, even if the defendant who engaged in the criminal conduct using property subject to asset forfeiture is not convicted, the property the defendant used is still subject to the civil forfeiture process, which uses a different standard and has different purpose, i.e., the removal of property from use in criminal activity.

Third, the bill's felony conviction requirement disregards the fact that misdemeanor and petty misdemeanor statutes specifically provide for the forfeiture of assets. Again, this is important because the asset forfeiture proceedings target property that is being used in criminal activity, regardless of a criminal conviction. For example, section 712-1230, HRS, provides for the forfeiture of gambling devices, paraphernalia used on fighting animals, or birds, implements, gambling records, and other property related to gambling. Quite often, the related criminal offense is promoting gambling in the second degree, under section 712-1222, HRS, which is a misdemeanor. Another example is section 199-7, HRS, which allows the forfeiture of property used in the commission of offenses described in chapters 6D (Protection of Caves), 6E (Historic Preservation), and 6K (Kaho'olawe Island Reserve), HRS. The offenses in these chapters are misdemeanors and petty misdemeanors, but the forfeiture of assets in these circumstances serves the same purpose: to stop the use of property in criminal activity and to deter future crimes. While not felonies, these are all serious offenses that negatively impact our society, and this bill would inhibit our ability to encourage property owners to manage their property in a legal manner, regardless of whether they are charged with criminal offenses.

Finally, the concerns referenced in the bill are misleading because they

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identify abuses that may occur in other jurisdictions but do not happen in Hawai'i, where we presently have significant safeguards against abuse. At the outset, our statute requires that there be a substantial connection between the property seized for forfeiture and the related crime. In the case of a seized car, for example, unless there is evidence that a particular car was used to facilitate or assist in a crime, or was obtained using the proceeds of a crime, a substantial connection is lacking and the car cannot be forfeited. See Carlisle v. \$10,447.00 in US Currency, 104 Haw. 323, 336 (2004). An interested party also may file a claim for relief in a court proceeding asserting that the interested party's property was used in the commission of a crime without that party's knowledge. This is an "innocent owner" defense to the forfeiture of the property. Additionally, section 712A-5.5, HRS, requires that the amount of the asset forfeiture be proportionate to the owner's conduct. Under section 712A-10(4), HRS, an interested party may file a petition for remission or mitigation for relief in an administrative proceeding.

In short, the existing statutes require proof that property was connected to a crime, give an aggrieved owner the right to show lack of knowledge of the criminal acts, and allow for relief from any excessive forfeiture.

For the foregoing reasons, I am returning House Bill No. 748 without my approval.

Respectfully,

A handwritten signature in black ink, appearing to read "David Y. Ige". The signature is fluid and cursive, with a large, sweeping flourish at the end.

DAVID Y. IGE
Governor of Hawai'i

A BILL FOR AN ACT

RELATING TO PROPERTY FORFEITURE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that civil asset
2 forfeiture frequently leaves innocent citizens deprived of
3 personal property without having ever been charged or convicted
4 of any crime. This amounts to government-sponsored theft. The
5 fair administration of justice means ensuring that not a single
6 innocent individual's personal property is permanently seized
7 without just cause and conviction, or compensation.

8 An injustice anywhere is a threat to justice everywhere,
9 and the purpose of this Act is to end civil asset forfeiture
10 without conviction, which undermines the fair administration of
11 justice and the rule of law.

12 SECTION 2. Section 712A-5, Hawaii Revised Statutes, is
13 amended by amending subsection (2) to read as follows:

14 "(2) Except that:

15 (a) Real property, or an interest therein, may be

16 forfeited under the provisions of this chapter only in



1 cases in which the covered offense is chargeable as a
2 felony offense under state law;

3 (b) No property shall be forfeited under this chapter to
4 the extent of an interest of an owner [~~, by reason of~~
5 ~~any act or omission established by that owner to have~~
6 ~~been committed or omitted without the knowledge and~~
7 ~~consent of that owner;~~] by reason of:

8 (i) The commission of any covered offense unless the:

9 (A) Covered offense is chargeable as a felony
10 offense under state law; and

11 (B) Owner has been convicted of the covered
12 offense by a verdict or plea, including a no
13 contest plea or a deferred acceptance of
14 guilty plea or no contest plea; or

15 (ii) Any act or omission established by that owner to
16 have been committed or omitted without the
17 knowledge and consent of that owner;

18 provided that nothing in this subsection shall be
19 construed to prevent the seizure of property prior to
20 conviction pursuant to section 712A-6.



1 (c) No conveyance used by any person as a common carrier
2 in the transaction of a business as a common carrier
3 is subject to forfeiture under this section unless it
4 appears that the owner or other person in charge of
5 the conveyance is a consenting party or privy to a
6 violation of this chapter;

7 (d) No conveyance is subject to forfeiture under this
8 section by reason of any act or omission established
9 by the owner thereof to have been committed or omitted
10 without the owner's knowledge or consent; [~~and~~]

11 (e) A forfeiture of a conveyance encumbered by a bona fide
12 security interest is subject to the interest of the
13 secured party if the secured party neither had
14 knowledge of nor consented to the act or omission[~~-~~];
15 and

16 (f) This chapter shall not apply to the forfeiture of an
17 animal prior to disposition of criminal charges
18 pursuant to section 711-1109.2."

19 SECTION 3. Section 712A-16, Hawaii Revised Statutes, is
20 amended by amending subsection (2) to read as follows:



1 "(2) All forfeited property and the sale proceeds thereof,
2 up to a maximum of three million dollars per year, not
3 previously transferred pursuant to [‡]subsection[‡] (1)(a) of
4 this section, [~~shall,~~] after payment of expenses of
5 administration and sale, [~~be distributed as follows:~~

6 ~~(a) One quarter shall be distributed to the unit or units
7 of state or local government [whose] officers or
8 employees conducted the investigation and caused the
9 arrest of the person whose property was forfeited or
10 seizure of the property for forfeiture;~~

11 ~~(b) One quarter shall be distributed to the prosecuting
12 attorney who instituted the action producing the
13 forfeiture; and~~

14 ~~(c) One half shall be deposited into the criminal
15 forfeiture fund established by this chapter.]~~

16 including reimbursement for any costs incurred by the department
17 of the attorney general related to the seizure or storage of
18 seized property, shall be deposited to the credit of the state
19 general fund."



1 SECTION 4. This Act does not affect rights and duties that
2 matured, penalties that were incurred, and proceedings that were
3 begun before its effective date.

4 SECTION 5. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 6. This Act shall take effect on July 1, 2019.

APPROVED this day of , 2019

GOVERNOR OF THE STATE OF HAWAII



HB No. 748, HD 2, SD 2

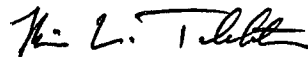
THE HOUSE OF REPRESENTATIVES OF THE STATE OF HAWAII

Date: April 25, 2019
Honolulu, Hawaii

We hereby certify that the above-referenced Bill on this day passed Final Reading in the House of Representatives of the Thirtieth Legislature of the State of Hawaii, Regular Session of 2019.



Scott K. Saiki
Speaker
House of Representatives




Brian L. Takeshita
Chief Clerk
House of Representatives


H.B. No. 748, H.D. 2, S.D. 2

THE SENATE OF THE STATE OF HAWAI'I

Date: April 9, 2019
Honolulu, Hawai'i 96813

We hereby certify that the foregoing Bill this day passed Third Reading in the
Senate of the Thirtieth Legislature of the State of Hawai'i, Regular Session of 2019.


President of the Senate


Clerk of the Senate