

# Liberty Brief

## Wyoming Liberty Group

# Reforming Civil Asset Forfeiture in Wyoming

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*By Stephen R. Klein\**

### I. Introduction

Recently, a number of scholarly reports and news stories have shed light on the abuse of civil asset forfeiture laws across the country.<sup>1</sup> Under these laws, local, state and federal law enforcement officials may seize and retain someone's property allegedly related to criminal activity without actually convicting the property owner of a crime in court. The government often converts money or assets seized to police use, giving rise to the accusation that police agencies are not fighting crime but instead "policing for profit."<sup>2</sup> In some of the most chilling examples of abuse, police have used civil forfeiture to shake down citizens, giving them the choice of either facing criminal charges or turning over their assets to the government.<sup>3</sup> According to a report by the Institute for Justice, a preeminent nonprofit law firm, Wyoming state law opens the door to this very same kind of abuse.<sup>4</sup>

But even if Wyoming law is subject to abuse, does this mean state law enforcement officers actually abuse it?

This brief explains civil asset forfeiture in Wyoming, and discusses potential reforms to state law. The first section discusses civil forfeiture generally and explains its purpose and pitfalls. The second section explains the law here in Wyoming, and elaborates on the actual practice of civil forfeiture by state and local police. The final section discusses potential reforms to state law.

Because the Wyoming Attorney General and other law enforcement agencies maintain limited data, this report cannot paint the full picture of civil asset forfeiture in Wyoming. Although reforms should be considered whether or not Wyoming law enforcement is actually policing for profit, at the very least the state must begin to seriously monitor the use of civil asset forfeiture.

\*Stephen R. Klein is a staff attorney with the Wyoming Liberty Group. Recently, the Third Court of Appeals of Texas relied on a friend-of-the-court brief co-authored by Stephen to reverse the conviction of Tom DeLay for money laundering and conspiracy. Learn more at [www.wyliberty.org/legal-center](http://www.wyliberty.org/legal-center).

## II. Civil Forfeiture Generally

Civil forfeiture is a process by which the government seizes someone's property and forfeits his rights to it in court. Usually police utilize this process to seize and forfeit property that they believe is related to criminal activity. The government then keeps the property for its own use, sells the property and keeps the funds, or destroys it.<sup>5</sup>

The historic roots of civil forfeiture pre-date the United States. While still under British rule, the American colonies complied with the British Navigation Acts, and following independence the United States Congress passed laws modeled on these acts, which "provided 80 to 90 percent of the finances for the federal government during that time."<sup>6</sup> These laws allowed for the seizure of goods for failure to pay taxes or comply with other laws even when the owner could not be charged and brought to trial. At the time, given the practical difficulty of reaching merchants and property owners who were oceans apart from the United States, holding the property itself liable for violating the law made sense. Today, in order to capture the proceeds of crime and to close loopholes for criminals such as transferring ill-gotten gains to a third party, civil forfeiture still has a proper place in law enforcement.<sup>7</sup>

In recent years, however, civil forfeiture has too often served as a loophole for law enforcement to bypass the protections afforded under our justice system. In 2007, a couple traveling through Tenaha, Texas, with two small children had their possessions seized (including cash, jewelry and mobile phones) and then faced this decision:

The county's district attorney . . . told [the couple] that they had two options. They could face felony charges for "money laundering" and "child endangerment," in which case they would go to jail and their children would be handed over to foster care. Or they could sign over their cash to the city of Tenaha, and get back on the road.<sup>8</sup>

Faced with this official extortion, the couple forfeited their property.<sup>9</sup> Although Tenaha recently settled a class action lawsuit brought by this couple and many of the more than 140 victims of this scheme,<sup>10</sup> such abuse spans well beyond the small Texas town.<sup>11</sup> In Tennessee, an investigation recently revealed profiling by police with the intent of seizing cash.<sup>12</sup> Not only have police wrongfully seized property, but in numerous cases they have used the funds inappropriately, even criminally. The abuse of forfeited funds by police agencies even led to the creation of a list – "The 14 Most Ridiculous Things Police Bought with Asset Forfeiture" – on the website BuzzFeed, listing purchases from \$10,000 worth of Gatorade to marijuana and prostitutes.<sup>13</sup>

Today's controversial civil forfeiture cases usually arise from drug laws. In 1970, Congress passed the Drug Abuse Prevention and Control Act, which includes a provision allowing for the forfeiture of seized property that is linked to illegal drugs.<sup>14</sup> In 1984, Congress added sections allowing federal agencies to "retain and use proceeds of forfeiture actions,"<sup>15</sup> and created the equitable sharing program, which "allows a seizing state, municipal, or multi-jurisdictional agency to petition the federal government to adopt the seizure."<sup>16</sup> The retention provision was reflected by a number of states in their own laws, and provided the basis for the fictional television show *Miami Vice*, in which the main characters posed as drug runners using cars, boats and clothes seized from real drug dealers.<sup>17</sup>

