



FOCUS *report*

Texas law	2
Federal law	3
Other states	4
Proposals	4

Lawmakers may consider proposed changes to civil asset forfeiture

Like many states, Texas allows law enforcement officers to seize property they suspect has been acquired through, used in, or is intended to be used for certain crimes. This process, known as civil asset forfeiture, occurs through the civil court system and is separate from criminal proceedings.

Concerns about this practice and how it was carried out prompted the Legislature to revise civil asset forfeiture laws in 2011 by specifying how proceeds from forfeited property could be spent, expanding reporting requirements on the use of seized assets, and restricting when peace officers and prosecutors may ask owners to give up ownership of their property. Further changes have been proposed in each subsequent legislative session. The 85th Legislature's House Criminal Jurisprudence Committee in 2017 created a subcommittee on civil asset forfeiture that considered many bills, but none was enacted. Bills addressing civil asset forfeiture may emerge again in the regular session of the 86th Legislature in 2019.

Debate about civil asset forfeiture often centers on whether a criminal conviction should be required before ownership of property may be transferred, the standard of proof that should be required to take it, how owners can prove their innocence and have their property returned, and what entity should receive forfeited property or its proceeds. Discussions also include whether to limit state and local participation in a federal program that allows seized assets to be shared by state and federal officials.

Supporters of changes to Texas civil asset forfeiture laws say current law fails to protect property owners' rights adequately. They say owners would be better protected if a criminal conviction were required before property was forfeited, if the burden of proof to forfeit property were raised, and if the state, rather than the owner, had to meet the burden of proof when an owner claimed innocence. Supporters say sending property to a general fund rather than to those who seize it would eliminate a potential financial motive for law enforcement agencies to seize property and that limiting participation in the federal forfeiture sharing program would encourage adherence to state requirements.

Critics of changes to Texas civil asset forfeiture laws say the laws are a valuable tool for state law enforcement agencies that prevent criminals, especially drug cartels and transnational gangs, from profiting from crime. Critics say that while the laws may have been abused in the past, they have worked well since the Texas Legislature in 2011 revised the statutes. Current law has safeguards to protect property owners' rights and ensure the law is applied fairly, critics say.

Texas law

Texas law enforcement officers, including sheriffs, police officers, and Department of Public Safety officers, may take private property if it is used or intended to be used for certain crimes. Seized property is referred to as contraband and can include cash, cars, homes, and other property. For example, a police officer could take cash from a driver after making a traffic stop if there were probable cause to believe the cash was related to a crime. A civil court may then transfer ownership of the property to a law enforcement department or other government office that may use or sell it. Seizure is the taking of the property, and forfeiture is the transfer of ownership of the property. Code of Criminal Procedure (CCP), ch. 59 governs this process.

In a 2017 report issued by the Texas attorney general, law enforcement officers and prosecutors in the state reported receiving about \$50.1 million in forfeited funds and the sale of forfeited property. In 2016 the amount seized was \$48.2 million and in 2015, \$53.2 million.

Seizing property. Property may be seized if it is used or intended to be used to commit a felony or misdemeanor offense listed in CCP, art. 59.01(2), including any first- or second-degree felony in the Penal Code and any felony in the Texas Controlled Substances Act. Many forfeiture cases arise from drug crimes, money laundering, and organized criminal activity. Under CCP, art. 59.03, peace officers may seize property with a search warrant or, under certain conditions, without a search warrant. Without a warrant, property may be taken if:

- the owner consented;
- the seizure was incident to a search to which the owner knowingly consented; or
- the seizure was incident to a lawful arrest, lawful search, or a lawful search that was incident to an arrest.

Peace officers may not ask, require, or induce anyone to sign a document to waive rights to seized property. This provision was expanded to its current form in 2011 amid a discussion about peace officers asking owners to sign waivers to transfer property after a traffic stop and before court proceedings.

Forfeiture proceedings. Civil courts decide if ownership of seized property will be permanently transferred to a law enforcement agency or other government entity. Prosecutors have 30 days after property is taken to start forfeiture proceedings by filing a lawsuit. Otherwise, property is returned to its owner, according to CCP, art. 59.04. The lawsuits are filed against the property, not the owner, resulting in cases with names similar to "*State of Texas v. \$5,000*" or "*State of Texas v. 2014 Cadillac Escalade*."

