LEGISLATIVE PROPOSALS BEFORE THE 110TH CONGRESS TO AMEND FEDERAL RESTITUTION LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

APRIL 3, 2008

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CONTENTS

APRIL 3, 2008

Page

OPENING STATEMENT

The Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Chairman, Subcommittee on Crime, Terrorism, and Homeland Security 1
The Honorable Louie Gohmert, a Representative in Congress from the State of Texas, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security 3
The Honorable Steve Chabot, a Representative in Congress from the State of Ohio, and Member, Subcommittee on Crime, Terrorism, and Homeland Security 4

WITNESSES

The Honorable Byron Dorgan, a United States Senator from the State of North Dakota
Oral Testimony 11
Prepared Statement 22
Mr. Jonathan Turley, J.B. and Maurice C. Shapiro Professor of Public Interest Law, George Washington Law School, Washington, DC
Oral Testimony 27
Prepared Statement 30
Andrew Weissmann, Esquire, Jenner & Block LLP, New York, NY
Oral Testimony 46
Prepared Statement 47
David B. Smith, Esquire, English & Smith, Alexandria, VA
Oral Testimony 52
Prepared Statement 54
Mr. Paul G. Cassell, Professor, S.J. Quinney College of Law, University of Utah, Salt Lake City, UT
Oral Testimony 69
Prepared Statement 71

APPENDIX

Material Submitted for the Hearing Record 141

LEGISLATIVE PROPOSALS BEFORE THE 110TH CONGRESS TO AMEND FEDERAL RESTITUTION LAWS

THURSDAY, APRIL 3, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:08 p.m., in room 2141, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Johnson, Davis, Gohmert, Chabot, and Lungren.

Staff Present: Bobby Vassar, Subcommittee Chief Counsel; Karen Wilkinsen, AOC Detailee; Veronica Eligan, Majority Professional Staff Member; Mario Dispenza (Fellow), ATF Detailee; and Caroline Lynch, Minority Counsel.

Mr. SCOTT. Good afternoon. I am pleased to welcome you to this hearing on the legislative proposals before the 110th Congress to amend Federal restitution laws.

We are here at the Subcommittee on Crime, Terrorism, and Homeland Security to hear testimony about the proposed legislation that would make sweeping changes to the Federal restitution laws aimed at reversing the trend of the increasing backlog of unpaid restitution of crime victims, which the Government Accountability Office estimated to be $25 billion at the end of 2005.

We will hear testimony about S. 973, sponsored by the Senator from North Dakota, Mr. Dorgan, and H.R. 4110, sponsored by the gentlelady from New Hampshire, Ms. Shea-Porter, in the House of Representatives, each titled, the "Restitution for Victims of Crime Act."

We will also hear testimony about H.R. 845, the "Criminal Restitution Improvement Act," sponsored by the gentleman from Ohio, Mr. Chabot, which was also introduced in the House.

[The bills referred to are printed in the Appendix of this publication.]

Mr. SCOTT. The bills would widen the number and type of Federal laws that would trigger mandatory restitution to a victim of crime and broaden the definition of a victim. They also would increase the type of victim costs that may be included in restitution orders, such as the victim's attorney fees. And they enhance en-

forcement of the restitution orders, such as mandating payment while a case is pending, and by delegating enforcement authority to prison officials through inmate financial responsibility.

Each of these changes is intended to get more compensation to more victims. But, by far, the most far-reaching changes in the proposals that they share in common is that they would authorize the U.S. Attorney to freeze the assets of suspects even before they are charged with any crime. The objective is to prevent defendants from hiding their assets, to keep them available to pay restitution to victims if and when the court orders restitution.

However, proponents of the measure have concerns about whether the objective behind freezing assets would actually be met and whether it would prevent a person from being able to hire counsel. Thus, this proposal is not only the most far-reaching but also needs the most discussion.

Under the proposals, the U.S. Attorney would be able to get an *ex parte* restraining order, freezing a suspect's assets, by showing a judge that the suspect, if indicted and if convicted, would be liable for victim restitution. The suspect would have no notice that the U.S. Attorney is applying for the order and, thus, would not be able to offer argument against it before it would take place.

Opponents of the measure consider it a Government seizure with no conviction and no linking to frozen assets as fruits of a crime or even tools to commit a crime, such as the Government must show in a typical asset-forfeiture procedure. The person may be entitled to a hearing after their assets are seized; however, to meet this burden of proof to get a hearing, the person must show that the seizure has hindered his ability to hire a lawyer or that the seizure has deprived him of the basic necessities of life.

Yet, even if a person gets a hearing, the court must deny his request to release his assets if the court finds that it is probable that he must pay restitution if convicted. Thus, his claim that the seizure has hindered his ability to hire counsel would, in essence, apparently have no effect on the court's decision.

If opponents to the measure are correct, this is not only likely to be an unconstitutional encroachment on one's sixth amendment right to counsel but also an unconstitutional violation of due process, which is why this measure needs full vetting.

Proponents to the proposals point out that restitution is already mandated in most instances of victim loss in Federal criminal cases. In 2001, the Government Accountability Office reported, quote, "The Mandatory Victims Restitution Act of 1996, requiring the court to order full restitution to each victim in the full amount of each victim's losses without regard of the offender's economic situation, has not resulted in significantly more restitution being collected but only a dramatic increase in the balance of reported uncollected criminal debt."

Also the GAO report indicated that, even in the few instances where the defendant does have some money or assets, it is difficult to collect restitution, noting that criminal defendants may be incarcerated with little earning capacity, and therefore their assets acquired through criminal activity may be seized by Government prior to the conviction. Thus, by the time fines and restitution are

assessed, offenders may have no assets left for making payments on restitution.

Now, if, as the GAO report indicates, the vast majority of offenders are broke when they come into prison, going out and trying to find a job with a felony record seems unlikely to improve their ability to have money to meet their own need to survive, the survival of their dependents, and have any money left over for restitution.

So, although everyone is in favor of more restitution, mandatory restitution, in even more cases, may or may not be the solution to meet that end, because we might be violating the old English maxim that you can't squeeze blood out of a turnip.

However, there are alternatives that may, in fact, meet the goal of getting more restitution to victims. And we would like to discuss them today, as we discuss the legislative proposals before us.

It has been my observation that restitution works best when it is an alternative to the incarceration, which results in the loss of employment income and assets that accompany such incarceration.

I believe that we should consider biting the bullet and establishing a victims' restitution fund from Federal appropriations and payments we can easily collect or reasonably collect from offenders. We should then refocus the Federal victim restitution collection efforts on areas where it may have more impact, such as going after assets of white-collar offenders who profit handsomely from their crimes and may have a means of paying. That way, victim restitution is neither dependent on the vagaries of an offender's ability to pay or Government's collection efforts.

So, as we discuss legislative proposals, I would like to discuss alternatives so that we may come together and establish the best mechanism for meeting our common goal.

It is now my pleasure to recognize the esteemed Ranking Member of the Subcommittee, the gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Chairman Scott. I appreciate your holding this hearing on a problem that Congress can and should correct, providing restitution to victims of crime.

Every 30 minutes, there is a murder in this country; every 5 minutes, a rape; every minute, a robbery; and every 36 seconds, an aggravated assault. Nearly 16 million Americans were the victims of crime in 2006.

These victims suffer a tremendous loss at the hands of their assailants. In addition to physical and emotional trauma, victims endure financial loss, including medical expenses, lost earnings and property damage. Annual losses for crime victims have been estimated at $105 billion.

Restitution has been part of our criminal justice system for nearly a century. It plays an important role in rehabilitating offenders by holding them accountable to their victims. Restitution also attempts to make victims closer to being whole by compensating their financial loss caused by the offender's criminal conduct, though it is clear the victims of violence are never really put back to the place they were before an attack.

Although Congress granted Federal courts explicit authority to order restitution in 1925, this authority was infrequently used for decades. Congress responded in 1982 with the Victim and Witness

Protection Act, which vested Federal courts with the general discretion to order restitution in any criminal case.

In the Violent Crime Control and Law Enforcement Act of 1994, Congress established mandatory restitution for sexual abuse, sexual exploitation of children, and domestic violence cases. In the Mandatory Victim Restitution Act, Congress made restitution mandatory for most serious Federal crimes, including crimes of violence and property crime.

Despite these Federal laws promising restitution to crime victims, the Government has failed to make payment on its promise. As much as 87 percent of criminal debt—restitution and fines, that is—is uncollected each year. The Justice Department estimates that the amount of uncollected Federal criminal debt increases with each passing year, jumping from $41 billion in fiscal year 2005 to nearly $46 billion in fiscal year 2006 and over $50 billion in fiscal year 2007.

In California, there is over $6 billion in uncollected Federal criminal debt for fiscal year 2007. In my home State of Texas, there is over $3 billion of uncollected debt, and over $1 billion in Michigan and Ohio.

That is why today's hearing is so important. I wish to thank Senator Dorgan and my colleague, Congressman Chabot, for their leadership on this issue. The legislation each has sponsored will come closer toward fulfilling Congress's promise of restitution for crime victims.

I would also like to add that, as a State district judge handling felony cases, often one of the considerations of whether or not to give somebody probation included whether or not, by giving them probation, there was an opportunity for a victim to become closer to being made whole. And if that were a possibility, then as a condition of probation, I could lock somebody up for as much as 2 years through different programs. But if there was a chance we could require restitution, then that would be ordered and made reasonable to where it could be met. And if it wasn't met, that was a breach of the conditions of probation. Might as well lock them up in prison if they weren't going to try to pay their restitution.

There is a different system here with the Federal authorities, but we have the authority here in Congress to fix things. It is one of the reasons I left the bench, because I didn't want to legislate from the bench. And I saw that through innovations, such as Senator Dorgan has proposed here, that we could literally try to fix things that we actually thought through and came up with a solution toward.

So, Senator, thank you, again, for your time and being here today. I look forward to hearing your testimony.

And yield back the balance of my time, Mr. Chairman.

Mr. SCOTT. Thank you.

Does the gentleman from Georgia have a comment?

The gentleman from Ohio is the chief sponsor of one of the bills, and we would call on him to describe his legislation at this time.

Mr. CHABOT. Thank you very much, Mr. Chairman. And I would like to thank you for holding this important hearing today and our witnesses for taking the time to testify.

And I want to thank you, Senator, for your leadership in this area of restitution.

Last year, at this time, the full Judiciary Committee was considering the Second Chance Act, which, among other things, reauthorized $360 million for re-entry programs for offenders. As the Committee considered the bill, I pointed out that it was missing a critical section, one that would have made the bill fairer and more just, and that is making the payment of restitution to the victims of criminal offenses mandatory.

In 2004, this Committee, the House, the Senate and the President recognized the need to bring greater fairness to our criminal justice system, particularly for crime victims. Through the Justice for All Act and the enactment of the Crime Victims' Bill of Rights, we gave victims a stronger voice in our criminal justice process. Included among these rights is the right to full and timely restitution as provided by law.

Yet victims continue to bear the brunt of crime in this country. According to the Department of Justice, crime costs victims and their families more than $105 billion, as was mentioned, in lost earnings, public victim assistance, and medical expenses. Moreover, despite a victim's right to, quote, "full and timely restitution," unquote, it remains one of the most under-enforced victims' rights within our just system. In fact, 87 percent, as has been mentioned, of criminal debt, including restitution and fines, goes uncollected each year. And the amount of outstanding criminal debt is only expected to increase, ballooning from $269 million to almost $13 billion. In fact, in my own State of Ohio, as was mentioned, more than $1.25 billion in criminal debt remained uncollected at the end of fiscal year 2007.

The Criminal Restitution Improvement Act of 2007, which I introduced last year, would fulfill the promise that we made to victims in 2004 and let them know that they have not been forgotten. H.R. 845 would make the payment of restitution mandatory in all Federal offenses for which monetary losses are identifiable.

In making restitution mandatory, this bill takes into account a defendant's economic circumstances and those that depend on the defendant when restitution decisions are made. Moreover, the bill allows the Attorney General to collect unreported or newly discovered assets above the payment schedule, which currently cannot be applied.

H.R. 845 is supported by the leading crime victims' organizations, including Parents of Murdered Children, the National Organization for Victims Assistance, and the National Center for Victims of Crime, just to name a few.

I would ask unanimous consent, Mr. Chairman, to enter additional letters of support for H.R. 845 by various crimes victims' rights organizations into the record.

Mr. SCOTT. Without objection, so ordered.

Mr. CHABOT. Thank you, Mr. Chairman.

[The letters follow:]

March 28, 2007

The Honorable Steve Chabot
United States House of Representatives
Washington, DC 20515-3501

Dear Congressman Chabot:

The National Center for Victims of Crime, Justice Solutions, Inc., Mothers Against Drunk Driving, the National Alliance to End Sexual Violence, the National Association of VOCA Assistance Administrators, the National Coalition Against Domestic Violence, the National Crime Victim Law Institute, the National Network to End Domestic Violence, and the Rape Abuse & Incest National Network wish to express our support for H.R. 845, the Criminal Restitution Improvement Act of 2007. This legislation would significantly strengthen the collection of crime victim restitution at the federal level, bringing important resources to victims of crime.

Last year saw the 10th anniversary of the federal Mandatory Victims Restitution Act of 1996. In passing that Act, Congress intended to "ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due" as well as "to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society." [S. Rpt. No.104-179, at 24 (1995)].

Unfortunately, the promise of that legislation has yet to be realized. A series of GAO reports from 2001 through 2005 have pointed to significant problems in the collection of victim restitution. Today, an estimated $46 billion in federal criminal debt remains uncollected; most of this amount is restitution owed to crime victims. This situation must be improved. Unpaid restitution directly affects the ability of crime victims to rebuild their lives.

Passage of the Criminal Restitution Improvement Act is a critical step in making the right to restitution a reality for many federal crime victims. We applaud your work on this important issue and urge your colleagues to support the Criminal Restitution Improvement Act of 2007.

Sincerely,

JUSTICE SOLUTIONS, INC.
MOTHERS AGAINST DRUNK DRIVING
NATIONAL ALLIANCE TO END SEXUAL VIOLENCE
NATIONAL ASSOCIATION OF VOCA ASSISTANCE ADMINISTRATORS
NATIONAL CENTER FOR VICTIMS OF CRIME
NATIONAL COALITION AGAINST DOMESTIC VIOLENCE
NATIONAL CRIME VICTIM LAW INSTITUTE
NATIONAL NETWORK TO END DOMESTIC VIOLENCE
RAPE, ABUSE, & INCEST NATIONAL NETWORK

One of "America's 100 Best Charities"
—*Worth* magazine

March 27, 2007

The Honorable Steve Chabot
United States House of Representatives
Washington, DC 20515-3501

Dear Congressman Chabot:

I am writing on behalf of the Rape, Abuse & Incest National Network, the nation's largest anti-sexual assault organization, to express support for the Criminal Restitution Improvement Act of 2007 (H.R. 845), which you introduced in the 110th Congress.

Victims of sexual violence experience not just physical and emotional injuries, but often suffer financially as well. This legislation would improve restitution collection efforts and help make sexual assault victims whole. The Act, which makes restitution mandatory for federal crimes resulting in pecuniary loss to identifiable victims, would bring greater fairness to the restitution system in the United States.

In closing, we support the enactment of this important legislation, which would benefit many victims of federal crimes of sexual violence. We commend you for your dedication to crime victims and applaud your hard work on this legislation.

Sincerely,

Scott Berkowitz
President and Founder

2000 L Street, N.W., Suite 406
Washington, DC 20036
National Sexual Assault Hotline: 800.656.HOPE
P: 202.544.1034 • F: 202.544.3556
www.rainn.org

National Organization of
Parents Of Murdered Children, Inc.
For the families and friends of those who have died by violence.

100 East Eighth Street, Suite B-41 • Cincinnati, OH 45202 • Toll Free: (888) 818-POMC
Fax (513) 345-4489 • Website: www.pomc.org • Email: natlpomc@aol.com

March 27, 2007

Representative John Conyers
Chairman
House Judiciary Committee
2426 Rayburn Building
Washington, DC 20515

Representative Lamar S. Smith
Ranking Member
House Judiciary Committee
2184 Rayburn House Office Building
Washington, D. C. 20515

Dear Representative Conyers and Smith;

On behalf of the National Organization of Parents Of Murdered Children, Inc (POMC) I would like to urge your support for H. R. 845, the Criminal Restitution Improvement Act of 2007. POMC was founded in 1978 by Charlotte and Bob Hullinger in Cincinnati, Ohio, after the murder of their daughter. What was once a small group is now a national organization with over 100 chapters and 350 contact people throughout the United States and abroad. Over 100,000 requests for POMC's services and assistance received each year.

H. R. 845.will provide some very important provisions to helping crime victims receive their court-ordered restitution such as;

- Makes payment schedules discretionary. Courts have interpreted current law to require a payment schedule for all restitution orders. Payment schedules often do not commence until after the defendant's incarceration ends and order only nominal monthly payments, even if the defendant has the financial means to pay more.

- Requires that restitution be paid over the shortest time possible.

- Authorizes the court to direct the defendant to repatriate oversees assets or surrender interest in an asset to comply with a restitution order.

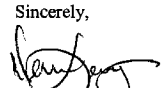
- Authorizes the Attorney General to collect unreported or newly discovered assets above the payment schedule. The Financial Litigation Units of the U.S. Attorney's Offices expend a tremendous amount of time and resources investigating the assets of criminal defendants. However, even when new or hidden assets are discovered, current law has been interpreted to prevent the FLUs from applying these assets if it would exceed the payment schedules.

- Makes restitution mandatory for ALL federal offenses. The Justice for All Act of 2004 expressed a host of rights for crime victims, including "the right to full and timely restitution as provided by law." H.R. 845 makes this promise a reality

Restitution is a fundamental need of crime victims. Its importance for victims with respect to financial as well as psychological recovery from the aftermath of crime cannot be overestimated. Being a victim of a crime, especially a violent crime, leaves a devastating impact on its victims. You cannot put a price tag on human life and there is no financial remuneration that can ever replace what victims have lost. However, restitution holds the offender accountable and, when paid, helps offset the economic loss experienced by the victim, who is often left with medical bills, funeral costs and other expenses. In some cases, a murder takes the life of the primary bread winner, leaving no way to even pay the rent.

Please support H. R. 845 in an effort to further assist crime victims collect the restitution they are legally entitled to receive.

Sincerely,



Dan Levey
National President
National Organization of Parents Of Murdered Children, Inc.

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Mr. CHABOT. Senator Dorgan has also introduced similar legislation, which he will describe in a few moments if we quit talking up here very soon. But I think it is safe to assume that we both believe that it is not too much to ask of our criminal system that it ensure that offenders repay their debts. Moreover, I believe the compliance with restitution orders is a strong measure of a prisoner's willingness to successfully re-enter our communities.

If we are willing to spend more than $360 million a year on offenders, doesn't fairness and justice dictate that victims should be able to receive what they lost, at a minimum? Why should these innocent individuals continue to bear the brunt of someone else's actions—criminal actions, I might add?

Again, I thank the Chairman for holding this hearing and our witnesses, particularly Senator Dorgan and Judge Cassell, for taking time out of their busy schedules to be with us here today. And I yield back the balance of my time.

Mr. SCOTT. Thank you. Thank you very much.

Our first witness is the Senator from North Dakota, the Honorable Byron Dorgan, sponsor of S. 973. He has a long and distinguished career as a Member of Congress, serving 6 years in the House and currently in his third term as Senator representing North Dakota. He earned a Bachelor of Science degree from University of North Carolina and Master's of Business Administration from the University of Denver.

Senator, your written statement will be made part of the record in its entirety, and we ask you to make whatever statement you would like to make now, hopefully staying within 5 minutes, but we will see. The lighting device is at the table.

TESTIMONY OF THE HONORABLE BYRON DORGAN, A UNITED STATES SENATOR FROM THE STATE OF NORTH DAKOTA

Senator DORGAN. Mr. Chairman, thank you very much.

It is actually North Dakota, not North Carolina, but it is north in any event.

And I am really pleased to be back and pleased, Chairman Scott, that you have called these hearings.

And I want to say first that Senator Grassley, the lead cosponsor on the bill that we introduced in the Senate, has asked to add a letter as part of this testimony. I ask consent that that be done.

[The letter follows:]

Reply To:
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(202) 224-3744
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United States Senate

CHARLES E. GRASSLEY
WASHINGTON, DC 20510-1501

Reply To:
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☐ 131 West 3rd Street
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(563) 322-4331
☐ 307 Federal Building
8 South 6th Street
Council Bluffs, IA 51501-4204
(712) 322-7103

April 2, 2008

The Honorable Robert C. "Bobby" Scott
Chairman
Subcommittee on Crime, Terrorism and
Homeland Security
Committee on the Judiciary
U. S. House of Representatives
Washington, DC 20515

The Honorable Louie Gohmert
Ranking Member
Subcommittee on Crime, Terrorism, and
Homeland Security
Committee on the Judiciary
U. S. House of Representatives
Washington, DC 20515

Dear Chairman Scott and Ranking Member Gohmert:

I write today in support of S.973, the Restitution for Crime for Victims of Crime Act which unanimously passed the Senate as part of the FY2008 Commerce, Justice, Science, and Related Agencies Appropriations Act on October 16, 2007. As the House Committee on the Judiciary, Subcommittee on Crime, Terrorism and Homeland Security hears testimony regarding legislative proposals to amend Federal restitution laws in the 110th Congress, I am compelled to share my views and strong support for this vital legislation.

Victims of federal crimes are generally entitled to "full and timely restitution" for losses from a convicted offender under Federal law. Despite this requirement, the amount of restitution that remains uncollected continues to spiral upward and currently stands at well over $45 billion. This gap in the collection of criminal restitution is unacceptable and as a senior member of the Senate Committee on the Judiciary and the Subcommittee on Crime and Drugs, I joined my colleague Senator Dorgan in cosponsoring S.973. This bi-partisan legislation would provide necessary tools to the Department of Justice to ensure that victims of crime are provided the restitution that they are rightfully owed.

Crime victims are often traumatized long after the initial crime. Restitution laws were developed as a way of making a victim whole once an offender has been punished. However, ever crafty criminals have taken advantage of the criminal justice system and have learned that they can continue to live the high life based upon their ill gotten gains long after the criminal wrongdoing is discovered. These unscrupulous individuals often travel the world, purchase million dollar homes in states that provide an unlimited "homestead exemption", or even pass illegally obtained funds to friends or family members—sometimes through shell companies but often times in plain sight. This abuse of our criminal justice system needs to stop.

S.973 updates our restitution laws and removes many existing impediments to increased collections. It will also provide new tools to help the Department of Justice prevent criminal defendants from spending down or hiding assets by mirroring restitution laws with our current federal forfeiture laws. The bill uses forfeiture laws as an example because it is a current, existing mechanism that is familiar to the courts, judges, prosecutors, and criminal defense lawyers. Crime victims should

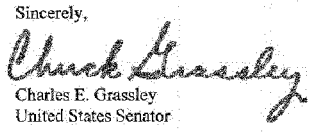
have a restitution system that is at least as effective as the systems used to combat drug crime and money laundering.

I understand that some have raised objections to S.973 on the grounds that it is too restrictive and punitive to criminal defendants when our legal system holds criminal defendants innocent until proven guilty. However, this legislation is designed with this concern in mind by allowing a criminal defendant to challenge a court's pre-judgment asset preservation order. This includes the ability of a criminal defendant to challenge a post-indictment restraining order if there is no probable cause for that order. Further, there are provisions included in the bill that allow the judge to grant adequate resources for attorney's fees and living expenses. In short, the bill trusts the trial judge to grant the release of any assets necessary for attorney's fees. We trust judges to grant reasonable attorney's fees in civil cases, there is no indication that they will act otherwise in a criminal trial.

Our legislation is supported by a number of organizations, including: The National Center for Victims of Crime, Mothers Against Drunk Driving, the National Organization for Victims Assistance (NOVA), the National Alliance to End Sexual Violence, Parents of Murdered Children, Inc., Justice Solutions, the National Network to End Domestic Violence, the National Coalition Against Domestic Violence, the National Association of VOCA Assistance Administrators (NAVAA) and the National Crime Victim Law Institute. Further, it has the full support and backing by the Department of Justice and it also passed the United States Senate by unanimous consent, hardly a small feat.

I encourage the Subcommittee to review S.973 when looking for legislative solutions to the ever increasing gap between restitution awards and actual collections. Criminals should not be able to use our criminal justice system to their advantage and avoid paying restitution. This legislation is a step in the right direction for ensuring that innocent victims of crime are given what they deserve.

Sincerely,



Charles E. Grassley
United States Senator

Cc: The Honorable John Conyers, Jr.
Chairman
House Committee on the Judiciary

The Honorable Lamar S. Smith
Ranking Member
House Committee on the Judiciary

Senator DORGAN. The National Center for Victims of Crime, I would like to ask consent that their statement in support of the bill also be a part of the hearing record.

[The information referred to follows:]

STATEMENT OF MARY LOU LEARY
Executive Director
National Center for Victims of Crime

Submitted to the House Subcommittee on
Crime, Terrorism, and Homeland Security
Committee on the Judiciary
April 3, 2008
Regarding Legislative Proposals to Improve
the Collection of Crime Victim Restitution

The National Center for Victims of Crime submits this statement for the consideration of Chairman Scott, Ranking Member Gohmert, and members of the Subcommittee on Crime, Terrorism, and Homeland Security. We urge this Subcommittee to approve legislation mirroring the provisions of S. 973, the Restitution for Victims of Crime Act of 2007. We urge full consideration of the Criminal Restitution Improvement Act, H.R. 845, and the Restitution for Victims of Crime Act of 2007, H.R. 4110.

As a national resource and advocacy organization for victims of crime, the National Center has long advocated for meaningful and enforceable rights for crime victims. The right to restitution is among the most tangible of all rights accorded crime victims, because through it the offender can redress some of the damage done by the crime.

Twelve years ago this month, Congress passed the federal Mandatory Victims Restitution Act of 1996.[1] In passing that Act, Congress intended to "ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due" as well as "to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."[2] Unfortunately, it is clear that this promise has gone unfulfilled.

Recent estimates of uncollected federal criminal debt—most of it restitution owed to victims of crime—recently topped $50 billion. Never has our failure to respond to crime victims appeared in such stark terms. This systemic failure to enforce crime victims' right to restitution must be addressed.

I know from my experience as a victim advocate and a former federal and state prosecutor that collecting restitution is of great importance to victims of crime. Some of the most heartbreaking restitution cases, particularly prevalent at the federal level,

involve elderly victims who have lost their life savings to fraud. The crime robs them not only of their money, but also of their sense of security and even their ability to remain independent and live in their own homes. The ensuing depression and stress may lead to a steep decline in their physical health. For these victims, restitution may preserve their future.

Even for victims who have not lost their life savings, restitution for the harm they sustained is important as they rebuild their lives. Repayment of their financial losses, including property losses, can be crucial in helping to repair the damages from the offense. It is also important as a tangible demonstration that the state, and the offender, recognize that the harm was suffered by the victim and that amends will be made.

Restitution is important for offenders as well. Courts have recognized that restitution is significant and rehabilitative because it "forces the defendant to confront, in concrete terms, the harm his or her actions have caused."[3] In fact, a study that examined the connection between restitution and recidivism found that individuals who paid a higher percentage of their ordered restitution were less likely to commit a new crime.[4] Significantly, the payment of criminal fines did not have this effect, indicating that it is the act of reparation to the victim that is important.[5]

Enforcing orders of restitution is also important to our criminal justice system. When a criminal court has issued an order, and that order remains unenforced, respect for our justice system suffers. Victims lose faith, criminal justice system employees become cynical, and offenders learn that they will not be held accountable when they conduct themselves as if they are "above the law."

