

HOUSE COMMITTEE ON JUDICIARY CIVIL LAW AND JUDICIAL ADMINISTRATION

March 4, 1991 Hearing Room 357 3:00 p.m. Tapes 43 - 44 MEMBERS  
PRESENT: Rep. Ray Baum, Chair Rep. Marie Bell Rep. Tom Brian Rep.  
Kelly Clark Rep. Jim Edmunson Rep. Rod Johnson Rep. Kevin Mannix Rep.  
Randy Miller MEMBER EXCUSED: Rep. Clark Rep. Edmunson VISITING  
MEMBERS: Rep. Ted Calouri STAFF PRESENT: Greg Chaimov, Committee  
Counsel Jeff Steve, Committee Assistant MEASURES HEARD: HB 2023 -  
Forfeiture (PH/WS) HB 2024 - Forfeiture/Care of Seized property (PH/WS)  
HB 2418 - Claimant's Bonding Requirements (PH/WS) - These minutes  
contain materials which paraphrase and/or summarize statements made  
during this session. Only text enclosed in quotation marks report a  
speaker's exact words. For complete contents of the proceedings, please  
refer to the tapes.

TAPE 43, SIDE A

004 CHAIR BAUM: Opens Subcommittee on Civil Law and Judicial  
Administration at 3:24 p.m.

HB 2023 - FORFEITURE - PUBLIC HEARING

Witnesses:

Representative Ted Calouri, District 7 George Stevenson, Assistant City  
Attorney for Salem

014 CHAIMOV: Summarizes HB 2023. Authorizes seizing agencies to  
freeze bank accounts instead of moving their contents to new accounts.

030 REPRESENTATIVE TED CALOURI, DISTRICT 7: Supports passage of HB  
2023. House Committee on Judiciary March 4, 1991 Page 2

046 GEORGE STEVENSON, ASSISTANT CITY ATTORNEY FOR CITY OF SALEM:  
EXHIBIT A City of Salem has engaged in forfeiture since 1985. Used to  
use bank accounts for simple injunctive procedure where the money stays  
in the account, draws the interest and when the case is closed then the  
account can be divided. HB 2023 would reestablish this practice.  
Supports HB 2023. 050 REP. JOHNSON: Do you have any information as to  
whether the banks approve or disapprove of this bill? 052 REP.  
CALOURI: Understands that the banks do not object because the banks  
monitored the proceedings leading up to formulation of HB 2023 and they  
did not voice any disapproval.

HB 2023 - FORFEITURE - WORK SESSION

059 MOTION, REP. MILLER: Moves HB 2023 to Full Committee with "do  
pass" recommendation. 065 VOTE: 5-0 Motion passes. Rep. Calouri to  
carry.

AYE: Johnson, Mannix, Miller, Bell, Baum NO: 0 EXCUSED: Brian, Clark,  
Edmunson

HB 2024 - FORFEITURE/ CARE OF SEIZED PROPERTY - PUBLIC HEARING

Witnesses:

Representative Ted Calouri, District 7 Gloria Gardiner, Assistant County  
Council for Clackamas County

070 REPRESENTATIVE TED CALOURI, DISTRICT 7: EXHIBIT B HB 2024 requires the forfeiting agency to service and maintain seized property pending final disposition of the forfeiture action. The discussion on this subject revolved mainly around real property and around businesses. The conclusion of the interim committee was if the court feels that it makes sense to employ a property manager to watch out for the property or to bring in someone to manage the business then the court should do so. With respect to automobiles, seizure and impoundment was found to be sufficient. Suggests that HB 2024 be directed specifically to real property and business operations and/or exclude automobiles and other categories that you might have in mind. 117 REP. CALOURI: HB 2020 relates to seller financed real estate. HB 2020 allows people other than financial institutions to prove their interests in seized property by submitting an affidavit stating that they did not know that there was any drug activity on the property. -HB 2418 relates to bonds. What the interim committee chose to do was to recognize the fact that a person's interest in the property may be less than the full value of the property. A conclusion of the committee was to say that the bond shall be 10% of the interest in the property rather than 10% of the total value of the property.

