



**The Nelson A. Rockefeller Center at Dartmouth College**

*The Center for Public Policy and the Social Sciences*

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### **CIVIL ASSET FORFEITURE POLICY**

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#### *An Analysis of New Hampshire and Relevant States*

Presented to the New Hampshire Senate Judiciary Committee

PRS Policy Brief 1718-06

March 23, 2018

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*This report was written by undergraduate students at Dartmouth College under the direction of professors in the Rockefeller Center. Policy Research Shop (PRS) students produce non-partisan policy analyses and present their findings in a non-advocacy manner. The PRS is fully endowed by the Dartmouth Class of 1964 through a class gift in celebration of its 50<sup>th</sup> Anniversary given to the Center. This endowment ensures that the Policy Research Shop will continue to produce high-quality, non-partisan policy research for policymakers in New Hampshire and Vermont. The PRS was previously funded by major grants from the U.S. Department of Education, Fund for the Improvement of Post-Secondary Education (FIPSE) and from the Ford Foundation and by initial seed grants from the Surdna Foundation, the Lintilhac Foundation and the Ford Motor Company Fund. Since its inception in 2005, PRS students have invested more than 65,000 hours to produce more than 170 policy briefs for policymakers in New Hampshire and Vermont.*



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## **EXECUTIVE SUMMARY**

As a result of the policy changes promulgated by Attorney General Sessions, federal Civil Asset Forfeiture policy has changed. Most notably, the Equitable Sharing Program has been revived, which gives state and local law enforcement agencies the ability to use federal law to seize assets. New Hampshire has the second most stringent standard for seizing assets, making the use of the federal rule more common among its law enforcement agencies. Given the significant federal changes, it is imperative that policymakers understand the ramifications and adjust New Hampshire law accordingly, recognizing the multiple facets and concerns regarding Civil Asset Forfeiture policy. A controversial issue, Civil Asset Forfeiture policy has legal, political, and constitutional implications that should be considered. While many argue that Civil Asset Forfeiture is necessary to destroy criminal organizations and stop illegal activity, there are strong opponents who believe it is a violation of civil liberties. Analysis of New Hampshire policy and that of other states shows varying standards that fit into four main policy categories. Through a state by state analysis, New Hampshire policy is compared to policies from a state adhering to each of these categories.

### **1. PURPOSE STATEMENT**

As the policy of Civil Asset Forfeiture continues to attract national attention, the state of New Hampshire has chosen to reexamine its own legislation and policy. Chairwoman Carson of the Senate Judiciary Committee seeks to learn more about the implementation and effect of Civil Asset Forfeiture policy in the state, in order to ensure that it aligns with federal standards. Similarly, exploring how other states handle Civil Asset Forfeiture provides valuable information to ensure that the policy governing New Hampshire is well-designed, effective and fair. Through a comparative analysis, Chairwoman Carson will be presented with comparative evidence regarding policies enacted to weaken criminal enterprises through Civil Asset Forfeiture.

### **2. BACKGROUND**

Civil Asset Forfeiture is a policy that allows law enforcement to seize assets, including property and money, involved in criminal activity or are the profits of such illicit behavior. Criminal Asset Forfeiture, a similar policy, differs in that such forfeiture requires a criminal conviction; conversely, Civil Asset Forfeiture does not require the owner of the seized assets to be charged with or convicted of a crime. After its seizure, the property is then sold by law enforcement; the money gained from this sale would go to a combination of local and federal law enforcement agencies, depending on the specific crime and the policy used to seize it. However, if individuals can prove that they acquired their assets through legal means, they are able to recollect their property.

Civil Asset Forfeiture was created on the premise that by reducing the resources of criminals, specifically drug lords and organized crime bosses, criminal enterprises would



thus be weakened. Because seizing assets through this policy does not require criminal charges or a conviction, law enforcement does not have to explicitly prove that individuals engaged in criminal activity—a difficult task in cases of sophisticated organized crime. In most uses of Civil Asset Forfeiture, the standard by which law enforcement judges whether the assets were involved in criminal activity is a preponderance of evidence which means that the law enforcement officially only needs to demonstrate that the asset was more likely than not involved in illicit behavior.

