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**TESTIMONY ON THE USE OF FORFEITURE
IN OFFENSES RELATED TO PROSTITUTION (H.B. 213)**

Good morning. My name is Travis Tu and I am here today on behalf of the American Civil Liberties Union of Pennsylvania. My thanks to the Judiciary Committee for allowing me the opportunity to present testimony today. My comments will be limited to House Bill 213, a bill that would authorize the seizure and forfeiture of vehicles used in the commission of criminal offenses related to prostitution. The ACLU believes that existing civil forfeiture schemes are flawed, and we support efforts to reform existing forfeiture laws. We appreciate this opportunity to raise concerns over the protection of civil liberties in the authorization of new forfeiture statutes.

Let me begin by stating that the ACLU recognizes this Commonwealth's legitimate interest in deterring criminal activity and disabling repeat offenders. We have, however, serious reservations about the means this bill uses to reach that objective. Broadening the civil forfeiture laws threatens Pennsylvanians' rights to be free from punishment that is disproportionate to the offense, and this bill also raises questions about the potential for double jeopardy.

Since the mid-1980s, our country has seen a dramatic rise in law enforcement's use of civil forfeiture. It has been seen as an ultimate weapon in the "war on drugs." The ability to seize for forfeiture the assets of those making tremendous profit from drug trafficking has been thought of as some form of poetic justice.¹ As law enforcement began to realize the relative ease with which forfeitures could be secured, the opportunity for forfeiture to become a lucrative source of supplemental revenue made forfeiture statutes open to excessive use and abuse. In keeping with the saying that 'politics makes for strange bedfellows,' the ACLU has taken guidance on this issue from Henry Hyde, Republican Chair of the U.S. House Judiciary Committee, who has tried in numerous sessions to pass reforms of this nation's two-century-old

civil asset forfeiture laws. In a letter to his House colleagues last year, co-signed by Representative Bob Barr of Georgia, Chairman Hyde noted that "it has become all too apparent in recent years that these civil asset forfeiture laws are sometimes being used in terribly unjust ways."²

Heightened awareness of states' uses of forfeiture statutes has caused the public and the courts to consider the question of whether these punishments fit the crimes. The question becomes even more appropriate as legislators consider expanding forfeiture laws to address a wider variety of crimes, in this case to offenses related to prostitution. Therefore, it would seem relevant as you consider this bill to ask whether the seizing and forfeiture of person's automobile suits the crime of a second or subsequent conviction for an offense related to prostitution. Are the conviction and resulting penalties related to these offenses no longer adequate, or should the government now authorize law enforcement to take possession of the offender's car, sell it to the highest bidder, and pocket the profits?

The U.S. Supreme Court, in *Austin v. United States* (1993), ruled that forfeiture could in certain instances be considered punishment and would in such cases be regulated by the Excessive Fines Clause of the Eighth Amendment.³ Just last week, the Supreme Court of Pennsylvania, in *Commonwealth v. 5043 Anderson Road*, curtailed what law enforcement could legally seize for forfeiture.

In that case, law enforcement found that the owner of the twenty-four-acre property was conducting a lucrative business selling marijuana from his family's house and adjacent garage. Pursuant to the Controlled Substances Forfeiture Act (42 Pa.C.S. 6801), the commonwealth filed a forfeiture petition for the entire property. The Supreme Court agreed with a lower court decision that limited the forfeiture to the house and the garage and excluded twenty-two acres deemed "unrelated" to the criminal activity.

The justices commented that using the district attorney's argument justifying law enforcement's "excessive" forfeiture of the entire property would produce "absurd" results and would defy what the justices called a "common sense" approach to forfeiture.⁴ This case

1 See 'Statement of Nadine Strossen on the Civil Asset Forfeiture Reform Act of 1997.' Available at <http://www.acju.org/congress/lg061197a.html>

2 See 'Bi-Partisan Civil Asset Forfeiture Reform Letter (1998).' Available at <http://www.acju.org/congress/lg033098a.html>

3 *Austin v. United States*, 509 U.S., 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993)

4 See 'Forfeiture Limited to Part of Property Used for Drug Sales,' *Legal Intelligencer*, April 22, 1999, Vol. 220, No. 77

demonstrates the growing need for the courts to remedy the excessive punishments inflicted by law enforcement's use of broad forfeiture statutes.

House Bill 213 also raises concerns over the potential for double jeopardy. In the case of *Commonwealth v. Wingait Farms* (1995), law enforcement seized a horse farm, horses, and other property under the Controlled Substance Forfeiture Act after findings that the property was used to facilitate drug violations in delivery of marijuana worth nearly half a million dollars. After pleading guilty to various drug charges, the owner of the property claimed that the forfeiture of her property was a violation of the Double Jeopardy Clause of the U.S. and Pennsylvania Constitutions.

The court ruled that the forfeitures in the case could not be considered double jeopardy, because “[the forfeiture statute] serves the purpose of depriving the defendant of the means to commit additional offenses and also helps the state defray the costs of investigation and prosecution.”⁵ Thus, the claim of double jeopardy was thrown out because the forfeiture was seen as remedial rather than punitive.

Here is where the use of forfeiture in drug related offenses might differ from the use of forfeiture in offenses related to prostitution. The use of forfeiture to seize the property of drug offenders is meant to deprive the offender of the means to commit additional offenses. H.B. 213 does not deprive offenders of the means to commit repeat offenses. A person could violate these crimes related to prostitution using someone else's vehicle, a rented vehicle or even perhaps a bicycle. Therefore, the use of forfeiture in these offenses could more easily be seen as further punishment and may therefore open the law to double jeopardy challenges.

While the bill makes clear the intent to use forfeiture against “habitual offenders,” it may be worthwhile to consider who besides the offender may be unduly burdened by the forfeiture of a car. Consider for a moment a one-car family where the mother works and the father either stays home to take care of the children, works nights, or is currently unemployed. After Mom returns from work, Dad drives down and solicits a prostitute. After being convicted of his second offense, the family loses the car unless Mom can show that she is the rightful owner of the car and that the acts were committed without her knowledge. The bill does not even make clear what would happen if both Mom and Dad were listed as owners of the vehicle. But, clearly if the title were in Dad's name alone, this one-car family would now be a no-car family.

We suggest that the committee consider adopting language similar to that proposed in

House Bill 263 (referred to this committee on February 1, 1999). Section 6801(1) of this bill would provide for a "hardship exception" in vehicle forfeiture cases related to drug offenses.

This section reads:

"No vehicle shall be subject to forfeiture... where forfeiture will impose a substantial hardship upon the family of the owner of the vehicle. For the purposes of determining whether a substantial hardship exists, the court shall consider whether the vehicle is the family's only source of transportation, public or private, whether the vehicle is the family's only means of obtaining food and other necessities, whether the vehicle is the family's only means of transportation to educational facilities or whether the vehicle is the family's only means of transportation to places of employment."

The ACLU does not support expanding the use of forfeiture in Pennsylvania to offenses related to prostitution. To that end, we urge the committee to look closely at ways to diminish the potential for inflicting disproportionate punishment contained in House Bill 213. Thank you for your consideration.