The National Center has spent many years examining the issue of restitution, working with advocates and policymakers to promote best practices in implementing this key victims' right.[6] We have watched with interest the repeated reports and recommendations made by the Government Accountability Office (GAO), and Congress' response to this issue.

- In 2001, the GAO released a report quantifying the failure to collect growing amounts of criminal debt. "Criminal Debt: Oversight and Actions Needed to Address Deficiencies in the Collection Processes" included 14 recommendations to the Department of Justice to improve criminal debt collection.[7]

- In 2004, the GAO issued a report calling the Department to task for failing to fully implement its recommendations. "Criminal Debt: Actions Still Needed to Address Deficiencies in Justice's Collection Processes" did not include new recommendations but reaffirmed outstanding recommendations from its earlier report.[8]

- In November of 2004, Congress noted the alarming continued growth of uncollected federal criminal debt, and called on the Attorney General to "establish a task force within 90 days of enactment of this Act that includes other Federal

agencies, including, but not limited to, the Department of the Treasury, the Office of Management and Budget, and the Administrative Office of the U.S. Courts, to participate in the task force. Led by the Department of Justice, the task force will be responsible for developing a strategic plan for improving criminal debt collection. The strategic plan shall include specific approaches for better managing, accounting for, reporting, and collecting criminal debt." Congress called on the Department of Justice to report back on its progress.[9]

- In August of 2005, the Department of Justice transmitted a report by the Task Force on Improving the Collection of Criminal Debt, which noted its progress on improving debt collection and developing legislative proposals to make further improvements.[10]

- In May of 2006, the Department transmitted proposed legislation to Congress.[11]

- In June of 2006, Senator Byron Dorgan (D-ND), together with Senators Susan Collins (R-ME), Michael DeWine (R-OH), Richard Durbin (D-IL), and Charles Grassley (R-IA), introduced S. 3565, the "Restitution for Victims of Crime Act of 2006." This legislation tracked the Department's proposal. In that same month, Congressman Steve Chabot (R-OH) introduced H.R. 5673, the "Criminal Restitution Improvement Act of 2006." Co-sponsoring the bill were Congressmen Phil Gingrey (R-GA), Louis Gohmert (R-TX), Daniel Lungren (R-CA), and Ted Poe (R-TX).

- Legislation was reintroduced in both houses in 2007 and was passed by the Senate in October of 2007.

- In November of 2007, the "Restitution for Victims of Crime Act of 2007," H.R. 4110, was introduced by Congresswoman Carol Shea-Porter (D-NH).

Now it is incumbent on this Committee to give real consideration to this legislation and the issue of improving the collection of victim restitution.

This bill would make a number of procedural changes to improve the collection of restitution. Among the most significant is a provision to allow federal prosecutors to seek the preservation of a defendant's assets prior to conviction to ensure their availability for restitution. Such a procedure is essential to prevent the wasting or hiding of assets between the time of indictment and the time of conviction.

The most recent study of the issue of victim restitution by the GAO examined several high-dollar white collar financial fraud cases and found that only about seven percent of the restitution ordered in those cases was collected—up to eight years after the offender's sentencing.[12] They noted that many fraud defendants have significant financial resources at the start of the criminal case, but by the time of sentencing have dissipated, transferred, or hidden much of their wealth.[13] We must give prosecutors the tools to preserve assets for restitution in appropriate cases.

Several states already allow this under their codes, and most of these provisions have been in existence for more than ten years. In Pennsylvania, prosecutors can seek a temporary restraining order in cases in which there is a substantial probability that the state will prevail, that restitution of more than $10,000 will be ordered, and that failure to enter the order will result in the assets being unavailable for payment of the anticipated restitution.[14] Minnesota and Utah have similar laws.[15]

In California, prosecutors may seek an order to prevent offenders from dissipating or secreting specified assets or property at the time of the filing of a complaint or indictment when a case involves a pattern of fraud and the taking of more than $100,000.[16]

Each of these provisions leaves the entry of an injunction preserving assets within the discretion of the court, allowing the court to weigh the need for such an order against the potential harm to the defendant. California's law specifically provides for the court to consider a defendant's request for release of funds in order to pay reasonable legal fees or necessary and appropriate living expenses, or for posting bail.[17] Importantly, it also requires the court to consider "the significant public interest involved in compensating the victims of white collar crime and paying court-imposed restitution and fines."[18] Clearly, these states consider the weighing of such competing interests within the capabilities of the courts.

Federal prosecutors should have a similar ability to seek to preserve a defendant's assets for purposes of paying victim restitution.

The National Center for Victims of Crime commends Senator Dorgan, Congressman Chabot, and Congresswoman Shea-Porter for their dedication to this issue, and urges this Committee to pass meaningful legislation to improve the collection of restitution. The result would be a more complete recovery for crime victims, a restorative sentence for offenders, and a system that can truly be said to provide justice for all.

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[1] Pub. L. 104–132, title II, subtitle A (§201 et seq.), 110 Stat. 1227 (1996).
[2] S. Rpt. No.104-179, at 24 (1995).
[3] People v. Moser, 50 Cal. App. 4th 130, 135 (1996).
[4] Cynthia Kempinen, "Payment of Restitution and Recidivism," *Research Bulletin* 2, No. 2 (State College, PA: Pennsylvania Commission on Sentencing, October 2002).
[5] Id.
[6] See, for example, National Center for Victims of Crime, "Restitution: Making It Work," *OVC Legal Series Bulletin #5* (November 2002); National Center for Victims of Crime, "Ordering Restitution to the Crime Victim," *OVC Legal Series Bulletin # 6* (November 2002); National Victim Center, "1996 Victims' Rights Sourcebook: A Compilation and Comparison of Victims' Rights Laws," (Arlington, VA: National Victim Center, 1997).
[7] U.S. General Accounting Office, "Criminal Debt: Oversight and Actions Needed to Address Deficiencies in the Collection Processes," GAO-01-664 (Washington, DC: July 2001).
[8] U.S. General Accounting Office, "Criminal Debt: Actions Still Needed to Address Deficiencies in Justice's Collection Processes," GAO-04-338 (Washington, DC: March 2004).
[9] Conference report accompanying the Consolidated Appropriations Act of 2005, H.Rept.108-792, page 716.
[10] Letter from Paul R. Corts, Assistant Attorney General for Administration, U.S. Department of Justice, to

The Honorable Frank Wolf, the Honorable Alan Mollohan, the Honorable Richard Shelby, and the Honorable Barbara Mikulski (August 31, 2005), transmitting the report prepared by the Task Force on Improving the Collection of Criminal Debt.

[11] Letter from William E. Moschella, Assistant Attorney General, U.S. Department of Justice, to the Honorable Dennis Hastert and the Honorable Richard Cheney (May 25, 2006), transmitting legislative proposal, the "Restitution for Victims of Crime Act of 2006."

[12] U.S. Government Accountability Office, "Criminal Debt: Court-Ordered Restitution Amounts Far Exceed Likely Collections for the Crime Victims in Selected Financial Fraud Cases," GAO-05-08 (Washington, DC: January 2005), 3.

[13] Supra, note 2, page 3.

[14] 42 PA Cons. Stat. § 9728 (2007).

[15] Minn. Stat. § 609.532 (2007); Utah Code Ann. § 77-38a-601 (2007).

[16] Cal. Penal Code § 186.11 (2007).

[17] Id.

[18] Id.

Senator DORGAN. And then I would like to commend Congressman Chabot and Congresswoman Carol Shea-Porter, who have worked on this issue. So, especially thanks to them.

You know, this is really interesting, because I was thinking about it a while ago, if you owe money these days, you would probably want to owe it to the U.S. Justice Department. If you're going to owe money to anybody, owe it in the form of something that is a court-ordered restitution to be collected by the Justice Department, because they are only collecting 4 cents on the dollar.

There is $50 billion owed. Now, why is that the case? Because, in most cases, it is the back room at the U.S. Attorney's Office that is asked to collect these things, and they are working up in the front room on prosecutions and so on, and precious little attention is paid to restitutions and fines.

But it is also the case that they are hampered, because the fact is those that have been ordered to provide restitution for victims in many cases have been given ample opportunity to dissipate those assets.

So I just think it is Byzantine that we have any real debate over whether something should be done. My hope is that whatever questions arise would be over what should be done, rather than whether. If, with $50 billion owed to victims, we don't do something, then we don't recognize a problem when it is right in front of us.

So let me mention a couple of things about where we are.

At my request, the GAO reviewed five major white-collar financial fraud cases with outstanding, unpaid restitution. They took a look at the details of five of them. Here is what they found. I have a couple of charts to show you what these folks have been doing.

White-collar crime perpetrators who have been judged guilty and ordered restitution: expensive trips overseas, jewelry, fancy cars, million-dollar homes, spending thousands of dollars a month on entertainment. These are people who have been ordered by the court to pay restitution, who haven't done so, and yet have found ways to spend this money on overseas trips and fancy homes and so on.

All of us ought to be outraged by that, because who are the victims? They are the victims who were victimized previously for which there was ordered restitution.

Now, the fact is many years can pass between the date a crime occurs and the date that a court might order restitution, and that gives criminal defendants ample opportunity to spend or hide their ill-gotten gains.

I have worked for some long while with the Justice Department to try to figure out how you can put together a system that works and one that provides protection for those who have been ordered restitution, because they need some protection to be able to appeal rulings and so on, but especially one that addresses the rights of victims. And I think we have done that.

Let me just describe—I have a number of cases; I will just describe one. A $3.2 billion restitution judgment—that is a big one—entered against defendants. But these defendants were pretty smart, actually. They had some time and they had some opportunity, so they transferred to their wives liquid assets, which they had titled solely in their name previously, transferred cash and securities worth more than $24 million. Another one transferred to

his wife $14 million, real and personal property of $6.7 million. Both created irrevocable trusts during the time they knew they were under criminal investigation. One transferred his trust real estate and liquid assets worth more than $20 million. The other funded his trust with real property currently valued at more than $5 million.

That money, of course, should have gone to victims. That is what the court intended. But because the system doesn't work, they got by with dissipating assets. And we shouldn't—none of us should allow that to happen.

Last fall, the U.S. Senate took up and passed the piece of legislation that Senator Grassley and I offered. We made a couple of changes, but I want you to know that the Senate has passed this legislation. I have visited with the Chairman of the full Committee and with you, Mr. Chairman, Chairman Scott, asking you to consider moving the legislation, as well.

It is supported by the Department of Justice, with whom we have worked, the National Center for Victims of Crime, Mothers Against Drunk Driving, National Organization for Victims Assistance, National Alliance to End Sexual Violence, Parents of Murdered Children, Justice Solutions, and the list goes on. I would like to put the complete list in the record.[1]

But it is pretty clear, A, we have a problem, and it is a big problem, $50 billion. One can make a case that perhaps some of these people will never pay a cent because they are destitute. I understand that. But that is not the reason that brings me to this hearing room.

What brings me to this hearing room is a system which allows some folks with a lot of money to be ordered by the court to provide restitution and, instead, they are taking trips to Europe. They are dissipating their assets. They are giving their money to the kids to start a business. And the victims are told to, "Go fly a kite" and the court doesn't seem to be able to do much about it, because those assets are not protected to be saved for the victims.

Now, Mr. Chairman, you said, and you are absolutely correct, you can't get blood from a turnip. That is true. But we ought to be able to squeeze a little money from those people who have been ordered to provide restitution and who are traveling to Europe for a vacation. We ought to be able to squeeze a little money out of those folks ordered to pay a restitution who are living in a million-dollar house. We ought to be able to squeeze a little money out of those folks who have been ordered to pay restitution to victims who have decided that they want to divert their assets to their spouse and their kids for the purposes of establishing trusts or starting a new business.

And I believe that if we all work together and do the right thing, provide adequate protection with the capability of a judge and the capability of having an attorney for defendants, provide the right protection, I believe we will come to the right conclusion. And that is, victims ought to expect that this Government and the order of restitution from a court will mean something to victims, especially

[1] The complete list referred to is contained in Senator Dorgan's prepared statement which is printed in this published hearing.

when it is ordered against those that have significant assets. That has been the case, and yet victims go wanting. This Congress should not allow that to happen.

The question isn't whether we do something. We should. The question is, what do we do? Can this be improved upon? Probably. But I certainly hope that this Committee will do what the full Senate has done. The full Senate has passed my legislation, the Dorgan-Grassley bill. My hope is the House will do the same.

Mr. Chairman, you are good to allow me the opportunity to come back over to the House and spend a bit of time with you, and I thank you very much for convening this hearing.

[The prepared statement of Mr. Dorgan follows:]

PREPARED STATEMENT OF THE HONORABLE BYRON DORGAN, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Chairman Scott and Ranking Member Gohmert, I would like to thank you for holding a hearing today to examine proposals to improve the collection of unpaid federal court-ordered restitution, including bipartisan legislation I have authored with Senator Grassley in the Senate called the Restitution for Victims of Crime Act, S. 973. Representative Chabot and Representative Carol Shea-Porter have introduced related measures in the U.S. House.

As all of us know, victims of crime and their families often face a significant challenge trying to rebuild their lives and recover a sense of emotional and financial security after a crime has been perpetrated against them. By law, victims of federal crimes are entitled to "full and timely restitution" for losses from a convicted offender.

Unfortunately, new data from the Department of Justice shows that the amount of uncollected federal criminal debt is still spiraling upward—jumping from $6 billion in 1996 to more than $50 billion by the end of fiscal year 2007. That's a more than eight-fold increase in uncollected criminal debt owed to the victims of federal crimes.

Government Accountability Office (GAO) investigators found that federal criminal justice officials collected an average of only four cents on every dollar of criminal debt that was owed to crime victims in 2000, 2001 and 2002.

These figures are disheartening, and the victims of crime in this country deserve better. Crime victims should not have to worry if those in charge of collecting court-ordered restitution on their behalf are making every possible effort to do so before criminal offenders have the opportunity to fritter away their ill-gotten gains on lavish lifestyles and the like. This matter is not mere speculation.

At my request, the GAO reviewed five white collar financial fraud cases with outstanding unpaid restitution. GAO found:

- Crime perpetrators who owed restitution taking expensive trips overseas.
- Convicted criminals living in million dollar mansions in upscale neighborhoods, but not making their court-ordered restitution payments.
- Criminals who fraudulently obtained millions of dollars in assets were using those assets to buy expensive clothing instead of paying restitution they owed.
- Criminals spending thousands of dollars per month in entertainment, even though court ordered restitution went unpaid.
- Convicted criminals who had taken their ill-gotten gains and established businesses for their children in order to avoid the payment of court ordered restitution.

S. 973 will give Justice Department officials the tools they have requested to help them do a better job collecting court-ordered federal restitution and fines. Our bill includes provisions that will remove many existing impediments to increased collections. For example, Justice Department officials have described a circumstance where they were prevented by a court from accessing $400,000 held in a criminal offender's 401(k) plan to pay a $4 million restitution debt to a victim because that court said the defendant was complying with a $250 minimum monthly payment plan, and that payment schedule precluded any other enforcement actions. S. 973 would remove impediments like this in the future.

This legislation also addresses a major obstacle identified by the GAO for officials in charge of criminal debt collection; that is, many years can pass between the date

a crime occurs and the date a court orders restitution. This gives criminal defendants ample opportunity to spend or hide their ill-gotten gains. That is why S. 973 provides for pre-conviction procedures for preserving assets for victims' restitution. This will help ensure that financial assets in control of a criminal defendant are available when a court imposes a final restitution order on behalf of a victim.

As a safeguard, our bill allows a criminal defendant to challenge a court's prejudgment asset preservation order. For example, a defendant may challenge a post-indictment restraining order if he or she can show that there is no probable cause to justify the restraint. In a similar manner, our proposal includes language that guarantees that an accused party will have access to adequate resources for attorney fees or reasonable living expenses from the time of indictment through the criminal trial.

These pre-conviction procedures for preserving assets for victims' restitution will prevent criminal defendants from spending or hiding their ill-gotten gains and other financial assets. These tools are similar to those already used successfully in some states, by federal officials in certain asset forfeiture cases, and upheld by the courts.

Key provisions of S. 973 would do the following:

- Clarify that court-ordered federal criminal restitution is due immediately in full upon imposition, just like in civil cases, and that any payment schedule ordered by a court is only a minimum obligation of a convicted offender.
- Allow federal prosecutors to access financial information about a defendant in the possession of the U.S. Probation Office—without the need for a court order.
- Clarify that final restitution orders can be enforced by criminal justice officials through the Bureau of Prisons' Inmate Financial Responsibility Program.
- Ensure that if a court restricts the ability of criminal justice officials to enforce a financial judgment, the court must do so expressly for good cause on the record. Absent exceptional circumstances, the court must require a deposit, the posting of a bond or impose additional restraints upon the defendant from transferring or dissipating assets.
- Help ensure better recovery of restitution by requiring a court to enter a pre-conviction restraining order or injunction, require a satisfactory performance bond, or take other action necessary to preserve property that is traceable to a charged offense or to preserve other nonexempt assets, if the court determines that it is in the interest of justice to do so.
- Permit the Attorney General to commence a civil action under the Anti-Fraud Injunction Statute to enjoin a person who is committing federal offense that may result in a restitution order; and permit a court to restrain the dissipation of assets in any case where it has power to enjoin the commission of a crime, not just in banking or health care fraud as permitted under current law.
- Allow the United States under the Federal Debt Collections Procedure Act to use prejudgment remedies to preserve assets in criminal cases that are similar to those used in civil cases when it is needed to preserve a defendant's assets for restitution. Such remedies, including attachment, garnishment, and receivership, are not currently available in criminal cases because there is no enforceable debt prior to an offender's conviction and judgment.
- Clarify that a victim's attorney fees may be included in restitution orders, including cases where such fees are a foreseeable result from the commission of the crime, are incurred to help recover lost property or expended by a victim to defend against third party lawsuits resulting from the defendant's crime.
- Allow courts to order immediate restitution to those that have suffered economic losses or serious bodily injury or death as the result of environmental felonies. Under current law, courts can impose restitution in such cases as a condition of probation or supervised release, but this means that many victims of environmental crimes must wait for years to be compensated for their losses, if at all.

The Restitution for Victims of Crime Act has been endorsed by a number of organizations concerned about the well-being of crime victims, including: The National Center for Victims of Crime, Mothers Against Drunk Driving, the National Organization for Victims Assistance (NOVA), the National Alliance to End Sexual Violence, Parents of Murdered Children, Inc., Justice Solutions, the National Network to End Domestic Violence, the National Association of VOCA Assistance Administrators

(NAVAA) and the National Crime Victim Law Institute. United States Attorney Drew Wrigley in Fargo, North Dakota has said this legislation "represents important progress toward ensuring that victims of crime are one step closer to being made whole."

Last fall, the Senate passed by unanimous consent a Dorgan-Grassley amendment on the Senate floor. This amendment contained all of S. 973 except the bill's environmental crimes title. I hope that members of the House Judiciary Crime Subcommittee and the members of the Full Committee will also agree that the current state of our federal criminal debt collection effort is not acceptable, and that this legislation is a serious effort to improve it.

April 13 marks the beginning of *National Crime Victims' Rights Week*, an annual commemoration that has been observed since the early 1980s to honor crime victims and call attention to their plight. One way to show our support would be to pass legislation to ensure that victims of crime and their families are given the compensation they are rightly owed.

Mr. Chairman and Ranking Member Gohmert and other members of subcommittee, I look forward to working with you to address any questions about our legislation and to send a clear message to white collar and other criminals: if you commit a crime you will be held accountable and will not be allowed to benefit in any way from your criminal activity and ill-gotten gains.

Mr. SCOTT. Thank you very much.

Are there any questions of the Senator?

If not, thank you very much, Senator.

Mr. GOHMERT. Would he like any questions?

Senator DORGAN. Just positive questions, if you have. [Laughter.]

But I did, Mr. Chabot, reference your work and the work of your colleague. I appreciate the work that has been done in the House, and I hope perhaps you will be able to move this legislation.

And, again, Mr. Chairman, I know you have other witnesses, so let me thank you for allowing me to come over.

Mr. SCOTT. Thank you very much.

The gentleman from Georgia?

Mr. JOHNSON. I move to strike the last word.

Mr. SCOTT. Is this a question for the witness? The process would be he testifies, we ask questions.

Mr. JOHNSON. Not really a question. I would just like to make an observation.

Mr. SCOTT. The gentleman is recognized to ask questions or to make a comment or whatever.

Mr. JOHNSON. Yes, with all due respect, Senator, I would say that the norm for defendants having been convicted and sentenced to pay restitution and, often, to serve mandatory lengthy prison sentences, that the number of those who have any assets are miniscule. It is mostly poor people, people without assets, who actually fall into the criminal justice system and wind up having committed crimes and convicted of crimes that require them to pay restitution.

And so, it just seems that the legislation, though the purpose is worthy, is like a mallet being used to subdue a mosquito and may be a little harsh to the average—to the overwhelming number of defendants who it would apply to.

And basically I am talking about the pre-charge ability of prosecutors to assess or to impose a freeze on whatever assets there might be, a car or a bank account with a couple ofhundred or a couple of thousand dollars, that kind of thing. So it gives prosecutors a lot of discretion prior to the individual even being charged. And then it ties the hands of the judges, further limiting their discretion to be able to assess a reasonable amount for restitution

payments or even to allow a defendant to come out from under the pre-conviction freeze.

And so I just wanted to make those observations.

I think there are a number of reasons why the Justice Department would be behind on collecting restitution, as well, such as they are overworked and overburdened pursuing more important matters. Perhaps we can staff them up a little bit more adequately so that they can do a better job of collecting restitution.

And maybe it is because the defendants who have been assessed the restitution don't have the money. Maybe that is the reason why there is so much money owed under restitution.

So, with all due respect, those are my observations.

Senator DORGAN. Mr. Chairman, if I might?

Your point is well-taken. In many ways, you are winning a debate we are not having, because my point isn't coming here to suggest that someone who commits a crime, is sentenced to a lengthy period in a facility for incarceration and comes out with nothing, my point isn't that Justice or anybody else is going to be able to get that from them. The Chairman said you can't get blood from a turnip; I agree with that.

But I would say this. Look at the newspaper in the morning and evaluate what scandals surround us these days, with unbelievable speculation, white-collar crime that is unbelievable. And then ask yourself this: When we send those folks to prison, as we should if they have violated the law, should we also allow them to send their money to an account someplace to be able to them when they come out of prison, or should some of that ill-gotten gain be retrieved by the Federal Government and go to the victims? That is the point.

Your point is an adequate point. You can debate—I don't have time and you don't have time—to debate the provisions of this bill to make certain the concern that you have is not a concern.

But I would say this. I don't think there is anybody on this Committee or in Congress who wishes to stand up and say, with respect to high-flying white-collar crime—and just take a look at the five that I asked GAO to look at—we believe it is important that victims should go wanting, even when the court has ordered restitution, while those folks are living in million-dollar homes or taking European vacations. I don't think anyone believes that is appropriate. All of us believe we ought to fix it.

So I accept your point and hope that we can solve the problem that does exist.

Mr. Chairman, thank you very much.

Mr. SCOTT. Thank you.

Gentleman's——

Mr. JOHNSON. Mr. Chairman?

Mr. SCOTT. Does the gentleman yield back?

Mr. JOHNSON. Well, if I could, before I yield back, I would like to make the observation that transfers of property by those who would defraud someone who is entitled to it under a restitution order by a court is certainly avoidable. In other words, I think current law would allow for a court to void a transfer made to defraud a creditor, if you will, a victim.

Senator DORGAN. That, too, is a fair point, but once it is transferred and the asset is gone, there is nothing for a victim or a court to retrieve.

Mr. JOHNSON. Thank you. I will yield back.

Mr. SCOTT. Thank you.

Mr. GOHMERT. Mr. Chairman, that stirred up a question I would like to ask the Senator, if you don't mind.

Mr. SCOTT. He has to leave, so——

Mr. GOHMERT. I will be very quick.

My friend Mr. Johnson mentioned we don't need a mallet to kill a mosquito. And I haven't read the whole bill, but there is nothing mandatory, in every case, that must be done to collect. Isn't there discretion in your bill, Senator?

Senator DORGAN. There is. And the issue here is the restraint of assets. And Congressman Johnson raises, I think, a very important point, which is why we have tried to deal with that in a very important way in this bill.

It is not the case that somebody can come in and restrain the assets pre-conviction without any appeal. But it is also the case that, if you don't have some tools in circumstances where you believe it is going to be completely dissipated and the victims will end up with nothing, you at least ought to give the court the opportunity to have those tools.

Mr. GOHMERT. So you are not advocating using a mallet to kill a mosquito. You are just saying, if a bear is coming, let's don't hand him insect repellant.

Senator DORGAN. It is not a long distance from the Senate to the House, but I didn't walk all the way over here because I was concerned about mosquitoes. I am very concerned about people who are taking European vacations who owe victims. I am concerned that the victims get what they are due.

Mr. GOHMERT. Thank you.

Mr. CHABOT. Mr. Chairman? The Senator is free to go, if he would like. I just wanted to make one comment in response to——

Mr. SCOTT. Well, let's let him leave before we get some other questions. [Laughter.]

Thank you, Senator.

Senator DORGAN. We have a vote at 2:45, so I have a great excuse. Thank you very much.

Mr. SCOTT. Thanks so much.

The gentleman from Ohio?

Mr. CHABOT. Just very briefly, in response to my friend from——

Mr. SCOTT. The next witnesses will come up.

Go ahead.

Mr. CHABOT. The bill—and ours are somewhat different. But our bill, H.R. 845, it does take into account the defendant's economic circumstances, so if they can't—if they have nothing, you are not going to, obviously, squeeze blood from a turnip, as the Chairman said. So it takes into account the defendant's economic circumstances, whether he or she has assets or not, in making the restitution mandatory.

And it also takes into account the dependents of the defendant also, so what circumstances would that put the defendant's family in, as well. So those are all taken into consideration.

But in a case where somebody has assets and could contribute to the victim, they ought to. And that is what our bill does.

Mr. SCOTT. And those where the judge has discretion, is there discretion on the freezing of assets pre-trial?

Mr. CHABOT. Thank you for the question. It is the judge's determination on that. So it is an issue, and——

Mr. SCOTT. Okay. Well, let's see what the panelists have to say.

Our first witness on the second panel is going to be Jonathan Turley of George Washington University Law School. He teaches courses in constitutional law, constitutional criminal law, environmental law litigation, and torts. He is a frequent witness before the House and Senate on constitutional and statutory issues, as well as tort reform legislation. He earned his BA from the University of Chicago and JD from Northwestern University.

Our next witness will be Andrew Weissmann of the law firm of Jenner & Block. He was the director of the Enron Task Force, the Chief of the Criminal Division of the United States Attorney's Office for the Eastern District of New York, and Special Counsel to the Director of the Federal Bureau of Investigation. He earned his bachelor's degree from Princeton and law degree from Columbia.

Our next witness will be David Smith of the firm English & Smith. Prior to entering private practice, he was a prosecutor in the Criminal Division of the U.S. Department of Justice and at the U.S. Attorney's Office in Alexandria, Virginia. He earned a bachelor's degree from University of Pennsylvania and a law degree from Yale.