### *2.1 History*

Civil Asset Forfeiture has roots in the colonial era. A similar practice abhorred by colonists, writs of assistance, allowed British officials to enter personal property and “seize whatever they deemed contraband.”<sup>1</sup> Because this was considered a reprehensible invasion of privacy, writs of assistance were cited as one of the grievances that pushed American colonists towards declaring independence.<sup>2</sup> The impact of this complaint led to the creation of the Fourth Amendment in the Bill of Rights outlawing unreasonable searches and seizures.<sup>3</sup>

Interestingly, colonists enacted a policy that many claim to be a similar invasion of property: Civil Asset Forfeiture. In an effort to curb rampant smuggling and piracy, Civil Asset Forfeiture allowed law enforcement to seize ships participating in such criminal behaviors without prosecuting those involved—a task that would be time consuming and difficult considering that the owners of these ships were often from different countries and thus not under American jurisdiction. In our modern era, Civil Asset Forfeiture was a largely unused practice, until the 1970s when drug and other organized crime became a rampant issue. Civil Asset Forfeiture has been increasingly used to combat this crisis.<sup>4</sup>

### *2.2 Justification and Grievances*

Recently, Civil Asset Forfeiture has gained notoriety as a policy permeated by bias that contributes to systems of oppression. While its legal justification provides significant benefits, such as a presumed reduction in crime that provides financial resources to the local, state and federal government who seize assets, its opponents critique the policy as perpetuating inequality that continues to disadvantage the marginalized. While Civil Asset Forfeiture does reduce the availability of resources to criminals, the policy is often cited as an infringement on civil liberties because it does not require criminal charges or criminal convictions. Because the standard of proof to seize assets is significantly lower than the standard for criminal charges and convictions, it is easier for law enforcement to seize assets: “Thirty-one states and the federal government set “preponderance of the evidence” as the standard of proof for all civil forfeitures...mean[ing] that property is more likely than not connected to a crime.”<sup>5</sup> This ease makes it possible for innocent people to have their assets seized, especially given that most states do not require law enforcement to report or track how many assets were seized, the value of these assets or where the funds were allocated. While it can be argued that they can simply prove that



their assets were not involved in criminal behavior, this burden of proof rests on the citizen.

Moreover, because it is often used against low income and minority communities who may lack the resources to fight to reclaim their assets, this policy can victimize these individuals. Similarly, because the standard of proof tends to be low, it permits bias to contribute to determining whose assets law enforcement seizes. Whether intentionally targeting specific communities or simply impacted by inherent personal bias, this policy has the potential to lead to dangerous abuses. Often the profits of Civil Asset Forfeiture go directly back to the local government, incentivizing its use, especially in areas struggling economically.<sup>6</sup> As such, Civil Asset Forfeiture has become the topic of polemical debate throughout the country and within liberal organizations. From this discussion, it is important to acknowledge that the prevailing opinion views Civil Asset Forfeiture in its current state unfavorably.

### *2.3 Stakeholder Interests*

Civil Asset Forfeiture has the potential to impact everyone, and thus citizens have a significant stake in the use of this practice. Its links to civil liberties and the possibility of it being used specifically against people of color and low-income communities, make it a particularly important issue. Liberal think tanks, right-leaning think tanks, advocacy organizations, as well as law enforcement agencies are particularly interested. Law enforcement has a stake in reducing crime, while advocacy groups seek to safeguard personal and civil liberties. Conservative organizations are also interested in protecting civil liberties and limiting the power of the government whereas liberal groups tend to place high value in preserving justice and equality across diverse groups. The existence of multiple sides of the argument attempt to balance each other out, given that everyone is concerned about maintaining order and upholding impartiality.

### *2.4 Influential Court Case*

The court case *United States v. 434 Main Street, Tewksbury, Mass*, provides an interesting context to assess the controversies regarding Civil Asset Forfeiture policies. In this case, the government attempted to seize a motel owned by the Caswell family. Law enforcement asserted that several of the rooms in the motel were involved in facilitating crime because 30 motel visitors in the past 20 years have been charged with drug related offenses. Despite this assertion, law enforcement had no evidence that the Caswells were aware of or involved in these crimes. Moreover, given the number of customers that had frequented the motel during this period, 30 people involved in criminal activity was not particularly significant. Still, law enforcement sought to seize the motel and sell it for an estimated \$1.5 million dollars. Complicating this case was the financial situation of the police department because, if seized, 80 percent of the profits would go to local law enforcement. These funds would comprise a significant portion of their annual budget of \$5.5 million dollars. Given the potential impact of this forfeiture, financial gain appeared