Local law enforcement officers work with local prosecutors after assets are seized to continue the forfeiture process. DPS officers may refer their case to the local prosecutor in the county where the seizure occurred or to federal authorities.

Prosecutors may not request, require, or induce anyone to waive property rights before a forfeiture proceeding begins. However, owners may waive rights after a proceeding starts or may lose their property through a default judgment if they do not attend a court proceeding.

In the civil trial, prosecutors have the burden of proving by a preponderance of the evidence that property was contraband and therefore subject to forfeiture (*see graphic, p. 4*). The "preponderance of the evidence" standard is commonly used in civil lawsuits, while criminal trials use the higher standard of "beyond a reasonable doubt." If the civil court burden is met, courts award the property to government entities. Property owners do not have to be convicted of a crime for the court to transfer ownership under CCP, art. 59.05(d).

Uses of forfeited proceeds. Use of forfeited proceeds is governed by CCP, art. 59.06. Law enforcement agencies and prosecutors may share forfeited cash and property if they have an agreement with each other as outlined by the statute. Law enforcement agencies may transfer property to city or county agencies, groundwater conservation districts, or school districts. Property seized by the Department of Public Safety may be forfeited to DPS and local or federal entities.

Current law restricts how forfeited property or funds from its sale may be used (*see graphic below*). In general, law enforcement agencies may use forfeited property only for law enforcement purposes, and prosecutor's offices may use the property only for official purposes of their offices. Restrictions include a prohibition on local entities using the existence of forfeiture proceeds to offset or decrease salaries of prosecutors or employees of law enforcement agencies. Up to 10 percent of forfeited funds received by a law enforcement agency or prosecutor may be used by a city or county for certain substance abuse prevention or treatment programs or certain types of education assistance.

Oversight and audits. Law enforcement agencies and prosecutors may spend forfeiture funds only after submitting a budget to their governing city or county and must account for property and expenditures in an annual audit by the city or county. Law enforcement agencies or prosecutors must

submit these audits to the attorney general, who must post online an annual statewide report on forfeited funds. The comptroller may perform the audit if agencies or prosecutors do not meet submission deadlines. The state auditor may audit the seizure and expenditure of contraband, and the attorney general may initiate proceedings to enforce the law on the use of proceeds under certain circumstances.

Federal law

The federal government also permits civil asset forfeiture in certain circumstances. The federal Equitable Sharing program allows state and local law enforcement agencies to receive a portion of assets if federal law was violated. State and local agencies may voluntarily participate in the program in two ways: by working with federal authorities on a task force or investigation or by requesting that a federal agency adopt

Authorized and prohibited uses of seized assets

Law enforcement agencies and prosecutors may not use assets for:

- political campaign contributions;
- donations to entities, except those that assist in certain criminal or child abuse or neglect cases, or in providing mental health, rehabilitation, or victim services;
- expenses to train or educate the judiciary;
- travel expenses for training or education seminars if the expenses violate general restrictions of the city or county;
- alcohol purchases;
- expenditures not approved by a city or county, if the elected head of a law enforcement agency or a prosecutor was leaving office; and
- increasing salaries, expenses, or allowances for city or county employees, unless approved by the city or county.

Law enforcement agencies may use assets only for law enforcement purposes, including for:

- equipment, including vehicles and computers;
- certain supply and travel expenses;
- conferences and training expenses;
- crime prevention and treatment programs;
- facility costs;
- investigative and witness-related costs; and
- audit costs and fees.

Prosecutors may use assets only for official purposes of their offices, including for:

- equipment and supplies;
- prosecution and training-related travel expenses;
- conferences and training expenses;
- crime prevention and treatment programs;
- investigative costs;
- facility costs;
- legal fees, including court costs, witness fees, and professional fees; and
- state bar and legal association dues.

Source for data: Code of Criminal Procedure, art. 59.06 (d-1), (d-3), (d-4)

a state or local agency's seizure of assets and handle it as a forfeiture under federal laws.

Local agencies opt into the federal program for a variety of reasons, including when cases involve officers from multiple jurisdictions, when cases might be resolved sooner or under different procedures under federal law, or if the agency might receive more of the assets under the program than if it were handled under state law. State and local law enforcement agencies may receive up to 80 percent of the proceeds in an Equitable Sharing case. Agencies have 30 days after property is seized to ask for federal adoption and must comply with state laws on the transfer of seized property to a federal agency. In 2015, the U.S. Department of Justice limited the practice of the federal government adopting assets taken by local entities, but in 2017 the department rescinded the limits.