Our final witness will be judge Paul Cassell, professor of law at the University of Utah College of Law. He has been an Assistant U.S. Attorney for the Eastern District of Virginia, professor of law for the University of Utah, and U.S. District Court Judge for the District of Utah, and has returned to full-time at the College of Law, where he teaches criminal procedure, crime victims' rights, criminal law and related classes. He has a bachelor's and law degree from Stanford.

Again, our witnesses' statements will all be entered in the record in their entirety. And I would ask each of our witnesses to summarize your testimony in 5 minutes or less. And the lighted device will turn from green to yellow when you have 1 minute left in your time, and will turn to red when your 5 minutes have expired.

Professor Turley?

TESTIMONY OF JONATHAN TURLEY, J.B. AND MAURICE C. SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON LAW SCHOOL, WASHINGTON, DC

Mr. TURLEY. Thank you, Chairman Scott, Ranking Member Gohmert, Members of the Subcommittee. It is an honor to appear again before you to talk about a subject that we can all agree is very important.

Restitution is very important to a criminal system, and it plays a role not just in deterrence, it even plays a role in rehabilitation. I think we can all agree on that. We can also agree that the current rate of recovery of restitution dollars is insufficient.

However, on these three bills, you see a great number of interstitial changes in the restitution laws. And on the initial read, I think

there is obviously much that has to be done. Many of these provisions are vague, and that vagueness will cause grave problems if these were to become law.

But I am going to talk today about the most troubling aspects of the bill. And even though I count friends among the sponsors and the supporters of this bill, I must come and say that I believe it would be a mistake to enact this legislation.

I have grave reservations about the necessity and the equity and the constitutionality of these provisions. Restitution has traditionally been a matter for courts to exercise discretion. And they have done it fairly well, and I think we would agree, however, that they have not done it enough. The question is, what is the solution?

The solution is not, in my view, to require restitution in all Federal cases. As we have already heard, Federal defendants are largely indigent. It is about an 85 percent rate. From what I could see with this legislation, it would succeed only in pushing the remaining 15 percent into indigent status. It would not, in my view, increase significantly restitution to victims, which I is believe what we all want.

It is true there is $46 billion that appears to be uncollected. But I believe it is also clear that much of the reason for that is that it can't be collected, that we are issuing restitutional orders against people who are indigent. And we are also doing a very bad job in collecting from those who are the not.

One of my greatest concerns about this legislation is the reduction of discretion for courts. I testified a few years ago with a Federal judge who told me on the side during one of the breaks that he had spent his entire life trying to become a Federal judge by having a distinguished career as a lawyer. He became a partner, he became a well-known trial lawyer, and the minute he became a judge he was told not to use any of that experience or background in the sentencing of a defendant. And he said he felt like he was a race horse tied to a plow. He could not use a thing that he had distinguished himself learning throughout his career.

Our Federal bench is remarkably talented. I have been a critic of many judges, but, pound for pound, it is a very good bench. And they should be given some discretion. I have never met a pro-criminal judge or an anti-victim judge. The reason that you don't impose restitution in some cases is a balancing of factors, to try to find the right mix so that you can punish this individual, maybe even rehabilitate this individual, while trying to give the victim back something of what was lost. I don't believe the solution is to take away all discretion when it comes to restitution.

I also encourage you to think about the impact of these laws on this legal system. It may look like these are modest tweaks, but they are not. In my view, they will trigger some cascading failures within that system. There are displacement impacts that occur when you impose a new layer of procedural requirements upon the court. I believe this legislation would prolong litigation in the Federal courts. It would actually hurt victims. And I honestly believe that it would be a mistake.

It would increase the burden upon courts and the public defenders' offices that are already limited. As a litigator, I can tell you, the dockets are getting longer. It is very common for me to tell my

clients they will have to wait for years for a final decision in a civil case. They are getting longer in criminal cases. This would add to that already-overburdened court system, and it would achieve very little, in my view.

I strongly oppose some of the provisions that are contained here, particularly the pre-trial, even pre-indictment freezing of assets. I believe that that would discourage lawyers and pressure plea agreements and requirea defendant to essentially defend himself over a charge that has not been made, over counts that are not confirmed for trial.

I also strongly oppose the provision that says you can require restitution before the completion of an appeal. There is a system under Rule 68 that works very, very well for that.

I list all of the objections I have here, but what I would strongly encourage my friends on the other side to consider is that sometimes roads paved with good intentions take us places we don't want to be. I believe this legislation will take us to one of those places. I think it will slow the courts, make them less efficient, make them less equitable, make them less fair. I don't think any of us want that.

And I believe that there are alternatives, and I would love to work with my friends and with this Committee to achieve those worthy ends.

Thank you.

[The prepared statement of Mr. Turley follows:]

PREPARED STATEMENT OF JONATHAN TURLEY

STATEMENT FOR THE RECORD
JONATHAN TURLEY
SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

LEGISLATIVE PROPOSALS BEFORE THE 110TH CONGRESS
TO AMEND FEDERAL RESTITUTION LAWS

APRIL 3, 2008

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

I.
INTRODUCTION

Chairman Scott, Ranking Member Gohmert, members of the Subcommittee, it is an honor to appear before you today to discuss the important question of the amending of federal restitution laws under H.R. 845, H.R. 4110, and S. 973.

These three bills contain a great number of interstitial changes to existing restitution laws. Given the practical limitations of this testimony,[1] I will not attempt to address all of these changes. In my view, there is considerable need for re-drafting of these bills, even if the fundamental changes to existing law are accepted by the Committee. Many of the provisions are extremely vague and would produce difficulties in interpretation and enforcement. However, I will focus today on what I consider to be the most troubling aspects of the three bills.

I come to the subject of this hearing from two perspectives. First, I am a law professor who has taught criminal procedure and constitutional law for many years. Second, I am a practicing criminal defense attorney who handles an array of criminal and constitutional cases. My comments today will reflect this mix of theoretical and practical concerns raised by these proposals. As will be shown, I have considerable reservations about the necessity, equity, and constitutionality of some of these provisions.[2]

The role of restitution goes back to some of the oldest criminal codes. Such provisions are mentioned in sources ranging from Homer's *Iliad* to the Code of Hammurabi to the criminal codes of the Germanic codes of the Middle Ages.[3] Indeed, it is a true that "the principle of restitution is an

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[1] I was happy to be called as a witness to this hearing. However, the call came only a couple of days ago while I was out of town on a criminal case. Thus, my written testimony today is more abbreviated than usual. I would be happy, however, to answer any questions at or after this hearing.

[2] I also had the honor of serving as a member and the reporter on the Environmental Crimes Advisory Group to the United States Sentencing Commission on the drafting of proposed penalties for environmental crimes by individuals and organizations.

[3] S. Schafer, *Victimology: The Victim and His Criminal* 8-11 (1977).

integral part of virtually every formal system of criminal justice of every culture and every time."[4] However, restitution has always been balanced with countervailing constitutional rights of the accused, judicial administration, and basic notions of fairness. For the most part, our current system mandates restitution in some cases, but otherwise leaves the matter to the discretion of the trial court. This discretionary power has long been viewed as a central component to criminal sentencing since the judge can balance the various punitive and restorative elements of a sentence.

The proposed legislation would produce radical changes to the federal system and, in my view, cause difficult procedural and constitutional problems. Yet, for all of the complications discussed below, the result will not likely be greater restitution for victims. Roughly 85% of federal defendants are indigent. *See* Administrative Office of the U.S. Courts, Report to Congress on the Optimal Utilization of Judicial Resources 74 (1998).[5] The most likely result of this legislation would be to push the remaining 15% into indigent status while greatly increasing the burden for already strapped courts and public defender offices. At the same time, it would work great unfairness into the system, including but not limited to, forcing defendants to fight for their right to hire their own lawyers, to pay out restitution before appeal, and to fund opposing lawyers.

There is obviously a concern over the size of uncollected federal restitution, estimated as roughly $46 billion. However, this figure may be misleading and thus not a compelling justification for sweeping changes to existing law. Much of federal restitution is uncollectible due to the fact that the defendants are indigent. It boils down to getting blood from stones. If anything, increasing mandatory restitution will only drive up this figure. Second, the General Accounting Office (GAO) has found our collection system to be wanting in pursuing those felons with assets. *See Criminal Debt, Court-Ordered Restitution Amounts Far Exceed Likely Collections for the Crime Victims in Selected Financial Fraud Cases*, Report to the Hon. Byron L. Dorgan, U.S. Senate, GAO-05-80, January 2005, at 3. The GAO found:

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[4] S. Rep. No. 532, 97th Cong., 2d Sess. 3, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2536.

[5] Available on The Federal Judiciary Homepage <http://www.uscourts.gov/optimal/toc.htm>.

> the collection of outstanding criminal debt is inherently difficult due to a number of factors, including the nature of the debt, in that it involves criminals who may be incarcerated, may have been deported, or may have minimal earning capacity; [and] the MVRA requirement that the assessment of restitution be based on actual loss and not on an offender's ability to pay.

Such studies challenge the notion that the problem is the need for more mandatory restitution laws and procedures.

I do not question the motivations behind these bills. Indeed, I count friends among the sponsors and supporters. However, I must respectfully but strongly oppose this legislation as inimical to our justice system and unnecessary to protect the interests of victims.

II.
RESTRICTING JUDICIAL DISCRETION

One of the greatest concerns raised by this legislation is the elimination of judicial discretion in sentencing. These laws are part of a relatively recent tendency of Congress to dictate decisions by federal judges and to limit their ability to craft what they consider to be the most appropriate and meaningful sentences in individual cases. In that sense, this controversy is part of a larger and longer debate. Many years ago during the height of federal sentencing reform, a federal judge complained to me that he spent his career distinguishing himself as an attorney and, in recognition of this experience, he was made a federal judge – but he was then told not to use that lifetime of experience in sentencing criminals. His frustration was both obvious and understandable. We have a great resource in our federal bench, composed of judges with many years of distinguished service as both jurists and lawyers. Not only do they have the ability to fashion sentences that best fit the facts of each case, but such tailoring of a sentence advances both the interests of justice and the reduction of recidivism.

The country continues to suffer the consequences of a recidivism crisis. In my study of the California system a few years ago, we found a chronic level of recidivism in that state that reached 70% for many categories of crime – with higher rates for some age groups. Congress has acknowledged this crisis and sought "to break the cycle of criminal

recidivism" through laws like the Second Chance Act of 2007.[6] This recidivism, in my view, is fueled in part by the limitations placed on judges through mandatory sentencing laws. Frankly, I have never met an anti-victim or pro-criminal judge. Judges try to balance the many elements of a criminal sentence to achieve punishment for the criminal, deterrence for others, and justice for the victim. That delicate balance is achieved when the judge is given not just options in sentencing but the discretion to use those options effectively in each case. Not only do these changes require restitution conditions that might interfere with rehabilitation, but they allow the Justice Department to go outside of the order crafted by the courts at sentencing. *See* H.R. 845, proposed §3664(j)(4).

The proposed legislation would continue the trend toward more micromanagement of judges in their sentencing decisions. Congress radically reduced such discretion when it passed the mandatory minimum sentencing rules. Yet, within the narrow ranges for sentencing, courts could still craft sentencing packages to include elements like restitution when they consider it appropriate.

While restitution has long been a component of federal and state sentencing, Congress enacted a comprehensive change in the area in 1982 with the Victim and Witness Protection Act ("VWPA").[7] The VWPA codified the traditional discretionary role of the judge for most crimes and encouraged greater incorporation of restitution for victims of crime. Congress identified various factors for consideration in the imposition of restitution orders, including "the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate."[8]

In 1996, however, Congress decided to limit this discretion in the Mandatory Victims Restitution Act ("MVRA").[9] The MVRA made restitution mandatory for certain crimes – regardless of the ability of the defendant to pay.[10] This removal of discretion was based on the view of

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[6] Second Chance Act of 2007: Community Safety Through Recidivism Prevention, H.R. 1593.

[7] Pub. L. No. 97-291, 96 Stat. 1248 (1982).

[8] 18 U.S.C. § 3663(a)(1)(B)(i)(II).

[9] Pub. L. No. 104-132, 110 Stat. 1227 (1996).

[10] 18 U.S.C. § 3663A.

members that courts were still not utilizing the restitution option in enough criminal cases,[11] estimated at 20% of cases.[12] Congress mandated restitution for crimes of violence; offenses against property, including those committed by fraud or deceit; and offenses related to tampering with consumer products.[13] In those areas, judges cannot base restitution on a defendant's financial condition. The act states "[t]he court shall order . . . that the defendant make restitution to the victim" without consideration of the defendant's ability to pay.[14] However, even in these mandatory areas, courts do consider the defendant's economic situation in determining the schedule and manner of restitution. *See* 18 U.S.C. § 3664(f)(2) (2000); *see, e.g., United States v. Cheal*, 389 F.3d 35, 53 (1st Cir. 2004); *United States v. Corbett*, 357 F.3d 194, 195-96 (2d Cir. 2004).

Some of this legislation pushes this trend to its ultimate conclusion: a virtual complete denial of discretion for judges in fashioning equitable and case-specific sentences involving restitution. Restitution for crime victims is a noble sounding and noble intended goal. However, it is less noble if it frustrates the efforts of courts to craft sentencing that allows for both punishment and rehabilitation.

S. 973 and H.R. 4110 would expand the number of laws with mandatory restitution by six.[15] H.R. 845 would go even further in making restitution mandatory for all federal crimes.[16] In my view, it is a mistake to add additional mandatory provisions to further restrict judges. The mandatory requirement of restitution for all federal crimes under H.R. 845 would bring a fundamental change in our criminal justice system; the implications of which have received little attention. Since Congress is also seeking to broaden the definition of victims, the result would be a considerable burden for courts in holding hearings on the various claims and challenges on restitution. When you further add the provisions regarding forfeiture and constitutional issues related to attorneys fees, the logistical

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[11] Victim Restitution Act of 1995, S. Rep. No 104-179, 104th Cong., 1st Sess. 13 (1995), reprinted in 1996 USCCAN 925 ("As a matter of practice, restitution is infrequently used and indifferently enforced.").

[12] 141 Cong. Rec. S 19277 (Dec 22, 1995) (statement of Sen. Hatch).

[13] 18 U.S.C. § 3663A(c)(1).

[14] 18 U.S.C. § 3663A(a)(1) (emphasis added).

[15] S. 973, Title III, §302; H.R. 4110, Title III §302.

[16] H.R. 845, § 2.

problems become potentially prohibitive.

While these types of tweaks may seem narrow, they tend to have pronounced and cascading impacts in a legal system, particularly a system that is already struggling with federal mandatory provisions and proceedings. Such displacement impacts must be considered in the cost and benefit analysis of Congress. This "parade of horribles" includes, but is not limited to, a significant increase in litigation for federal courts, the creation of a new barrier for courts in fashioning orders to assure rehabilitation (and decrease the likelihood of recidivism), the prolongation of litigation over assets for survivors and victims, a sizable increase in the demands on federal public defender offices, and a likely extension of probationary periods. The Supreme Court has warned about how such over-arching provisions undermines the justice system and can work against the interests of the most seriously injured victims. *See Holmes v. Security Investor Protection Corp.*, 503 U.S. 258, 274 (1992) ("Allowing suits by those injured only indirectly would open the door to massive and complex damages litigation, which would not only burden the courts, but would also undermine the effectiveness of [the law].").

Our courts are already buckling under ever-expanding dockets and limited resources. As a litigator, I am constantly amazed at the limited time that judges can now spend on cases and the years that most cases now have to sit on dockets awaiting final action. It is not because our judges do not work hard enough. They struggle to move civil cases while responding to the immediate demands of criminal trials and hearings. Congress with this legislation would take an already over-wrought system and push it further into gridlock by adding another layer of mandatory proceedings. Why? Courts already have the ability to order this form of relief and often do so. It hardly serves victims for Congress to further bog down our courts with mandatory provisions that are unlikely to produce much more than added administrative delays.

III.
PRE-INDICTMENT ASSET ORDERS

One of the added layers of proceedings that would follow this legislation concerns pre-trial assets. Under these changes, assets of defendant's could be frozen pre-indictment – using the model under the

Controlled Substances Act.[17] However, these pre-indictment procedures would raise very serious constitutional questions and would significantly add to the burden for both courts and defendants in these cases.

Under the proposed changes, the government can secure an order freezing assets for ten days through an ex parte filing – subject to a later hearing on the basis for freezing the assets to preserve funds for restitution. This hearing, however, only requires a showing of probable cause that, if convicted, the defendant would be required to pay a certain level of restitution. Since Congress is considering making restitution mandatory in all cases or, alternatively an expanded number of cases, the showing would be easily made. As for the amount, the prosecutors will likely claim the maximum amount of possible restitution – a task made easier by the expansion of the definition of a victim.

This process comes uncomfortably close to the Queen of Hearts' approach of "Sentence first - verdict afterwards" in the *Trial of the Knave* from Lewis Carroll's *Alice in Wonderland.* Citizens would be required to fight for the assets – including assets needed for attorneys' fees – that were frozen before they were even charged, let alone convicted. At the most important time of a criminal case (the pre-indictment stage), defendants could not be assured that they could pay counsel. Not only would this discourage lawyers from taking cases, but it would force defendants and counsel to fight over assets at the very same time that they are trying to prepare for a criminal charge. The result would be more pressure on defendants to plead guilty and would invite abusive motions from prosecutors designed to add pressure on a target.

Even if the defendant has the resources or wherewithal to fight the motion, they would be placed in the bizarre situation of arguing about a sentencing penalty before they are even charged or tried. Thus, the hearing would be a speculative exercise of what the final counts at trial might be and how many victims (under the new expanded definition) would seek restitution. This is far different from the seizure of a boat used in a drug run in a straightforward forfeiture case. *Cf. United States v. Collado*, 348 F.3d 326-27 (2003). In these cases, the government can seek the entirety of the

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[17] S. 973 Title II, Proposed §3664 (A)(a)(3) ad H.R. 4110, Title II, Proposed §3664 (A)(a)(3).

worth of a defendant as assets on the theory that, if successful, many victims might claim the money.

Obviously, the Sixth Amendment looms large in this controversy. The Supreme Court has upheld the freezing of assets under forfeiture conditons, even when they are claimed as needed for legal representation. *Caplin & Drysdale v. United States*, 491 U.S. 617, 626 (1989) ("A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney."); *see also United States v. Monsanto*, 491 U.S. 600, 614 (1989) (same). Freezing assets in the pre-indictment or pre-trial stages for restitution can constitute a denial of the right to counsel of choice or a due process violation. *See United States v. Gonzales-Lopez*, 548 U.S. 140 (2006). Once frozen, many non-indigent defendants would be compelled to use a public defender. Otherwise, they would have to hire a lawyer to just fight for the right to use assets to hire a lawyer. To just secure a hearing, the defendant would need to show by a preponderance of the evidence that he could not afford counsel due to the asset order or support his family under proposed Section 3664(a)(1)(A). While the defendant could seek a hearing to reduce the assets frozen by the court, it would be highly uncertain. Putting aside the permissible size of the award which is left ambiguous, any challenge to the basis for the order requires the defendant to make "a prima facie showing that there is a bona fide reason to believe that the court's *ex parte* finding of probable cause under subsection (a)(1) was in error." Presumably, no such showing is possible unless the alleged crime is not subject to restitution, but at least under one bill, all crimes would be subject to restitution.

While much of a person's assets are frozen, the government could claim that counsel would be available at a "reasonable" rate using the remaining assets. This would produce an argument over how much the defendant should be allowed to spend on his defense and whether the expenditures of his own assets are "excessive." Practically, the defendant's own assets would be treated like a court fund where the court decides what is reasonable in terms of experts and other costs. The defendant would be in a similar position to an indigent litigant, petitioning for the use of his own money for his own defense.

This country is based on the concept of "innocence until proven guilty." This demands a verdict before sentencing. It is grossly unfair to allow the freezing of assets before indictment or trial on the possibility that

the defendant might be guilty and be subject to restitution. The result is to put a heavy thumb on the scale of justice, making it more difficult for citizens to contest the charges of the government against them.

IV.
PRE-APPEAL RESTITUTION

As with the pre-indictment asset provision, the pre-appeal restitution provision raises serious constitutional and fairness questions. Under these proposals, courts would be restricted in how they address the payment of restitution before the exhaustion of a direct appeal. Under S. 973, absent a showing of good cause, a court would be compelled to order the payment of restitution regardless of whether an appeal is taken by the defendant. This would undermine the right of an appeal for a defendant by forcing payments that may not be recouped if he or she is successful on appeal. A strong challenge could be made under both due process and Sixth Amendment claims.

Currently, courts may stay the execution of a restitution order pending appeal and often do so in the interests of justice. However, the courts "may issue any order reasonably necessary to ensure compliance with a restitution order." Fed. R. Crim. P. 38(e)(2). Under this approach, a court can use Rule 38 to protect the interests of the victims while guaranteeing the defendant a meaningful appeal. The court can impose a bond requirement or a restraining order to protect those assets. It is a system that has worked well for many years.

The proposal would take a simple Rule 38 hearing and replace it with an ill-defined, ill-conceived "good cause" proceeding. Obviously, any defendant will argue that "good cause" is shown by the basis of the appeal. Yet, the defendant will be arguing that claim to the trial judge that he is seeking to reverse – a judge who will have already ruled against such claims in post-trial motions. It is unclear what "good cause" would be beyond a judge expressing self-doubt over the judge's own rulings.

Once a defendant wins on appeal, however, it will be hard to "get this cat to walk backwards." This is one of the great differences between fines to the government and restitution to victims. With a fine, a court can order payment to the government with the understanding the United States would have to return the money if the fine is overturned on appeal. *See United*

States v. Hayes, 385 F.3d 1226, 1229 n.3 (9th Cir. 2004) (wrongly convicted criminal defendant may seek amounts wrongly paid to the government as a result of a criminal judgment.). No separate civil action is required. *See Telink, Inc. v. United States*, 24 F.3d 42, 46-47 (9th Cir. 1994).

Restitution to a victim is quite different. Victims will likely have had the restitution for many months or even years before any final decision. If they spent the money, it would be difficult for a defendant to get restitution on his restitution. If an appeal is to have any meaning, a defendant should not be expected to turn over his assets before an appellate court has ruled whether he was properly convicted in the first place. Indeed, when combined with the pre-indictment provision, the system becomes positively grotesque. First, a citizen would be expected to fight for his assets that were frozen before indictment – usually arguing the merits of the case and scope of victims. Then, a defendant may well be denied assets demanded for his defense to prove his innocence. Finally, after conviction, he will be required to hand over those assets before he has had a chance to prove that he was wrongly convicted. Such a system shocks the conscience and should not be imposed by Congress.

V.
EXPANDING THE DEFINITION OF A VICTIM AND THE DISCLOSURE OF CONFIDENTIAL INFORMATION

A current proposal would magnify the problems discussed above by expanding the definition of a victim. H.R. 845. Under the proposed Section 3664, the Congress would declare:

> (a) Restitution Required- The court shall order a convicted defendant to make restitution for all pecuniary loss to identifiable victims, including pecuniary loss resulting from physical injury to, or the death of, another, proximately resulting from the offense.
>
> (b) To Whom Made-
>
> (1) GENERALLY- The court shall order restitution be made to each victim of the offense.
>
> (2) DEFINITION OF VICTIM- As used in this section and section 3664, the term 'victim' means--
>
> (A) each identifiable person or entity suffering the pecuniary loss (and any successor to that person or

> entity); and
> (B) others, as agreed to in a plea agreement or otherwise provided by law.

That is a considerable expansion from the current definition under 18 U.S.C. § 3663A(a)(a), which states:

> (2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

The existing limitation regarding victims "directly and proximately" harmed guarantees that the most immediate and deserving victims are addressed in court orders. 18 U.S.C. § 3663A(a)(2); *see also United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006) (denying victim status); *see also United States v. Davenport*, 445 F.3d 366, 374 (4th Cir. 2006). It is hard to imagine the limitations on a definition of a victim that extends to any "identifiable person or entity suffering pecuniary lost" (or their successors).[18] This would clearly extend far beyond the immediate victims in a given case. Presumably, any third party who could show a loss associated with some crime could demand a hearing. In H.R. 845, this includes a claim of "pecuniary loss (and

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[18] Consider the alleged victim rejected in *Sharp* under the current definition. The plaintiff, Law Professor Elizabeth Nowicki, argued that she suffered physical injury as a result of the defendant selling drugs to her boyfriend who became abusive. Since the defendant was convicted on those offenses, she claimed the right to restitution. While the court acknowledges Professor Nowicki's clearly noble purposes in seeking such restitution, it offers a glimpse into how broad this potential class of victims could be under the proposed language.

successor to that person or entity") "including pecuniary loss resulting from physical injury to, or death of, another."

Courts would be inundated with such claims and would function like special masters in the division of assets – prioritizing claims and determining true pecuniary losses. In these claims, the defendant (who may have had his assets frozen since the pre-indictment stage) would have to litigate each such claim. The result could be chaos for courts and a debilitating burden for defendants.

To make matters worse, all of these victims can demand reimbursement of their attorneys' fees (below) and also have access to the presentence report containing confidential information.[19] Currently, these reports are tightly controlled because they contain highly sensitive information about a defendant and his or her family. *See* 18 U.S.C. §3664(d)(2); *see also In re Block,* slip op., 2008 WL 268923 (4th Cir. Jan. 21, 2008); *United States v. Anderson*, 724 F.2d 596 (7th Cir. 1984); *United States v. Martinello*, 556 F.2d 1215 (5th Cir. 1997).

Given the broad definition of victim and mandatory provisions, the required disclosure under H.R. 845 of "all portions" of the presentence report to "potential recipients of restitution" is a serious breach of private and confidential materials. It is also unnecessary. Currently, victims are given notice and are allowed to file demands for their losses. They have little need for most of this information to establish such claims. The release of such information can cause collateral injury to family members and associates of the accused. The record offers no rationale for lifting these restrictions, particularly given the countervailing efforts to protect privacy interests in government records.

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[19] The presentence report provision of H.R. 845 also contains a worrisome omission. It no longer cites in Section 3664(c) a provision referencing the governing standard on access of counsel to the probation process. Under Rule 32(c) (2) of the Federal Rules of Criminal Procedure, a "probation officer who interviews a defendant as part of a presentence investigation must, on request, given the defendant's attorney notice and a reasonable opportunity to attend the interview." F.R.C.P. 32(c)(2).

VI.
PAYMENT OF ATTORNEYS' FEES AND STATUS OF SURVIVORS

The legislation would also mandate that defendants reimburse victims for their attorneys' fees. Under H.R. 845, this is defined as fees and costs that are "necessarily and reasonable incurred for representation of the victim . . . related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense."

This added burden for defendants runs contrary to our constitutional values and legal traditions. It is the equivalent to an "English Rule" for the criminal system – forcing the losing party to pay for fees and costs of litigation. Under this scheme, a defendant would be forced to first pay for counsel to simply defend his assets pre-indictment. He would then likely see those assets frozen – potentially denying him the full use of his resources for counsel. Then, if he challenges the claims of victims or the government over assets, he will have to pay both his and the victims' legal fees. Since the definition of victims is defined broadly, this could amount to dozens of attorneys filing bills for reimbursement. In many cases, defendants may be forced to simply abandon the fight rather than run up attorneys' fees from victims.