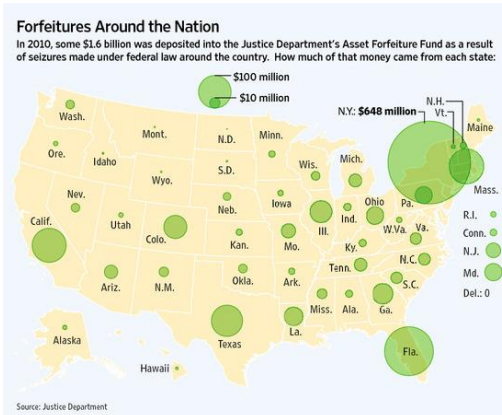


to be a large motivating factor. The Institute of Justice, the law firm representing the Caswells, argued that the government, in seeking to acquire the motel, was violating the U.S. Constitution in two different respects. It was violating the 8th Amendment which “forbid[s] ‘excessive fines’ that deprive individuals of their livelihoods” by seizing the source of income of the family. In addition, the existence and enforcement of the Equitable Sharing Program was in violation of the 10th amendment which affirms state rights.<sup>7</sup> The judge in this case decided that law enforcement failed to meet its burden of proof and thus the forfeiture was not justified.<sup>8</sup> The important implications of this case lies in the rationale for why Civil Asset Forfeiture was deemed unjustified which elucidates key concerns about these policies.

### 3. FEDERAL POLICY AND RECENT CHANGES

In July 2017, Attorney General Jeff Sessions revived the Equitable Sharing Program which had been dissolved under former Attorney General Eric Holder. The Equitable Sharing Program allowed local and state law enforcement agencies to use federal law to seize cash, cars, and other property without a warrant or criminal charges. Attorney General Holder disbanded this program in January 2015, in response to the criticisms of many that the program gave law enforcement far too much power with very little oversight; additionally, many argued that the cash incentives of the program further eroded civil liberties of those whose assets were confiscated.

On September 9, 2017, the United States House of Representatives passed the “Restraining Excessive Seizure of Property through the Exploitation of Civil Asset Forfeiture Tools (RESPECT) Act”, or H.R. 1843, by a voice vote.<sup>9</sup> This legislation would reverse the policy changes by Attorney General Session that revive the Equitable Sharing program. While this bill is currently stalled in the Senate Finance Committee, the fact that no House members have voiced opposition to the bill demonstrates a possibility of Senate passage and signature by President Trump.<sup>10</sup> Such changes will affect the implementation of Civil Asset Forfeiture policies in New Hampshire as they relate to federal standards. Figure 1 elucidates how widely used Civil Asset Forfeiture is throughout the country.



Source: Justice Department



### *3.1 Federal Standards*

Under 18 U.S. Code § 981, federal statute allows for Civil Asset Forfeiture. This law was passed in 1984 as part of the “Comprehensive Crime Control Act of 1984” and allows for “seizure to be made without a warrant if...there is probable cause to believe that the property is subject to forfeiture.”<sup>11</sup>

Furthermore, the federal government sets “preponderance of the evidence” as the standard of proof for all civil forfeitures. Federal guidelines for Civil Asset Forfeiture also place the burden on the owner of the seized asset to prove that the property is not involved in illicit activities, which makes it difficult for individuals to regain their assets, even if no illegal activity has transpired.

A March 2015 report from the Office of the Inspector General shows a lack of concern by the Department of Justice as to whether assets seized “advance criminal investigations.”<sup>12</sup> The report also states that, in addition to a lack of pertinence to criminal investigations, Civil Asset Forfeiture poses a significant risk to civil liberties. The Inspector General criticizes the Department of Justice for not requiring state and local law enforcement who utilize the Equitable Sharing Program provision of Civil Asset Forfeiture to participate in training on proper asset seizure and compliance with federal law.<sup>13</sup>

### *3.2 Equitable Sharing Program*

Authorized under Section 881(e)(3) of Title 21, the Equitable Sharing Program says that the Attorney General “shall assure that any property transferred to a State or local law enforcement agency.”<sup>14</sup> Therefore, the current statute gives the Attorney General discretion about whether or not to take advantage of this program—discretion that Attorney General Sessions is using.