Other states

More than 100 proposed state laws on civil asset forfeiture were introduced nationwide in 2017, according to the National Conference of State Legislators (NCSL). Forty-seven states currently allow the practice, while Nebraska, New Mexico, and North Carolina have abolished it.

State laws vary in several ways, including the burden of proof to transfer ownership, whether a criminal conviction is required, and who receives forfeited assets (*see graphic, p. 5*). The process used by those claiming to be innocent owners and participation in the federal Equitable Sharing program also vary among states.

Proposals to change Texas law

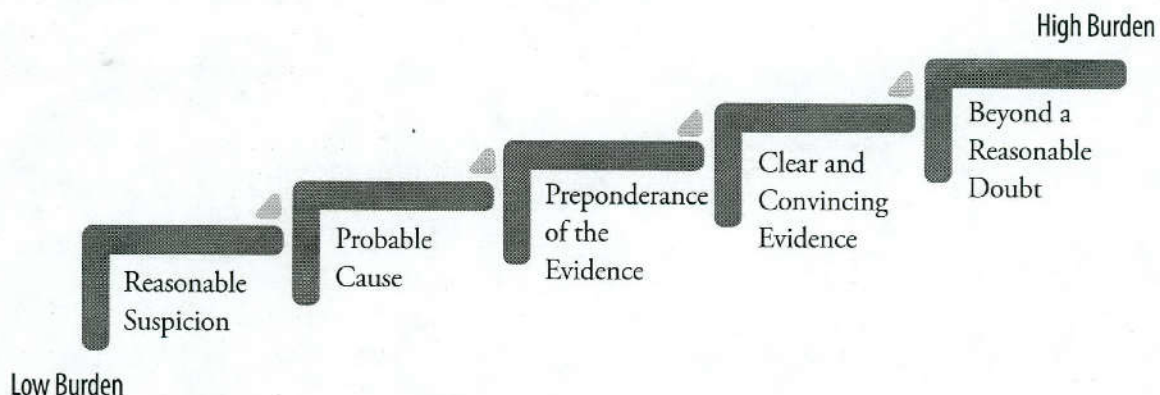
In 2017, about 20 bills focused on asset forfeiture were filed during the regular session of the 85th Legislature. A subcommittee of the House Criminal Jurisprudence Committee considered about half of the proposals, but none was considered by the full House or Senate.

Discussion about state law governing civil asset forfeiture is expected to continue in the regular session of the 86th Legislature in 2019. Proposals to change state law could include:

- requiring a criminal conviction before property is taken from an owner;
- changing the standard of proof required to take property;
- shifting the burden of proof when property owners claim to be innocent of an alleged crime;
- changing who takes ownership of forfeited property; and
- limiting participation in the federal program that allows some seized assets to be shared by state, local, and federal officials.

Criminal conviction to forfeit property. Property may be seized and forfeited in Texas if it is acquired through, used in, or intended to be used for certain crimes, but it is not required that the owner be convicted of the crime. Lawsuits to decide if property will be forfeited take place in a civil court and are separate from any criminal trial. Proposals to change current law include requiring a criminal conviction before

Standards of proof



Source for data: National Conference of State Legislators, *Evolving Civil Asset Forfeiture Laws*, February 2018

private property may awarded to law enforcement or other government authorities.

Supporters of requiring a criminal conviction before property is forfeited say that when law enforcement officers use civil courts to take private property related to a crime, the seizure should be justified with a criminal conviction that needs proof beyond a reasonable doubt. One study of a sample of forfeiture cases in Harris County between December 2013 and December 2015 reported that almost 40 percent of cases did not have a criminal conviction related to the seizure.

Supporters say requiring a criminal conviction would give property owners a presumption of innocence, the protections of a higher burden of proof, and the due process protections of a criminal trial. For example, criminal trials guarantee attorneys for defendants, an important right lacking in the civil trials currently used for forfeiture. Without a requirement for a conviction, law enforcement officers could have an incentive to seize property for profit when there is no crime or only a suspicion of wrongdoing or to prioritize asset forfeiture over other duties, according to those who want to change the law. These changes would not harm law enforcement agencies' ability to gather evidence, they say, which is governed by other laws.