One of the more curious aspects of S. 149 is a provision that seems to allow the government to penalize survivors of a deceased defendant.[20] Proposed section 3560(d)(2(D) states:

> If restitution has not been fully collected on the date on which a defendant convicted in a criminal case dies – (i) any amount owed under a restitution order (whether issued before or after the death of that defendant) shall be collectible from any property from which the restitution could have been collected if that defendant had survived, regardless of whether that property is including in the estate of the defendant.

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[20] This issue is discussed (with many of the other questions raised in this testimony) in the excellent CRS Report prepared by Charles Doyle on the legislation. *See Criminal Restitution Proposals in the 110th Congress*, August 17, 2007.

Thus, presumably under this provision, property may have passed to survivors including fee simple land transfers, but still remain subject to forfeiture.

This oddity allows for a modern equivalent of the concept of the "corruption of the blood." One of the abuses that the Framers wanted to end in our Constitution was the concept of families bearing the shame and penalties for treasonous relatives. As Story observed, "By corruption of the blood all inheritable qualities are destroyed; so, that an attained person can neither inherit lands, nor other hereditament from his ancestors, nor retain those, he is already in possession of, nor transmit them to any heir." III Story, Commentaries on the Constitution of the United States 170 (1833). Under the language of S. 149, federal law would substitute the defendant with his heirs, causing considerable confusion and raising some difficult legal questions.

VII.
EXTENSION OF THE PROBATIONARY OR SUPERVISION PERIOD

H.R. 845 would also appear to extend the period for probation or supervised release. Indeed, since most defendants are indigent, this extension would be considerable. Unless a court found that the defendant would not even be able to make nominal contributions (an unlikely event), the law suggests that the defendant would remain in the system for the pendency of the restitution order. This would add considerably to the burden of the probation offices around the country as well as the courts.

VIII.
CONCLUSION

The foregoing concerns lead me to oppose these legislative proposals. I do so with the reluctance of someone who believes strongly in the role of restitution in sentencing. Restitution can have a profound economic and emotional benefit for victims. It also can have a rehabilitative effect on a felon. Forcing a felon to pay such things as funeral costs serves to remind him or her of the terrible damage caused to others. Moreover, no felon should enjoy wealth while victims go uncompensated.

Yet, some roads are "paved with good intentions" but lead to places we do not want to go. These bills would, in my view, cause confusion, waste, and great inequities in the system. In the end, all of these problems would be incurred to achieve little. Most defendants are indigent and this legislation would likely guarantee that the remaining 15% would join their ranks. The problem with restitution recovery is not heartless judges or cunning counsel. It is the fact that most defendants cannot pay such costs. I would not be opposed to this legislation, however, if it were merely symbolic. It is not. The real impact of the changes will be felt in the courts, probation offices, and public defender offices around the country. The system will have to spend copious amounts of time and money to satisfy these mandatory provisions despite the fact that little additional restitution is likely to be produced. We all want to make victims whole, but over-burdening the judicial system and probationary system is no means to achieving that worthy end.

Once again, allow me to thank you for the honor of speaking with you today. I would be happy to answer any questions that you might have.

Mr. SCOTT. Thank you.
Mr. Weissmann?

TESTIMONY OF ANDREW WEISSMANN, ESQUIRE, JENNER & BLOCK LLP, NEW YORK, NY

Mr. WEISSMANN. Chairman Scott, Ranking Member Gohmert, Members of the Subcommittee and staff, the proposed Restitution for Victims of Crime Act of 2007 would, in my opinion, result in the unwarranted skewing of power in favor of the prosecution without the concomitant benefit to the public that would justify that result.

I am going to focus on two aspects of the bill. First, the means by which the proposed bill would expand prosecutorial authority would set the bar too low for the prosecution to seize assets and the bar inordinately high for the defense to challenge that seizure.

Second, the bill would virtually eviscerate in many corporate criminal investigations the protections supposedly afforded by the Department of Justice in its recent McNulty Memorandum governing corporate charging decisions. Such a result, I believe, would be both unwarranted and truly unintended.

The bill authorizes the prosecution to make an *ex parte* application to restrain any assets belonging to an individual or a corporation even before indictment. Further, the bill directs that the prosecutor must demonstrate only probable cause to believe that the defendant, if convicted, will ordered to satisfy a restitution penalty in the case of a felony. Upon that showing, the legislation directs the court to take action in favor of the prosecution to secure the assets or substitute assets. Moreover, if it determines that it is in the interest of justice to do so, the court shall issue an order necessary to preserve any nonexempt assets of the defendant that may be used to satisfy such restitution order.

This is a dramatic departure from current law with significant potential for abuse. One example: Pre-conviction, a prosecutor could exert enormous leverage over a current or even prospective corporate defendant by freezing all of its assets that may be used to satisfy a restitution order. Such a result is particularly draconian when one remembers that corporate criminal liability can be triggered based on the actions of a single low-level employee.

Furthermore, because current law permits defendants to be held jointly and severally liable for the full amount of restitution, the bill would enable the prosecution to obtain *ex parte* an order freezing all assets of a company or individual based on the alleged conduct of other people.

Such consequences are particularly unfair when one considers the myriad procedural safeguards missing from the bill. The bill sets an initial pre-conviction threshold standard to seize a person's or a company's assets that could always be met by the prosecution. The bill would enable a prosecutor to show that a person, if convicted of a felony, would be required to pay restitution. That showing could be made simply by pointing to the indictment or complaint and reading the statute. That would be all that the prosecution would have to do.

There would be no benefit of the adversary system. There would be no requirement to establish a likelihood of success on the mer-

its. There would be no requirement to show that a defendant is likely, probable or even suspected of dissipating assets to be restrained. And with that, the prosecution can freeze all assets that may be subject to restitution upon conviction.

This standard, bizarrely, is far lower than that that currently exists in the civil arena. And when you consider that, you have to consider that, concomitantly, the defense is then given no opportunity under this bill to challenge that order. The bill suggests that there is that opportunity, but, in fact, if you look at it, it is virtually impossible to meet the threshold.

A defendant can only obtain the possibility of a hearing if he or she shows, by a preponderance of the evidence, that there are no assets to obtain counsel or to pay for necessary expenses and—not or—and make a prima facie showing that there is a bona fide reason to believe that the court's *ex parte* finding of probable cause was in error.

So let's assume that, after the *ex parte* order that the defendant is rendered completely penniless, that is insufficient. Because what the defendant would have to show is that the initial restraining that the prosecution received *ex parte* was invalid or there is some reason to believe that. That could never be met, given how easy it is for the prosecution to meet the initial threshold.

Finally, even if the court then decides to hold a hearing, the current bill says that the defendant is not entitled to any discovery that he or she would not otherwise get. And because that stage of the proceeding under current law, there is no ability to obtain any evidence from the Government with respect to the names of witnesses, the much-sought-after hearing would basically be illusory.

Thank you very much.

[The prepared statement of Mr. Weissmann follows:]

PREPARED STATEMENT OF ANDREW WEISSMANN

Good morning Chairman Scott, Ranking Member Gohmert, and members of the Committee and staff. I am a partner at the law firm of Jenner & Block in New York. I served for 15 years as an Assistant United States Attorney in the Eastern District of New York and had the privilege to represent the United States as Director of the Department of Justice's Enron Task Force and Special Counsel to the Director of the Federal Bureau of Investigation. I also am an adjunct Professor of Law at Fordham Law School where I teach Criminal Procedure. I am also here today testifying on behalf of the U.S. Chamber of Commerce.

H.R. 4110, the proposed "Restitution for Victims of Crime Act of 2007" would, if passed in its current incarnation, result in the severe and unwarranted skewing of power in favor of the prosecution, with no concomitant benefit to the public that would justify that result. The bill would afford prosecutors sweeping authority over defendants' assets—and consequently over defendants—without necessary due process guarantees or sufficient regard for the presumption of innocence, which we all cherish.

I make several points in my remarks. First, the bill would greatly expand the scope of the assets that can be restrained pre-conviction. The bill would provide sweeping authority to restrain pre-conviction assets unconnected to any wrongdoing by the defendant. The bill runs contrary to the long tradition and jurisprudence of pre-conviction asset restraint and forfeiture, which are grounded exclusively in the recognition that the funds to be seized are "tainted."

Second, the means by which the proposed bill would enable this expansion of prosecutorial authority applies fundamentally unfair standards, which set the bar far too low for the prosecution to seize assets, and the bar inordinately high for the defense to challenge that seizure.

Third, the confluence of these two problems in the proposed bill would virtually eviscerate in many corporate criminal investigations the protections supposedly afforded by the Department of Justice in its recent McNulty Memorandum governing

corporate charging decisions. Such a result would be both unwarranted and, surely, unintended.

Finally, there is insufficient evidence that the current lack of pre-conviction restitution provisions applicable to untainted assets is the cause of the growing number of uncollected restitution judgments entered in criminal cases. Thus, the proposed bill is unnecessary to remedy this perceived problem.

A. THE ABOLITION OF THE TAINT REQUIREMENT

The proposed bill would make several important changes to current forfeiture law. First, it authorizes the United States to make an *ex parte* application to a federal judge in order to restrain, without limitation, *any* asset of an individual or corporation even before the individual or corporation is indicted.[1] Further, the bill directs that the prosecutor must demonstrate only "*probable cause* to believe that [the] defendant, if convicted, will be ordered to satisfy an order of restitution for an offense punishable by imprisonment for more than 1 year." Section 202(a)(a)(1) (emphasis supplied). Upon that showing, the legislation directs that "the court . . . shall (i) enter a restraining order or injunction; (ii) require the execution of a satisfactory performance bond; or (iii) take any other action necessary to preserve the availability of any property traceable to the commission of the offense charged." Section 202(a)(a)(1)(A). Moreover, "if it determines that it is in the interests of justice to do so, [the Court] shall issue any order necessary to preserve any nonexempt asset . . . of the defendant that *may* be used to satisfy such restitution order." Section 202(a)(a)(1)(B) (emphasis added).

This scheme is a significant departure from current asset restraint practice and policy. These pre-conviction restraint provisions are divorced from the long-established requirement that the restrained property bear the taint of the defendant's wrongdoing. For decades, federal prosecutors have had the ability to freeze the *tainted* assets of persons pre-trial in order to ensure that these assets are properly forfeited to the government upon conviction. Key to this prosecutorial power has been the requirement that the assets that are subject to seizure are traceable to the crime itself. To freeze (and subsequently obtain) forfeitable property or funds, prosecutors have been required to show that such property is tainted.[2] This requirement has cabined prosecutorial discretion by limiting the universe of restrainable funds to those traceable to the crime committed.

The bill completely removes this "taint" nexus. Indeed, the government may freeze *all* of an individual's or corporation's assets if they "may" be used to pay a restitution order. The bill directs that "if it determines that it is in the interests of justice to do so, [the Court] *shall issue* any order necessary to preserve *any* nonexempt asset . . . of the defendant that *may* be used to satisfy such restitution order." Section 202(a)(a)(1)(B) (emphasis added). The bill thus expressly brings all non-tainted assets under the control of the prosecutor whenever those assets "may" be used at some point in the future to satisfy a restitution order.

This is a dramatic departure from current forfeiture policy, with enormous potential for abuse. For instance, pre-conviction, a prosecutor could exert enormous leverage over a current or even prospective corporate defendant by obtaining an order freezing all of its assets that "may" be used to satisfy a restitution order. Such a result is particularly unfair and Draconian when one remembers that criminal corporate liability can under current law attach based on the errant acts of a single low-level employee—even if the employee's actions are in contravention of a strong corporate compliance program.[3] Furthermore, because 18 U.S.C. § 3664(h) permits

[1] *See* Section 202(a)(a)(1). Notably, the fact that such restraint of any asset—even those untainted by wrongdoing—may occur before indictment renders all persons subject to the prosecutor's reach and eliminates the initial safeguard of the grand jury. See Section 202(a)(b)(1) (referring to "the case of a preindictment protective order").

[2] Indeed, what is known as in rem civil forfeiture was an action at common law customarily used to proceed against the tainted property itself on the theory that it was guilty. As the Supreme Court wrote in *United States v. Sowell*, as soon as the criminal used the property unlawfully, "forfeiture under those laws took effect, and (though needing judicial condemnation to perfect it) operated from that time as a statutory conveyance to the United States of all the right, title and interest then remaining." 133 U.S. 1, 19 (1890). Statutory enactments have added numerous criminal forfeiture provisions that permit the recovery of tainted property as punishment for the wrongdoing.

[3] A corporation can be held criminally liable as a result of the criminal actions of a single, low-level employee if only two conditions are met: the employee acted within the scope of her employment, and the employee was motivated at least in part to benefit the corporation. No matter how large the company and no matter how many policies a company has instituted in an attempt to thwart the criminal conduct at issue, if a low-level employee nevertheless commits such a crime, the entire company can be prosecuted. *New York Central & Hudson River Rail-*

courts to make defendants jointly and severally liable for the full amount of restitution, the proposed bill would enable the prosecution to obtain *ex parte* an order wiping out all assets of a defendant completely, based on the alleged conduct of *other* people.

Such consequences of the bill are particularly unfair when one considers the myriad procedural safeguards that are missing from the bill, a subject to which I now turn.

B. Procedural Unfairness in the Bill

The bill sets an initial threshold standard to seize a person's assets pre-conviction that could always be met by the prosecution. By its terms, the proposed bill would enable a prosecutor to show, *ex parte* and merely by "probable cause," that a person, if convicted, would be ordered to satisfy an order of restitution for an offense punishable by imprisonment for more than one year. Section 202(a)(a)(1). This minimal "showing" could always be satisfied by (a) reference to the indictment or criminal complaint—both of which conclusively establish probable cause—and (b) reading the statutory penalties for the offense. Moreover, the bill would forbid the district court from choosing in its discretion not to take action in favor of the prosecution, mandating that "the court . . . *shall* (i) enter a restraining order or injunction; (ii) require the execution of a satisfactory performance bond; or (iii) take any other action necessary to preserve the availability of any property traceable to the commission of the offense charged." Section 202(a)(a)(1)(A) (emphasis added).

Accordingly, without the benefits of the adversary system, without establishing a likelihood of success on the merits, and without any showing that a defendant is likely, probable, or even suspected to dissipate the assets to be restrained, the prosecution can freeze all assets that may be subject to restitution upon conviction. This standard is, bizarrely, far less than that required of civil litigants seeking to restrain assets pre-verdict.

Making matters worse, this minimal prosecutorial *ex parte* threshold showing is combined with a dearth of any meaningful defense opportunity to challenge the *ex parte* seizure. The proposed defense standard is so restrictive, and has so many hurdles, that in effect once the prosecution has met its initial minimal showing, the restraint is final until the end of the criminal case.

The bill provides that post-indictment a defendant may be granted a post-restraint hearing regarding the *ex parte* restraint order *only* if the defendant "establishes by a preponderance of the evidence that there are no assets, other than the restrained property, available to the defendant to retain counsel in the criminal case or to provide for a reasonable living allowance for the necessary expenses of the defendant and the defendant's lawful dependents" *and* "makes a prima facie showing that there is bona fide reason to believe that the court's ex parte finding of probable cause . . . was in error." Section 202(a)(b)(2) (emphasis added). Even then, the bill does not require a hearing: the Court "*may* hold a hearing to determine whether there is probable cause to believe that the defendant, if convicted, will be ordered to satisfy an order of restitution for an offense punishable by imprisonment for more than one year, and that the seized or restrained property *may* be needed to satisfy such restitution order." Section 202(a)(b)(3)(A) (emphasis added). During any such hearing, however, the defendant may not obtain disclosure of evidence or the identities of witnesses earlier than otherwise provided by existing law. Section 202(a)(b)(5) ("In any pretrial hearing on a protective order . . . [t]he court shall ensure that such hearings are not used to obtain disclosure of evidence or the identities of witnesses earlier than required by the Federal Rules of Criminal Procedure or other applicable law.").

This standard is virtually insurmountable. First, a defendant has to have "no" assets left to pay counsel or to provide for "necessary" living expenses. A defendant with *any* assets to retain counsel or pay necessary expenses—even if clearly insufficient funds for either or both—could be found to fail this test. Second, and more im-

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road v. United States, 212 U.S. 481 (1909) (upholding constitutionality of statute that permitted imputation of agents' conduct to create criminal liability for the carrier itself); *Dollar S.S. Co. v. United States*, 101 F.2d 638 (9th Cir. 1939) (affirming steamship corporation's conviction for dumping refuse in navigable waters despite the company's extensive efforts to prevent its employees from engaging in that very conduct); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d. Cir. 1989) (affirming conviction despite the fact that bona fide compliance program was in effect at company); *United States v. George F. Fish, Inc.*, 154 F. 2d. 798 (2d Cir. 1946) (affirming corporation's conviction based on criminal acts of a salesman); *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958) (clerical worker); *Texas-Oklahoma Express, Inc. v. United States*, 429 F.2d 100 (10th Cir. 1970) (truck driver); *United States v. Dye Constr. Co.*, 510 F.2d 78 (10th Cir. 1975). *See generally* Weissmann, Andrew, "Rethinking Criminal Corporate Liability," Indiana Law Journal, Vol. 82, No. 2, Spring 2007, available at SSRN: http://ssrn.com/abstract=979055.

portantly, even the defendant who is left completely indigent after the *ex parte* restraint will not prevail in challenging the restraint. In order to obtain a hearing, the proposed bill requires *in addition* that the defendant establish that there is a *bona fide* reason for finding the restraint order to be in error. Given that the initial threshold standard that the prosecution has to meet is virtually automatic—and will certainly be met upon almost any indictment for an offense allowing restitution—this standard simply cannot be found by a court to be satisfied. Thus, even if the *ex parte* restraining order renders a defendant penniless to care for her family and to obtain even the most modest retained defense counsel, that defendant still cannot obtain relief. Finally, even, if a defendant surmounts these obstacles, a hearing is not guaranteed under the bill, and even if a hearing is afforded in the discretion of the court, at that hearing the defense is prohibited from having access to evidence or witnesses that it would not otherwise have under existing law. Given that under existing law, a defendant has minimal rights to discovery—and could never obtain a list of government witnesses at this stage of a criminal proceeding—the much-fought for hearing would be all but illusory.

C. IMPACT ON THE DEBATE REGARDING THE MCNULTY MEMORANDUM

The proposed bill could also serve, perhaps unintentionally, as an end run around the protections of the Department of Justice's ("DOJ") McNulty Memorandum. That Memorandum, issued by DOJ in December 2006 to forestall legislation that would have had more far-reaching consequences, placed severe restrictions on when the government could consider whether a corporation is paying fees for its employees. The Memorandum basically prohibited DOJ from weighing in on that private decision in all but the rarest case. The Memorandum also placed limits on when DOJ is supposed to request a waiver of the attorney-client privilege.

The proposed bill jeopardizes the effectiveness of these provisions. First, because the bill would enable DOJ in myriad corporate criminal investigations to obtain sweeping *ex parte* restraint orders against a company, it could render it virtually impossible for a company to pay legal fees for its employees. In other words, the Department would not have to weigh in on what the company intended to do regarding the payments of fees, as it was found for instance to have done in the so-called KPMG case.[4] Instead, DOJ could engage in self-help, and simply freeze all of a company's available assets *ex parte* that may be needed to pay restitution. In large corporate cases, such as KPMG, or Enron, Tyco or WorldCom, that enormous power would be palpable.

Second, by causing a seismic shift in the already disproportionate power of the prosecution in corporate cases, any company subject to an *ex parte* asset restraint would waive any and all rights in order to survive such a freeze. The current congressional interest in legislative responses to the McNulty Memorandum would be rendered meaningless. Once prosecutors have the power to seek control of all or a significant portion of a corporation's assets pre-conviction and *ex parte*, the corporation will take any steps to have the government avoid that result or remove that restraint. Thus, the proposed bill, by giving unprecedented powers to the prosecutor before a defendant is convicted or even indicted, tips the scale dramatically and unfairly in the government's favor.

D. DISREGARD OF CURRENT PROSECUTORIAL POWERS

The proposed bill fails to recognize the existing tools prosecutors possess for restraining assets in order to preserve them for restitution.

Current forfeiture law assists those wrongfully deprived of their property in obtaining it via the government's forfeiture tools. Many federal statutes contain explicit provisions allowing property owners to make claims on forfeited assets before they are obtained by the prosecution. In that sense, restitution aims are achieved through the traditional means of freezing and seizing tainted assets. Moreover, by statute, the Attorney General's ability to enforce restitution awards is linked to its forfeiture tools. Under 21 U.S.C. § 853(i)(1), the Attorney General is authorized to "grant petitions for mitigation or remission of forfeiture, restore forfeited property

[4] *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006). District Judge Lewis Kaplan found that prosecutors had invoked the Department's then-existing corporate charging guidelines, the Thompson Memorandum, at the very outset of its investigation to pressure KPMG to break its long-standing tradition of paying its employees' legal fees. KPMG's payment of legal fees was at the top of the prosecutors' agenda from their very first discussions with KPMG, and the court found that the prosecutors had indicated that the government would not look favorably on the voluntary advancement of legal fees. Judge Kaplan concluded that by causing KPMG to cut off legal fees to employees, the Thompson Memorandum violated the Fifth Amendment's due process clause and the Sixth Amendment right to counsel.

to victims of a violation of this title, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section." The Attorney General may also direct the sale of property ordered forfeited and direct the disposition of those funds, as well as to "take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition." 21 U.S.C. § 853(i)(5).

Importantly, both the federal RICO statute, 18 U.S.C. § 1963(m), and the federal criminal forfeiture statute, 21 U.S.C. 853(p), permit the government to obtain the forfeiture of substitute assets post-conviction,[5] when the defendant transferred the tainted property to a third party, placed the property beyond the court's jurisdiction, has been commingled with other property which cannot be divided without difficulty, or has been substantially diminished in value. Attempting to frustrate the government's effort to forfeit property has been held to be punishable as obstruction of justice. *See United States v. Baker*, 227 F.3d 955 (7th Cir. 2000). This is a significant weapon in the government's arsenal, because it ensures that guilty defendants cannot put forfeitable property or funds beyond the government's grasp. In short, current law satisfies the government's need to obtain property without giving the prosecutor the power to freeze any and all assets held by a corporation or an individual.

Finally, there is scant evidence that the large amount of uncollected restitution payments—cited as a reason for the proposed bill—is a result of defendants' improperly dissipating assets pre-conviction. An equally plausible reason for the growing size of uncollected restitution orders is that courts are currently required to enter such orders regardless of a defendant's ability to pay, and thus impose large restitution orders but set reasonable payment schedules. That scheme, which currently governs restitution orders, would of course result in what currently appears to be a large unpaid restitution bill, when in reality it may bear no resemblance to a defendant's avoiding restitution payments at all. In short, the proposed bill may be seeking to remedy a problem that does not exist, and does so by a means that fails to accord procedural safeguards to protect the public.

Thank you for the opportunity to testify.

[5] One Circuit permits the pre-trial restraint of substitute assets, see In re Billman, 915 F.2d 916 (4th Cir. 1990), but that view is not shared by other Circuits.

Mr. SCOTT. Thank you.
Mr. Smith?

TESTIMONY OF DAVID B. SMITH, ESQUIRE, ENGLISH & SMITH, ALEXANDRIA, VA

Mr. SMITH. Good afternoon, Mr. Chairman and distinguished Members of the Committee.

Much of what I was going to say in my opening statement has been already said by my distinguished colleagues at this table. And I really thank them for the excellent job that they have obviously done. I didn't get a chance to read their submissions before I came here, but I see that they are excellent.

I am a leading authority on forfeiture, and I am the author of a two-volume Matthew Bender Treatise on the subject which also covers restitution law. And I have served, for a couple of decades now, as co-chair of the Forfeiture Abuse Task Force for the National Association of Criminal Defense Lawyers. And I helped the House Judiciary Committee and the Senate Judiciary Committee draft the Civil Asset Forfeiture Reform Act of 2000, which many of you on this Committee fought for, and it was a big victory for the reformers.

I have been asked to address the pre-trial asset restraint provision of these bills, but I would like to make it clear that my concerns about these bills are not limited to that provision. I agree with the points made in the excellent letter filed by Thomas Hillier on behalf of the public defender community, which I did get a chance to read, and I wish I had time to address those issues as well. But I think the other folks here, as well as myself, have focused on what we think is the most serious problem of all in this bill, or these bills, and that is the pre-trial asset restraining provision.

Basically, we don't need a pre-trial asset restraining provision specifically directed toward restitution. And that is because the courts already have the power to freeze forfeitable assets prior to trial, under the forfeiture statutes. And once forfeited, those assets are normally turned over to crime victims to compensate them for their losses.

Whether this is called restitution or restoration of the proceeds of crime to the victims, which is another way that the Justice Department styles it, doesn't really matter. The money gets back to the victims already. That is the policy of the Department of Justice—that is, to compensate crime victims out of forfeited funds.

So the only thing that these new restitution bills actually add to the picture is an unfair and totally ill-conceived provision allowing the court to freeze legitimate assets—that is, clean funds, not tainted by association with any crime—for the purpose of increasing the amount of money available for restitution, if that was ordered at the end of the day by the court.

Now, there are better ways to do this than a provision which trenches so heavily on the sixth amendment right to counsel of choice and the basic assumptions of our adversary system of justice. And one of those better ways, or two of them, I've suggested in my statement, and that is to take money that is now earmarked for law enforcement purposes, and instead of putting it in a for-

feiture fund, which is used to buy police cruisers and to pay the salaries of sheriffs' departments and so forth. Why not useg those funds exclusively to make restitution to victims?

That proposal is actually consistent with the Justice Department's supposed policy of favoring restitution to victims over other uses for forfeiture funds. The problem is that that policy is not always followed in the field by Department prosecutors, who have other constituencies, let's put it that way. They want to keep the State and local folks happy, who assisted in the prosecution, by giving them a portion of the money to fund their own law enforcement budgets. And so you can understand why they are pulled in different directions.

But Congress has the power to make a decision to direct these funds to the place where they are most needed, and that is for restitution to the victims. And I suggest that that is a far better way to go about increasing the funds available for restitution than the idea of freezing every defendant's assets prior to trial.

I would also say that Senator Dorgan made the point that there are some rich defendants who will fraudulently transfer funds to their wives, to others, in order to avoid restitution and other penalties. Well, Congressman Johnson was quite correct to point out that current law allows the Government to set aside those fraudulent transfers under State and Federal fraudulent transfer statutes. And they do do that, and they should do that, where a significant amount of money is involved.

And another way that the Government can prevent such fraudulent transfers before they even occur is to prohibit them as a condition of bail. And that is done in quite a few cases involving rich defendants. I am thinking of one in particular, which I am involved in right now, where exactly that was done,

So, you know, the court has a lot of control over a defendant's handling of his assets through the court's power to set bail conditions. That same power has been used to force defendants to repatriate assets from abroad which have been transferred there. And so the court has already got considerable flexibility and power over a defendant's ability to transfer assets improperly to avoid restitution and other penalties. So I just don't think this provision is needed, and it is certainly not worth the candle, as I put it.

It gives prosecutors a nuclear weapon with which to pauperize every single defendant, and abuse it they will. We know that from experience in the forfeiture area. When prosecutors are allowed to seize substitute assets, as they have been in the 4th Circuit unfortunately, they have done so repeatedly in an effort to force a defendant to be represented by the public defender, which is not adequate in a complicated white-collar case, and thereby force them to plead guilty rather than go to trial. And I can cite you chapter and verse on that later on.

Thank you very much. I see my time is up.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF DAVID B. SMITH

TESTIMONY OF DAVID B. SMITH, ESQ.

