



Department of Justice

STATEMENT

OF

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DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

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

AT THE HEARING ENTITLED

**“H.R. 2878 Enhanced Financial Recovery and Equitable Retirement Treatment
Act of 2007”**

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**Testimony
Of**

Kenneth E. Melson

Director, Executive Office for United States Attorneys

Before the

**Subcommittee on Crime, Terrorism, and Homeland Security
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At the hearing entitled

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November 1, 2007

Chairman Scott, Congressman Forbes, and members of the Committee, thank you for the invitation to testify about the important work of our Assistant U.S. Attorneys and the Department of Justice in collecting debts owed to the United States and to third-party victims, pursuant to your consideration of H.R. 2878, the Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007. Before discussing the Department’s efforts to more effectively collect civil and criminal debt, allow me to say a word about our Assistant U.S. Attorneys. As a veteran Assistant United States Attorney myself, and now a component head at the Department, I believe that our success in executing the Department’s mission turns, in large measure, on the skill and experience of federal prosecutors. We are committed to finding ways to continue to recruit and retain the best and brightest Assistant U.S. Attorneys the country has to offer.

Let me assure you that the United States Attorneys Offices (USAOs) work vigorously to collect debts on behalf of the government and third party victims and I applaud their efforts. As a result, the USAOs collected more than \$19 billion in criminal and civil debts from 2002–2006. While these are impressive results, the criminal debt balance across the country has recently grown significantly. As a 2004 Government Accountability Office (GAO) report noted, the amount of outstanding criminal debt almost doubled since GAO’s 2001 report, from \$13 billion in FY 1999 to \$25 billion in FY 2002. By the end of FY 2006, the amount has almost doubled again to nearly \$46 billion.

That figure does not accurately reflect realistic potential recoveries, however. Approximately 90 percent of the outstanding balance is not collectible, according to an independent study. This is due to a variety of reasons, such as the fact that a debtor has been deported or is serving a lengthy prison sentence, or that court orders often fail to require immediate payment. The most prevalent reason, by far, is the requirement of the Mandatory Victims Restitution Act of 1996 (MVRA) that restitution be imposed for the full amount of the loss to victims without regard to a defendant’s ability to pay. As a result, financial penalties are imposed on individuals with no resources, no income, or those who have limited incomes while incarcerated—in other words, individuals who effectively do not have the means to pay the imposed debts.

While GAO’s 2004 report stated that the overall collection rate decreased slightly since its 2001 report, it failed to recognize that amounts collected on behalf of both federal and non-

federal victims have increased substantially. That is, those who have been directly harmed by a defendant's actions are now receiving more in compensation than they have in the past. This is especially important for non-federal victims, many of whom have to rely on the efforts of the USAOs as their only means for recovery. I am pleased to report that for the three years following the 2004 report, i.e., FY 2004, 2005 and 2006, the USAOs have collected well over \$1 billion each year for victims of crime, with more than \$1.5 billion to victims in FY 2006 alone. This is a significant increase over the collection figures for the previous three Fiscal Years—\$800 million or less each year—made all the more impressive because it was accomplished using relatively-unchanged Financial Litigation Unit (FLU) staffing levels in the midst of rising caseloads and massive amounts of debt to collect.

Nevertheless, more can be done in this area, and the Department is fully committed to collecting debts owed to victims of federal crimes. In the 2001 report, GAO made 13 recommendations it believed would help improve the efficiency and effectiveness of criminal debt collection. The Executive Office for United States Attorneys (EOUSA) has addressed all 13 recommendations. As part of this process, EOUSA has produced *The Prosecutor's Guide to Criminal Monetary Penalties*. This manual discusses debt collection and includes the entire process of ensuring that victims of crime are compensated for their losses. This includes charging defendants; negotiating plea agreements; and determining, imposing, and enforcing criminal fines and restitution. The guide goes well beyond the narrow focus of GAO's recommendations and serves as a manual for the FLU's as well as criminal prosecutors, victim-witness coordinators, probation officers, and clerks of courts.

In conjunction with the dissemination of this publication, EOUSA's Office of Legal Education developed and hosted training courses around the Nation for Department of Justice employees, clerks of courts, probation officers, and investigative agents. This series of two-day conferences emphasized the need for communication, cooperation and coordination among the different entities with debt-collection responsibilities in order to maximize recoveries for victims.

In addition, EOUSA has sought and received funding from the Office for Victims of Crime to cover the costs associated with adding criminal debts to the Treasury Offset Program (TOP). The TOP offsets federal payments in order to satisfy—or partially satisfy—a federal debt. In cooperation with the Administrative Office of United States Courts (AOUSC), USAOs have begun to submit criminal debts to the TOP. To date, the USAOs have referred criminal debts totaling \$3.9 billion to the TOP. Additional criminal debts will be submitted once the local clerks of courts have the necessary computer systems in place.

