

## TESTIMONY OF AMY BARON-EVANS

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BEFORE THE SUBCOMMITTEE ON CRIME, TERRORISM  
AND HOMELAND SECURITY OF THE JUDICIARY COMMITTEE  
OF THE UNITED STATES HOUSE OF REPRESENTATIVES

**November 1, 2007 Hearing**

H.R. 2878, Enhanced Financial Recovery and  
Equitable Retirement Treatment Act of 2007

Mr. Chairman and Members of the Committee:

Thank you for inviting me to this hearing to provide the views of the Federal Public and Community Defenders on H.R. 2878, the Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007. We have offices in 89 of 94 federal judicial districts. All of our clients are indigent, and over 75% are African American, Hispanic or Native American. More than 80% of federal criminal defendants require appointed counsel. We represent 60% of those defendants, with the other 40% represented by panel attorneys.<sup>1</sup>

We oppose this bill. As we understand it, the goal is to collect more money from convicted criminal defendants, and to use it for debt collection activities, some prosecution activities, and ultimately for enhanced retirement benefits for Assistant United States Attorneys (AUSAs). The bill would also take 5% of principal payments on fines and special assessments currently paid to the Crime Victims Fund, and 5% of principal payments on restitution obligations currently paid to individual victims to be used for the same purposes. The theory seems to be that if higher monetary obligations are imposed on criminal defendants, this will fund improved debt collection activities, and in this way, sufficient money will be generated to fund what appears to be at least a doubling of the cost of retirement benefits for AUSAs, of which there are currently about 5600. However, it is difficult to see how this scheme would result in substantially, if any, more dollars collected, with 80% of federal criminal defendants being indigent and more so when they go to prison.

We oppose the bill because it amounts to a tax on the poor to fund retirement benefits for the relatively rich. Giving prosecutors a financial interest in the cases they bring would create a conflict of interest, and at least the appearance of injustice. The bill also has *ex post facto* problems. Further, the reason law enforcement officers receive the retirement package they do – hazardous duty -- is entirely inapplicable to federal prosecutors. The bill would create inequity in compensation between AUSAs and Assistant Federal Public Defenders (AFPDs), which is unwarranted and would be

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<sup>1</sup>[http://jnet.ao.dcn/Reports/Criminal\\_Justice\\_Reports/Good\\_Practices\\_for\\_Federal\\_Panel\\_Attorney\\_Program.html](http://jnet.ao.dcn/Reports/Criminal_Justice_Reports/Good_Practices_for_Federal_Panel_Attorney_Program.html).

detrimental to the system. To be perfectly clear, we are not seeking higher retirement benefits to be paid from funds recouped from our clients, an obvious conflict of interest.

### **THE PROPOSAL AMOUNTS TO A TAX ON THE POOR.**

Sec. 101 would impose a surcharge of 5% (or \$50 on an amount less than \$1000) on any amount of a fine, restitution or special assessment that is unpaid as of the 15th day after judgment. The surcharge would be imposed even when, under 18 U.S.C. § 3572(d), the court, in the interest of justice, scheduled payment on a date certain or in installments, and the person was not out of compliance with the schedule. It would also apply if the person was participating in BOP's financial responsibility program, whereby a portion of his or her meager prison earning is regularly deducted to pay court-imposed financial obligations. *See* 28 CFR §§ 545.11, 545.25.

The only persons to whom this would *not* apply are those few defendants in a position to pay off criminal monetary penalties within 15 days of judgment. In short, this is a tax on the poor, to fund retirement benefits for the relatively rich.

Sec. 103 would increase the amount of the mandatory special assessment by multiples of 2 to 5.<sup>2</sup> Indigent individuals would be required to pay a special assessment of \$10-25 for a misdemeanor, and \$200 for a felony. If the poorest of defendants does manage to save a few hundred dollars, the government has a position as a priority creditor to take it from them, rather than allow those defendants a second chance to get on their feet as productive citizens.

### **IT WOULD CREATE A FINANCIAL INCENTIVE THAT IS INAPPROPRIATE FOR PUBLIC PROSECUTORS AND THE APPEARANCE OF IMPROPRIETY.**

By the advent of the American Revolution, the English model, in which private parties brought criminal prosecutions, was replaced with the system we have today, in which public prosecutors acting solely in the public interest and without financial or other personal motives, prosecute criminal cases.<sup>3</sup> One reason for the switch was that persons

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<sup>2</sup> While the court need not impose a fine after considering the defendant's resources, obligations to dependents, or need to make restitution, 18 U.S.C. § 3572(a), (b), there is no provision for judicial waiver of the special assessment.

<sup>3</sup> *See* Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, in 3 *Encyclopedia of Crime and Justice* 1286, 1286-1287 (S. Kadish ed. 1983). Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 *Harv. J.L. & Pub. Pol'y* 357, 371 (1986) ("[B]y the time of the American Revolution \* \* \* local district attorneys were given a virtual monopoly over the power to prosecute. Crime victims were no longer allowed to manage and control the prosecution of their crimes."); Joan E. Jacoby, *The American Prosecutor: A Search for Identity* 19 (1980) ("By the advent of the American Revolution, private prosecution had been virtually eliminated in the American colonies and had been replaced by [a] series of public officers who were charged with handling criminal matters."); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 *Rutgers L.J.* 77, 99 (1995) ("By the time of the Revolution, public prosecution in America was standard, and private prosecution, in effect, was gone."); Jack M.

acting as private prosecutors often abused the criminal justice system by initiating prosecutions to exert pressure for financial payment.<sup>4</sup> The public prosecution model helps to ensure equal justice, and the appearance of equal justice.