The equitable sharing program provides states with a cost-saving measure by letting the Department of Justice handle forfeiture cases in exchange for a share of the forfeited property.<sup>18</sup>

According to the Institute for Justice, "the best available data on asset forfeiture in the United States indicates that its use is extensive at all levels of government and suggests that it is growing."<sup>19</sup> Currently, 80 percent of forfeitures made under federal law occur without criminal prosecution.<sup>20</sup> In numerous states, especially where assets are seized from interstate travelers, more often than not individuals do not challenge the

forfeiture.<sup>21</sup> In the event the property owner makes an effort to have his property returned it can cost thousands of dollars in attorney's fees.<sup>22</sup>

Wyoming law provides little protection from the worst abuses of civil asset forfeiture, but what little data is available indicates a need for increased oversight and other reforms.

### III. Civil Forfeiture Law and Practice in Wyoming

#### A. Law

The Wyoming Legislature followed closely on the heels of the federal law when it passed the Wyoming Controlled Substances Act of 1971.<sup>23</sup> The property subject to civil forfeiture under the Controlled Substances Act nearly parallels that under federal law, including controlled substances, containers for controlled substances, vehicles used to transport controlled substances and drug paraphernalia.<sup>24</sup> Wyoming maintains a separate statute governing criminal forfeiture, usually property seized for use in prosecuting misdemeanors and crimes.<sup>25</sup> This criminal forfeiture statute also governs seizure of other property illegal under Wyoming law, including "any electronic, mechanical or other device . . . primarily useful for the purpose of the surreptitious interception of wire, oral or electronic communications,"<sup>26</sup> illegally copied music<sup>27</sup> and equipment used to illegally kill wildlife.<sup>28</sup> However, it is the Controlled Substances Act that provides broad seizure and forfeiture power to the state without requiring the conviction of the property owner of a crime.

The Controlled Substances Act is problematic in the procedure for both the initial seizure of property and the forfeiture that follows it. The act governs seizure of property as follows:

Property subject to forfeiture under this act may be seized by any law enforcement officer of the state upon process issued by any district court or district court commissioner having jurisdiction over the property. Seizure without process may be made if:

(i) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(ii) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal, injunction or forfeiture proceeding based upon this act;

(iii) The board or commissioner has *probable cause to believe that the property was used or is intended to be used in violation of this act.*<sup>29</sup>

The first two categories for seizing property "without process"—that is, a warrant—do require some due process. The first category allows for seizure incident to an arrest, but police must nevertheless have probable cause to believe the arrestee has actually committed a crime. The property owner is subject to all protections under the Wyoming and U.S. Constitutions, and under this category police only may seize property along with this arrest. The second category allows for the seizure of property already subject to a judicial proceeding. Civil forfeiture proceedings in Wyoming are problematic,<sup>30</sup> but they nevertheless provide some due process prior to seizure. It is the third category for seizure without process that can give rise to the abuse described in the previous section.<sup>31</sup>

The power granted third category only applies to "the board or commissioner," that is the State Board of Pharmacy<sup>32</sup> or the attorney general.<sup>33</sup> The rest of the statute applies to "any law enforcement officer of the state," so this is an important qualification. Nevertheless, the attorney general has the power to "appoint special assistant attorneys general for any purposes" with the approval of the governor.<sup>34</sup> This includes the power to appoint local county prosecutors as special assistants, which presumably covers local police and sheriffs.<sup>35</sup> The third category, then, likely applies as broadly as the first two to all Wyoming law enforcement, though this may not be the intent of the law. An officer, upon discovering a seemingly large quantity of cash or other property that he believes is merely related to the drug trade may seize it whether or not the property owner actually employs or previously employed the property for that purpose. The hazy definition of merely requiring

an officer to believe the property is *intended* to be used to violate the Controlled Substances Act makes probable cause a highly subjective determination.

As implied by the seizure provision in the Controlled Substances Act, the forfeiture process can either precede or follow the seizure of property. However, following seizure the law provides for “prompt institution of proceedings,”<sup>36</sup> and requires that a court considering forfeiture proceedings must have jurisdiction.<sup>37</sup> Otherwise, the law does not place specific rules on the forfeiture process. According to the Frequently Asked Questions page of the website for the Wyoming Division of Criminal Investigation (a branch of the Attorney General’s Office<sup>38</sup>), “the government has to be able to prove in a civil, administrative or criminal proceeding that the asset was used to facilitate drug trafficking, or was derived from drug trafficking for it to be forfeited to the government.”<sup>39</sup> However, unlike a criminal court which requires the government to prove guilt beyond a reasonable doubt,<sup>40</sup> under the Controlled Substances Act the government must only prove in civil court that property violates the law by a preponderance of the evidence.<sup>41</sup> Technically, this means the burden is evenly split between the government and the property owner. Realistically, the property owner has the greater burden, being without government resources such as the Attorney General’s Office. Furthermore, unlike in criminal court,<sup>42</sup> the state is not required to provide an attorney to someone who cannot afford counsel when contesting a civil forfeiture case. The actual practice of civil forfeiture exemplifies these disadvantages, described in the following subsection.<sup>43</sup>

Finally, once property is forfeited, the attorney general may do a number of things, including sell it, transfer it to a Wyoming municipality or political subdivision “for its official use,” or destroy it.<sup>44</sup> In 2005, Wyoming Attorney General Patrick Crank agreed to a 70/30 split of funds between the Division of Criminal Investigation and state agencies that “are ... involved

in the seizure and ultimate forfeiture.”<sup>45</sup> Discussion with the Attorney General’s Office confirmed that this remains the agency’s policy.