Much of the GAO report focused on the lack of asset investigations resources. As a result, EOUSA has put particular emphasis in this area. The Department has made additional resources available from the Three Percent Fund to assist the districts with asset investigations. The Three Percent Fund, as you know, was authorized by Pub. L. 107-273, Section 11013 (28 U.S.C. § 527 note), which allows the Department to retain “up to 3 percent of all amounts collected pursuant to civil debt collection activities.” This money allows districts to hire outside investigators to work on older, high dollar, complex cases which would otherwise have been difficult to collect, and thus had not been addressed with available FLU resources. For other

cases, we have identified several individuals with asset-investigation expertise that are available to assist the districts. EOUSA has also entered into a nationwide contract for credit bureau report services as well as an online asset search engine. Through these contracts, the FLU's now have convenient, easy-to-use web-based access to credit bureau reports and asset searches that are an important tool in assessing a debtor's ability to pay. In addition, EOUSA developed a training course dedicated solely to asset investigations in debt-collection cases. Furthermore, we are currently in the process of finalizing a reference manual for the FLU's to use in conducting asset investigations.

EOUSA is also developing a State of the District Report and a Compliance Checklist, which will be provided to the USAOs on an annual basis. The State of the District Report will summarize the collection accomplishments of each USAO and provide the United States Attorneys with an invaluable management tool to measure the success of their offices' collection responsibilities. The Compliance Checklist will provide the FLU with an opportunity to review its current policies and procedures to ensure compliance with EOUSA's requirements.

A further example of the Department's commitment in this area was the hiring of an independent contractor to conduct a business process re-engineering study of the debt collection process and recommend a new Department-wide debt collection system. This new system, the Consolidated Debt Collection System (CDCS)—along with the system currently being developed by AOUSC—should greatly reduce the data-entry responsibilities of the FLU's, allowing them to concentrate their efforts on enforcement of the debts. CDCS has recently been implemented in all USAOs and is in the process of being rolled out to the Department's litigating

components.

For FY 2002, GAO estimated the collection rate at only four percent. As a result, EOUSA hired an independent contractor to review the outstanding criminal debt balance portfolio of the USAOs to determine the amount of collectible debt and to outline trends in the data that could lead to increased collections. While we are still in the process of reviewing and digesting the data presented in the report, it is interesting to note that the contractor, based on statistical analyses, estimated that the amount of collectable debt is closer to ten percent rather than the 25 percent estimated by the USAOs. Based on the ten percent figure, the FY 2006 collection rate for criminal debts in the USAOs is approximately 33 percent—that is, \$1.5 billion was collected out of the \$4.6 billion collectable amount of the outstanding balance.

The 2004 report states that the Department had not implemented its general recommendation that the Attorney General, the Director of AOUSC, the Director of OMB, and the Secretary of the Treasury form a joint task force to develop a strategic plan for improving criminal debt collection. On January 5, 2005, the Attorney General established the Task Force on Improving the Collection of Criminal Debt. The Task Force, led by the Department's Office of Legal Policy, includes representatives from EOUSA, the Office of Management and Budget, the Department of the Treasury, and AOUSC. As directed in the conference report accompanying the 2005 Commerce-Justice-State (CJS) appropriation bill, the Task Force submitted a report to the Congress on its activities and the development of a strategic plan for improving criminal debt collection on August 31, 2005. Many of the efforts I have discussed today not only address GAO's recommendations but also are in furtherance of the goals and

objectives set forth in the strategic plan.

Additionally, as outlined in the strategic plan, the Department transmitted to Congress a legislative proposal drafted by the Task Force, the “Restitution for Victims of Crime Act of 2006”, on May 25, 2006, which has been introduced in the Senate as S. 973. In addition, it has been incorporated into H.R. 3156, introduced by Ranking Members Smith and Forbes. Title I of the draft legislation, the “Collection of Restitution Improvement Act of 2006”, amends the MVRA to improve collection procedures by addressing obstacles currently encountered by USAOs in the enforcement of restitution orders. In particular, this provision clarifies that restitution is due immediately upon the imposition of a restitution order, as is the case with an ordinary civil judgment, and that any payment schedule set by a court at sentencing is only a minimum obligation of the offender. An example of why this restitution is necessary can be seen in a recent case out of the Northern District of Texas, *United States v. Roush*, where the district court prohibited the United States from enforcing a restitution order beyond the amount provided in the court-ordered payment schedule even though the defendant had other assets available that could have been used to satisfy the restitution order.