English & Smith, Alexandria, Virginia

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

April 3, 2008 Hearing
The Restitution for Victims of Crime Act of 2007

Mr. Chairman and Distinguished Members of the Committee:

I am honored to have this opportunity to appear before you today to give my views on the pre-trial asset restraint provisions of the "Restitution for Victims of Crime Act of 2007." I am a practicing criminal defense attorney specializing in federal criminal cases and, in particular, federal forfeiture cases. I am the author of the leading two-volume treatise, *Prosecution and Defense of Forfeiture Cases* (Matthew Bender 2007), which also covers federal restitution law. I helped the House and Senate Judiciary Committees draft the Civil Asset Forfeiture Reform Act of 2000, an Act that brought about long-needed reforms of our civil forfeiture laws. I have served for almost two decades as co-chair of the Forfeiture Abuse Task Force of the National Association of Criminal Defense Lawyers (NACDL). I am currently serving on the NACDL's Board of Directors as well. I previously testified before this Subcommittee on the subject of money laundering reform legislation

(in 2000). I frequently give advice to other attorneys on the subject of avoiding fee forfeiture and have litigated fee forfeiture and pre-trial asset restraint cases (fortunately, not involving my own fees). It may interest you to know that I have also represented over a thousand victims in federal fraud cases and am very sympathetic to their plight.

I began my legal career with the Department of Justice and served for a time as deputy chief of the Asset Forfeiture Office of the Criminal Division at Main Justice in the Reagan Administration. The views I am expressly today are my own but I can assure you that they represent the views of the National Association of Criminal Defense Lawyers as well.

I. Introduction

Although my concerns about this bill are not limited to the pre-trial asset restraint provisions, I have been asked to focus my remarks on those provisions as they are, by far, the most objectionable provisions in the bill from the standpoint of the criminal defense bar.

Congress has repeatedly rejected the government's requests to authorize the pre-trial restraint of "substitute assets" in criminal forfeiture cases. And for very good reasons, which I shall detail below. Yet, this Bill would allow the government to do exactly that—not for the purpose of *forfeiture* but to conserve assets of the defendant that *might* be needed at the end of the day

to satisfy an order of restitution that *might* be imposed by the court. This part of the Bill is entirely ill-conceived, as it would open a pandora's box and severely undermine a defendant's ability to use his own *legitimate* assets to retain private counsel to defend him, and to pay for the costs of his defense. It would give the government a nuclear weapon, which could and *would be* employed in an abusive manner to prevent defendants from retaining counsel of their choice to represent them, and to pay their necessary living expenses while they attempt to defend themselves against the federal government's awesome powers of prosecution. It would fundamentally alter the character of our criminal justice system. Defendants who wish to retain counsel in the mine-run of serious felony cases would be able to do so only with the permission of the prosecutor, which would be capriciously denied in many cases because the prosecutor would rather face a public defender with much more limited time and resources. Defendants in many cases would, in effect, be compelled to plea bargain because they could not afford to bankroll a proper defense to the charges.

Providing for the pre-trial restraint of substitute assets for restitution is not likely to increase the recovery of assets for crime victims very substantially. Even if I am wrong about that, the damage this provision would do to the Sixth Amendment right to counsel--the bedrock that supports all the other precious rights afforded to the accused in our country--far outweighs any possible gain in the *economic* recoveries for victims. *See U.S. v. Najjar,*

57 F. Supp. 2d 205 (D. Md. 1999) (declining government's request to restrain substitute asset, court holds that defendant's right to counsel of choice is more important than the government's interest in the untainted portion of the "substitute property"). *See also U.S. v. Lee*, 232 F.3d 556, 561 (7th Cir. 2000) (government's interest in obtaining forfeiture of substitute property is simply not on a par with its interest in forfeiting tainted property). I would therefore urge the Subcommittee to oppose any legislation that would authorize pre-trial restraint of legitimate assets.

The asset restraint provision in the restitution bill is particularly egregious and one-sided, as it affords virtually no due process protections to the defendant or to innocent third parties whose property may also be restrained.

II. Congress has correctly refused to authorize the pre-trial restraint of legitimate property ("substitute assets") in forfeiture cases. It should not now depart from that path in order to somewhat increase the amount of money available to pay restitution.

While elimination of this unprecedented provision would, in some cases, allow a defendant to dissipate untainted assets that could have been applied to restitution, assuming that a restitution order is ultimately entered, that is a small price to pay for avoiding the damage to our constitutional values and our adversary system of criminal justice that would be entailed by the enactment of this ill-advised provision. If pretrial asset restraint is a "nuclear weapon of the law" (*Grupo Mexicano de Desarrollo, S.A. v.*

Alliance Bond Fund, Inc., 527 U.S. 308, 332 (1999), then the pretrial restraint of clean ("substitute") assets is a thermonuclear weapon. Congress has repeatedly rejected the DoJ's requests for such a weapon[1] and it should not now be swayed because the benefit would go to victims rather than the government. We don't want every line AUSA to be armed with a thermonuclear weapon in every case and be able to decide whether the defendant will be allowed to use his clean assets to retain counsel or support his family while he faces the challenge of a federal prosecution.

The *courts* have also expressed their concern about prosecutorial overreaching if pretrial restraint of "substitute" clean assets were to be authorized. *E.g., U.S. v. Ripinsky*, 20 F.3d 359, 365 (9th Cir. 1994) ("we refuse to extend this drastic remedy to the untainted assets of an individual who is merely accused of a crime"); *In re Account Nos. NTA4961722095, NDA40215631*, 91 F. Supp.2d 1015, 1017-18 (E.D. Wis. 1998) (pointing to the ease with which the government could "financially paralyze an individual before that individual has been indicted or convicted of a crime" if government can restrain untainted assets prior to trial).

This is no mere hobgoblin. Experience in the Fourth Circuit, the only circuit that (disregarding the plain language of the

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[1] *E.g., U.S. v. Gotti*, 155 F.3d 144 (2d Cir. 1998) (Congress has plainly excluded substitute assets from the class of property that may be restrained before trial). Congress again rejected the DoJ's request for such authority in the USA PATRIOT Act of 2001, Pub. L. No. 107-56. The DoJ drafted Act originally included such a provision but it was stripped out by Congress.

forfeiture statutes and their legislative history) allows the pretrial restraint of substitute assets in forfeiture cases, has amply demonstrated that many prosecutors will abuse this weapon if it is made available. Prosecutors in the Fourth Circuit have ignored DoJ's "policy" that *untainted* assets needed to pay counsel or support one's family should be exempted from the restraint order. In that circuit, a defendant in most financial crime cases can retain counsel only if the government wishes to let him do so. I routinely practice in the Fourth Circuit and have first-hand experience with such cases. I have seen how draconian pre-trial asset restraint orders make a mockery of due process and the right to counsel of choice. 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, §13.02[4][b], 13-44.6 (Dec. 2007 ed.). That is not the criminal justice system envisaged by the Framers.[2]

It is all too easy for the government to make exaggerated or ill-founded forfeiture claims on an *ex parte* basis and thereby provide a supposed justification for freezing all of a defendant's

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[2]For example, in *U.S. v. DeLuca*, No. 98-154 (E.D. Va.), a husband and wife accused in an extremely complex bank fraud case were prevented from using their millions of dollars in clean real estate assets to retain counsel. They were forced to plead guilty because their overburdened court-appointed counsel could not possibly get ready to try the massive case in the ridiculously short period of time allowed them by the "rocket docket" district court. The prosecutors knew this and made sweeping, far-fetched forfeiture allegations to "justify" a pretrial restraint of all the DeLucas' assets. The district judge believed that under Fourth Circuit precedent he could not "look behind" the indictment's forfeiture allegations. The prosecutors ignored the DoJ "policy" requiring that legitimate assets needed to pay attorney fees be exempted from the pretrial restraining order.

legitimate assets.[3] It would be at least as easy to make such unfounded claims regarding a potential restitution order.

III. Congress should consider other means of increasing the amount of funds available for restitution.

If Congress wishes to increase the amount of money available to pay victims compensation for their losses and injuries, there are other means available that would not trench so heavily on constitutional protections. For example, Congress could provide that all property forfeited under federal law be deposited in the Victims Fund, rather than being earmarked for law enforcement purposes. That would not only increase funding for restitution; it would take away the undue pecuniary incentive that law enforcement now has to feather its own nest by seeking forfeitures that are unjust or excessive.[4]

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[3]In my experience, judges or magistrates typically rubber stamp requests for freeze orders because they have no information other than that which the prosecutor chooses to provide to them. That is one reason why the courts have repeatedly criticized the reliability of *ex parte* determinations, often in the context of pretrial asset restraint. *E.g., U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492 (1993); *U.S. v. Monsanto*, 924 F.2d 1186, 1195 (2d Cir.) (*en banc*), *cert. denied*, 502 U.S. 943 (1991).

[4]Of particular concern here is the system by which forfeited property is "shared" with state and local police agencies, which directly benefit from the forfeitures their officers assist in. The millions of dollars flowing to these state and local police agencies can be used for any ostensible law enforcement purpose, thus creating an unappropriated slush fund. Chairman Henry Hyde and many other members of the House Judiciary Committee wanted to abolish this "earmarking" system as part of the CAFRA but the law enforcement community was adamantly opposed to any such reform.

Congress could also make it clear that restitution takes priority over forfeitures, so that the government would not be able to trump victims' claims by interposing a forfeiture claim that "relates back" to the time when the offense was committed.[5] I believe that Congress has already done so, in 18 U.S.C. 3572(b), but the government disputes that, claiming that the words "other monetary penalty" does not include criminal forfeitures, even when the forfeiture is in the form of a money judgment against the defendant.

IV. The procedures the Bill authorizes for imposing and challenging pre-trial asset restraining orders are manifestly unfair to defendants and third parties.

Apart from the danger of authorizing the pre-trial restraint of legitimate assets, the Bill would deny the defendant and third parties a fair opportunity to learn the alleged basis for the restraint order and a fair opportunity to be heard in opposition to the government's request. Nor does the Bill automatically exempt assets needed to pay reasonable attorney's fees, litigation expenses, and necessary living expenses of the defendant and his

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[5]The DoJ has policies that usually favor restitution over other possible uses of forfeited property but they are sometimes ignored by prosecutors. *E.g., Adams v. U.S. Dept. of Justice Asset Forfeiture Div.,* 2007 WL 3085986 (C.D. Ill. Oct. 18, 2007) (suit by fraud victims seeking to recover money held by the U.S. Attorney's office; instead of turning the money over to the victims, DoJ was giving it to local law enforcement agencies for their assistance in the investigation of the fraud case).

immediate family.[6] The Bill's pre-trial restraint provision is blatantly skewed against the defendant and third parties.

First, the defendant should not be required to establish (in (2)(A)), as a prerequisite for a hearing, that "there are no assets, other than the restrained property, available to the defendant to retain counsel in the criminal case or to provide for a reasonable living allowance..." This is in addition to the onerous requirement that he make "a prima facie showing that there is a bona fide reason to believe that the court's *ex parte* finding...was in error." Experience in forfeiture cases has shown that it is most difficult to prove that one cannot pay for one's criminal defense or support one's family without the use of the restrained assets. Some courts have wrongly required defendants to prove that they could not borrow money from any relative or friend; that they could not sell their home or obtain a second mortgage, etc. Where does the defendant get the money to retain counsel to contest the restraint order, when it is so burdensome and difficult to even obtain a hearing? Few lawyers are willing to "front" a substantial amount of their time to a defendant in the hope that he will be successful in obtaining the lifting of the restraint order. CJA counsel does not typically view a challenge to the restraint order as part of his job or else doesn't have sufficient time to

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[6]DoJ policy provides for the release of funds to pay legitimate attorney fees and family living expenses in criminal forfeiture cases where the government restrains substitute assets (*i.e.*, in the Fourth Circuit only). However, prosecutors ignore this "policy" as often as not.

undertake that challenge. If he wishes to keep the client, he may also have a conflict of interest because if he is successful in the challenge he is forced to withdraw from the case.

Two circuits, the Fifth and the Ninth, do not require any showing that the restrained assets are needed to pay counsel or to support one's family. *U.S. v. Holy Land Foundation for Relief and Development*, 2007 U.S. App. LEXIS 17135 (5th Cir. July 18, 2007) (*en banc*); *U.S. v. Crozier*, 777 F.2d 1376, 1382-84 (9th Cir. 1985); *U.S. v. Roth*, 912 F.2d 1131, 1133 (9th Cir. 1990) (defendant has due process right to post-restraint hearing regardless of whether he needs the property to pay counsel or for living expenses). Some courts have interpreted the Second Circuit's important decision in *U.S. v. Monsanto*, 924 F.2d 1186 (2d Cir.)(*en banc*), *cert. denied*, 502 U.S. 943 (1991), as also supporting "the notion that without regard to the need to obtain counsel, a defendant is entitled to a hearing on the restraint of his property." *U.S. v. Kirschenbaum*, 156 F.3d 784, 793 (7th Cir. 1998). The Eighth Circuit has held that due process requires an adversary hearing *before* the court issues an asset restraining order. *U.S. v. Riley*, 78 F.3d 367, 379 (8th Cir. 1996) (case did not involve property needed to pay counsel or for living expenses). Since these are all constitutional decisions, Congress should, at a minimum, not require the defendant to make a showing that the restrained assets are needed to pay counsel or to provide the necessities of life for one's family.

(3) Hearing- The current language in subparagraph (A) would permit the court to deny a hearing for any reason or no reason at all (i.e., the court "may hold a hearing"). The defendant may be unjustly denied a hearing even if he makes a prima facie showing that there is a bona fide reason to believe that *ex parte* finding of probable cause was in error.

(4) Rebuttal- This provision, which states that the government must be allowed to cross examine any defense witness, exemplifies the Bill's dangerously one-sided approach. There is no parallel provision stating that a defendant must be allowed to cross examine any government witness, and **(5) Pretrial Hearing** contains highly objectionable language pointing in the opposite direction. (5) could be viewed as directing the court to *deprive* defendants of the right to cross examine government witnesses where such cross would "obtain disclosure of evidence or the identities of witnesses earlier than required by the Federal Rules of Criminal Procedure or other applicable law." That provision will be interpreted by the government to require a kangaroo hearing where the government gets to present any evidence it wishes to (perhaps *ex parte*, so as to deprive the defendant of an early look at its evidence), but the defendant does not get to cross-examine the government's witnesses. No court has ever suggested that the government has a right to so limit the defense at a pretrial hearing; as far as I am aware, the government has never made such an argument.

Finally, (5) directs the court to "not entertain challenges to the grand jury's finding of probable cause regarding the criminal offense giving rise to a potential restitution order." This too is objectionable. The grand jury proceeding is not only *ex parte* but totally dominated by the prosecutor; thus, it is far too unreliable to justify a complete bar on challenging the probable cause supposedly "found" by the grand jury. The grand jury is often not even instructed properly on the elements of the crime it is asked to find probable cause for. Two circuits have held that a defendant challenging a pretrial restraint order must be given the opportunity to challenge the grand jury's probable cause determination. *U.S. v. Monsanto*, 924 F.2d 1186, 1195 (2d Cir.) (*en banc*), *cert. denied*, 502 U.S. 943 (1991); *Aronson v. City of Akron*, 116 F.3d 804, 810 (6th Cir. 1997).

Third Party's Right to Post-Restraint Hearing- This provision does not adequately protect innocent third parties' property interests. It gives a third party with a legal interest in the property a right to ask that the restraining order be modified to mitigate the hardship caused by the order, but it does not authorize the court to lift the restraining order entirely if the third party proves that the property belongs to him (and is thus not available to pay a future restitution order) rather than to the defendant. There is no reason why the third party should have to wait until the conclusion of the criminal case (perhaps years away) in order to object on the ground that the property belonged to the

third party and not to the defendant. Forfeiture case law allows a third party to get the restraint order lifted immediately after the pretrial hearing and this restitution statute should be no different.

The use of the word "belonged" in (3)(B) is also ambiguous. When must the property have "belonged" to the third party in order to obtain relief? At the time the restitution order is entered? At the time of the indictment? At the time when the defendant's criminal acts were committed? It should be no earlier than the time of the indictment, because until then the third party usually has no reason to suspect that the property may be the proceeds of crime, or otherwise subject to a claim by the government or victims.

The other problem with (3)(B) is that it contains no protection for third parties who are bona fide purchasers (BFPs) for value, unlike 21 U.S.C. 853(n)(6), on which it is supposedly modeled. A third party BFP for value should clearly be protected against the confiscation of her property to pay the defendant's restitution obligations.

V. Sec. 743. Amendments to the Anti-Fraud Injunction Statute.

I would be remiss if I did not take this opportunity to express my opposition to this sweeping expansion of 18 U.S.C. 1345(a)(2). That civil anti-fraud injunction statute reaches "clean" assets of the defendant ("property of equivalent value")

and thus poses the same problem as sec. 742.[7] However, §1345(a)(2) is presently limited in scope to only 2 federal crimes: healthcare fraud and banking law violations as defined in 18 U.S.C. 3322(d). Congress's limitation of this powerful provision to those two categories was not arbitrary and should not be undone by this Congress. The proposed amendment would make §1345(a)(2) applicable to every single federal offense that "may result in an order of restitution." Section 1345(a) was enacted in 1990 to provide extraordinary powers to prosecutors trying to recover billions in assets from the notorious S&L fraudsters of the late 1980's. It was then expanded to cover health care fraud, a particularly pernicious and costly type of fraud that bilks our government out of billions each year. There is no justification for providing the same drastic weapons to prosecutors to combat every garden variety felony offense that could give rise to an order of restitution.

Conclusion

While ultimately doing little to improve the compensation available to crime victims, this Bill would tear a big hole in the Sixth Amendment right to use legitimate funds to retain counsel of choice to defend the accused. It is not worth the candle. I was recently reminded of the importance of that right in the first

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[7]Notably, §1345(a)(2) provides no protections for money needed to pay counsel or for necessary living expenses. While some courts have seen fit to exempt such monies from restraint, statutory protections are needed.

episode of the wonderful HBO series on the life of John Adams, which aired on March 16, 2008. In 1770, Adams bravely defended the British soldiers who carried out the "Boston Massacre," when they were tried for murder. Thanks to Adams' stalwart defense work, which made him deeply unpopular in Boston for a time, all of the soldiers were acquitted by the jury. Had Adams not taken their case, they would likely have been found guilty and hung because the Boston mob was screaming for their blood.

Mr. SCOTT. Thank you.
Judge Cassell?

TESTIMONY OF PAUL G. CASSELL, PROFESSOR, S.J. QUINNEY COLLEGE OF LAW, UNIVERSITY OF UTAH, SALT LAKE CITY, UT

Mr. CASSELL. Chairman Scott and distinguished Members of the Subcommittee, I am pleased to be here today to testify in support of improving our Nation's restitution statutes.

If there is one aspect of criminal justice policy which is uncontroversial, it is the idea that a criminal who causes a loss to a victim ought to have to pay that loss back to the victim. Congress repeatedly has adopted this principle, and, most recently, it has been mentioned in the Crime Victims' Rights Act, which was passed just a couple of years ago.

Unfortunately, however, that goal of requiring criminals to pay back losses to victims is not being achieved. And I would like to recommend four specific reforms to our Federal restitution statutes.

First, Federal judges should be given the authority to award restitution for all losses suffered by crime victims, not just narrow categories of losses. Right now, the main restitution statutes limit a judge's power to award restitution to lost property, medical expenses, lost income, funeral expenses, and costs of participating in the investigation. There is no general authorization for restitution, with the result that when judges make a discretionary decision, such as Professor Turley has talked about, to award restitution, all too frequently the appellate courts have been forced to overturn those decisions, because the statutes do not support the award.

For example, in *United States v. Reed*, the 9th Circuit was forced to overturn a restitution award to victims whose cars were damaged when an armed felon fled police, because they were not damaged by the crime of a felon being in possession of a firearm.

In the *United States v. Blake*, the 4th Circuit was forced to overturn a District Court order for restitution for victims who had had their credit cards stolen and charges run up on those cards because the crime of theft of the credit card is not the same as the crime of spending money on the credit card. The 4th Circuit said its decision represented, quote, "poor sentencing policy," but the law did not permit such an award.

The law should be changed. As the U.S. Judicial Conference has recently recommended, Federal judges should be given discretionary authority to award restitution when it is just and proper under the circumstances of the case.

Second, Federal judges should be given the power to award restitution for all Federal crimes, not just those that happened to be listed in title 18 of the U.S. Code. An illustration of the problem comes from *United States v. Elias*. There, the defendants sent two young men with no protective equipment into a tank to clean out toxic waste. While working in the tank, one of the men was overcome by toxic fumes, and he sustained very serious permanent brain damage that will require expensive medical treatment for the rest of his life.

Again, the district judge exercised discretion and concluded that a $6.3 million restitution award was appropriate, but the 9th Circuit was forced to overturn the award. Why? Because environ-

mental offenses are listed in title 42 of the U.S. Code, not title 18 for which restitution is authorized. This makes no sense, and Congress should give judges authority to award restitution for all Federal crimes.

Third, judges should be given discretionary authority to restrain defendants from dissipating assets that could be used to satisfy a restitution award. And here I must, with all respect, disagree with Mr. Weissmann who has simply misdescribed the bills that are in front of this Committee. The bills do not authorize the seizure of assets. They simply authorize the judge, if the judge finds it appropriate, to restrain transference of the assets.

So if the defendant wants to continue to live in his million dollar home, he is entitled to do that under these bills. But the bills would also authorize the judge to forbid the defendant from transferring that home to his wife or something like that that could preclude enforcement of restitution. The General Accounting Office has found that this is a serious problem and that assets acquired illegally are often rapidly depleted on intangible and excessive lifestyle expenses. There is no justification for letting a Federal criminal steal money from a victim and then use that money to live the high life before a final conviction could be obtained.

Federal judges should be given the authority on application from prosecutors to restrain a defendant from dissipating assets that could be used to satisfy a restitution award. Of course such authority should include appropriate procedural protections for defendants and innocent third parties. And the proposed bills in front of this Committee do that. They would allow a restraining order only on a finding of probable cause and then only for assets that would be necessary for restitution and defendants can obtain expenses for living expenses or to pay legal counsel.

The provisions of the Act are modeled on a forfeiture provision that has been upheld by the United States Supreme Court. Crime victims deserve the same kinds of protections when prosecutors are trying to get assets for them as the Federal Government can use when it is trying to forfeit assets to the U.S. Government.

Finally, Congress should also repeal the abatement ab initio doctrine, which prevents a restitution award from being entered when a convicted defendant dies before his appeals are final. Again, this problem might be well highlighted by the case that I believe Mr. Weissmann worked on. In the case of United States versus Kenneth Lay, there was a 16-week jury trial after which Mr. Lay was convicted of massive securities frauds involving Enron. However, he died before the sentencing hearing. And as a result, the district judge was prevented from entering a $43 million restitution award that would have gone to the victims of that crime.

The statute should be changed. Right now the statutes do not allow a judge to award restitution unless the defendant has finally exhausted all of his appeals. We should change the law to allow the judge to impose the restitution order and then let the defendants pursue any appeals that might be appropriate.

So in sum, I think the issues that are in front of this Subcommittee are very simple. When a criminal causes a loss to a victim, the criminal should be ordered to pay the victim for that loss. I urge the Committee to move forward on the legislation in front

of it, which would help to implement this principle in our Nation's Federal criminal justice system.

[The prepared statement of Mr. Cassell follows:]

PREPARED STATEMENT OF PAUL G. CASSELL

STATEMENT

OF

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BEFORE

THE HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON CRIME

ON

IMPROVING RESTIUTION IN FEDERAL CRIMINAL CASES

ON

APRIL 3, 2008

WASHINGTON, D.C.

Mr. Chairman and Distinguished Members of the Committee,

I am pleased to be here today to discussion ways to improve restitution in the federal criminal justice system.

The core purpose of restitution is to "ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."[1] Indeed, the congressional mandate for restitution is "to restore the victim to his or her prior state of well-being to the highest degree possible."[2] Unfortunately, because of limits in the current federal restitution statutes, this purpose is not being fully achieved. Congress should modify the federal restitution statutes to give judges the power to require convicted criminals to fully compensate their victims for harms caused by their crimes.

Several important bills have recently been introduced in Congress to improve restitution procedures. S. 973 by Senator Dorgan and others, the "Restitution for Victims of Crime Act," and H.R. 845 by Representative Chabot and others, the "Criminal Restitution Improvement Act," both would make valuable improvements for crime victims restitution. In my testimony today I will touch on some of the improvements that these bills would make, while urging Congress to go even further to improve restitution for crime victims.

Part I explains the vital importance of restitution to crime victims. When a convicted federal criminal has caused a loss to the victim, the victim should be entitled to have the criminal pay for the loss. This is not only a matter of common sense, but of long-established congressional policy. Restitution is particularly important given our nation's commitment to equal justice, as the losses from crimes fall disproportionately on racial minorities and the poor.

Part II of my testimony urges Congress to give judges the ability to award restitution for all losses suffered by crime victims. Current federal law authorizes judges to order restitution only for certain narrow categories of losses, such as to compensate victims for damage to their property or to reimburse them for medical expenses. The need to fit restitution awards into these narrow pigeonholes has led to considerable litigation about whether particular restitution awards made by district court judges were authorized by statute. But in the midst of resolving those disputes, a larger point has been missed: that restitution's purpose is to restore crime victims to where they would have been had no crime been committed. Unfortunately, by limiting restitution to a few specific categories of loss, the current restitution statutes do not permit trial judges to achieve that goal. My testimony discusses specific examples of appellate court cases that have overturned quite appropriate district court restitution orders on the grounds that they were not statutorily-authorized. Congress should extend these statutes and give judges appropriate power to require criminals to pay for the losses they have caused.

Part III of my testimony urges Congress to allow judges to impose restitution on

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[1] *United States v. Reano*, 298 F.3d 1208, 1212 (10th Cir. 2002).

[2] *United States v. Hill*, 798 F.2d 402, 405 (10th Cir. 1986) (citing S. REP. NO. 97-532, 97th Cong., 2d Sess. at 30, *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536).

criminals convicted of *all* federal crimes, not just federal crimes that happen to be found in Title 18 of the Criminal Code and a few other areas. Perhaps because of a drafting oversight, the current federal laws only allow restitution for offenses found in a particular parts of the U.S. Code. This is a very artificial limit, meaning that while restitution can be awarded for wire fraud or bank robbery (which are forbidden in Title 18), it cannot be ordered for environmental offenses or securities offenses (which are forbidden in Title 42 and Title 15). Restitution should be broadly permitted for any federal criminal offense.

Part IV urges passage of legislation to give courts the authority to restrain a defendant's assets that might be used to satisfy a restitution award, upon a proper showing from the Government. Legislation is needed to prevent defendants from dissipating assets and thus thwarting the purposes of the restitution statute. Carefully drawn legislation would be fully consistent with the Constitution.

Part V of my testimony urges adoption of legislation that would allow restitution to be enforced even where the convicted criminal has passed away before exhausting his appeals. The recent Enron case, in which more than $43 million in restitution could not be ordered because of a glitch in statutes on this issue highlights the need for reform.

Finally, Part VI of my testimony urges Congress to it pass legislation giving judges greater power to prevent profiting by criminals. The current federal law on the subject is apparently unconstitutional, yet Congress has not taken steps to correct the problem. It would be an embarrassment to the federal system of justice if criminals were able to be profit from their crimes merely because no one had taken the time to draft appropriate, constitutional legislation. Corrective legislation could be easily drafted, by giving judges discretionary power to prevent profiteering as a condition of supervised release. In addition, it is possible to draft a constitutional statute that forbids profiteering by criminals.