### **B. Practice**

Anecdotally, there is some evidence that Wyoming law enforcement agencies abuse the civil forfeiture process. The Wyoming Highway Patrol occasionally publishes stories on its website relating to seizures under the Controlled Substances Act.<sup>46</sup> Nearly all of these reports detail seizures of drugs and, sometimes, currency along with them.<sup>47</sup> The Highway Patrol reports that in 2010 it seized “various grades of marijuana, cocaine, heroin, methamphetamine, hashish and pharmaceuticals.”<sup>48</sup> That year, it also seized \$264,718.00 in currency.<sup>49</sup> In one instance, the Highway Patrol seized a safe from a traveler based on a drug alert from a police dog, then the “little over \$131,000.00” discovered inside the safe, having failed to locate any narcotics or drug paraphernalia.<sup>50</sup> The seizure occurred after “the driver was unable to come up with a logical explanation as to why he had that much cash in his vehicle in a safe which he did not have the means to open.”<sup>51</sup> The driver was not charged

with a crime, and was “allowed to proceed on his journey.”<sup>52</sup> The situation certainly raises suspicion, and it is possible that the driver was trafficking drug money. Nevertheless, possessing large amounts of currency is legal, and to charge the driver with a crime would have required substantially more evidence. The Highway Patrol may have seized drug money that day, and complied with the Controlled Substances Act, but both the law itself and its enforcement circumvented due process.

Even if the driver in that case returned to Wyoming to challenge the seizure (it appears he did not<sup>53</sup>), a recent ruling from the Wyoming Supreme Court illustrates the difficulties of such a challenge. In the case *In re U.S. Currency Totaling \$7,209.00*, the court considered an

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appeal from Joseph Libretti and Frank Hohlios.<sup>54</sup> The case arose from a forfeiture complaint for \$116,584.43, three vehicles and one firearm, of which Libretti and Hohlios challenged \$7,209.00 of the money seized.<sup>55</sup> After receiving notice that the complaint would be heard in the Natrona County District Court, Libretti filed a motion to appear by telephone, which was granted.<sup>56</sup> However, on the day of the hearing Libretti claimed he did not understand that it was a hearing on the merits of the case (that is, a trial), and was unprepared to present evidence.<sup>57</sup> The court proceeded, and ruled that the seized funds were “proceeds from violations of the Controlled Substances Act.”<sup>58</sup> Hohlios attended the same hearing in person, but did not announce himself to the state’s lawyer until after the hearing was over, and claimed he did not understand how the proceeding worked and was not given a chance to be heard.<sup>59</sup> On appeal, the Wyoming Supreme Court ruled that the district court followed the Wyoming Rules of Civil Procedure, and that the objections by Libretti and Hohlios were without merit.<sup>60</sup>

Had they acquired legal representation, Libretti and Hohlios would have had a better understanding of the forfeiture process and could have at least made their case. However, although \$7,000 is not a small amount of money, it could have cost more than that entire amount to pay even a single attorney to represent them both.<sup>61</sup> Furthermore, legal counsel does not alter the state’s minimal burden under the preponderance of the evidence standard. As the currency case illustrates, this standard allows the court to simply take the word of law enforcement at face value.<sup>62</sup> Cases such as this leave those who do not have significant financial resources or legal experience with no recourse.

The process of civil forfeiture in Wyoming is troubling, but it is more troubling that its incidence cannot be readily measured. When the Institute for Justice prepared its “Policing for Profit” report in 2010, Wyoming “did not respond to [its] request” for data.<sup>63</sup> The Controlled Substances Act law only requires the attorney general to “submit a biennial report to the joint appropriations interim committee concerning recipients and the amount of property and proceeds received, disposed of or expended under” the

federal equitable sharing program, or civil forfeiture cases conducted in cooperation with the federal government.<sup>64</sup> Efforts by the author, working with a Wyoming legislator, to acquire more data revealed that the Attorney General’s Office has not submitted or even compiled these reports, and that the office claims it does not have the information to do so. However, Wyoming law also requires any state law enforcement agency to report receipts from the equitable sharing program to the attorney general within 30 days and then any expenditure of such funds within 90 days “on forms to be prescribed by the attorney general.”<sup>65</sup>

The *Policing for Profit* report was only able to gather limited data using federal reports. These data may include totals from both criminal and civil forfeitures.<sup>66</sup>