Opponents of requiring a criminal conviction before property is forfeited say the current requirement that property be used or intended to be used for a crime is the necessary

standard to ensure criminals do not profit from illegal activity. Confining these cases to the civil courts, rather than using criminal courts, is appropriate because civil trials are used for other property disputes and for similar cases, including contracts, family law, eminent domain, and child custody. Current law gives prosecutors and law enforcement agencies options in cases for which they cannot or do not want to pursue a criminal conviction but want to ensure a criminal does not keep profits from a crime. For example, if a person accused of a crime fled while on bond or if witnesses died or were unavailable, a criminal trial and conviction could be impossible. Also, a case against a low-level drug seller could be dismissed after the dealer cooperated with authorities, leaving civil forfeiture the only way to take the dealer's proceeds from the drug sales.

Opponents say existing civil forfeiture proceedings grant strong protections to property owners, even without a criminal conviction. Law enforcement officers work under the umbrella of criminal investigation and search laws, including a requirement for reasonable suspicion or probable cause before taking certain actions. Property owners may challenge the seizure in court, where they have the right to be heard and present evidence. Law enforcement officers, prosecutors, and judges have a duty to seek justice and to work in good faith to determine whether property is related to a crime. Requiring a criminal conviction could halt asset forfeitures in many cases and let criminals keep their profits from crimes because it would make the forfeiture process impracticable.

Features of state asset forfeiture laws

Burden of Proof

- Many states, including Texas, require "preponderance of the evidence" to forfeit property.
- In recent years, three states have raised their burden of proof to "clear and convincing evidence."

Criminal Conviction

- Eleven states require a criminal conviction for civil asset forfeiture. Texas does not.

Use of Proceeds

- Most states allow 50 to 100 percent of forfeited assets to be used by law enforcement entities.
- Seven states use all forfeited assets for non-law enforcement purposes.

Source for data: National Conference of State Legislators, Evolving Civil Asset Forfeiture Laws, February 2018

For example, it may be months or years after an offense before criminal trials occur and assets, including large items such as cars, would have to be stored during that time.

Standard of proof to forfeit property. Current law requires law enforcement agencies to prove by a preponderance of the evidence in a civil court that property is subject to forfeiture. Debate on current law includes whether this is a proper standard for courts to decide if property will be forfeited. Some proposals would raise that burden of proof to either “clear and convincing” or “beyond a reasonable doubt.”

Supporters of raising the standard of proof say that the current “preponderance of the evidence” standard should be replaced with a higher standard that would give property owners more protection. The preponderance standard means that only the slimmest advantage in the amount of evidence — often compared to dropping a feather on the scale of justice — can result in private property being taken by the government. Supporters of revising the standard say this fails to adequately protect Texans’ property rights. Before the government may take private property, they say, it should have to show a court stronger evidence that meets a higher standard of either “clear and convincing evidence” or “beyond a reasonable doubt.”

Opponents of raising the standard of proof say the “preponderance of the evidence” standard balances the rights of property owners with the need to reduce the profitability of crime and puts forfeiture on par with other similar legal actions. This standard is used for disputes over other property matters, such as nuisance abatement suits. Raising the standard to clear and convincing evidence, would set the bar too high. Increasing the standard to “beyond a reasonable doubt” would equate two different decisions: a civil court decision about property with a criminal court decision to take away liberty.

Innocent owner burden of proof, reimbursement.

Property owners who say they had no role in an alleged crime committed in Texas may use what is called the “innocent owner” defense to try to recover seized property. Code of Criminal Procedure, art. 59.02 (c) and (h) require owners to prove by a preponderance of the evidence a lack of participation in the crime or of knowledge about the crime. Proposals to amend the innocent owners defense include shifting from the property owner to the law enforcement agency seizing the property who must meet the burden of proof when the defense is raised. Other proposals include

Other civil asset forfeiture proposals

In addition to proposals to change how and when property may be seized and transferred, other potential changes could include:

- prohibiting property that has been seized illegally from being subject to forfeiture;
- requiring law enforcement agencies to reimburse property owners for court costs, storage fees, and attorney’s fees if a court determined property was not subject to forfeiture or a case was dismissed;
- expanding information that must be reported in audits of seized property to include the crime on which a seizure was based, whether charges were brought, and how charges were resolved;
- exempting from forfeiture certain types of property, such as homesteads, cars under a certain limit, and small amounts of cash; and
- prohibiting the use of electronic readers to seize money from a debit or other card unless authorized by a warrant.

allowing innocent owners who prevail in court to recover attorneys’ fees and other costs.