Title II of the draft bill, the “Preservation of Assets for Restitution Act of 2006”, provides prosecutors with the tools to restrain defendants’ assets prior to trial. This provision is necessary because, under current law, there are no statutory provisions that require a defendant to preserve his assets for restitution when charged with an offense for which restitution is likely to be ordered. Indeed, GAO’s 2005 report stated that the lack of procedures available to ensure that assets are preserved for restitution is a major impediment to the effective collection of

restitution. In selected cases reviewed by GAO, court records showed that five to 13 years passed between the time defendants began to engage in criminal activity and the dates of their judgments. During that time, defendants can dissipate their assets because the United States does not obtain any enforcement right for restitution until after the defendant has been sentenced and judgment has been entered. The changes suggested in the proposed legislation are based on existing procedures for asset forfeiture, but are directed toward improving restitution, in which defendants' assets are provided directly to victims rather than forfeited to the government.

I would like to thank Senators Dorgan, Grassley and Durbin for including the draft bill recommended by the Task Force on Improving the Collection of Criminal Debt as an amendment to the 2008 CJS Appropriations bill, which was recently passed by the Senate. I am hopeful that the conference committee will also see the importance of this draft legislation to the lives of crime victims.

By its very nature, the collection of criminal debts is difficult. The outstanding criminal debt balance is now four times greater than the amount GAO reported in its 2001 report. As mentioned earlier, and discussed in the report, the primary reason for this dramatic increase—which was not unexpected—is the MVRA's mandate that restitution be imposed in most federal crimes for the full amount of the loss, regardless of the defendant's ability to pay. The solution for improving the collection process is complex and, unfortunately, there are no quick fixes that can be put into place that will guarantee success. Nevertheless, as I hope that I have made clear, the Department holds the collection of debts owed to the federal government and victims of crime as a high priority, and it is firmly committed to continuously improving the process. I

believe that the steps that we have taken and will continue to take will go a long way toward making a difference in the lives of federal victims of crime.

With regard to H.R. 2878, the “Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007”, the Department is still reviewing this very complex piece of legislation and has not as yet taken a formal position on it. The Administration's views on the bill will be the subject of a forthcoming letter. Before concluding, I should identify a few areas where the Department has questions and some possible concerns regarding the H.R. 2878 as currently drafted, including funding for the proposed retirement benefit for AUSAs, the legislation’s impact on the Crime Victims Fund, fairness to other Department employees, and its possible impact on attrition rates. In the past, the Administration has opposed the extension of law enforcement officer retirement provisions to other elements of the law enforcement community, even though, unlike H.R. 2878, those extension proposals would have included mandatory retirement, the principal rationale for the enhanced benefit provisions.

The Department has several concerns regarding the conversion of AUSAs to the Law Enforcement Officer (LEO) retirement system. First, the Department has concerns about perceptions of fairness in providing expanded retirement benefits to AUSAs, but not to others in the Department. Many other department attorneys perform substantially the same work as AUSAs. In fact, litigating division attorneys often work side-by-side with their AUSA counterparts on key cases, but they would not receive this substantial benefit. We also believe there will be non-attorney staff that could be unfairly impacted by this legislation. For example,

investigators who support law enforcement, security specialists, and other staff whose duties support or closely align with those of current LEO positions will believe their jobs should receive the same benefits proposed here for AUSAs, exacerbating the financial concerns with the bill.

Second, although the legislation provides a potential means for funding required increased agency contributions to the Civil Service Retirement and Disability Fund for AUSAs that convert to the LEO retirement system, it does not address the fact that the Department has not made ongoing contributions to the Fund that it otherwise would have been required to make for LEO employees. Those retroactive agency-share contributions would have amounted to roughly \$1.2 billion. This amount reflects an effective shortfall in the Fund, in that AUSAs who convert to LEO status will be drawing enhanced annuities for which agency contributions were never made. While the legislation as drafted does not require that the Department bear the cost of this shortfall, the shortfall nevertheless exists, and the taxpayer in one way or another will bear this cost.

Third, the cost of funding ongoing increased agency contributions to the Civil Service Retirement and Disability Fund would be on the order of \$75-85 million per year. Although the legislation proposes a means for funding this cost through surcharges on unpaid debts and new offsets, if collections are not sufficient to cover these costs, they would instead be borne by the U.S. Attorneys' operating appropriation. Considering that the vast majority of criminal debt is uncollectible, it is difficult to assume that additional surcharges and penalties could be collected.

Accordingly, the Department's and the U.S. Attorneys' appropriation bear a potentially significant risk.

Regarding the Crime Victims Fund, the legislation as drafted imposes a five percent surcharge on delinquent criminal monetary penalties, but also provides that 95 percent of each principal payment made by a defendant be credited to the Crime Victims Fund, with five percent of the payment going to the Enhanced Financial Recovery Fund established by the legislation. This at least delays the crediting to the Crime Victims Fund of 5 percent of each principal payment—and indeed, as drafted it appears to permanently prevent such crediting altogether. This shortfall represents five percent less than would be available to victims of crimes absent the legislation.

As I noted at the beginning of my testimony, the Department recognizes the invaluable role of the AUSAs in its mission and its leadership is committed to finding ways to recruit and retain the very best.

Thank you again for the opportunity to testify, and I look forward to answering the Committee's questions.