**Table 1** compiles data from the Law Enforcement Management and Administrative Statistics (LEMAS), “a survey of law enforcement agencies nationwide . . . conducted every three to four years by the Census Bureau.”<sup>67</sup>

**Table 1. Forfeitures as Reported to LEMAS\* by Wyoming Law Enforcement (Drug-Related only)<sup>68</sup>**

<b>Year</b>	<b>Total Assets Forfeited</b>	<b>Assets Forfeited/ Law Enforcement</b>
1993	\$1,396,335	\$34,030
1997	\$7,028	\$130
2000	\$281,988	\$5,392
2003	\$1,364,135	\$16,056

\*Lemas: Law Enforcement Management and Administrative Statistics

LEMAS data are based exclusively on funds derived from drug-related forfeitures, and the surveys also call for agencies only to report proceeds received by their agency in the previous calendar year.<sup>69</sup> Thus, Table 1 may under-report forfeiture proceeds in Wyoming.

Under Wyoming law, any police agency may work with the federal government to help seize drugs under federal law—which suffers from the same problems as the Wyoming Controlled Substances Act—in exchange for a share of the forfeited funds.<sup>70</sup> This is known as the

equitable sharing program, and nine years of proceeds to Wyoming police agencies under the program are compiled in **Table 2**.

**Table 2. Equitable Sharing Proceeds from the Assets Forfeiture Fund<sup>71</sup>**

<b>Fiscal Year</b>	<b>Proceeds Returned to State</b>
2000	\$0
2001	\$38,604
2002	\$715
2003	\$10,881
2004	\$18,250
2005	\$119,916
2006	\$260,660
2007	\$66,348
2008	\$113,176
Total	\$628,550
Average per Year	\$69,839

Because the Attorney General's Office has not reported state participation in the equitable sharing program as it is required to do under state law,<sup>72</sup> the data in Table 2 cannot be corroborated by state reports. However, if the data are accurate, compared to neighboring states Colorado<sup>73</sup> and Nebraska<sup>74</sup> Wyoming's participation in

the program is negligible. While Wyoming's nine-year total yielded \$628,500, police agencies in neighboring Colorado and Nebraska each netted more than \$3 million per year in the same period.

Although the Attorney General's Office is not required to report seizures and forfeitures conducted under the Controlled Substances Act—that is, those performed outside of the equitable sharing program—some recent data are available. An inquiry by the Legislative Services Office revealed only one document regarding civil asset forfeiture prepared by the Attorney General's Office, a single-page spreadsheet dated September 9, 2011. Following further inquiry, this table was updated and is reproduced in **Table 3**. This compiles seizures and forfeitures made by the Division of Criminal Investigation, the Wyoming Highway Patrol and some local agencies that participate in the state drug enforcement task force.

While these data do not offer a complete picture, Table 3 supports several points. According to the Wyoming Division of Criminal Investigation, "[t]he amount of drug assets seized will vary considerably each year. In recent years, the amount of drug assets seized has generally declined."<sup>76</sup> From the data available, it appears that seizures have indeed declined recently. Table 3 hints that the Wyoming Highway Patrol is the most frequent user of the civil forfeiture law, since the attorney general reports that \$272,589.84 was seized in 2010, and the Highway Patrol itself reports that it seized \$264,718.00 in currency that year.<sup>77</sup> It is also possible, then, that many property owners who have their assets seized are travelers from out-of-state, but

**Table 3. Seizure / Forfeiture History 2008-2013 as Reported by Wyoming Attorney General's Office<sup>75</sup>**

	<b>2008</b>	<b>2009</b>	<b>2010</b>
<b>Total seized</b>	\$486,674.77	\$1,293,404.91	\$272,589.84
<b>Refunded to Suspect</b>	\$194,526.90	\$883,921.11	\$49,599.11
<b>Paid to Local Law Enforcement</b>	\$10,904.00	\$34,321.00	\$7,462.78
<b>Transfer to Forfeiture Acct. – State</b>	\$183,655.95	\$210,663.33	\$61,920.20
<b>Transfer to Forfeiture Acct. – Federal</b>	\$95,856.92	\$20,907.51	\$52,319.75
<b>Year's Balance</b>	\$1,731.00	\$143,591.96	\$101,288.00

this cannot be concluded from these data.

The most interesting aspect of Table 3 is that in some years a substantial amount of money seized is refunded; the average refunds from 2008 to 2013 approaches 50 percent of assets seized. According to information provided by the Legislative Services Office, there is no internal refund process in the Attorney General’s Office, so these refunds only follow a court hearing. It is encouraging that property owners can recover their assets even against the preponderance-of-the-evidence standard,<sup>78</sup> but it is discouraging that law enforcement is seizing so much property on which it has no basis to forfeit. Wyoming law enforcement may too often roll the proverbial dice in hopes for a win in court or that forfeiture will not be challenged. While the total amount of money seized has declined significantly in recent years, so has the percentage of assets refunded. One cannot conclude that Wyoming law enforcement agencies are policing for profit, but the refund rate is at least cause for further inquiry and thorough oversight of the civil forfeiture process.