I testify today as a law professor from the S.J. Quinney College of Law at the University of Utah, where I teach Crime Victims' Rights and Criminal Procedure among other subjects. I have also published scholarly works on the subject of crime victims' rights.[3] From July 2002 to November 2007, I served as a federal district court judge for the District of Utah. From October, 2005, to November, 2007, I served as the Chair of the Judicial Conference's Criminal Law Committee.

I. RESTITUTION FOR CRIME VICTIMS MUST BE GIVEN A HIGH PRIORITY IN THE FEDERAL CRIMINAL JUSTICE SYSTEM.

While other aspects of the nation's criminal justice system may be controversial, there appears to be near universal agreement on the need for restitution. As commentators have

[3] *See, e.g.*, DOUGLAS BELOOF, PAUL CASSELL & STEVEN TWIST, VICTIMS IN CRIMINAL PROCEDURE (Carolina Academic Press 2d ed. 2005); Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835.

recognized, "In perhaps unique contrast [to the division of opinion about other aspects of criminal justice policy], the idea of requiring offenders to make restitution for the harm attributable to their crimes appears by every available indicator to command an almost universal level of favorable interest."[4] In the federal system specifically, the importance restitution for crime victims has been repeatedly recognized. The 2004 Crime Victims Rights Act (CVRA) specifically includes in its list of rights for victims a right "to full and timely restitution as provided in law."[5]

The CVRA's right to restitution build on a long line of statutes designed to ensure that victims are made whole when they suffer losses at the hands of criminals. The idea behind these statutes was well expressed by the President's Task Force on Victims of Crime in 1982:

> Crime exacts a tremendous economic cost. In the vast majority of cases it is the victim, not the offender, who eventually shoulders this burden. This is unjust. The concept of personal accountability for the consequences of one's conduct, and the allied notion that the person who causes the damage should bear the cost, are at the heart of civil law. It should be no less true in criminal law.[6]

Building on these ideas, in 1982 Congress passed the Victim and Witness Protection Act that required restitution in many federal criminal cases. The goal behind the legislation was to ensure that "restitution to the victim will be the expected norm, and no longer an afterthought."[7] Thus, it was the intent of Congress "that judges order restitution in each and every case where the court finds there has been property loss or injury to the victim, . . . to make the victim whole once again. It is the duty of the court to insure that the convicted criminal be the one who pays."[8]

Congress expanded restitution rights in 1996 with the Mandatory Victim Restitution Act.[9] The legislative history surrounding the Act explains: "The true cost to the victims and survivors of crime, particularly violent crime, is incalculable. Even so, where known, the direct costs of crime to its victims are staggering. In 1991, the direct economic costs of personal and household crime was estimated at $19.1 billion, a figure that does not include the costs associated with homicides or costs attributed to the criminal justice system."[10] As a result, Congress concluded that "[i]t is essential that the criminal justice system recognize the impact that crime has on the victim, and, to the extent possible, ensure that [the] offender be held accountable to repay these costs."[11]

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[4] Alan T. Harland & Cathryn J. Rosen, *Impediments to the Recovery of Restitution by Crime Victims*, 5 VIOLENCE AND VICTIMS 127, 128 (1990).
[5] 18 U.S.C. § 3771(a)(6).
[6] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 79 (1982).
[7] 128 CONG. REC. 26810 (Oct. 1, 1982) (statement of Sen. Heinz).
[8] 128 CONG. REC. 26811 (Oct. 1, 1982) (statement of Sen. Laxalt).
[9] Codified at 18 U.S.C. § 3663A.
[10] S. Rep. 104-179 at 17.
[11] *Id.* at 18.

In spite of these lofty goals, however, victims of federal crimes still face significant hurdles to receiving full restitution for their losses. The challenges are of two types: First, not every loss from a crime is covered by the current federal restitution statutes. Some losses are not covered and some crimes simply fall outside of the restitution regime. Second, even where restitution is ordered, collection of the restitution order remains far from perfect. While federal prosecutors have made heroic efforts in many cases to obtain restitution for victims, too often their efforts are in vain because of inadequate enforcement tools.

In my testimony today, I will talk about ways to improve both the coverage of federal restitution statutes and the enforcement of federal restitution statutes. Because of the limited time available, I will not talk about every reform that has been suggested. In particular, the Department of Justice has provided a detailed review of some of the ways in which collection of restitution could improved, and I endorse those proposals.

But before turning to the specifics of needed reforms, one more point should be highlighted: Restitution becomes even more important when we remember that victimization does not strike all segments of American society equally. Instead, it is clear that racial minorities and the poor are much more likely to be victimized by crime (especially violent crime) than are whites and the affluent. According to the latest data from the Bureau of Justice Statistics, African-Americans are victimized at a rate more than 37% higher than are whites.[12] For completed crimes of violence, the victimization rate is more than double that for whites.[13] For the poor, the same pattern reappears. Those earning less than $15,000 a year are far more likely to become the victim of a crime than are those earning more than $50,000 a year.[14] Indeed, for completed crimes of violence. Those earning less than $15,000 a year or more than twice as likely to be victimized as those earning more than $50,000 a year.[15]

As part of our nation's commitment to equal justice, Congress should ensure that all victims of federal crimes receive full restitution from the criminals who victimized them. Along the same lines, some may argue that restitution should be restricted because racial minorities and the poor are disproportionately represented among federal offenders. If I understand the argument correctly, the concern is that oversized restitution awards will make it difficult for these offenders to reintegrate into law-abiding society. This argument, however, fails to recognize that judges are already required – and will continue to be required – to set an appropriate payment for any restitution award, taking full account of the offender's ability to pay.[16] Thus, no offender will ever be required to pay more than is economically reasonable under the circumstances. More important, with regard to race, it is well known that most crimes

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[12] BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2005 at Table 5.
[13] *Id.*
[14] *Id.* at Table 14.
[15] *Id.*
[16] 18 U.S.C. § 3664(f)(2).

are intra-racial.[17] When considering restitution, then, the choice will typically be whether a loss from a crime should be borne by a victim or a criminal of the same race. In making this choice, the interests of the law-abiding victim must be given precedence over those of the offender. As the President's Task Force on Victims of Crime has explained, "It is simply unfair that victims should have to liquidate their assets, mortgage their homes, or sacrifice their health or education or that of their children while the offender escape responsibility for the financial hardship he has imposed."[18]

To achieve the goal of full and enforceable restitution for crime victims, several important reforms must be made to federal restitution laws. I turn, then, to these reforms.

II. JUDGES SHOULD BE EMPOWERED TO AWARD RESTITUTION FOR ALL LOSSES INCURRED BY A VICTIM, NOT JUST NARROW CATEGORIES OF LOSSES.

Congress should expand the federal restitution statutes to give judges greater authority to order convicted criminals to pay restitution to their victims. Current federal law authorizes judges to order restitution only in certain narrow categories, such as to compensate for damage to property or medical or funeral expenses. These narrow categories have led to considerable litigation about whether various restitution awards were properly authorized by statute. But in the midst of resolving those disputes, a larger point has been missed: that judges should have broad authority to order defendants to make restitution to restore victims to where they would have been had no crime been committed. Trial courts should have broader authority to award restitution where the interests of justice so require.

A. Current Restitution Statutes Permit Judges to Award Restitution Only for Very Specific Items of Loss and for Narrow Connections to a Crime.

The Supreme Court has held that a district court's power to order restitution must be conferred by statute.[19] The main federal restitution statutes – 18 U.S.C. §§ 3663 and 3663A – permit courts to award restitution for several specific kinds of loss, including restitution for loss of property, medical expenses, physical therapy, lost income, funeral expenses, and expenses for participating in all proceedings related to the offense. The statutes contain no general authorization for restitution to crime victims, even where such restitution is indisputably just and proper.

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[17] BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2005 at Table 42.

[18] *Id.*

[19] *Hughey v. United States*, 495 U.S. 411, 415-16 (1990); *see also United States v. Bok*, 156 F.3d 157, 166 (2d Cir. 1998) ("It is well-established that a federal court may not order restitution except when authorized by statute."); *United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991) ("Federal court have no inherent power to order restitution. Such authority must be conferred by Congress.").

A case I handled in 2006 will illustrate the problem. In *United States v. Gulla*,[20] I sentenced a defendant for the crimes of bank fraud and aggravated identity theft. Ms. Gulla had pled guilty to stealing personal information out of the mail from more than 10 victims, and then running up false credit charges of more than $50,000. Government search warrants recovered an expensive Rolex watch and eleven leather jackets purchased by Ms. Gulla. Following the recommendation of the government, I sentenced Ms. Gulla to a term of 57 months in prison. I also ordered her to pay restitution for the direct losses she caused.

But the victim impact statements in the case revealed that they had suffered more than just financially from these crimes. One victim wrote about the considerable time expended on straightening things out:

> I was 71 years of age when two fraudulent checks were written on courtesy checks that were stolen from my mailbox. . . . There is no way to describe the frustration and time involved in contacting the various financial institutions, to determine if there were any other fraudulent charges. We had to stop automatic withdrawals since there were not funds available to cover the checks. We are grateful that we did not have to cover the checks because this would have been a problem. There was considerable time and frustrations involved in getting everything straightened out. I believe that justice should be satisfied and the guilty person be held accountable for breaking the law. Even to this day we worry about someone tampering with our mail. We have investigated a locked mail box and have not made any decision as yet.

Another victim wrote that she spent a great deal of time clean up her credit:

> My husband and I are victims of Ms. Gulla's scam. We had a check stolen from our mailbox, and apparently she forged her name to it, and changed the amount.. . . Since then, it has cost us more than $200 in check fees, fees for setting up a new account, and fees for stopping payment on checks. This does not include my time (about 20 hours, and still counting) to track down outstanding checks, talking to the banks (mine and the one where she tried to cash the check), rearranging automatic deductions, talking to the sheriff and filling out appropriate paperwork.
>
> Now I am not able to put mail out in my mailbox, so I have to make [a] special trip to the post office to mail letters. As of this date, I am still attempting to clear up the affected account.
>
> This has been a great inconvenience for us, and it makes me question my safety in my home, if someone is able to gain access to my personal mail, what is next?

Finally, one last victim wrote about losing time with her children to deal with the crime:

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[20] 2:05-CR-634-PGC (D. Utah Mar. 8, 2006).

> We felt, and continue to feel, very vulnerable now that something has been stolen out of our mailbox, something that allows someone with dishonest, selfish intentions access into our personal information. . . .
>
> [Another way the crime] impacted us was by loss of time. Ms. Gulla's selfish act caused us countless phone calls to the credit card company (and although they've been very helpful, they have not always been very speedy). We have had to spend time filling out forms and sending in paperwork to resolve this situation, which was no fault of our own. It has been extremely frustrating to do all this, especially since we are self-employed and have 3 small children. Any time we have spen[t] on Ms. Gulla's theft is time we are not running our own livelihoods or enjoying our precious children. That has been the biggest loss of all.

In light of these victim statements, it seemed to me (as I said in court) that I should be able to order restitution beyond the direct financial losses of the phony charges run up by the defendant. In particular, I thought it would be fair to order restitution for the lost time the victims suffered in responding to the defendant's crime. Unfortunately, as the government explained at the hearing, current law does not allow this. Restitution is not permitted for consequential losses[21] or other losses too remote from the offense of conviction.[22]

The case law around the country demonstrates that this particular problem is not unique. In many circumstances, courts of appeals have overturned restitution awards that district judges thought were appropriate, not because of any unfairness in the award but simply because the current restitution statutes failed to authorize them:

- In *United States v. Reed*,[23] the trial court ordered restitution to victims whose cars were damaged when the defendant, an armed felon, fled from police. The Ninth Circuit reversed the restitution award because the defendant was convicted of being a felon in possession of a firearm and the victims were not victimized by *that* particular offense.

- In *United States v. Romines*,[24] a defendant on supervised release absconded from his residence and employment, driving away on his employer's motorcycle and later cashing an $8,000 check from his employer's bank account. He was caught, and the district court ordered restitution of $8,000 to the employer as part of the sentence for the supervised release violation. The Eleventh Circuit reversed

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[21] *United States v. Sablan*, 92 F.3d 865, 870 (9th Cir. 1996).

[22] *See, e.g.*, *United States v. Havens*, 424 F.3d 535 (7th Cir. 2005) (a victim of identify theft "takes the position that she is entitled to reimbursement for all the time she spent in this endeavor [of clearing credit], but in our view that goes too far"); *United States v. Barany*, 884 F.2d 1255, 1260 (9th Cir. 1989) (victim's attorney's fees too remote); *United States v. Kenney*, 789 F.2d 783, 784 (9th Cir. 1986) (wages for trial witnesses too remote).

[23] 80 F.3d 1419, 1421 (9th Cir. 1996).

[24] 204 F.3d 1067 (11th Cir. 2000).

because the government, rather than the employer, was the victim of the defendant's violation: "The only victim of that crime was the government, whose confidence in [the defendant's] rehabilitation seems to have been misplaced." [25] Accordingly, the Eleventh Circuit overturned the restitution order because "of the absence of textual authority to grant restitution."[26]

- In *United States v. Cutter*,[27] the defendant sold a house to his niece, then filed a fraudulent bankruptcy petition. The defendant was convicted of false statements in the petition. At sentencing, the district court ordered the defendant to pay his niece $21,000 in restitution because of her losses in a fraudulent conveyance action instituted by the bankruptcy trustee. The First Circuit overturned the order because the niece was not a direct victim of the defendant's criminal action of filing a fraudulent petition before the bankruptcy court.[28]

- In *United States v. Havens*,[29] the defendant pleaded guilty to various offenses relating to identity theft. The victim had earlier pursued a civil action against the defendant, receiving $30,000 in damages, and the district court ordered restitution in that amount. The Seventh Circuit reversed this restitution order, holding that it was unclear which damages and costs qualified as appropriate losses under the Mandatory Victims Rights Act.[30]

- In *United States v. Shepard*,[31] a hospital social worker drained a patient's bank account through fraud. The hospital paid the patient $165,000 to cover the loss. The social worker was later convicted of mail fraud and the district court ordered restitution of the $165,000 to the hospital. But the Seventh Circuit held that the patient was the only direct victim of fraud in the case and reversed the restitution order to the hospital.[32]

- In *United States v. Rodrigues*,[33] a defendant, an officer of a savings and loan, was convicted of numerous charges stemming from phony real estate transactions. The district court found that Mr. Rodrigues usurped a S&L's corporate opportunities by substituting himself for the S&L in four real estate deals and ordered him to pay $1.5 million in restitution – his profits in those deals. The Ninth Circuit reversed, holding that since the defendant's profits arose from the defendant taking his victim's corporate opportunities, rather than from direct

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[25] *Id.* at 1069.
[26] *Id.*
[27] 313 F.3d 1 (1st Cir. 2002).
[28] *Id.* at 8-9.
[29] 424 F.3d 535 (7th Cir. 2005).
[30] *Id.* at 538-39.
[31] 269 F.3d 884 (7th Cir. 2001).
[32] *Id.* at 886-87.
[33] 229 F.3d 842 (9th Cir. 2000).

losses by the S&L, restitution was improper. "Although the corporate opportunity doctrine allows recovery for a variety of interests, including mere expectancies, restitution under the VWPA is confined to direct losses."[34]

- In *United States v. Stoddard*,[35] the trial court ordered substantial restitution by the defendant, an official of a savings bank. The defendant misappropriated $30,000 from an escrow account and used the money to fund two real estate purchases. He subsequently netted $116,223 in profits from the real estate transactions. Although the trial court ordered restitution to the savings bank based on the defendant's profits, the Ninth Circuit set the order aside because that the restitution statute only allowed restitution for direct losses.[36]

- In *Government of the Virgin Islands v. Davis*,[37] the defendant pleaded guilty to conspiracy to defraud, forgery, and related counts in connection with an attempt to defraud an estate of more than a million dollars in real and personal property. The trial judge ordered restitution that included the attorney's fees spent by the estate to recover its assets, but the Third Circuit reversed: "Although such fees might plausibly be considered part of the estate's losses, expenses generated in order to recover (or protect) property are not part of the value of the property lost (or in jeopardy), and are, therefore, too far removed from the underlying criminal conduct to form the basis of a restitution order."[38]

- In *United States v. Arvanitis*,[39] the trial court awarded attorney's fees in favor of a victim who had spent considerable money investigating the defendant's fraud. The Seventh Circuit reversed because the restitution statute for property offenses "limits recovery to property which is the subject of the offense, thereby making restitution for consequential damages, such as attorney's fees, unavailable."[40]

- In *United States v. Sablan*,[41] a defendant was convicted of computer fraud, and the district court ordered restitution including consequential damages of $5,350 incurred by the victim. The Ninth Circuit reversed the part of the restitution order based on consequential damages, such as expenses arising from meeting with law enforcement officers investigating the crime, because such expenses were not strictly necessary to repair damage caused by defendant's criminal conduct.

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[34] *Id.* at 846.
[35] 150 F.3d 1140, 1147 (9th Cir. 1998).
[36] *Id.* at 1147.
[37] 43 F.3d 41 (3rd Cir. 1994).
[38] *Id.* at 47.
[39] 902 F.2d 489 (7th Cir. 1990).
[40] *Id.* at 496.
[41] 92 F.3d 865, 870 (9th Cir. 1996).

- In *United States v. Blake*,[42] the defendant was convicted of using stolen credit cards and the district court ordered restitution to victims for losses that resulted from their stolen credit cards. Even though there was a clear factual connection between Mr. Blake's conduct and the offense of his conviction, the Fourth Circuit reversed a restitution order reluctantly. "Although the result we are compelled to reach represents poor sentencing policy, the statute as interpreted requires the holding that the persons from whom Blake stole the credit cards do not qualify as victims of his offense of conviction, and as such he cannot be ordered to pay restitution to them . . . the factual connection between his conduct and the offense of conviction is legally irrelevant for the purpose of restitution."[43]

- In *United States v. Hays*,[44] the defendant was convicted of possession of stolen mail, specifically three credit cards. The trial court ordered him to pay restitution to the credit card companies of $3,255 for charges to those stolen credit cards. The Eleventh Circuit reversed, because the charges were not caused by the specific conduct that was the basis of the offense of conviction (mail fraud).

The point here is not that any of these restitution awards were correctly or incorrectly made by the trial judges under the current statutory framework. Instead, the point is that the judges in these cases *should* have had authority to make these awards. After all, at sentencing a trial judge has full and complete information about the nature of the offense, the impact of the crime on the victim, and the defendant's personal and financial circumstances.[45] When a judge has reviewed all of that information and determined that restitution is appropriate, it is not clear why that order should be subject to further litigation about whether it fits into some narrow statutory category. After all, the core purpose of restitution is to "ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."[46] Indeed, the congressional mandate for restitution is "to restore the victim to his or her prior state of well-being to the highest degree possible."[47] Unfortunately, however, because judges must fit restitution orders within narrow pigeon holes, this congressional purpose may not be fully achieved.

B. The Restitution Statutes Should Be Broadened to Give Judges Power to Make

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[42] 81 F.3d 498, 506 (4th Cir. 1996).
[43] *Id.*
[44] 32 F.3d 171, 173-74 (11th Cir. 1995).
[45] *See* FED. R. CRIM. P. Rule 32(d)(1)(B), (2)(A)(i)-(iii) ("The presentence report must . . . calculate the defendant's offense level and criminal history category; . . . the defendant's history and characteristics, including; any prior criminal record; the defendant's financial condition; any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment . . ."); *see also* Rule 32(c)(B) ("If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.").
[46] *United States v. Reano*, 298 F.3d 1208, 1212 (10th Cir. 2002).
[47] *United States v. Hill*, 798 F.2d 402, 405 (10th Cir. 1986) (citing S. REP. NO. 97-532, 97th Cong., 2d Sess. at 30, *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536).

Such Restitution Awards as are Just and Proper in Light of all the Circumstances.

The main federal restitution statutes – 18 U.S.C. §§ 3663 and 3663A – should be amended to give judges broad discretionary authority to enter restitution awards that are just and proper in light of all the circumstances. The Judicial Conference has taken precisely this position, explaining:

> Currently, there is no authorization under federal law for general restitution to crime victims. A judge may order restitution only if the loss suffered by the victim falls within certain categories specified by statute. On recommendation of the [Criminal Law] Committee, the Judicial Conference agreed to support legislation that would authorize general restitution in any criminal case at the discretion of the judge when the circumstances of the case warrant it.[48]

In light with the recommendation of the Judicial Conference, Congress should amend § 3663A to read as follows:

§ 3663A. Mandatory restitution to victims of certain crimes

(a) (1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.
(2) For the purposes of this section, the term "victim" means a person ~~directly and proximately~~ harmed <u>or who suffered loss or injury</u> as a result of the commission of an offense for which restitution may be ordered, <u>or who suffered harm, injury, or loss that would not have happened but for the defendant's crime,</u> including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant--
(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--
(A) return the property to the owner of the property or someone designated

[48] Report of the Judicial Conference of the United States, Sept. 2006, at 18.

by the owner; or(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to–

(i) the greater of--

(I) the value of the property on the date of the damage, loss, or destruction; or(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim–

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services and, in the court's discretion, any appropriate sum to reflect income lost to the victim's surviving family members or estate as a result of the death; ~~and~~

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense~~.~~; and

(5) in any case, to pay to the victim any amount or transfer to the victim any property that the court in its discretion finds is just and proper to help restore the victim to the position the victim would have been in had the defendant not committed the crime or to compensate the victim for any form of injury, harm, or loss, including emotional distress or other consequential injury, harm, or loss, that the victim has suffered as a reasonably foreseeable result of the defendant's crime or that would not have happened but for the defendant's crime.

(c) (1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense–

(A) that is–

~~(i) a crime of violence, as defined in [18 U.S.C. § 16];(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or(iii) an offense described in [18 U.S.C. § 1365] (relating to tampering with consumer products);~~ an offense against the United States or a violation of supervised released and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss or other harm of any type, including any

consequential loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that--

(A) the number of identifiable victims is so large as to make restitution impracticable; or(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with [18 U.S.C. § 3664].

Parallel changes should be made to 18 U.S.C. § 3663.

These modifications make several important improvements. First, in section (c)(1)(A), restitution would be authorized for *any* federal offense. It is nonsensical to limit restitution to offenses found in certain parts of Title 18 – as discussed in Part III of this testimony.

Second and most important, the restitution statute would be changed to broadly authorize trial judges, in their discretion, to award restitution where it was fair. Restitution would be authorized any time it was "just and proper to help restore the victim to the position the victim would have been in had the defendant not committed the crime or to compensate the victim for any form of injury, harm, or loss, including emotional distress or other consequential injury, harm, or loss, that the victim has suffered as a result of the defendant's crime or that would not have happened but for the defendant's crime." This general authorization would avoid pointless litigation about whether a restitution award happened to fit into one statutory cubby hole or another. Instead, the focus would be on whether restitution was "just and proper." Obviously, a defendant would be free to appeal such awards (just as restitution awards can be appealed now). But the focus on appeal would be on the appropriateness of the award, not parsing technical statutory authorizations.

It is important to emphasize that this authorization would give *discretion* to trial judges to enter broad restitution awards. Because a sentencing judge has considerable information – both about the defendant and the victim – it is appropriate to vest discretion over this particular kind of award. Other, more indisputable areas of restitution (such as for loss of property or medical or funeral expenses) would remain mandatory, as they are under current law.

Third, the statute would be changed to give judges discretion in homicide cases to award restitution to surviving family members for the income that the murder victim would have earned. This is an issue that is currently before the appellate courts, with the question being whether the "lost income" provision in the statute applies only to bodily injury cases or to

homicide cases as well.[49] Regardless of how that litigation about the current statutory regime ultimately plays out, it is hard to see any argument for flatly denying judges the ability to award restitution against a convicted murderer in favor of the victim's survivors when the judge believes such restitution is appropriate. Members of Congress actively involved in victims' rights have spoken in favor of lost income restitution in homicide cases.[50] The proposed changes would reflect that position.

Fourth, the statute would be changed to recognize "but for" causation as a basis for awarding restitution. Under current law, the fact a loss would not have occurred "but for" the defendant's crime is an insufficient basis for a restitution award. As the Third Circuit explained, legal "fees might plausibly be considered part of [the victim's] losses, [but] expenses generated in order to recover (or protect) property are not part of the value of the property lost (or in jeopardy)" even if those expenses would not have resulted "but for" the criminal conduct.[51] Restitution for "but for" losses, however, seems entirely fair and is indisputably what Congress wants. Congress wants restitution "to restore the victim to his or her prior state of well-being to the highest degree possible."[52] Permitting judges to require defendants to make restitution for losses that would not have occurred but for the defendant's crimes would go a long way towards helping to restore victims to their prior state of well-being.

Fifth, the proposed changes would allow a judge to award restitution for reasonably foreseeable consequential damages. As a matter of policy, there is no justification for the results

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[49] *Compare United States v. Serawop*, 505 F.3d 1112 (10th Cir. 2007) (upholding district court lost income award in voluntary manslaughter case); *United States v. Bedonie*, 317 F. Supp. 2d. 1285 (D. Utah 2004), *rev'd on other grounds*, 413 F.3d 1126 (10th Cir. 2005) (holding that lost income calculation and restitution proper under the MVRA); *and United States v. Razo-Leora*, 961 F.2d 1140 (5th Cir. 1992) (holding that prosecution produced sufficient evidence that $100,000 award to widow of murder victim for lost income was relatively conservative and that the award had adequate support) *and United States v. Ferranti*, 928 F. Supp. 206 (E.D.N.Y. 1996), *aff'd without discussion of restitution issues sub nom., United States v. Tocco*, 135 F.3d 116 (2d Cir. 1998) (ordering restitution of direct and indirect victims of arson in which one firefighter was killed and one seriously injured, and requiring payment for the lost earnings of the deceased paid to his widow) *with United States v. Checora*, 175 F.3d 782, 795-96 (10th Cir.1999) (vacating a district court's restitution order based on insufficient evidence after the district court found that a murder victim paid Child and Family Services for the upbringing of his children) *and United States v. Jackson*, 978 F.2d 903, 914-15 (5th Cir. 1992), *cert. denied*, 508 U.S. 945 (1993) (reversing a district judge's restitution order for the victims' lost income and funeral expenses in a well-publicized murder and kidnaping because the district court did not make any factual findings concerning the amount of the victims' losses) *and United States v. Fountain*, 768 F.2d 790, 801-03 (7th Cir. 1985) (holding that future income calculations and restitution "unduly complicates the sentencing process and hence is not authorized by the [VWPA].").

[50] *See* 150 CONG. REC. S10910 (Oct. 9, 2004) (statement by Sen. Kyl) ("We specifically intend to endorse the expansive definition of restitution given . . . in *U.S. v. Bedonie* and *U.S. v. Serawop* in May 2004 [awarding lost income in two homicide cases]").

[51] *Davis*, 43 F.3d at 46-47.

[52] *Hill*, 798 F.2d at 405 (citing S. REP. NO. 97-532, 97th Cong., 2d Sess. at 30, *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536).

in cases like *Government of the Virgin Islands v. Davis*, where a victim suffers a consequential loss from a crime (such as attorney's fees) and yet a sentencing judge is not empowered to award restitution.