HR 2878 would create improper incentives, which would, at least, appear to be improper and create disrespect for law. Conceivably, it could result in a formal or informal quota system. It could distort the function of prosecutors from that of seeking justice to something akin to personal injury lawyers who receive financial rewards contingent on case outcomes and numbers of plaintiffs. Public prosecutors should not be exposed to these incentives, and should not be seen as having such incentives.

Funding prosecutorial activities other than debt collection from funds collected from convicted defendants would also be improper. Sec. 104(d)(2)(A) states that funds may be used by DOJ to provide “legal, investigative, accounting, and training support,” without limitation to debt collection activities. While Sec. 104(d)(2)(B) states that the funds may not be used “to determine whether a defendant is guilty of an offense,” this limitation is essentially undone by subsequent text stating, “except incidentally” if “necessary or desirable” to preserve assets or enforce a judgment, and then quite broadly in Sec. 104(e), that the Attorney General may use the funds “*for other prosecution and litigation expenses.*”

### **THE BILL WOULD PERMIT PROSECUTIONS IN VIOLATION OF THE *EX POST FACTO* CLAUSE.**

Sec. 105(a) would permit prosecutions in violation of the *Ex Post Facto* Clause. The final clause would apply the amendments made by sections 101 and 103 to “any offense involving conduct that continued” after enactment, even where the offense is not a continuing offense such as conspiracy.

Mail fraud, for example, is committed for *ex post facto* purposes on the date of mailing, although some conduct “involved” in the mail fraud scheme may take place after that date. Another example is illegal entry – the offense is committed on the date of entry, but it may “involve” conduct, *i.e.*, staying, after that date. Yet another is bribery, which is committed for *ex post facto* purposes on the date of the bribe, but some conduct “involved” may occur after that date, *e.g.*, the person bribed does something in return. In fact, the language is so broad that the government could claim that it applied to so-called “relevant conduct” as defined in the Sentencing Guidelines.

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Kress, "Progress and Prosecution," in 423 *The Annals of the American Academy of Political and Social Science* 99, 103 (1976) ("[P]ublic prosecution was firmly established as the American system by the time the Judiciary Act of 1789 created United States district attorneys to prosecute federal crimes."); Robert L. Misner, "Recasting Prosecutorial Discretion," 86 *J. Crim. L. & Criminology* 717, 729 (1996) ("By the outbreak of the Revolution, private prosecution was replaced by public prosecution through county officials.\* \* \*").

<sup>4</sup> Goldstein, *supra* note 2, 1286-1287.

**RETIREMENT BENEFITS FOR AUSAs EQUAL TO THOSE OF LAW ENFORCEMENT AND GREATER THAN THOSE OF AFPDs IS UNJUSTIFIED AND WOULD BE DETRIMENTAL TO THE SYSTEM.**

As we understand it, federal law enforcement agents receive the retirement package they do because they engage in hazardous duty. AUSAs do not. They are lawyers -- they go to court, write briefs, interview witnesses, meet with opposing counsel, etc. They interview witnesses in their own offices, which in most districts, are in the federal courthouse, so they need not leave the building. Investigations in the field are handled by law enforcement agents. To the extent a federal prosecutor may occasionally leave his or her office to participate in an investigation, he or she is accompanied by a law enforcement agent armed with a gun. AFPDs, in contrast, typically do most of their own investigations. Our offices have one or two investigators to staff their entire caseload. AFPDs go to dangerous places, such as Liberia, Afghanistan, and the inner city. If accompanied by an investigator, the investigator is unarmed.

HR 2878 would ensure that AFPDs are under-compensated as compared to AUSAs. According to statute, the compensation paid to AFPDs may not exceed that paid to AUSAs in the district. *See* 18 U.S.C. § 3006A(g)(2)(A). The March 1993 Report of the Judicial Conference of the United States on the Federal Defender Program states at pp. 24-25:

With regard to attorneys and other supporting personnel in federal public defenders' offices, the CJA contemplates **equal pay** with the United States attorneys' offices for persons with comparable qualifications and experience. **Parity in salary and benefits** generally for federal defender staff **will reflect the importance of the work performed in defender offices and, more importantly, will assist in recruiting and retaining qualified and diversified personnel.**

HR 2878 would ensure that AUSAs receive a total compensation package, including benefits, greater than that of AFPDs. As the Judicial Conference notes, this would be bad policy. AFPDs perform a valuable service to the public and our criminal justice system. Without them, the system could not function. Having high quality lawyers in Federal Defender Offices is critical to effective representation of the indigent, and the smooth functioning of the system.

In sum, we urge you to reject this bill.