The Department of Justice defines law enforcement agencies as “city, district, local, county, or state police, sheriff, or highway patrol departments, and state or local prosecutors’ offices.”<sup>15</sup> Law enforcement agencies receive a percentage of the assets that they seize. Although typically, this results in the local law enforcement agency receiving 80 percent and the Department of Justice receiving 20 percent, Department of Justice policy allows for this percentage to change based upon “the degree of participation” by the local agency.<sup>16</sup>

Notably, the Department of Justice guidelines require that state or local law enforcement agencies “comply with all applicable state laws and regulations pertaining to the transfer of seized property to a federal law enforcement agency.”<sup>17</sup> As a result, state legislatures have the clear authority to prohibit such transfers from taking place.



### *3.3 How Federal Standards Affect New Hampshire*

The revival of the Equitable Sharing Program by Attorney General Sessions will significantly affect New Hampshire. It will allow for state and local law enforcement agencies to pursue Civil Asset Forfeitures under federal standards, instead of state law standards, if that is desired. Therefore, legislators should recognize how this change in policy will affect how law enforcement agencies carry out Civil Asset Forfeiture, and, as a result, legislators should determine whether changes are needed to the policy to achieve the desired policy outcome.

## **4. METHODOLOGY: STATE BY STATE COMPARISON**

In many states, including New Hampshire, state legislatures have passed laws defining the use and standard for Civil Asset Forfeiture at the state level causing these laws to vary so greatly from state to state. Generally, across the United States there are four subclasses of standards for civil forfeiture, in order from most stringent to least stringent: prima facie or probable cause, probable cause, preponderance, and clear and convincing. Of course, the revival of the Equitable Sharing Program allows law enforcement agencies to utilize the federal standard of preponderance of evidence in lieu of existing state standards, but states have the clear authority to restrict state and local law enforcement agency cooperation through the Equitable Sharing Program. Determining where the policy is defined is important for understanding its implications. In New Hampshire, the state legislature providing guidance has proved to be effective, showing coordination between the legislature and executive branches.

In evaluating Civil Asset Forfeiture, our methodology focuses on a state-by-state comparison. In each state we compare policy, implementation and outcomes, to provide a relevant analysis for the state legislature of New Hampshire to make the most informed policy. In choosing Vermont, Nebraska, and Montana there was rubric in which the states were ranked. Our first priority was having a state in our analysis from each subclass of Civil Asset Forfeiture laws. Each state in our analysis represents one of these subclasses. Nebraska represents a state that has enacted comprehensive forfeiture reform. Montana and New Hampshire are both states where procedural reforms have taken place, but nothing more such as closing the Equitable Sharing Loophole. Vermont also represents a state that has little to no reforms regarding Civil Asset Forfeiture. In choosing states from different classes of reforms, our goal is to provide an overview of what reforms are possible, what they look like, and what the effects of different reforms has been. The different states show that a path to either more stringent or less stringent laws exist. From this analysis, New Hampshire policymakers will gain a deeper understanding of the implications and possible effects of policy changes.

The population, geography, and median income of each state were closely considered. Nebraska, Montana, and Vermont all represent states with similar demographics to New Hampshire. Each has higher median incomes than the national average will parallels to





the high median income of New Hampshire. Furthermore, the use of federal and state law was considered in choosing the states. The Equitable Sharing Loophole is not unique to New Hampshire. It effects almost every state, and, in the comparison of state and federal law use, it is an important consideration for our analysis. Within implementation, our analysis values quantitative reasoning. Wherever possible comparisons were made between state and federal revenue, oversight abilities, how funds are used, and dominant characteristics of those whose assets are seized through this policy. In a final metric to standardize our analysis between different states, we share the grades for the Civil Asset Forfeiture policy of the selected states given by the Institute for Justice. The Institute for Justice grading is meant to simply guide our reading and provide a uniform system to compare the policies of the chosen states, not be taken as the final word. Most states implemented significant reform after their grades were published.