S. 973 would take a modest, positive step in this direction by specifically authorizing crime victims to receive restitution (under both § 3663 and § 3663A) to "reimburse the victim for attorney's fees reasonably incurred in an attempt to retrieve damaged, lost, or destroyed property" or to "reimburse the victim for reasonably incurred attorneys' fees that are necessary and foreseeable results of the defendant's crime (which shall not include payment of salaries of Government attorneys)." This language would eliminate a conflict in the circuits regarding whether attorney's fees are recoverable under the existing restitution statutes. Thus, in most cases – such as *Government of the Virgin Islands v. Davis* – the circuit courts have held that attorney's fees are not recoverable as restitution.[53] A few circuit courts, however, have found restitution for attorney's fees to be proper – at least on the particular facts of the case.[54]

Attorney's fees should *always* be recoverable by a crime victim, so long as the fees were a reasonable foreseeable consequence of the defendant's crime. When a defendant is convicted of committing a crime that causes a loss to a victim, that victim should be made whole. If the defendant has forced the victim to spend money to hire an attorney, the defendant should suffer that financial cost – not the innocent victim. Anything else fails to restore a victim to his or her "prior state of well-being to the highest degree possible."

But attorney's fees are only small part of a much larger problem. Consequential losses take a variety of shapes and forms. The current restitution statute do not authorize award of such restitution.[55] When a victim suffers a loss as a reasonable foreseeable consequence of a

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[53] *See, e.g., United States v. Onyiego*, 286 F.3d 249, 256 (5th Cir. 2002) (reversing restitution award for costs incurred by victim travel agencies in defending against lawsuits by airlines resulting from defendant's theft of airline tickets); *United States v. Diamond*, 969 F.2d 961, 968 (10th Cir. 1992) ("expenses generated in recovering a victim's losses . . . generally are too far removed from the underlying criminal conduct to form the basis of a restitution order"; striking district court restitution order of attorney's fees); *United States v. Barany*, 884 F.2d 1255 (9th Cir. 1989) (attorney's fees "too remote"; striking restitution award of attorney's fees in favor of victim); *United States v. Mitchell*, 876 F.2d 1178, 1184 (5th Cir. 1989) (no provision for attorney's fees in Victim Witness Protection Act).

[54] *See, e.g., United States v. Akbani*, 151 F.3d 774, 779 (8th Cir. 1998) (finding no clear error in restitution award for attorney's fees where defendant did not object to the amount of the award in the district court); *United States v. Mikolajczyk*, 137 F.3d 237, 246 (5th Cir. 1998) (while "[t]he VWPA does not generally authorize recovery of legal fees expended to recover stolen property," in this particular case victim Ford Motor Company was required to incur legal costs to defend against a fraudulent lawsuit, which were properly recoverable as restitution); *United States v. Blackburn*, 9 F.3d 353, 359 (5th Cir. 1993) (attorney's fees properly recoverable because fraudulent lawsuit against the victim was part of the offense).

[55] *See, e.g., United States v. Brock-Davis*, 504 F.3d 991 (9th Cir. 2007) (reversing $4,000 restitution award to motel for lost income stemming from defendant's use of motel room as a methamphetamine lab because, among other reasons, it was a consequential damage and therefore not recoverable); *United States v. Sablan*, 92 F.3d 865, 870 (9th Cir. 1996) (in computer fraud case, reversing restitution award for

defendant's crime – be it attorney's fees or anything else -- the sentencing judge should be able to order a defendant to pay for the loss, if doing so is appropriate under the circumstances of the case.

Another form of consequential damage is emotional distress. Crime victims have often had to resort to a separate civil suit to obtain such damages. From a policy perspective, this makes little sense. When a criminal is convicted, his guilt has been established by proof beyond a reasonable doubt, and harm to a victim – such as emotional distress – is frequently an obvious and foreseeable consequence. It is therefore entirely appropriate to allow the sentencing judge to award restitution for emotional distress as part of the criminal proceeding when the judge believes it is appropriate to do so. Nothing in the proposal would alter existing law provided that, if a victim chooses to file a separate civil suit, any resulting civil judgment would be an offset against the restitution award.[56]

One last note: In a number of cases, defendants will lack the financial resources to pay sizable restitution awards. But that is not a good reason for depriving trial judges of authority to order such awards in appropriate cases. And in all cases, after restitution is awarded, the sentencing judge will set an appropriate payment schedule based on a defendant's ability to pay.[57]

C. Expanding Judicial Authority to Award Restitution Does Not Violate a Defendant's Constitutional Rights.

Expanding restitution in the fashion described here will not violate a defendant's constitutional rights. It is important to understand that the changes proposed here would operate within the framework of a larger statutory scheme. Defendants would, of course, still be entitled to notice and hearing about any proposed restitution.[58] Defendants would also be able to appeal any inappropriate award.

The constitutional questions that have been raised about expanding restitution have typically centered around two points: first, whether the Supreme Court's decision in *United States v. Hughey* requires that losses be directly tied to an offense of conviction; and, second, whether expanded restitution awarded by judges would violate a defendant's right to a jury trial under either the Sixth or Seventh Amendments. Neither of these concerns applies to my proposals.

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consequential expenses incurred due to the defendant's crime); *United States v. Schinnell*, 80 F.3d 1064 (5th Cir. 1996) (reversing district court decision to award $344,000 in restitution to victim bank for accounting fees and costs to reconstruct bank statements during time when defendant was fraudulently withdrawing funds from bank customer's accounts because consequential damages not recoverable); *United States v. Wright*, 176 Fed. Appx. 373 (4th Cir. 2006) (unpublished) (security costs to firearms dealers after defendant's theft of firearms improper consequential damages).

[56] 18 U.S.c. § 3664(j)(2).

[57] 18 U.S.C. § 3664(f)(2)-(3).

[58] 18 U.S.C. § 3664(b), (d)(3), (e).

1. *Hughey v. United States Involved a Narrow Statutory Question.*

In 1990, the Supreme Court in *Hughey v. United States* considered a narrow statutory issue. The Court reviewed an award of restitution made by the federal trial court under VWPA which called for restitution for charged and convicted offenses.[59] After pleading guilty to one count of a six count indictment, the trial court ordered Mr. Hughey to pay restitution in the amount of $90,431. This figure resulted from Mr. Hughey's alleged theft and unauthorized use of 21 credit cards, although Mr. Hughey pleaded guilty to the use of only one specific credit card.[60] Looking at the language of the restitution statute itself, the Court held that "restitution as authorized by the statute is intended to compensate victims only for losses caused by the conduct underlying the offense."[61] Although faced with policy questions "surrounding VWPA's offense-of-conviction limitation on restitution orders," the Court declined to resolve such issues.[62] Rather, the Court relied on the "statutory language regarding the scope of a court's authority to order restitution," finding the language unambiguous.[63] And even if such language had been ambiguous, the Court's "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant . . . preclude[d its] resolution of the ambiguity" in favor of criminal restitution.[64]

It is clear this case simply turned on what the restitution statute in question authorized – restitution only for the offense of conviction – and therefore the Court clearly held that the sentencing judge was without authority to do anything more. Of course, a broader statute of the type proposed above would not suffer from this defect. Because it is a decision of *statutory* interpretation, *Hughey* cannot be read as shedding light on constitutional issues.

2. *A Defendant Is Not Entitled to a Jury Trial on Restitution, Even if Broad Forms of Restitution are Allowed.*

Turning to constitutional issues, the main constitutional challenge that has been raised to broad restitution statutes is that they would trigger a need for a jury trial, under either the Sixth Amendment or the Seventh Amendment. These challenges are unfounded.

a. The Sixth Amendment Does Not Give a Defendant a Right to Jury Trial on Restitution Issues.

Even in the wake of *Blakely* and *Booker*'s expansion of a defendant's Sixth Amendment right to a jury trial, it is clear that restitution of the type proposed here would not trigger the need for a jury trial.

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[59] 495 U.S. 411 (1990).
[60] *Id.* at 414.
[61] *Id.* at 416.
[62] *Id.* at 419.
[63] *Id.*
[64] *Id.*

The Circuits that have looked at the question in recent months have uniformly held that judges can undertake the fact-finding necessary to support restitution orders under *Blakely* and *Booker*.[65] As the Sixth Circuit has explained, "Nor does [] *Booker*'s analysis of the Sixth Amendment affect restitution, because a restitution order for the amount of loss cannot be said to 'exceed the statutory maximum' provided under the penalty statutes."[66] Of course, the proposed changes described above expand the existing statutory maximum, so that a defendant who commits a federal crime would be on notice that he was subject to a restitution order for any amount that was "just and proper" to restore a victim. Judicial fact-finding under that broad umbrella would not increase the penalty to which a defendant is exposed, the trigger for a Sixth Amendment jury trial right.

The conclusion that a defendant is not entitled to a jury trial on restitution is supported by another consideration: historically, dating to the earliest days of this country, judges have made restitution decisions.[67] At common law, for example, restitution was a statutory remedy "to be awarded *by the justices* on a conviction of robbery or larceny."[68] This common law rule was recognized by the Supreme Court in 1842 in *United States v. Murphy*:

> The statute of 21 Hen. VIII., c. 2, gave full restitution of the property taken, after the conviction of an offender, of robbery. The writ of restitution was to be granted by the justices of the assize . . . .[69]

And forcible entry and detainer is one crime in which it was common to encounter provision of a restitutionary remedy at common law. Upon conviction by a jury of forcible entry and detainer, for example, *Blackstone's Commentaries* explains that "besides the fine on the offender, the justices shall make restitution by the sheriff of the possession . . . ."[70] Many states early on

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[65] *See, e.g.*, *United States v. Garza*, 429 F.3d 165, 170 (5th Cir. 2005) (per curiam) ("We agree with our sister Circuits, who have uniformly held that judicial fact-finding supporting restitution orders does not violate the Sixth Amendment."); *United States v. Ingles*, 445 F.3d 830 (5th Cir. 2006) (same); *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005); *United States v. Sosebee*, 419 F.3d 451, 462 (6th Cir. 2005); *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005) ("We have accordingly held that *Apprendi v. United States* . . . does not affect restitution . . . and that conclusion is equally true for *Booker*."); *United States v. May*, 413 F.3d 841, 849 (8th Cir. 2005) ("Several circuits have affirmatively rejected the notion that . . . *Booker* affect the manner in which findings of restitution can be made. . . . These cases are persuasive."); *United States v. Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005) ("In contrast to its application of the Sentencing Guidelines, the district court's orders of restitution and costs are unaffected by the changes worked by *Booker*."); *United States v. Antonakopoulos*, 399 F.3d 68, 83 (1st Cir. 2005) (*Booker* does not apply to restitution because restitution does not involve imprisonment).

[66] *United States v. Sosebee*, 419 F.3d 451, 462 (6th Cir. 2005).

[67] The following material is taken from *United States v. Visinaiz*, 344 F. Supp. 2d 1310, 1323-26 (D. Utah 2004), *aff'd*, 428 F.3d 1300 (10th Cir. 2005).

[68] 16 C.J.S. *Criminal Law* §3255 (1918) (citing 21 Hen. VIII c 11; 7 & 8 Geo. IV c 29 § 57) (emphasis added).

[69] 41 U.S. 203, 206 (1842).

[70] 4 BLACKSTONE COMM. p. 117 (2001 Mod. Engl. ed. of the 9th ed. of 1793).

criminalized forcible entry upon and detainer of land, and often these statutes authorized the judge to order restitution and the payment of damages upon conviction.[71]

It is quite clear that restitution ordered by judges was routinely available at common law and in the early American courts as a remedy for the crimes of larceny and forcible entry and detainer. This also supports the conclusion that restitution has historically been understood as a "civil" and not a "punitive" remedy. Judge-ordered restitution as part of the sentence for these crimes did not appear to be controversial around the time of the country's founding. And even if most larceny sentences did not require judges to find additional facts to calculate restitution, the evidence does not establish that this was universally so and it seems probable that judges would sometimes have been required to set a specific valuation for restitutionary purposes when an indictment only specified (or the jury only found) value as "less than 200 shillings" for purposes of establishing the degree of the crime. To the extent that this kind of additional judicial fact-finding likely occurred in some larceny cases, it supports the conclusion that the Framers would have understood the "criminal prosecution" to which the Sixth Amendment right to a jury trial extended as not implicating restitution.

For all these reasons, a defendant has no Sixth Amendment right to a jury trial on restitution awards.

b. The Seventh Amendment Does Not Give Defendant's a Right to Jury Trial on Restitution Issues.

It might be argued that expanding restitution to cover such things a consequential damages (including emotional distress damages) would trigger a defendant's right to jury trial under the Seventh Amendment. The Seventh Amendment, of course, protects the constitutional right of all persons – not just criminal defendants – to a jury trial in a civil case. The amendment provides, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[72] It would be odd, to say the least, to discover that while the amendment directly addressing the procedural rights of criminal defendants – the Sixth Amendment – does not give defendants a right to a jury trial on restitution, somehow the Seventh Amendment jury trial provision does. Such a conclusion would be contrary to the general rule of constitutional construction that the specific must take precedence over the general. Indeed, the Supreme Court has stated that if "a constitutional claim is covered by a specific provision . . , the claim must be analyzed under the

[71] *See Allen v. Ormsby*, 1 Tyl. 345 (Vt. 1802) (citing sec. 5 of the forcible entry and detainer act of February 27, 1797); *Crane v. Dodd*, 2 N.J.L. 340 (N.J. 1808) (citing sec. 13 of the state's forcible entry and detainer act providing for an award of "treble costs"); *People ex rel. Corless v. Anthony*, 4 Johns. 198 (N.Y. Supp. 1809) (citing St. 11th Sess. c. 6, forcible entry and detainer statute authorizing an award of restitution and damages to the aggrieved party). *But see Commonwealth v. Stoever*, 1 Serg. & Rawle 480 (Pa. 1815) (no damages allowed under state's forcible entry and detainer statute).
[72] U.S. CONST. amend. VII.

standard appropriate to that specific provision, not under the rubric of substantive due process."[73] As the Seventh Amendment applies only to civil suits, and does not specifically discuss criminal prosecutions, criminal procedures, or restitution orders, the specific again must take precedence over the general.

A few courts, however, have noted that there is a possible issue in this area. In *United States v. Scott*,[74] a panel of the Seventh Circuit stated that "to blur the line" between criminal restitution and common law damages "would create a potential issue under the Seventh Amendment because the amount of criminal restitution is determined by the judge, whereas a suit for damages is a suit at law within the amendment's meaning."[75] *Scott* dealt with a restitution order for audit expenses incurred by the employers which Mr. Scott defrauded. The Seventh Circuit concluded that the MVRA required restitution in the amount equal to the loss of the value of property that resulted from the criminal conduct. Although that court discussed whether common law damages applied to such a restitution order, it ultimately affirmed the award of restitution because "damage-to-property" had occurred.[76] At the end of the day, *Scott* does not actually say much about the Seventh Amendment as a potential barrier to judicially-determined restitution orders, but rather touches on the issue to point out the distinction between restitution and common law damages.

It is clear from the cases cited in *Scott*, however, that the overwhelming view in the Circuit Courts is that the Seventh Amendment does not apply to a criminal restitution hearing. While the Supreme Court itself has yet to reach the question, it has recognized that every "Federal Court of Appeals that has considered the question [of whether judicially-ordered restitution violates the Seventh Amendment] has concluded that criminal defendants contesting the assessment of restitution orders are not entitled to the protections of the Seventh Amendment."[77] The Circuits that have decided the issue often take the position that a restitution order is "penal" rather than "compensatory" and therefore conclude the Seventh Amendment simply does not apply.[78]

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[73] *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998).
[74] 405 F.3d 615, 619 (7th Cir. 2005).
[75] *Id.*
[76] *Id.*
[77] *Kelly v. Robinson*, 479 U.S. 36, 53 n.14 (citing cases from Note, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 62 TEXAS L. REV. 671, 672 n.18 (1984)).
[78] *United States v. Rostoff*, 164 F.3d 63, 71 (1st Cir. 1999) (citing *United States v. Palma*, 760 F.2d 475, 479-80 (3d Cir. 1985) (citing cases from the Second, Eighth, Ninth, Tenth, and Eleventh Circuits)); *United States v. Savoie*, 985 F.2d 612, 619 (1st Cir. 1993); *United States v. Keith*, 754 F.2d 1388, 1392 (9th Cir. 1985) ("Congress made restitution . . . a criminal penalty."); *United States v. Watchman*, 749 F.2d 616, 617 (10th Cir. 1984) ("Restitution is a permissible penalty imposed on the defendant as part of sentencing."); *United States v. Satterfield*, 743 F.3d 827, 837 (11th Cir. 1984) ("restitution as part of the criminal sentence"); *United States v. Brown*, 744 F.2d 905, 909 (2d Cir. 1984) ("restitution . . . serves . . . traditional purposes of punishment . . . [and is a] useful step toward rehabilitation"); *United States v. Florence*, 741 F.2d 1066, 1067 (8th Cir. 1984) (restitution as an "aspect of criminal punishment"). *See, e.g.*, Irene J. Chase, *Making the Criminal Pay in Cash: The Ex Post Facto Implications of the Mandatory*

My own view is that it is better to avoid a debate about whether to label restitution as penal or compensatory. Indeed, a strong case can be made that restitution is, at least for some purposes, best described as "compensatory."[79] The notion of compensating victims for losses attributable to the defendant's crime is logically and intuitively non-punitive. Restitution is, instead, a device ultimately aimed at restoring the victim back into the position he occupied prior to his victimization. And regardless of the context, as the Seventh Circuit noted in *United States v. Newman*, while "[t]he criminal law may impose punishments on behalf of all of society, . . . equitable payments of restitution in this context inure only to the specific victims of a defendant's criminal conduct and do not possess a similarly punitive character."[80] After all, even the Supreme Court has noted that the ordinary meaning of restitution is to "restor[e] someone to a position he occupied before a particular event."[81]

Regardless of whether restitution is in some sense penal or compensatory, however, there is a straightforward way to reach the conclusion that restitution is not covered by the Seventh Amendment jury trial guarantee. As explained by the Second Circuit in *Lyndonville Savings Bank & Trust Co. v. Lussier*,[82] because "adjudication of the restitution is an adjunct of sentencing and is therefore part of a criminal proceeding, the Seventh Amendment providing for the preservation of the right of a trial by jury in civil suits does not apply."[83] The Circuit noted that "judicially ordered restitution in criminal cases has a long history, rooted in the common law at the time the Seventh Amendment was adopted."[84] Finally, the Second Circuit relies on "the purpose and process of adjudicating the amount of restitution in a criminal proceeding . . . as part of a defendant's sentence [to serve] the traditional penal functions of punishment, including rehabilitation."[85]

In a widely-quoted opinion written by Judge Richard Posner, the Seventh Circuit has reached much the same conclusion. In *United States v. Fountain*,[86] the Circuit considered the constitutionality of a federal restitution statute under the Seventh Amendment. The Circuit

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Victims Restitution Act of 1996, 68 U. CHI. L. REV. 463, 489 (2001) (arguing that construing the MVRA as a civil penalty raises serious Seventh Amendment concerns, and advocates courts considering restitution under the MVRA as a criminal penalty).

[79] *See Visinaiz*, 344 F. Supp. 2d at 1320-23 (developing the argument and citing supporting authority), *aff'd*, 428 F.3d 1300. *See, e.g.*, *United States v. Nichols*, 169 F.3d 1255, 1279 (10th Cir. 1999) ("[W]e believe the district court erred in viewing restitution as a punitive act, thus leading it into the albeit logical but nonetheless erroneous conclusion it could not apply the MVRA."); *United States v. Arutunoff*, 1 F.3d 1112, 1121 (10th Cir. 1993) ("the VWPA's purpose is not to punish defendants or to provide a windfall for crime victims but rather to ensure that victims, to the greatest extent possible, are made whole for their losses").

[80] 144 F.3d 531, 538 (7th Cir. 1998).

[81] *United States v. Hughey*, 495 U.S. 411, 416 (1990).

[82] 211 F.3d 697, 702 (2d Cir. 2000).

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] 768 F.2d 790, 800-02 (7th Cir. 1985).

concluded that "criminal restitution is not some newfangled effort to get around the Seventh Amendment, but a traditional criminal remedy; *its precise contours can change through time without violating the Seventh Amendment*."[87] Looking at the historical analogy of the restitution statute, the Circuit commented that restitution of stolen goods was an established criminal remedy predating the Seventh Amendment.[88] And since restitution is "frequently an equitable remedy, meaning of course, that there is no right of jury trial," then a district judge's restitution order does not violate the Seventh Amendment.[89]

Judge Posner's conclusion makes sense as a matter of the historical record. Indeed, from certain historical examples, consequential damages, including treble damages were often awarded as restitution. This common law practice of restitution was retained in several state statutes in the early years of the Republic.[90] *Ross v. Bruce*,[91] *Commonwealth v. Andrews*,[92] and *Crane v. Dodd*,[93] cite state statutes which provided for treble damages to the victim of theft after the defendant had been convicted. It is clear that as a historical matter, consequential damages, through an award of treble damages upon conviction of the defendant, were awarded by some state courts as a matter of course. Thus restitution, including certain compensatory damages awards, were clearly an established criminal remedy in earlier times.

Judge Posner's conclusion also makes sense as a matter of practicalities. Today, a defendant who is found guilty by a jury of, for example, bank fraud in violation of 18 U.S.C. § 1344 faces a penalty of up to 30 years in prison, a fine of up to $1,000,000, and restitution for property that the bank lost even if it is in the millions of dollars. It would odd in the extreme to say that, on her own, a judge could order a defendant to be sent off prison for many years and to pay restitution for millions of dollars in losses, but nevertheless had to hold a jury trial before awarding such things as attorney's fees or other consequential damages. The jury trial protections of the Constitution should not be trivialized by being read in such a haphazard fashion.

III. RESTITUTION SHOULD BE AN AVAILABLE OPTION FOR ALL FEDERAL CRIMES.

Remarkably, federal judges do not have authority to award restitution for all crimes. Instead,

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[87] *Id.* at 801 (emphasis added).
[88] *Id.*
[89] *Id.*
[90] *See* Act of September 15, 1786 (12 St.L. 282-283 Ch. 1241 (Penn.); *Ross v. Bruce*, 1 Day 100 (Conn. 1803) (citing state statute 413 authorizing "treble damages" for theft); *Commonwealth v. Andrews*, 2 Mass. 14, 24, 1806 WL 735, 7 (Mass. 1806) (citing larceny act of March 15, 1785, authorizing award of treble the value of goods stolen to the owner upon conviction).
[91] 1 Day 100 (Conn. 1803) (citing state statute 413 authorizing "treble damages" for theft).
[92] 2 Mass. 14, 24, 1806 WL 735, 7 (Mass. 1806) citing larceny act of March 15, 1785, authorizing award of treble the value of goods stolen to the owner upon conviction).
[93] 2 N.J.L. 340 (N.J. 1808) (citing sec. 13 of the state's forcible entry and detainer act providing for an award of "treble costs").

the restitution statutes create a patchwork quilt of cases in which judges have restitution authority, as authority is limited to crimes that happen to be found in Title 18 of the U.S. Code and few other scattered provisions. Congress should eliminate this artificial barrier and give federal judges authority to award restitution to victims in *all* cases in which a victim has suffered a loss.

The main federal restitution statutes – 18 U.S.C. § 3663 and 18 U.S.C. § 3663A – authorize judges to award when sentencing a criminal for various prescribed offenses. Section 3663 permits a court to award restitution "when sentencing a defendant convicted of an offense under this title [i.e., Title 18]" or for and offense under "21 U.S.C. 841, 848(a), 849, 856, 861, 863" or for various offenses in title 49 (i.e., aircraft hijacking). Section 3663A permits a court to award restitution when sentencing a defendant for "a crime of violence," "an offense against property under this title [i.e., Title 18] or under . . . 21 U.S.C. § 856(a)," or for an offense involving tampering with consumer products under 18 U.S.C. § 1365.

The upshot is the federal district court judges lack the authority to award restitution when sentencing criminals who have committed many serious offenses that happen to lie outside the prescribed authority. A few illustrations will demonstrate this point:

- In *United States v. Elias*,[94] the defendant forced his employees to clean out a 25,000 gallon tank filled with cyanide sludge, without any treatment facility or disposal area. He was convicted of violating the Resource Conservation and Recovery Act by disposing of hazardous wastes and placing employees in danger of bodily harm. The district court ordered the defendant to pay $ 6.3 million in restitution. The Ninth Circuit overturned the restitution order because the restitution statute only authorizes imposition of restitution for violations of Title 18 and certain other crimes, not environmental crimes.[95]

- In *United States v. Simer*,[96] Defendant plead guilty to committing "lewd, obscene and indecent acts in the presence of a child on an aircraft". The district court ordered him to pay restitution for the "lost fuel, revnue and other costs as a result of [the defendant's] activity which cuased the flight not to be able to proceed." The 9th Circuit reversed the restitution order "because committing lewd, obscene and indecent acts in the presence of a child under the age of 16 on an aircraft does not meet the category of crimes within the statute's application [(18 U.S.C. §§ 3663 or 3663A)]."

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[94] 269 F.3d 1003 (9th Cir. 2001) (unpublished), 1999 WL 503831.

[95] *Id.* at 1021-22; *see also United States v. Hoover*, 175 F.3d 564, 569 (7th Cir. 1999) (holding that the district court lacked legal authority to order restitution to the IRS for the defendant's tax liability); *United States v. Minneman*, 143 F.3d 274, 284 (7th Cir. 1998) (holding that the VWPA does not authorize restitution for Title 26 tax offenses).

[96] 187 F.3d 650 (9th Cir. 1999) (unpublished),1999 WL 503831.

- In *U.S. v. Ortiz*,[97] Defendant pled guilty to drug charges in 1999 and was sentenced to 70 months in jail, followed by four years of supervised release. After his release from prison, he violated his conditions of release several times. At a supervised release hearing, the district judge ordered the defendant to pay $500 for his damaged ankle bracelet. The 5th Circuit vacated the restitution order because restitution could not be ordered under § 3663 or § 3663A or any other provision of law.

The only justification for this curious state of affairs is found in legislative history accompanying several of the restitution statutes. In 1982, when expanding restitution through the adoption of 18 U.S.C. § 3663, a Senate Report expressed the view that restitution should not extend to the antitrust laws, the securities laws and certain other regulatory statutes because such statutes "involve complex issues which are outside the intended scope of Section [3663] such as standing, reliance and causation" and "have historically contained their own methods of restituting victims – such as the authorization of treble damages – a system of sanctions and reparations the Committee believes should remain integral parts of the regulatory statutes themselves."[98] In 1996, when Congress expanded the coverage of the restitution statutes, the accompanying Senator Report stated:

> Other than offenses under part D of the Controlled Substances Act (21 U.S,C. 841 et seq.), the committee specifically rejects expanding the scope of offenses for which restitution is available beyond those for which it is available under current law. Regulatory or other statutes governing criminal conduct for which restitution is not presently available contain their own methods of providing restitution to victims and of establishing systems of sanctions and reparations that the committee believes should be left unaffected by this act.[99]

These explanations do not justify denying judges the ability to order restitution to victims of all federal crimes. First, it simply untrue that other statutes "contain their own methods of providing restitution to victims." As the examples recited above demonstrate, other statutes typically lack means of providing restitution. As shown in the *Elias* case, the environmental statutes contain no such means. Even the one example cited in the Senator reports – treble damages – is not particularly instructive. A victim of an antitrust crime, for example, would have to file an independent civil action to obtain such damages – even after a defendant had been found criminally culpable for an antitrust violation. The criminal antitrust statutes themselves provide no means for a judge to award restitution in the criminal case.