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HB 2418 - CIVIL FORFEITURE - PUBLIC HEARING

Witnesses:

David Fedanque, American Civil Liberties Union (ACLU) George Stevenson, Assistant City Attorney for City of Salem Genoa Ingram, Oregon Association of Realtors

171 DAVID FEDANQUE, ACLU: Citizen member of the Asset Forfeiture Advisory Committee. The Committee had some lengthy discussions about the purpose of the bond requirement. Some members thought that there was not very much purpose in the bond requirement. It is borrowed from the federal system and is intended to make it more difficult for people to pursue claims for the return of their property. The ACLU supports HB 2418 over the current law in allowing people to pursue their claims in a more reasonable manner. Would support eliminating the bond requirement all together.

189 GEORGE STEVENSON, ASSISTANT CITY ATTORNEY FOR SALEM: EXHIBIT B During discussions last interim it became evident that it was wrong to require a person who had only a small interest in an asset or business to put down a bond of 10% of the total value of the real property or business. 196 REP. JOHNSON: How will the proportion be determined? 208 STEVENSON: Courts require that in the pleadings the value of the items are to be listed. If the claimant accepts that value then the percentage can be known. 211 REP. JOHNSON: What is the value of their interest as opposed to the value of the item? 224 GENOA INGRAM, OREGON ASSOCIATION OF REALTORS: Supports HB 2418. This should decrease the volume of motions to waive the bond. Concerned whether the 10% should be 10% of the original value of the interest claimed or 10% of the then current balance of the interest claimed. 237 REP. MANNIX: Suggests amending HB 2418 on line 21, page 1 to say "current" value.

238 STEVENSON: Sees no problem with it. Perhaps it could be "inventory" value.

240 REP. MANNIX: What rate of depreciation are we going to use?

HB 2418 - FORFEITURE - WORK SESSION

255 MOTION, REP. MANNIX: Moves to amend HB 2418 to read on line 21, page 1 before the word "value" add the word "inventory."

DISCUSSION ON THE MOTION

260 REP. JOHNSON: Suggests defining what "inventory" means.

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269 REP. MANNIX: A person who claims an interest in a piece of property would have received notices with "inventory" written on them. Believes that it is apparent enough.

279 REP. MILLER: Understands that on line 21, page 1 it refers to the "value of the interest claimed by the person in the property." Perhaps the value is set by the claiming person in the property, not the person who made up the inventory. If a person is going to pay 10% of the value claimed by the person seeking the interest then it would be 10% of what ever interest that they claim.

287 REP. MANNIX: They may claim a 1/2 interest, but also challenge the inventory value of the property. 309 REP. JOHNSON: Understands that no where on the inventory will it show what the value of the person's interest is unless this person is claiming 100 % interest in the item.

317 REP. MANNIX: Suggests having the issue of inventory go to the judges. Withdraws motion.

328 MOTION, REP. MANNIX: Moves HB 2418 as amended to Full Committee with a "do pass" recommendation. 330 VOTE: 6-0 Motion passes. Rep. Calouri to carry.

AYE: Edmunson, Johnson, Mannix, Miller, Bell, Baum NO: 0 EXCUSED: Brian, Clark

HB 2024 - FORFEITURE AND MAINTENANCE OF SEIZED PROPERTY - PUBLIC HEARING

Witnesses:

Gloria Gardiner, Assistant County Counsel, Clackamas County Maurice Russell, Oregon State Bar Association Rick Lewis, Oregon Association Chiefs of Police Ken Sherman, Oregon Banker's Association David Fedanque, American Civil Liberties Union Pete Shepard, Department of Justice