Supporters of revising the innocent owner standard say current law violates Texans’ private property rights by requiring property owners who were not part of a crime to prove they did not know or do something to keep what is rightfully theirs. Shifting the burden to the government when an owner raises the innocent owner defense would place the responsibility where it belongs — on government officials making the accusation. Law enforcement agencies should have sufficient information about a crime to meet this burden. This change would help prevent injustices that occur when innocent owners give up their property rather than challenge the seizure because it is too difficult or costly.

Opponents of revising the innocent owner standard say the burden is properly placed on property owners who raise the defense because they are the ones with the information, such as car titles or bank records, that can prove innocence. If the burden were shifted and law enforcement agencies had to prove that the defense did not apply, the agencies likely would have to obtain the proof from the owners, which could involve detailed investigations into property owners. This could extend court cases and delay returning property to innocent owners. Law enforcement agencies work in

good faith to seize property only from those involved with a crime and to return property early in the forfeiture process to legitimate innocent owners who raise the innocent owner defense.

Disposing of forfeited property. Currently, law enforcement agencies and prosecutors may use forfeited cash and property and, in some circumstances, may share the proceeds with other local entities. Some have proposed requiring that property or proceeds go to a government fund that is not directly attached to the entity that seized the property.

Supporters of changing who receives forfeited property say that proceeds from forfeited contraband should not directly benefit the law enforcement agency that seized it because it could create a financial incentive to make seizures. This could lead to seizures with little evidence of a crime and could encourage law enforcement officers to prioritize seizures over other duties. Instead, supporters say, property and proceeds should go to an external entity, such as a local or state general fund, a general law enforcement fund, or a state attorney general.

Opponents of changing who receives forfeited property say forfeited proceeds should remain with the local entities involved in the seizure so they can be used to address the harm from a crime more directly and to combat other crimes in that area. Proceeds and property sent from local entities to a general local or state account could be diverted to purposes other than public safety or used outside of the area in which they were generated, opponents say, and those sent to the state could be held for other reasons, such as building up the state's reserves. Current law keeps profit incentives in check through court involvement and through oversight and transparency measures, including requiring an annual audit of forfeited proceeds and their expenditure.

Participating in Equitable Sharing program.

The federal Equitable Sharing program allows seized and forfeited assets to be shared among state, local, and federal authorities under certain circumstances, including when a state or local law enforcement agency requests that the federal government adopt the seizure of assets and handle it as a federal forfeiture. Current Texas law does not set a minimum value of a seizure for participation in the federal program. Some proposals would restrict Texas law enforcement agencies from participating in the Equitable Sharing program unless the value of the seized property reached a specified threshold.

Supporters of limiting participation in the Equitable Sharing program say limits are needed to ensure Texas law enforcement agencies do not routinely try to bypass state requirements by asking the federal government to adopt a seizure. Under the federal program, local agencies might get a larger portion of the assets or might receive assets sooner while not being subject to certain requirements under state law. Texas entities could be tempted to use the federal program if Texas made changes such as raising the burden of proof to forfeit property or shifting the burden to the government when an owner claims innocence. Supporters of limiting participation say that without limits or a requirement that the state's procedures be used, the federal program could be used to circumvent state provisions governing forfeiture.

Opponents of limiting participation in the Equitable Sharing program say that doing so could hamstring the ability of law enforcement agencies to remove the profit from crimes by reducing agencies' options to use the federal program. Handling a case under federal law may be best in some situations, and local agencies should continue to have the discretion to decide how to pursue each case, opponents say.

— Kellie A. Dworaczyk

HOUSE RESEARCH ORGANIZATION



Steering Committee:

Dwayne Bohac, *Chairman*
Alma Allen, *Vice Chairman*
Angie Chen Button
Joe Deshotel
John Frullo
Donna Howard
Ken King
Brooks Landgraf
J. M. Lozano
Eddie Lucio III
Ina Minjarez
Andrew Murr
Joe Pickett
Gary VanDeaver

John H. Reagan Building
Room 420
P.O. Box 2910
Austin, Texas 78768-2910
(512) 463-0752

www.hro.house.texas.gov

Staff:

Laura Hendrickson, *Director*;
Michael Marchio, Kaulie Lewis, *Editors*;
Rita Barr, *Office Manager*;
Kellie Dworaczyk, *Senior Analyst*;
Janet Elliott, Casey Floren, Alison Hern,
MacKenzie Nunez, *Analysts*