#### *4.1 New Hampshire*

Civil Asset Forfeiture has to be considered in the context of the specific state. New Hampshire is the fifth smallest state by size and ninth least populous state in the United States.<sup>18</sup> The majority of the population resides in the southern part of the state near major cities. The state is also relatively homogeneous, close to 94 percent of residents are white.<sup>19</sup> In 2016, the New Hampshire state legislature passed State Bill 522 requiring a criminal conviction (in most cases) before the state can forfeit property.<sup>20</sup> Now, the state bears the burden of proving that the property is guilty, shifting the burden from the individual to the state. The standard of proof required to forfeit evidence is also now “clear and convincing” as opposed to “preponderance of the evidence” which is a much higher standard. Before State Bill 522, the standard for seizing property was essentially suspicion. There is now a much higher standard of evidence needed to enact Civil Asset Forfeiture. At the state level, this has eliminated much of the financial incentive of the state to use Civil Asset Forfeiture. However, the federal Equitable Sharing Loophole still exists.

In New Hampshire, since 1999, only \$1.15 million dollars have been generated through state Civil Asset Forfeitures. Comparatively, the federal government has raised over \$17 million dollars in revenue from Civil Asset Forfeiture from New Hampshire.<sup>21</sup> The key distinction between state and federal usage of this policy deals with how the funds can be used. In the state forfeiture policy of New Hampshire, 45 percent of the funds seized may be used whereas using equitable sharing 80 percent of the funds may be used. State Bill 522, signed by Governor Maggie Hassan, a Democrat, removed many of the incentives to use Civil Asset Forfeiture and made it harder to employ this policy with the state law. However, the bill does not mention the federal equitable sharing program.

Reforms regarding Civil Asset Forfeiture have gained prominence in New Hampshire, since the policy change under United States Attorney General Holder. In 2015, the House of Representatives introduced House Bill 636 which would eliminate Civil Asset Forfeiture completely. Bipartisan support of this bill was present in the House of



Representatives. However, the minority committee found the bill “inexpedient to legislate”.<sup>22</sup> Currently, Representative Mike Sylvia, R-Belmont, has introduced another reform bill that prevents seizures unless it involves \$100,000 cash or more.<sup>23</sup> This bill would also close the federal loophole that is being used to generate the majority of funds. The logic behind this bill is that there is an inherent conflict of interest when states and the federal government can use these funds to fund their own ventures, especially when the funds they seize are the exact funds used to support their operations.

New Hampshire is the 11<sup>th</sup> state to have such a requirement as made clear in S.B. 522 (requiring a criminal conviction). New Hampshire has made substantive forfeiture procedural reforms. As a result, the change in policy by Attorney General Sessions in reviving the Equitable Sharing Program is unlikely to have a large effect in New Hampshire. However, this can only be observed in practice. It is very possible that police will pursue more cases through the federal loophole given their severe limitations based on the state policy. In essence, the tightening of the state policy may push even more of the forfeitures to the federal system. How the state authorities will adapt to S.B. 522 is impossible to predict. What is easily observed, however, is that even when the state law was less stringent, the majority of funds raised through civil forfeiture were under the jurisdiction of the federal law.

Before the legislative reform, S.B. 522, was passed in 2016, New Hampshire received a “D-” grade from the Institute of Justice.<sup>24</sup> According to reports submitted to the Department of Justice, the Manchester Police Department seized the highest amount of assets aside from state-wide entities.<sup>25</sup> This is to be as expected as Manchester is the most populous city in New Hampshire. The department that used Civil Asset Forfeiture the most in the state was the Drug Task Force led by the New Hampshire Attorney General, who seized \$476,166 in 2014.<sup>26</sup> Although no local police department or task force exempted themselves from using Civil Asset Forfeiture, there are two departments, Newport and Franklin, whose value of civil assets seized were under \$1,000. Both these towns have populations of less than 10,000 people.<sup>27</sup> The state attorney general is required to biennially submit reports to the legislature detailing the value and itemization of all assets seized and forfeited. Interestingly, the reports were given in total net amounts, and as a result it is not possible to further delineate figures such as average forfeiture value, or when it was seized. The data does not allow for a detailed analysis of what is being seized and forfeited.

#### *4.2 Vermont*

Due to their proximity and similar demographics, it is useful to study Civil Asset Forfeiture laws in Vermont and compare them to those in New Hampshire. While Vermont has a smaller population than New Hampshire, both states have a majority white population and household median incomes between \$55,000 and \$70,000.<sup>28</sup> Additional similarities in state diversity, size, and geography allow us to consider how policies in Vermont could be adopted in New Hampshire to achieve similar policy outcomes.