365 CHAIMOV: Summarizes HB 2024. 393GLORIA GARDINER, ASSISTANT COUNTY COUNSEL, CLACKAMAS COUNTY: EXHIBIT C Has concern with the language on page 2, line 1 of HB 2024 that replaces the word "may" with

"shall." Current law allows the forfeiting agency discretion to maintain or service the property. This should remain discretionary instead of mandatory. By putting a duty on maintaining and servicing this would invite litigation because the question will arise as to what constitutes reasonable maintenance and service. Right now the forfeiting agencies do not want to be under a duty to maintain and service if they do not think it necessary. -How can you require a government to run a private business. That in effect is what HB 2024

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is doing. It says to a city or county that if you seize property during forfeiture proceedings that you need to maintain it or run it. That is not an appropriate burden to put on a city or county.

TAPE 44, SIDE A

037 GARDINER: Supports adoption of her proposed amendments. See Exhibit C 041 CHAIR BAUM: Have you ever thought about receiverships?

047 GARDINER: That is the-way it is now. 055 CHAIR BAUM: The question is whether or not we want to put that onus on the local government.

056 GARDINER: Does not think the onus should be on the government. Even though that cost may be recoverable at the end in the mean time the cost is going to have to come out of the pocket of the government.

057 CHAIR BAUM: Not if the receiver is getting paid by the entity if indeed the entity is a profit making entity.

061 GARDINER: You are saying that the receivership would be paid out of business profits? 062 CHAIR BAUM: What minimum maintenance might have to be done when you don't have a business entity that's worth seizing?

069 GARDINER: The argument would be that everything we do is sufficient. The problem is someone is going to sue us anyway. The main concern here is the litigation costs. 080 REP. EDMUNSON: Doesn't the government have a reasonable responsibility to take care of forfeited material? What is the government's duty generally? What about the situation where the forfeiture is not warranted and property is returned? 097 GARDINER: If that happened then any person would have the right to sue the local government to recover the cost of damage or loss of their property. They could do that in the forfeiture law suit itself.

102 REP. EDMUNSON: Isn't that preferable to let claimants sue the local government rather than pass a law that requires a care and storage duty.

105 GARDINER: If we pass HB 2024 we are inviting claimants to sue us more than they sue now.

112 REP. JOHNSON: What is the central purpose of the civil forfeiture system? Is it to punish the criminals who are engaged in illicit activities or is it to make money for the government?

117 GARDINER: Neither of those. Understands that the purpose of civil forfeiture is to take away the instrumentalities used to carry out

illegal activity, to discourage that kind of activity in the House Committee on Judiciary March 4, 1991 Page 6 future. , , 120 REP. JOHNSON: It is not to make money for the government?

121 GARDINER: Not directly. 124 MAURICE RUSSELL, OREGON STATE BAR: Thinks it is a good idea to place limitations on the public agency, but HB 2024 does not go far enough. Exhibit (Given to staff) If a forfeiting agency is to use the property pending forfeiture they should be placed under limitations. The OSB is not of the view that a lender as such should be able to simply consent to the use of the vehicle or property or business, because the lender does not necessarily have the interests of their buyer in mind. Also, there are third party interests that may come into play. These third parties may be harmed by the use of the property that did not take into account possible depreciation to the property. For these reasons the OSB believes that forfeiting agency should be required to get both a court permission and the consent of the lender. At this point, court permission would be sufficient under HB 2024 as written even if the lender did consent to the use of the property. Neither the lender's interest nor those of the consumer are taking into account. It is inappropriate to have that thing allowed.

160 RICK LEWIS, OREGON ASSOCIATION CHIEFS OF POLICE (OACP): EXHIBIT D Opposes HB 2024. The concern that the OACP has is with regard to storage of vehicles and requirements to service and maintenance of those vehicles, especially if they are low value vehicles. Opposed to having to build indoor facilities to house these cars. Would agree with the amendment that would require servicing and maintaining real property with some guidelines to follow.