The *Policing for Profit* study gave Wyoming an overall “C” grade because while state laws are flawed the evidence indicates that the extent of forfeiture use is not abusive. Given the data and specific cases discussed in this section, it does not appear that any Wyoming police agencies are working harms to the

extent witnessed in Tenaha, Texas.<sup>80</sup> Nevertheless, Wyoming must be more diligent in monitoring the practice of civil asset forfeiture, and should make several reforms to the law that will prevent legal abuse from ever becoming a problem.

#### IV. Reforms for Civil Forfeiture in Wyoming

There is some evidence that police agencies in Wyoming abuse civil asset forfeiture, and the law should be reformed to prevent abuse and better protect innocent citizens. Importantly, this can be achieved without sacrificing the effectiveness of the law through several amendments to the Controlled Substances Act. The most important change is to raise the level of proof required in a forfeiture hearing to at least a clear and convincing standard of proof. Other reforms to consider include bolstering due process by eliminating the prospective element from seizure, ending Wyoming’s participation in equitable sharing with the federal government, and placing all revenue from seized assets in a general state fund. At the very least, transparency should be extended to require police agencies to account for all revenue acquired through the civil forfeiture process, and the Attorney General’s Office should comply with the law’s reporting requirements.

##### A. Elevate the Standard of Proof Requirement

Civil forfeiture should require a clear and convincing

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2011	2012	2013	Total
\$499,915.83	\$179,856.27	\$135,590.69	\$2,868,032.31
\$91,278.66	\$45,671.24	\$13,681.80	\$1,278,678.82
\$82,593.37	\$167,456.61	\$48,850.25	\$351,588.01
\$85,289.20	\$138,926.84	\$59,831.67	\$740,287.19
\$144,887.50	\$17,964.05	\$10,890.42	\$342,826.15
\$95,867.10	\$(190,162.47)	\$2,336.55	\$154,652.14

standard of proof, or proof “that would persuade a trier of fact that the truth of the contention is highly probable.”<sup>81</sup> Currently, after property is seized in Wyoming, the evidentiary hearing only requires that the state prove by a preponderance of the evidence that the property is subject to forfeiture.<sup>82</sup> A “preponderance of the evidence” is defined as “proof which leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence.”<sup>83</sup> The current standard is a 50/50 division of burdens between the prosecution and the defendant,<sup>84</sup> and the clear and convincing standard is generally regarded as only a step short of proof beyond a reasonable doubt, which is required for any criminal conviction.<sup>85</sup> Although this will make it more difficult for the state to forfeit someone’s rights to cash and other property seized for its alleged relation to the drug trade, it will make it no more difficult to seize drugs themselves, since testing of substances is quite conclusive. Furthermore, cash and property seized along with drugs will remain relatively easy to forfeit, again due to the ease with which narcotics can be identified in court and the ability of the state to tie such property to trafficking such narcotics.

The simplest solution is to eliminate civil forfeiture entirely and require criminal law enforcement to follow criminal forfeiture,<sup>86</sup> but there are legitimate justifications for civil forfeiture and maintaining an evidentiary standard below the beyond-a-reasonable-doubt standard required for criminal trials. The most apparent scenario under Wyoming law would be a case where the state needed to seize drug proceeds transferred by a criminal to a third party, or multiple third parties.<sup>87</sup> In such a case it is very difficult to convict the holder of the funds of a crime, but relatively easy to go after the property that is the product of criminal activity. Thus, a higher level of proof would require the state to make a strong case for drug-related materials and would place no greater burden on the forfeiture of actual drugs, ensuring that civil

asset forfeiture is a legitimate tool for law enforcement.

### **B. Enhance Due Process**

As discussed earlier, seizing property without process invites abuse,<sup>88</sup> and this may be easily amended. Just as the law does not allow the arrest of persons who may intend to commit a crime, it should not allow the seizure and forfeiture of property that merely “is intended to be used in violation of [the Controlled Substances Act].”<sup>89</sup> This is especially important when property is, by itself, legal to possess; property such as money, cars and the like. Maintaining the portion of the law that allows seizure of material that “was used ... in violation of this act” would help ensure that property is seldom seized without arresting the suspect of a crime.<sup>90</sup> For example, instead of seizing money with probable cause that its intended use is for the purchase of drugs,<sup>91</sup> money would have to be accompanied with actual drug paraphernalia, drugs or other strong evidence, leading to charges for possession, conspiracy or related criminal charges.<sup>92</sup>

### **C. Deposit All Forfeited Funds to the State’s General Fund**

Another reform the state should consider is requiring the deposit of all forfeited funds and funds from forfeited assets into the state’s general fund. As discussed in the previous section, currently forfeited funds become property of the Attorney General’s Office, and these funds are shared with agencies that participate in specific forfeiture actions.<sup>93</sup> Giving the Attorney General’s Office—which oversees the Division of Criminal Investigation—immediate oversight over forfeited funds gives the appearance of easy abuse. Furthermore, the attorney general’s power to distribute forfeited funds to other state law enforcement agencies also raises concerns about separation of powers, because it is the duty of the legislature to appropriate and assign funding.<sup>94</sup> Because the state does not collect adequate data about the practice of civil forfeiture,

***“Civil forfeiture should require a clear and convincing standard of proof, or proof that would persuade a trier of fact that the truth of the contention is highly probable.”***



there are no specific reports detailing how state police agencies use this money. It would be better for the legislature to oversee the distribution of forfeited funds, just as they oversee Wyoming's biennial budget.