Recently, Vermont has reformed their Civil Asset Forfeiture law by raising the standard of proof to forfeit property.<sup>29</sup> At the same time, the new Civil Asset Forfeiture law also created incentives for the law enforcement agencies to “police for profit.”<sup>30</sup>

In 2015, the Vermont legislature amended its Civil Asset Forfeiture laws to require a criminal conviction in a criminal court before a forfeiture proceeding in civil court, under Peter Shumlin, a Democrat.<sup>31</sup> In other words, Vermont now requires that their state government provide “clear and convincing evidence” of property being related to a crime prior to confiscation—making the standard of proof of the state more stringent than the federal and more widely-utilized standard of proof for Civil Asset Forfeiture, which simply requires a “preponderance of evidence.”<sup>32</sup> Moreover, Vermont allows law enforcement agencies to keep up to 45 percent of forfeiture proceeds, which serves as a financial incentive for to seize property. Previously, 100 percent of forfeiture proceeds went to the state treasury, which in turn did not incentivize law enforcement agencies to seize property for profit.<sup>33</sup> Nevertheless, it is important to note that Vermont law enforcement agencies retain a significantly smaller proportion of forfeiture is comparison to most states.

State law in Vermont dictates that it is the responsibility of the owner of seized assets to prove that their assets have not been involved in criminal activity. In Vermont, the owner of seized or forfeited assets must go through a “forfeiture hearing” to prove that their assets are not involved in criminal activity. Statute Vt. Stat. Ann. tit. 18, § 4244(d) outlines this process.<sup>34</sup>

First, the owner has the option of filing a demand for the judicial determination of the forfeiture within 60 days of notice of seizure and forfeiture. This demand comprises of a civil complaint and a sworn affidavit that includes the facts that the claimant will rely upon to prove the innocence of their assets. The demand must also be filed with the court administrator in the county where the assets were seized. The court will hold a hearing on the petition of the claimant no later than 90 days after the conclusion of the criminal prosecution. Once the demand for a forfeiture hearing has been submitted, a lienholder who has received notice of it may choose to intervene as a party. In this case, the court can determine whether the lienholder had a valid interest in the seize property, and may even order that the lienholder be compensated to the extent of the interest of the lienholder. Furthermore, the court cannot forfeit property if an “owner, co-owner, or person who regularly uses the property” shows a preponderance of evidence that indicates that they did not consent, were not aware, and/or could not prevent the defendant from using the seized property.

Between 2000 and 2013, Vermont law enforcement agencies received approximately \$13 million in Department of Justice equitable sharing proceeds and \$4.2 million through in Treasury Department equitable sharing proceeds. Vermont law requires law enforcement agencies to file controlled substance forfeiture reports to the state treasurer. However, when the Institute of Justice submitted a Vermont Public Record Request to the Office of



State Treasurer to obtain forfeiture reports from 2009 to 2014, the office of the treasurer replied: “No such records, reports, or funds were sent to the Office of the State Treasurer during those years.”<sup>35</sup> It remains unclear if these records do not exist due to law agencies being out of compliance with reporting requirements, or because no forfeitures had occurred under state law during this time.<sup>36</sup> Nevertheless, lack of reporting makes it difficult, if not impossible, to track seized assets in Vermont.

In 2010, the Institute of Justice gave Vermont a “B+” for their Civil Asset Forfeiture laws. The law firm determined this grade by considering three different aspects of Vermont forfeiture law, including standard of proofs, innocent owner burden, and profit incentive. In 2015, the Institute of Justice gave Vermont a “C” after considering the same factors. This grade decrease was a result of the new financial incentive Vermont gives law enforcement agencies by allowing up to 45 percent of forfeiture proceeds to go to law enforcement coffers instead the state treasury.