186 REP. JOHNSON: Understands Lewis as saying that as to personal property there should be some kind of reasonable storage language so that if the car can be stored outside then fine, if not then inside. All you have to do is store it so it does not lose its value. As to real property it may be inappropriate to let it go unmaintained so that if there is a leak in the roof someone will have to repair it. It may also be reasonable not to leave real property vacant. Business operations may have different requirements for reasonable care. Would you accept these 3 categories?

208 LEWIS: Yes. Has a few concerns about having a forfeiting agency run a business. Agrees with personal property proposal of Rep. Johnson.

218 REP. BELL: What is your opinion on line 1, page 2 where it says "shall" instead of "may."

221 LEWIS: Would like to see "may. "

237 KEN SHERMAN, OREGON BANKER'S ASSOCIATION: EXHIBIT E and F The OBA is in general support of HB 2024. Has proposed amendments. See Exhibit F On line 1, page 2 proposes changing "may" to "shall." Delete line 3 entirely. Concerned that if you read through the structure of this part of HB 2024 section 3 lists what the agency "must" do and Section 4 which lists what the agency "may" do. If HB 2024 passes, no where is the agency permitted to remove the property in question to a storage area for safe keeping. Does not believe that was the intention of the drafters and OBA Amendments would simply reinsert the option of

House Committee on Judiciary March 4, 1991 Page 7

placing the property in a storage facility for safe keeping back into

Subparagraph 4 as something that the agency "may" do.

293 DAVE FIDANQUE: EXHIBIT G Details examples of forfeiture seizures gone awry. Strongly supports the Bill. Proposes amendments. See Exhibit G On page 2, line 21 urges inclusion of the language following subsection 6 "except as required by subsection (3) of this section". The idea behind this is if authorities seize a coin collection or other cash they should be required to keep it safe and maintained.

TAPE 43, SIDE B

010 PETE SHEPARD, DEPARTMENT OF JUSTICE: EXHIBIT H and I Does not understand HB 2024 to permit an agency which has seized property to use it pending forfeiture. Does not read HB 2024 as requiring an agency which does not presently have a covered impound lot to construct one. The obligations imposed by HB 2024 are obligations of reasonableness. This Committee will hear HB 2028 which contains the authority to appoint a receiver. The proposed amendment See Exhibit A concerning the maintenance of businesses is better addressed by the appointment of receivers. -Proposes technical amendment to HB 2024. See Exhibit I The Department does not want to be obligated to maintain property that it does not have physical control over. -Supports Banker's Association Amendments. See Exhibit F Has no objection to the American Civil Liberties Amendment. See Exhibit G

051 REP. MANNIX: Referring to ACLU proposed amendments. Wouldn't it be easier to be precise about the kind of situation that we are talking about and say "except as to cash with intrinsic value for collectors" to define what we are talking about.

058 SHEPARD: That would be satisfactory to the Department.

068 CHAIR BAUM: To Mr. Shepard, are you aware of the HB 2024-1 amendment that would replace the language on page 2, line 2 with language that would say "any real property or business operation"? See Exhibit A 072 SHEPARD: Understands the issue in HB 2024-1 pertaining to maintenance of businesses is better addressed in the context of HB 2028 which provides for the appointment of a receiver to manage the property. Recommends that the Committee look to HB 2028 to deal with the business operations. 084REP. BELL: To Fidanque: Was the coin collection that you were talking about mounted or was it a bag of coins that could have been a bag of pennies? 087 FIDANQUE: It was obvious to both the seizing agency and the owner that it was a coin collection. 105 REP. BELL: Have any of the amendments addressed the situation where you have a bag of unidentified coins which may be valuable but which in the eyes of someone seizing the property may be just another bag of coins for deposit?

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103 FIDANQUE: The reason that his amendment was made contingent on subsection (3) See Exhibit G "being serviced or maintained as may be reasonably appropriate" implies that the forfeiting agency is either made aware of the nature of the property seized or it should be obvious if the agency is to be held liable.