#### **D. Reconsider Participation in Equitable Sharing**

The state should strongly consider restricting participation in the federal equitable sharing program. The equitable sharing program grants the U.S. Attorney General the power to share forfeited funds with the states, but only with "any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property."<sup>95</sup> All other reforms to state law—a higher standard of proof, enhanced due process and depositing forfeited funds to the state's general fund—can be circumvented easily when state agencies may team with the federal government under federal law. This has happened before. Since a state court case all but eliminated civil forfeiture under state law in Nebraska, "Nebraska law enforcement has been relying exclusively upon [equitable sharing] to seize suspected drug-related assets."<sup>96</sup> Thus, any reform that makes Wyoming law more protective of due process than federal law must be accompanied with an end to state participation in equitable sharing or at least by restrictions on participation (such as limiting participation to complex money laundering investigations or other large organized criminal ventures).

#### **E. Improve Oversight and Reporting**

Finally, given the documented abuse of civil forfeiture in other states, Wyoming must take oversight of civil forfeiture seriously. Currently, state law enforcement agencies and the attorney general are required only to report on participation in the equitable sharing program to the joint appropriations legislative committee.<sup>97</sup> Inquiries to the Legislative Services Office and Attorney General's Office indicate that these reports have never been compiled or filed. The law should require each

state law enforcement agency to report all assets seized or forfeited, and this should be included in the attorney general's report. Maine, for example, even categorizes the types of property that are forfeited.<sup>98</sup> Especially with a law that is so precariously open to abuse, the public should be able to effectively monitor how it is applied across the state.

#### **V. Conclusion**

Law enforcement, particularly criminal law enforcement, is an essential function of government. This function, however, can become more dangerous than the problems it seeks to solve—thus the importance of constitutional protections to due process. Under Wyoming law, like many other states, civil forfeiture is a tool used against drug trafficking. Nevertheless, recent instances of abuse nationwide call for an inspection of both civil forfeiture law and practice within our state. Wyoming law currently opens the door to abuse, and data collected by the state offers, at best, an incomplete view of forfeiture practice. There are some indications the law has been abused. Wyoming law enforcement and the attorney general must be tasked with a far more detailed accounting.

Given the instances of abuse by federal law enforcement and police agencies in other states, Wyoming should not wait for a scandal before reforming the law, especially since these laws may be reformed without adversely affecting law enforcement's ability to fight crime. With adequate oversight and transparency, along with heightened evidentiary standards and other reforms, Wyoming can be a leader in civil asset forfeiture reform. Wyomingites can take heart that our police agencies have not succumbed to temptations as have some agencies in other states, but it would be a far better to take steps toward making Wyoming a more "tough, but fair" state by sensibly reforming civil forfeiture laws and ensuring these abuses cannot occur legally.<sup>99</sup> ■

***"Recent instances of abuse nationwide call for an inspection of both civil forfeiture law and practice within our state."***

## Endnotes

<sup>1</sup> See, e.g., Sarah Stillman, Taken, THE NEW YORKER, Aug. 12, 2013, available at [http://www.newyorker.com/reporting/2013/08/12/130812fa\\_fact\\_stillman](http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman).

<sup>2</sup> See generally Eric Blumenson & Eva Nilsen, Policing for Profit: the Drug War's Hidden Economic Agenda, 65 U. CHI. L. REV. 35 (1998).

<sup>3</sup> Asset Forfeiture: Use and Abuse, ON POINT, Aug. 8, 2013, at 102, available at <http://onpoint.wbur.org/2013/08/08/asset-forfeiture>.

<sup>4</sup> Marian R. Williams, Jefferson E. Holcomb, et al., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE, INST. FOR JUSTICE, Mar. 2010, available at <http://www.ij.org/policing-for-profit-the-abuse-of-civil-asset-forfeiture-4> (hereinafter POLICING FOR PROFIT).

<sup>5</sup> See BLACK'S LAW DICTIONARY (9th ed.) at 722 ("forfeiture[.:] 1. The divestiture of property without compensation. . . . civil forfeiture[.:] An in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity.").

<sup>6</sup> POLICING FOR PROFIT, supra note 4, at 10, citing J.R. Maxeiner, Fear and Loathing and the Forfeiture Laws, 75 CORNELL L. REV. 1151 (1977).