#### *4.3 Nebraska*

Though not geographically similar, it is useful to analyze how Civil Asset Forfeiture laws in Nebraska work in light of the broad law reforms the state has passed recently to restrict the ability of state and local law enforcement agencies to transfer property to the federal government and receive subsequent revenue.<sup>37</sup>

In 2016, Nebraska Governor Pete Ricketts, a Republican, signed L.B. 1106, a forfeiture bill requiring a criminal conviction before forfeiture can take place. In practice, this act virtually abolishes civil forfeiture in the state.<sup>38</sup> Under this new bill, the state must first obtain “a criminal conviction on drug, child pornography, or illegal gambling charges,” and then prove, with clear and convincing evidence, that the property in question was used or was intended to be used for the crime at hand.<sup>39</sup> Moreover, the new bill prevents law enforcement authorities from circumventing state law by transferring laws to the federal government by establishing a limit. In particular, in order for a transfer to take place from Nebraska to the federal government, the value of the property in question must exceed a total of \$25,000.

Conversely, Nebraska maintains a financial incentive for asset forfeiture that is enshrined within the state constitution and, therefore, cannot be changed without a constitutional amendment.<sup>40</sup> Article VII-5 of the Nebraska Constitution designates half of all forfeit revenue to law enforcement agencies to use for drug enforcement efforts, while the other half of the forfeit revenue are directed to help fund public education. Though Nebraska provides a financial effort for Civil Asset Forfeiture, it is notable that at 50 percent of forfeit revenue that goes towards law enforcement agencies, financial incentive is significantly smaller than in other states.

Furthermore, innocent owner burden still lies on the owner of the property in Nebraska. As outlined in Nebraska Revised Statute 28-431, the person who seizes property must



petition for the disposition of the property within ten days of the seizing the property. This petition must “describe the property, state the name of the owner if known, allege the essential elements of the violation which is claimed to exist, and conclude with a prayer for disposition.” The county attorney is then responsible for delivering a copy of this petition to the owner of, or person having any interest in, the property that was seized. If such persons are unknown, then the county attorney must provide notice of the seizure and petition through publication in a newspaper that is circulated in the county of seizure for four consecutive weeks, with at least five days in between each publication of notice. The owner of seized property may petition the district court of the county at any time between the initial seizure of the property and the court disposition. The court will release the property if the owner is able to prove that they were not aware that such property was in violation of the Uniform Controlled Substances Act.

Nebraska law does not require for law enforcement agencies to track or record report forfeiture proceedings in the state, and, as a result, it is difficult to know what types of assets are forfeited in the state and who they are seized from.<sup>41</sup> Total revenue, however, is known: between 2000 and 2013, Nebraska law enforcement agencies received approximately \$48 million in Department of Justice equitable sharing proceeds and \$2.6 million through in Treasury Department equitable sharing proceeds.<sup>42</sup>

In 2015, the Institute for Justice gave Nebraska an overall “C” for their Civil Asset Forfeiture laws, based on the same standards it graded other states. However, the firm evaluated the laws of the Nebraska before Nebraska governor Pete Ricketts (R) signed L.B. 1106 in 2016, which essentially abolished Civil Asset Forfeiture in the state.<sup>43</sup>

#### *4.4 Montana*

Montana presents a useful comparison for researching their Civil Asset Forfeiture policies given its demographic similarities to New Hampshire. A significant portion of the populations of each state is white and the median income is similar to that of New Hampshire. These statistics provide context that allow the hypothesis that if New Hampshire were to adopt policies similar to those in Montana, the implementation and effects would likely be similar given the similarities of the states. Significantly, Montana has recently taken steps to increase accountability and transparency by enacting policies that limits Civil Asset Forfeiture.

In the summer of 2015, Montana initiated reforms to its policy. Aimed at increasing transparency and objectivity, this new policy was enacted through a bill, HB 463, signed by Governor Steve Bullock, a Democrat.<sup>44</sup> This new policy restores the rights of the citizens to due process by allowing Civil Asset Forfeiture only after the owner of the property has been convicted of a crime. Moreover, this bill also seeks to protect innocent people from having their assets seized by forcing the government to prove that the assets were involved in criminal activity. Prior to this legislation, citizens were charged with the difficult and intensive process of proving the legitimacy and the lack of criminal activity



associated with their assets.<sup>45</sup>

In 2016, the state Supreme Court reiterated this logic of this law through its ruling that reaffirmed the rights of the citizen to a trial by jury prior to law enforcement having the ability to seize their property.<sup>46</sup> In this case, state law enforcement attempted to seize the property of a Montana man, who was convicted of drug charges in federal court. The owner of the property attempted to have his case heard by a jury—a request that the judge denied. The court ruled that this lack of a jury trial was unconstitutional.<sup>47</sup> “The pre-2015 law also required forfeiture hearings of property used in drug manufacturing to be held without a jury. The new law strikes that requirement, but it does not expressly grant the right of a trial by jury.”<sup>48</sup>