110 REP. BELL: Is the money deposited before the person sees the receipt that tells about the value of the seizure so that a contention may be made?

112 FIDANQUE: The statute on page 2, line 22, speaks to immediately depositing in a financial institutions. Multnomah County takes that language very seriously.

120 REP. BELL: Would it be better to have a time lag before deposit?

123 FIDANQUE: Certainly some flexibility would be helpful.

134 REP. MANNIX: We can try to provide guidance by saying that "except as to cash with evident or known intrinsic value to collectors." 147  
REP. JOHNSON: Is this the only place in the statutes that deals with what police officers are supposed to do after they seize property?

151 SHEPARD: Yes.

160 REP. JOHNSON: One of the things we don't want to have to do is incur maintenance expenses unless necessary to preserve value.

167 SHEPARD: There are examples such as maintaining motorcycles where if they are not started periodically then engine damage may result.

173 REP. JOHNSON: Is there a different obligation between general and personal property? The general forfeiture scheme does not anticipate operating businesses does it?

181 SHEPARD: The forfeiture statute extends to any property within the description of the categories of Section 3 of the law.

186 FIDANQUE: With respect to Mr. Shepard's proposed amendment (See Exhibit F) if the committee decides to insert that language on line 2, then it would also be appropriate to insert that language on line 7 that relates to transferring property pending the forfeiture proceeding.

199 REP. EDMUNSON: To Fedanque: In your oversight committee did you find that these abuses were infrequent? Maybe the solution is to repeal the forfeiture law.

213 FIDANQUE: We heard more horror stories than I anticipated. The ACLU's position has not been to oppose civil forfeitures under all circumstances, but to require that there be a higher burden of proof on the part of the government and to require a prior criminal conviction before the forfeiture could be finalized. Would like to see a system in place that would allow for seizing the property, making sure the property was maintained and that it was not disposed of pending the outcome of a criminal case. , These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tepee. House Committee on Judiciary March 4, 1991 - Page 9

243 REP. MANNIX: To Mr. Shepard: With respect to real property vs. operation of a business you suggested that the Committee not deal with real property and business operations because those topics are being dealt with in another bill. Is that right?

249 SHEPARD: That is right. The other bill (not mentioned) provides

expressly for the appointment of a receiver and allows either party to the forfeiture proceeding to seek such an appointment. 252 REP. BRIAN: Most of the testimony that he heard during interim session hearings came from innocent property owners who may have loaned or rented their property to another who committed the crime without knowledge of the criminal activities. Does not remember any business being confiscated and damage incurred during the holding period.

HB 2024 - WORK SESSION 288 MOTION, REP. MANNIX: Moves amendments of Oregon Bankers Association. See Exhibit F 295 VOTE: No objection. Motion passes. 296 MOTION, REP. MANNIX: Moves adoption of Department of Justice Amendments. See Exhibit I 306 VOTE: No objection. Motion passes. 307 MOTION, REP. MANNIX: Moves on line 21 of HB 2024 that after the number "6" insert "except as to cash with apparent or known intrinsic value for collectors,". 323 VOTE: No objection. Motion passes.

324 REP. BRIAN: To Mr. Shepard: What is your opinion of the amendment on line 7 of adding "physical custody"?

334 SHEPARD: Does not think that it needs to be added in line 7. The reason for that is that subsection (a) of line 7 is intended to give a seizing agency the authority to hand off the case to a cooperating agency which will actually conduct the forfeiture and that mechanism is the essential mechanism by which many of the drug enforcement task forces in your community share the responsibility for these forfeiture cases. Would want to make sure that any property seized for forfeiture even if it had been seized by constructive notice could still be transferred for forfeiture purposes between cooperating agencies. In subsection (b), the provision for an interlocutory sale of the property should apply to property which is not in the physical custody of the government as well as property which is in the physical custody of the government.