<sup>7</sup> See generally Cameron H. Holmes, Forfeiture Achieves Proper Purposes by Appropriate Means, 39 N.Y.L. SCH. L. REV. 335 (1994).

<sup>8</sup> See Stillman, supra note 1.

<sup>9</sup> Id.

<sup>10</sup> Id.; see also POLICING FOR PROFIT, supra note 4, at 16.

<sup>11</sup> See POLICING FOR PROFIT, supra note 4, at 19, 21, 28, 33, 36, 38.

<sup>12</sup> Civil Forfeiture Highway Shakedowns in Tennessee, YOUTUBE, May 19, 2011, <http://www.youtube.com/watch?v=rjd4Q4u5cqU>.

<sup>13</sup> Nick Sibilla, The 14 Most Ridiculous Things Police Bought With Asset Forfeiture, BUZZFEED, Jun. 24, 2013, <http://www.buzzfeed.com/nicks29/the-14-most-ridiculous-things-police-bought-with-a-4y3w>.

<sup>14</sup> 21 U.S.C. §§ 801–971 (1970).

<sup>15</sup> Michael J. Duffy, A Drug War Funded with Drug Money: the Federal Civil Forfeiture Statute and Federalism, 34 SUFFOLK U. L. REV. 511, 512 (2001); see 21 U.S.C. § 881(e)(1)(A) (2013).

<sup>16</sup> Id.

<sup>17</sup> See Miami Vice: Brother's Keeper (NBC television broadcast Sept. 16, 1984).

<sup>18</sup> See generally Jason R. Rumke, Note, Passing the Buck: An Analysis of State v. Franco, 257 Neb. 15, 594 N.W.2d 633 (1999) and Nebraska's Civil Forfeiture Law, 83 NEB. L. REV. 1299 (2005).

<sup>19</sup> POLICING FOR PROFIT, supra note 4, at 34.

<sup>20</sup> POLICING FOR PROFIT, supra note 4, at 13, citing HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? (1995).

<sup>21</sup> See, e.g., Civil Forfeiture, supra note 12.

<sup>22</sup> See POLICING FOR PROFIT, supra note 4, at 19 ("The county did return the \$43,720; however, Annan had to pay \$12,000 for his attorney—more than a quarter of his life savings.")

<sup>23</sup> WYO. STAT. § 35-7-1001 (1971).

<sup>24</sup> Compare WYO. STAT. § 35-7-1049(a) (2013) with 21 U.S.C. § 881(a) (2012).

<sup>25</sup> WYO. STAT. § 7-2-105 (2013).

<sup>26</sup> WYO. STAT. § 7-3-703 (2013).

<sup>27</sup> WYO. STAT. § 40-13-202 (2013).

<sup>28</sup> WYO. STAT. § 23-6-208 (2013).

<sup>29</sup> WYO. STAT. § 35-7-1049(b) (2013) (emphasis added).

<sup>30</sup> See infra notes 54–62 and accompanying text.

<sup>31</sup> See supra notes 8–13 and accompanying text.

<sup>32</sup> WYO. STAT. § 35-7-1002(xxv) (2013).

<sup>33</sup> Throughout the WCSA, reference is made to "the commissioner." This is the commissioner of drugs and substances control, a title held by the attorney general of Wyoming. WYO. STAT. § 35-7-1003.

<sup>34</sup> WYO. STAT. § 9-1-608 (2013).

<sup>35</sup> See, e.g., State v. Eleven Thousand Three Hundred Forty-Six Dollars and No Cents in United States Currency, 777 P.2d 65, 68 (Wyo. 1989) ("[W]e note in this case that the Deputy County and Prosecuting Attorney whose office handled [the defendant's] criminal prosecution was also appointed as Special Assistant Attorney General for purposes of initiating and conducting these forfeiture proceedings.").

<sup>36</sup> WYO. STAT. § 35-7-1049(c) (2013).

<sup>37</sup> WYO. STAT. § 35-7-1049(d) (2013).

<sup>38</sup> WYO. STAT. § 9-1-611(a) (2013).

<sup>39</sup> Drug Seizures – Division of Criminal Investigation, DIVISION OF CRIMINAL INVESTIGATION, <http://wyomingdci.wyo.gov/dci-operations-section/drug-seizures> (last visited Sept. 9, 2013).

<sup>40</sup> See In re Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.").

<sup>41</sup> In re U.S. Currency Totalling \$7,209.00, 278 P.3d 234, 237 (Wyo. 2012).

<sup>42</sup> See Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

<sup>43</sup> See infra notes 54–62 and accompanying text.

<sup>44</sup> WYO. STAT. § 35-7-1049(e) (2013).

<sup>45</sup> Letter from Patrick J. Crank, Attorney General to Mike Reed, President, Wyoming Ass'n of Sheriffs & Chiefs, May 19, 2005, copy on file with Wyoming Liberty Group.

<sup>46</sup> See generally WYOMING HIGHWAY PATROL, <http://www.whp.dot.state.wy.us> (last visited Sept. 9, 2013).