Based on these changes implemented in Montana, when considering how to effectively implement a just Civil Asset Forfeiture policy, four elements are suggested: eliminate incentives to law enforcement, allow it only when the owner has been convicted of a crime, restrict the use of the equitable sharing program and ensure that the mantra of “innocent until proven guilty” remains true.<sup>49</sup> Montana participated in the equitable sharing program rather sparingly, only receiving 5.5 million dollars in proceeds from equitable sharing program between 2000 and 2013.<sup>50</sup>

According to the Institute of Justice Report, Montana earned a “D-” for its policies on Civil Asset Forfeiture.<sup>51</sup> Montana had the lowest standard to judge whether property could be seized: probable cause. “It is the same standard required for a search warrant and far lower than the beyond a reasonable doubt standard required for a criminal conviction.”<sup>52</sup> In order to get property returned, the individuals whose property was seized must prove that the criminal activity that their property was involved with occurred without their knowledge or consent. Furthermore, all of the profits from the forfeiture went to the law enforcement who seized the property which provides a substantial financial incentive to local law enforcement to employ Civil Asset Forfeiture. Moreover, “the Montana State Bar issued an ethics opinion that found no conflict of interest despite an acknowledgement that the funds are often used to hire deputy prosecutors that assist the county prosecutor.”<sup>53</sup> Still, however, this grade does not reflect the new reforms enacted in the state to further protect the rights, assets and liberties of citizens.

## **5. NEXT STEPS**

Given that the majority of the recent literature on Civil Asset Forfeiture questions its legal and moral justifications, specifically whether it is just to allow assets to be seized without filing criminal charges, it is important to examine the argument in support of this practice. To acquire a better understanding of this viewpoint, it is necessary to reach out to policymakers and stakeholders, especially given that most information opposed to this practice is more widely available. To incorporate this into the report, interviews with



stakeholders within conservative think tanks and other organizations as well as policymakers involved in recent Civil Asset Forfeiture policy changes will be conducted. Specifically, those involved in drastic policy changes will be identified, in order to acquire a better understanding of the logic and rationale driving these changes.

It is important to understand how Civil Asset Forfeiture is implemented by street-level bureaucrats, like law enforcement officials. Interviewing police officers, prosecutors, and Department of Justice officials will give us a first-hand account that will inform our findings. Furthermore, interviewing Chairwoman Carson will enable us to better understand the specifics on what the Judiciary Committee is looking for as they thoughtfully evaluate this policy. In addition, the American Civil Liberties Union is an important stakeholder in this policy debate. Interviewing Gilles Bissonnette, the legal director for the New Hampshire ACLU, would be an informative step. In New Hampshire, he is a vocal advocate against Civil Asset Forfeiture in New Hampshire and would add an interesting perspective. For the sake of comprehensiveness, a prominent supporter of Civil Asset Forfeiture in the state will also be interviewed.

Moreover, the voice vote passage of the RESPECT Act by the U.S. House of Representatives is significant to federal policy; the lack of opposition to the measure could lead to a similar outcome in the Senate and possibly approval by President Trump over the next few months. Following the progress of this legislation will be essential, as it could change federal policy and the report should reflect those changes.

## **6. CONCLUSION**

Based on the current data and analysis of civil asset forfeiture, the policies that govern New Hampshire are in line with federal standards. However, recently such policies have undergone significant changes that provide a variety of options if New Hampshire decides to take further action and alter its civil asset forfeiture policies. By selecting states with similar demographics, median incomes and geographies and then examining their civil asset forfeiture policies compared to those of New Hampshire, this exploration provides policymakers with different alternative policies and the potential impacts of these changes if the state were to adopt similar policies. The rationale driving these changes stem from concerns about civil liberties and the burden of proof as it relates to citizens being able to prove that their assets were not involved in criminal activity. This logic can serve as a guide for how policymakers in this state conceptualize this issue. While it is not clear what the “best” policy is, this analysis allows for broad generalizations and suggestions to guide policy changes.



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