362 MOTION, REP. MANNIX: Moves amendments from Debtor Creditor Section of the Oregon State Bar with some changes. See EXHIBIT J Moves to replace lines 1-16 of page 2 with the language "a forfeiting agency may, pending forfeiture and final disposition and subject to the need to retain the property in any criminal proceeding, apply to the court for an order providing that the property may be sold, leased, rented or operated in the manner and on the terms specified in such order, which shall not materially diminish the property's House Committee on Judiciary March 4, 1991 Page 10

value and shall be commercially reasonable.. DISCUSSION ON THE MOTION

400 CHAIMOV: Suggests including all language of the proposed amendment. See Exhibit J 410 MOTION RESTATEMENT, REP. MANNIX: Changes motion to include all language contained in subsection (5) of Exhibit J. 418 VOTE: No objection. Motion passes.

TAPE 44, SIDE B

020 CHAIMOV: Subsections (5) and (9) of Chapter 791 Oregon Laws 1989 See Exhibit K deal with what an agency can recover from the proceeds of a sale. Suggests an amendment that would allow the agency to specifically recover from the sale any expenses incurred in the servicing and maintaining of property as is currently required.

027 MOTION FOR CONCEPTUAL AMENDMENT, REP. MANNIX: Motion to adopt Counsel Chaimov's suggested amendments as conceptual. 031 VOTE: No objection. Motion passes. 032 MOTION, REP. MANNIX: Moves HB 2024 as amended to Full Committee with a "do pass" recommendation. DISCUSSION ON

THE MOTION 036 REP. BELL: Is concerned about the issue of making maintenance of property mandatory as opposed to discretionary.

042 REP. MANNIX: The purpose of HB 2024 is to make local governments be more cautious about how they are handling the property. We have limited this responsibility as to what kind of property is being held.

051 REP. BELL: What would happen if the City of La Grande foreclosed on some fur coats, and Rolls Royces would they be able to take care of merchandise seized that require more than normal care? 057 CHAIR

BAUM: There is going to be a standard of reasonableness that is going to have to be applied there. 065 REP. BELL: If we leave the

discretionary "may" in then the governmental agency will be more likely to take care of it to sell it at its highest value. There will be times when local government will not be able to meet the expectations of the

owner. Making maintenance and care discretionary gives local governments some flexibility. 068 REP. MANNIX: If local government can't take

care of it then they should not seize it. They House Committee on Judiciarg March 4, 1991 - Page 11

should exercise this judgement at time of seizure.

075 REP. BELL: What time element for storage are we talking about?

080 REP. BRIAN: HB 2024 is not without some safeguards.

088 REP. BELL: Accepts the concept "reasonably appropriate."

093 VOTE: 6-0 Motion passes. Rep. Calouri to carry.

AYE: Brian, Johnson, Mannix, Miller, Bell, Baum NO: 0 EXCUSED: Clark, Edmunson

106 REP. MANNIX: Does HB 2024 really have to go to Ways and Means?.

133 CHAIR BAUM: Closes Subcommittee on Civil Law and Judicial Administration at 4:56 p.m.

Submitted by: David Harrell, Office Manager Reviewed by: J. Kennedy Steve, Assistant

EXHIBIT LOG:

A Amendment to HB 2023 - George B. Stevenson - 2 pages B Testimony on HB 2024 - Rep. Ted Calouri - 1 page C Amendment to HB 2024 - Gloria Gardiner - 1 page D Amendment to HB 2024 - Rick Lewis - 5 pages E Testimony on HB 2024 - Kenneth Sherman - 2 pages F Amendment to HB 2024 - Kenneth Sherman - 1 page G Amendment to HB 2024 - David Fidanque - 1 page H Testimony on HB 2024 - Peter D. Shepard - 1 page I Amendment to HB 2024 - Peter D. Shepard - 1 page J Amendment to HB 2024 - Debtor/Creditor Section, OSB - 1 page K Written Material on HB 2024 - Greg Chaimov - 4 pages L Testimony on HB 2024 - Marge Kafoury - 1 page

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