<sup>47</sup> See, e.g., 88 Pounds of Marijuana Seized During Traffic Stop, WYOMING HIGHWAY PATROL, Aug. 13, 2013, <http://www.whp.dot.state.wy.us/news/88-pounds-of-marijuana-seized-during-traffic-stop>.

<sup>48</sup> Wyoming Highway Patrol 2010 Felony Drug Seizures, WYOMING HIGHWAY PATROL, Jan. 25, 2011, [http://www.whp.dot.state.wy.us/home/patrol-news/maincontent/news\\_116.html](http://www.whp.dot.state.wy.us/home/patrol-news/maincontent/news_116.html).

<sup>49</sup> Id.

<sup>50</sup> Traffic Complaint Results in Seizure of Over \$131,000, WYOMING HIGHWAY PATROL, May 7, 2010, [http://www.whp.dot.state.wy.us/home/patrol-news/maincontent/news\\_140.html](http://www.whp.dot.state.wy.us/home/patrol-news/maincontent/news_140.html).

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> See infra note 75 and accompanying table. In 2010, nearly \$50,000 of seized assets was returned, and it is unlikely that a seizure such as this would only lead to a partial refund if successfully challenged.

<sup>54</sup> 278 P.3d 234 (Wyo. 2012).

<sup>55</sup> Id. at 236.

<sup>56</sup> Id. at 236–37.

<sup>57</sup> Id. at 237.

<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> Id. at 241–42.

<sup>61</sup> See supra note 22.

<sup>62</sup> In re U.S. Currency, 278 P.3d at 237.

<sup>63</sup> POLICING FOR PROFIT, supra note 4, at 102.

<sup>64</sup> WYO. STAT. § 35-7-1049(m) (2013). See also supra notes 16–18 and accompanying text.

<sup>65</sup> WYO. STAT. § 35-7-1049(k) (2013).

<sup>66</sup> POLICING FOR PROFIT, supra note 4, at 41.

<sup>67</sup> POLICING FOR PROFIT, supra note 4, at 27.

<sup>68</sup> POLICING FOR PROFIT, supra note 4, at 102.

<sup>69</sup> POLICING FOR PROFIT, supra note 4, at 29.

<sup>70</sup> WYO. STAT. § 35-7-1049(j) ("Any law enforcement agency of this state may accept, receive, dispose of and expend the property or proceeds from any property forfeited to the federal government or any state and allocated to the agency by the United States attorney general pursuant to [the equitable sharing program] or any law of another state.")

<sup>71</sup> POLICING FOR PROFIT, supra note 4, at 102.

<sup>72</sup> See supra notes 63–65 and accompanying text.

<sup>73</sup> POLICING FOR PROFIT, supra note 4, at 50.

<sup>74</sup> POLICING FOR PROFIT, supra note 4, at 74.

<sup>75</sup> A copy of the table from which this is adapted is on file with the Wyoming Liberty Group.

<sup>76</sup> Drug Seizures, supra note 39.

<sup>77</sup> See Wyoming Highway Patrol, supra note 48.

<sup>78</sup> See supra notes 40–42 and accompanying text.

<sup>79</sup> POLICING FOR PROFIT, supra note 4, at 41, 102.

<sup>80</sup> See supra notes 8–10 and accompanying text.

<sup>81</sup> In re SRJ, 212 P.3d 611, 612 (Wyo. 2009)

<sup>82</sup> In re U.S. Currency, 278 P.3d at 237.

<sup>83</sup> J.F.F. v. State, 132 P.3d 170 (Wyo. 2006), citing Thornberg v. State ex. rel. Wyo. Workers' Compensation Div., 913 P.2d 863, 866 (Wyo. 1996).

<sup>84</sup> But see supra notes 40–43 and accompanying text.

<sup>85</sup> See POLICING FOR PROFIT, supra note 4, at 42.

<sup>86</sup> See supra notes 25–28 and accompanying text.

<sup>87</sup> See Asset Forfeiture, supra note 3.

<sup>88</sup> See supra notes 29–31 and accompanying text.

<sup>89</sup> See WYO. STAT. § 35-7-1049(b)(iii) (2013).

<sup>90</sup> Id. (emphasis added).

<sup>91</sup> See supra note 31 and accompanying text.

<sup>92</sup> See, e.g., WYO. STAT. § 35-7-1031 (2013) (Detailing penalties for unlawful possession of certain narcotics).

<sup>93</sup> See supra note 45 and accompanying text.

<sup>94</sup> See WYO. CONST. art. 3, §§ 33–34.

<sup>95</sup> 21 U.S.C. § 881(e)(1)(A) (2013)..

<sup>96</sup> Rumke, supra note 18, at 1312–13.

<sup>97</sup> WYO. STAT. § 37-7-1049(k), (m) (2013).

<sup>98</sup> See POLICING FOR PROFIT, supra note 4, at 63.

<sup>99</sup> WYO. STAT. § 8-3-123(a)(v) (2013) (Adopting the "Code of the West" as the official state code).