Second, even if it is assumed that the some of these other statutes provide a system of "sanctions and reparations," that is of little comfort to crime victims Crime victims who have suffered a loss from a crime need to have those losses restored – not fines assessed against criminals.

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[97] 252 Fed.Appx. 664 (5th Cir. 2007) (unpublished).
[98] S. Rep. No. 97-532 at 33, 1982 U.S.C.C.A.N. at 2539.
[99] S. Rep. No. 104-179 at 19, 1986 U.S.C.C.A.N. 924, at 932.

Third, to make things even more curious, it is clear that restitution could be awarded in a criminal antitrust case – if the Government charged an antitrust conspiracy or aiding and abetting an antitrust offense, both Title 18 offenses. For instance, in *United States v. All Star Industries*,[100] a corporation was charged with violating section 1 of the Sherman Act (15 U.S.C. § 1) and for aiding and abetting a price-fixing scheme (18 U.S.C. § 2). Because of the aiding and abetting charge, the district court awarded $859,935 in restitution for the inflated prices that resulted. The Fifth Circuit affirmed the award, noting that it was proper because of the Title 18 charge. Given that virtually every antitrust offense will likely involve more than one person, the ability of judges to award restitution in antitrust cases will come down to the happenstance of whether the prosecutors have elected to include a conspiracy charge or an aiding and abetting charge along with the substantive antitrust offenses. The form of the charging instrument should not determine the power of a judge to compensate crime victims.

Victims of all federal crimes should have the right to seek restitution from convicted criminals who have caused a loss to them. Congress should eliminate the artificial restraints currently found in the restitution statutes and give judges the power to award restitution in all federal criminal cases.

IV. CONGRESS SHOULD EXPAND THE ABILITY OF JUDGE'S TO RESTRAIN DEFENDANT'S FROM TRANSFERRING ASSETS THAT COULD BE USED TO SATISFY RESTITUTION AWARDS.

Congress should also expand the ability of judges to block defendants from transferring assets that could be used to satisfy a restitution award. Criminal defendants should not be able to defeat a restitution award by simply spending money criminally taken from a victim and then later pleading poverty. Yet this is precisely what is happening in many cases. The General Accounting Office recently documented this dissipation of assets:

> During the intervals between criminal activities and the related judgment, Justice acknowledge that dispositions and circumstances involving the offenders' assets or the offenders often occur that create major debt collection challenges for the [Financial Litigation Units charged with enforcing restitution awards]. According to Justice, criminals with any degree of sophistication, especially those engaged in fraudulent criminal enterprises, commonly dissipate their criminal gains quickly and in an untraceable manner. Assets acquired illegally are often rapidly depleted on intangible and excess "lifestyle" expenses. Specifically, travel, entertainment, gambling, clothes, and gifts are high on the lift of means to rapidly dispose of such assets.[101]

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[100] 962 F.2d 465 (5th Cir. 1992), *rev'd on other grounds*, *United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994).

[101] GAO, CRIMINAL DEBT: COURT-ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES, GAO-05-80 at 12 (Jan. 2005)

To deal with this serious problem, Congress should adopt legislation giving courts greater power, at the request of prosecutors, to secure assets that could be used to reimburse victims for their losses from federal crimes. The asset preservation provisions found in S. 973 (introduced by Senator Dorgan and others) and in H.R. 845 (introduced by Representative Chabot and others) would be valuable steps in this effort. Focusing for convenience on S. 973, it would make three valuable improvements in the law. First, S. 973 would amend the Anti-Fraud Injunction Statute to permit the Attorney General to seek a court order enjoining a person who is "committing or about to commit a Federal offense that may result in an order of restitution" from dissipating assets – expanding the provision from current law, which authorizes such orders only in cases of banking or health care fraud offenses. Second, S. 973 amends the Federal Debt Collection Procedures Act to allow the same prejudgment remedies to help collect restitution that are available to the United States in ordinary civil cases. Third, it would provide that the Government could make an *ex parte* application to a judge for an order restraining a defendant's assets or securing a bond from the defendant to ensure that restitution will be paid. The order would issue upon a finding of probable cause "that a defendant, if convicted, will be order to pay an approximate amount of restitution for a[] [felony] offense . . . ."

The first two changes appear to be completely non-controversial. It makes no sense to permit courts to enjoin the dissipation of assets for banking and health care offenses, but not drug dealing or environmental crimes. That power should broadly extend across the federal criminal code. Moreover, it is absurd that when the government seeks to collect funds on a defaulted student loan it has collection powers that are not available to it when it seeks to collect funds a swindler is stealing from crime victims. These two changes should be adopted without delay.

The third change should also be adopted rapidly, although an objection that has been raised that is worth a brief discussion. Several criminal defense attorneys have apparently taken the position that the restraining order provision is unfair to defendants and even unconstitutional.[102] This objection is without merit.

But before turning to this objection, it is important to understand its limited scope of an objection based on defendant's concerns. Third parties who have interest in the restrained property have elaborate protections under S. 973. In particular, any person other than a defendant "who has a legal interest in the property affected by a protective order" under the provision would have a right to seek modification of the order by showing that it "causes an immediate and irreparable hardship to the moving party" and that there are "less intrusive means . . .to preserve the property for the purpose of restitution." Upon such a showing, the court would then hear rebuttal evidence (if any) from the Government followed by any modification of the restraining order that might be appropriate, to extent that modification is possible without destroying the ability to provide restitution to crime victims.[103]

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[102] Letter from David B. Smith to Kyle O'Dowd, Legislative Director, National Association of Criminal Defense Lawyers (Oct. 31, 2007).

[103] These safeguards appear to go beyond what the Constitution requires. *Cf. United States v. Holy Land*

With regard to criminal defendants as well, S. 973 provides very significant protections – protections that exceed what the Constitution and sound public policy require. First, the order can issue only upon a finding of probable cause that the defendant has committed a federal felony offense. Thus, to put it simply, the legislation affects only those who are probably serious federal felons who have caused a loss to a victim. Second, if a court finds probable cause, the court can enter a restraining order for purposes of awarding restitution; but the order is limited to restitution collection purposes, such as "preserv[ing] the availability of any property traceable to the commission of the offense charged." Third, after such an order is entered, the defendant is then entitled to a hearing if he can establish a good basis for a hearing. In particular, a defendant can obtain a hearing either after indictment by showing that he lacks other assets to pay counsel or living expenses and there is a bona fide reason to believe that the restrained assets will not be needed to pay restitution to a crime victim. Fourth, the provisions operate against a backdrop of other federal laws protecting defendant's rights, including notably the Speedy Trial Act,[104] which guarantees a defendant (unless he or she moves for a continuance) a swift trial on the merits of the Government's allegations.

These provisions comply with the Constitution. The procedural protections are modeled on the asset forfeiture provisions found in 21 U.S.C. § 853, which were upheld against constitutional attack by the United States Supreme Court in *United States v. Monsanto*.[105] There the Court explained that "it would be odd to conclude that the Government may not restrain property . . . based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government may restrain *persons* [i.e., lock up a defendant without bail] where there is a finding of probable cause to believe that the accused has committed a serious offense."[106] The Court further noted that in some circumstances the Government can constitutionally *seize* property based on finding of probable cause. It is fair less intrusive to merely restrain disposition of property pending further court proceedings about what should happen to it. Likewise, S. 973 does not seize any property, but simply preserves the status quo until a court finally determines whether a defendant is guilty beyond a reasonable doubt and, if so, whether the restrained property should be used to compensate a crime victim for losses the defendant caused with his crime.

The Circuit courts that have examined the asset forfeiture provision have generally concluded that "that due process requires the district court to hold a prompt hearing at which the property owner can contest the restraining order -- without waiting until trial to do so -- at least when the restrained assets are needed to pay for an attorney to defend him on associated criminal charges." [107] S. 973 complies with that instruction by giving a defendant an opportunity to

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Foundation for Relief and Development, 493 F.3d 469, 477 (5th Cir. 2007) (en banc) (rejecting third-party challenges to asset freezing provisions in 21 U.S.C. § 853).

[104] 18 U.S.C. §§ 3161 *et seq.*

[105] 491 U.S. 600 (1989).

[106] *Id.* at 615 (*citing United States v. Salerno*, 481 U.S. 739 (1987) (upholding preventative detention provisions of the Bail Reform Act).

[107] *United States v. Melrose East Subdivision*, 357 F.3d 493, 499 (5th Cir. 2004) (*citing United*

challenge a restraining order that blocks retention of counsel or payment of reasonable living expenses. This complies with the due process requirement that, before trial, a defendant have "a brief hearing [to] . . . provide an opportunity . . . to prove by a preponderance of the evidence that the government seized untainted assets without probable cause that he needs those same assets to hire counsel."[108]

Confirming the constitutionality of the proposed provisions are parallel provisions in several states that provide for comparable restraints on assets. California law, for example, contains a "freeze and seize" provision[109] that allows a prosecutor to obtain a temporary restraining order or similar order to preserve assets for restitution:

> To prevent dissipation or secreting of assets or property, the prosecuting agency may, at the same time as or subsequent to the filing of a complaint or indictment charging two or more felonies, as specified in subdivision (a), and the enhancement specified in subdivision (a), file a petition with the criminal division of the superior court of the county in which the accusatory pleading was filed, seeking a temporary restraining order, preliminary injunction, the appointment of a receiver, or any other protective relief necessary to preserve the property or assets. This petition shall commence a proceeding that shall be pendent to the criminal proceeding and maintained solely to affect the criminal remedies provided for in this section. The proceeding shall not be subject to or governed by the provisions of the Civil Discovery Act as set forth in Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure. The petition shall allege that the defendant has been charged with two or more felonies, as specified in subdivision (a), and is subject to the aggravated white collar crime enhancement specified in subdivision (a). The petition shall identify that criminal proceeding and the assets and property to be affected by an order issued pursuant to this section.[110]

California trial courts are empowered to grant the petition. There then follows an opportunity for a defendant to request a court hearing regarding the restraining order. At the hearing, the court is directed to consider relevant factors as follows:

States v. Jones, 160 F.3d 641, 645-48 (10th Cir.1998); *United States Monsanto*, 924 F.2d 1186, 1203 (2d Cir. 1991) (en banc); *United States v. Moya-Gomez*, 860 F.2d 706, 729-30 (7th Cir.1988); *United States v. Harvey*, 814 F.2d 905, 928-29 (4th Cir.1987), superceded as to other issues, *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir.1988) (en banc), *aff'd*, 491 U.S. 617 (1989). The Eleventh Circuit, however, holds that no pretrial hearing is required under 21 U.S.C. § 853(e) even when the restrained assets are needed to pay counsel. *United States v. Bissell*, 866 F.2d 1343, 1354 (11th Cir. 1989); *see also United States v. Reigster*, 182 F.3d 820, 835 (11th Cir. 1999).

[108] *United States v. Farmer*, 274 F.3d 800, 805 (4th Cir. 2001).

[109] *See People v. Green*, 22 Cal.Rptr.3d 736, 738 (Cal. App. 2004).

[110] Cal. Penal Code § 186.11(c)(2).

> The court shall weigh the relative degree of certainty of the outcome on the merits and the consequences to each of the parties of granting the interim relief. If the prosecution is likely to prevail on the merits and the risk of the dissipation of assets outweighs the potential harm to the defendants and the interested parties, the court shall grant injunctive relief. The court shall give significant weight to the following factors:
>
> (A) The public interest in preserving the property or assets pendente lite.
> (B) The difficulty of preserving the property or assets pendente lite where the underlying alleged crimes involve issues of fraud and moral turpitude.
> (C) The fact that the requested relief is being sought by a public prosecutor on behalf of alleged victims of white collar crimes.
> (D) The likelihood that substantial public harm has occurred where aggravated white collar crime is alleged to have been committed.
> (E) The significant public interest involved in compensating the victims of white collar crime and paying court-imposed restitution and fines.[111]

The California courts have found these procedures to be constitutionally adequate.[112]

A similar provision is found in Pennsylvania law. Pennsylvania prosecutors are allowed to obtain a temporary restraining order on the following grounds:

> A temporary restraining order under subsection (e) may be entered upon application of the Commonwealth without notice or opportunity for a hearing, whether or not a complaint, information, indictment or petition alleging delinquency has been filed with respect to the property, if the Commonwealth demonstrates that there is probable cause to believe that the property with respect to which the order is sought appears to be necessary to satisfy an anticipated restitution order under this section and that provision of notice will jeopardize the availability of the property to satisfy such restitution order and judgment. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this subsection shall be held at the earliest possible time and prior to the expiration of the temporary order.[113]

Likewise, Minnesota law allows prosecutors to obtain an order to a financial institution freezing funds of an accused felon.[114] And, last but certainly not least, my home state of

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[111] Cal. Penal Code § 186.11(g)(3).
[112] *See, e.g., People v. Pollard*, 109 Cal.Rptr.2d 207 (Cal. App. 2001); *People v. Semaan*, 64 Cal.Rptr.3d 1 (Cal. App. 2007).
[113] 42 Pa. Con. Stat. Ann. § 9728(f).
[114] Minn. Stat. § 609.532.

Utah allows prosecutors to obtain an *ex parte* order preserving assets.[115] The law then provides for a hearing about the need for such an order.[116]

In light of these significant state examples, the similar provisions of S. 973 comply with constitutional requirements. But not only does S. 973 comply with the Constitution, its provisions simply make good sense. Once a federal district judge has found probable cause to believe that a defendant has committed a federal crime that will require an order of restitution, the significant interests of crime victims must be considered. It is fundamentally unfair for a defendant to be able to steal money from a victim and then continue to live "the high life" on the victim's own money – while courts remain powerless to enjoin this wasting of funds. S. 973 strikes a proper balance, ensuring that funds will be available to satisfy a restitution award in favor of a crime victim while allowing the accused to demonstrate a need for access to any improperly restrained assets to pay for an attorney or reasonable living expenses.

V. THE ABATEMENT AB INITIIO DOCTRINE SHOULD BE REPEALED FOR RESTITUTION AWARDS.

Congress should also act to repeal the doctrine of abatement ab initio, which sets aside the conviction of a criminal if he dies pending his appeal. This problematic doctrine was highlighted in the recent Enron-related case of *United States v. Lay.*[117] Kenneth Lay was convicted on May 25, 2006, of all counts against him in a case involving securities and wire fraud, following a sixteen-week jury trial and a separate one-week bench trial. Lay was scheduled to be sentenced on October 23, 2006. But before that could happen, on July 5, 2006, Lay suffered a heart attack and died.

Because of Lay's death, the federal district court presiding over the matter was required to vacate Lay's conviction. As a result, the Government was not able to pursue in the criminal case a restitution claim for more than $43 million.

The district judge was required to vacate Lay's conviction under the doctrine known as "abatement *ab initio*." This doctrine hold that, until a defendant's conviction has been affirmed on appeal, the defendant's death operate to void the conviction *ab* initio. The doctrine developed from a common law notion that, when a defendant has not had a chance to test his conviction in appellate courts, then it is unfair to maintain the conviction against him.[118] For example, the Fifth Circuit has asserted that: "When an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of them merits of appeal, which is an integral part of our system for finally adjudicating his guilt or innocence."[119] This

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[115] Utah Code Ann. § 77-39a-601(2).
[116] Utah Code Ann. § 77-38a-601(4)
[117] 456 F.Supp.2d 869 (S.D. Tex. 2006).
[118] *See* Greg Rios, *Abatement Ab Initio and a Crime Victim's Right to Restitution*, NCVLI News, Fall 2006, at p.6.
[119] *United States v. Estate of Parsons*, 367 F.3d 409, 413-14 (5th Cir. 2004).

view, however, unfairly disparages the skill with which the nation's federal district judges conduct criminal trials. While it is always possible that a district judge might make an error during the course of a trial, the odds are certainly against it; the vast majority of guilty verdicts in criminal cases are affirmed on appeal. As a matter of sound public policy, surely the law ought to at least presume that at trial produced an accurate result, rather than making the counter-factual, contrary assumption.

In addition, it is simply not the case that a convicted criminal has a "right" to an appeal. There is no federal due process right to take an appeal.[120] Instead, a criminal ability to appeal derives from a federal statute authorizing appeals in criminal cases.[121] That appeal provision should be construed in light of another, much more recent federal statute – the Crime Victims' Rights Act.[122] That statute requires all crime victims to be "treated with fairness." It certainly is not fair to let a criminal steal from a victim, be convicted by a jury of the theft beyond a reasonable doubt, and yet escape an order of restitution because of the happenstance that he dies before his appeal is finally decided.

A growing number of state courts have rejected the abatement doctrine. A good illustration comes from the decision of the Washington Supreme Court in *State v. Devin*.[123] *Devin* overruled an earlier precedent requiring abatement *ab initio*. *Devin* explained that the earlier decision rested on the "outdate premise that convictions and sentences serve only to punish criminals, and not to compensate their victims."[124] In light of an amendment to the Washington Constitution requiring that crime victims be treated with dignity and respect, that assumption could no longer be sustained. The Court also noted that the doctrine rests on the incorrect assumption that a convicted criminals are innocent. In fact, as the United States Supreme Court has recognized, "Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears."[125] Finally, with regard to prevent financial harm to a convicted criminal's heir, "it makes no sense to protect the heirs of criminals but not their victims."[126] For all these reasons, the Washington Supreme Court overturned the rule requiring automatic abatement of a conviction when a defendant died pending appeal. Other state courts have recently reached similar holdings.[127]

It is clear that the doctrine of abatement *ab initio* can be overruled by statute.[128] Congress should pass such a statute to ensure that a result like that in the *Lay* case never occurs again.

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[120] *Herrera v. Collins*, 506 U.S. 390, 399 (1993) ("'[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears").
[121] 18 U.S.C. § 3742(a).
[122] 18 U.S.C. § 3771.
[123] 158 Wash.2d 157, 142 P.2d 599 (Wash. 2006).
[124] *Id.* at 604.
[125] *Devin*, 142 P.3d at 604 (quoting *Herrera v. Collins*, 506 U.S. 390, 399 (1993)).
[126] *Devin*, 142 P.3d at 605.
[127] *Alabama v. Wheat*, 907 So.2d 461 (Ala. 2005); *Idaho v. Korsen*, 111 P.3d 130 (Idaho 2005); *Michigan v. Peters*, 537 N.W.2d 160 (Mich. 1995).
[128] *See State v. Devin*, 142 P.3d 599, 604 (Wash. 2006) (noting that historically abatement has applied only "in the absence of a statute expressing the contrary").

H.R. 4111 has been introduced on a bi-partisan basis in this Congress and would achieve that goal by abolishing the automatic abatement doctrine. In its place, the bill would forbid criminal punishments (i.e., imprisonment or a fine) after the death of a convicted defendant, while allow restitution awards to be imposed. At the same time, however, the bill would allow the estate of a convicted person to seek appellate review of a restitution order. This bill strikes a reasonable balance between competing concerns and should be swiftly adopted.

VI. CONGRESS SHOULD GIVE JUDGES GREATER AUTHORITY TO PREVENT CRIMINALS FROM PROFITING FROM THEIR CRIMES.

Congress to pass legislation that would give judges sufficient power to insure that criminals do not profit from their crimes. The current federal law on the subject is apparently unconstitutional, yet neither the Justice Department nor the Congress has taken steps to correct the problem. It would be an embarrassment to the federal system of justice if criminals were able to be profit from their crimes merely because no one had taken the time to put in place an effective prohibition. Corrective legislation could be easily drafted, by giving judges discretionary power to prevent profiteering.

A. The Current Federal Law Forbidding Profiteering from Crimes is Unconstitutional.

By way of background, the federal criminal code, like the codes of various states, contains a provision concerning forfeiture of profits of crime. This provision, found in 18 U.S.C. § 3681, allows federal prosecutors to seek a special order of forfeiture whenever a violent federal offender will receive proceeds related to the crime. Congress adopted this statute in 1984,[129] and modeled it after a New York statute popularly known as the "Son of Sam" law.[130] In 1977, New York passed its law in response to the fact that mass murderer David Berkowitz received a $250,000 book deal for recounting his terrible crimes.

In 1991, the United States Supreme Court found that the New York Son of Sam law violated the First Amendment. In *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*,[131] the Court explained that the New York law "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content."[132] The New York statute that was struck down covered reenactments or depictions of a crime by way of "a movie, book, magazine article, tape recording, phonograph record, radio, or television presentation, [or] live entertainment of any kind."[133]

The federal statute is widely regarded as almost certainly unconstitutional, as it contains

[129] Pub. L. No. 98-473, 98 Stat. 2175 (Oct. 12, 1984).
[130] N.Y. Exec. Law § 632-a (McKinney 1982 and Supp.1991).
[131] 502 U.S. 105 (1991).
[132] *Id.* at 116.
[133] N.Y. Exec. Law § 632-a(1) (McKinney 1982), *reprinted in* 502 U.S. at 109.

language that is virtually identical to the problematic language in the old New York statute. In particular, the federal statute targets for forfeiture depictions of a crime in "a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind."[134] Thus, it can easily be argued by a criminal that the statute contains the same flaw – the targeting of protected First Amendment activity – that the Supreme Court found unconstitutional in the New York statute. Indeed, the Supreme Court in *Simon & Schuster* cited the federal statute as similar to that of New York's.[135] Moreover, the current guidance from the Justice Department to its line prosecutors is that this law cannot be used because of constitutional problems.[136]

B. Anti-Criminal-Profiteering Legislation Could Give Judges Expanded Power to Prevent Profiteering as a Condition of Supervised Release.

Unfortunately, neither the Department of Justice nor Congress have taken steps to revise the defective federal anti-profiteering statute in the wake of *Simon & Schuster*. Fortunately, there appears to be a relatively straightforward and constitutional solution available to Congress. As the Massachusetts Supreme Court has recognized in analyzing *Simon & Schuster*, nothing in the First Amendment forbids a judge from ordering in an appropriate case, as a condition of a sentence (including supervised release), that the defendant not profit from his crime. As *Commonwealth v. Powers*[137] explains, such conditions can be legitimate exercises of court power to insure rehabilitation of offenders and to prevent an affront to crime victims. These conditions do not tread on First Amendment rights, because they do not forbid a criminal from discussing or writing about a crime. Instead, they simply forbid any form of "profiteering."

Congress should give judges the power to order, in an appropriate case, that a term of supervised release be extended beyond what would otherwise be allowed for the sole purpose of insuring that a criminal not profit from his crime. For example, in a notorious case, upon appropriate findings, a judge might be empowered to impose a term of supervised release of life with the single extended condition that a criminal not profit from his crime. Legislation might look like this:

> 18 U.S.C. § 3583
>
> . . .
>
> (b) Authorized terms of supervised release.--Except as otherwise provided, the authorized terms of supervised release are--
>
> (1) for a Class A or Class B felony, not more than five years;
>
> (2) for a Class C or Class D felony, not more than three years; and
>
> (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.
>
> <u>Not withstanding any other provision of law, a court may impose a term of supervised release for any term of years or life that includes as a provision the</u>

[134] 18 U.S.C. § 3681(a).
[135] *See* 502 U.S. at 115.
[136] *See* DOJ Criminal Resource Manual 1105.
[137] 650 N.E.2d 87 (Mass. 1995).

> requirement that a defendant not profit from his or her crime. Notwithstanding any other provision of law, at any time the court may extend an existing term of supervised release to any term of years or life upon a finding that a defendant may profit from his or her crime.

This approach would recognize that sometimes after sentencing facts come to light suggesting that a defendant might be about to profit from his crime. Accordingly, this approach would allow extension of an existing term of supervised release (thereby assuring that the court has jurisdiction over a defendant) upon a finding that the defendant might profit.

C. Broader Legislation Could Forfeit any Profits from Profiteering.

While extending the terms of supervised release is a good way to prevent profiting that is about to occur, it does not address the problem of a criminal who has already profited. For example, a sentenced criminal might receive funds from a book deal before a court or victim becomes aware of this fact. Alternatively, a defendant might traffic in some tangible article that has gained notoriety – and value – because of its role in a crime

To deal with such situations, it would be appropriate to amend the federal anti-profiteering statute – 18 U.S.C. § 3681 – so that it can address such situations by forfeiting any profits a defendant obtains from a crime. The problem with the statute now, as with the old New York law, is that it targets First Amendment speech – and only First Amendment speech – for forfeiture. The statute could be redrafted to cover *all* forms of profiteering from a crime, not just those involving speech. A new statute could also be put in place to forbid defendants from profiting by selling tangible articles that have gained notoriety (and thus value) because of their association with the crime.

"Son of Sam" laws generally target the profits from book or movie deals, thereby trying to prevent the specter of a criminal profiting at the expense of his victim. Son of Sam laws typically forfeit any profits a criminal obtains from his crime and makes them available to crime victims. As noted earlier, in 1991 the Supreme Court found that the New York Son of Sam law, which required any entity contracting with an accused or convicted person to turn over income relating to that contract, to be an unconstitutional restriction on speech.[138] *Simon & Schuster, Inc.*, held that the New York statute was a content-based restriction on speech because it imposed a financial disincentive only on one particular kind speech. The Court concluded that the statute was not narrowly tailored enough to constitutionally achieve the compelling state interest of compensating crime victims.

After *Simon & Schuster, Inc.*, a number of states adopted what might be called "second generation Son of Sam laws. These statutes attempted to comply with *Simon & Schuster, Inc.* by broadening their focus.[139] Surprisingly, however, many of these statutes continued to target

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[138]*Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 502 U.S. 105 (1991).
[139]*See, e.g.*, CAL. CIV. CODE § 2225 (adopted in 1994); COLO. STAT. § 24-4.1-204 (adopted in 1994); IOWA CODE ANN. § 910.15 (adopted in 1992); 42 PENN. CON. STAT. § 8312 (adopted in 1995); TENN.

expressive activity protected by the First Amendment, leading to a rocky reception in appellate courts.

The fate of Nevada's anti-profiteering statute can serve to illustrate the problem of laws focusing on speech. In 1993, the Nevada legislature changed its Son of Sam law – Nevada Revised Statute § 217.007 – to address constitutional issues raised in *Simon & Schuster, Inc.*[140] The revised Nevada statute created a cause of action for a victim's right to sue within five years of the time when a convicted person "becomes legally entitled to receive proceeds for any contribution to any material that is based upon or substantially related to the felony which was perpetrated against the victim."[141] The Nevada Legislature defined "material" as "a book, magazine or newspaper article, movie, film, videotape, sound recording, interview or appearance on a television or radio station and live presentations of any kind."[142] In 2004, the Nevada Supreme Court invalidated the statute in *Seres v. Lerner*.[143] Given that the statute clearly targeted expressive activity and was content-based, the Nevada Supreme Court concluded that the statute was unconstitutional because it chilled First Amendment speech. Indeed, the statute targeted solely expressive activity, rather than "all fruits of the crime" or anything "related to the crime" to provide a victim's right of action to the proceeds due a convicted person.

A similar fate befell California's anti-profiteering statute in 2002, which also singled out income from speech. The California statute, first enacted in 1983, sought to forfeit proceeds from expressive activities related to crime. The salient provision (enacted before *Simon and Schuster, Inc.*) imposed an involuntary trust, in favor of crime victims, on a convicted felon's "proceeds" from expressive "materials" (books, films, magazine and newspaper articles, video and sound records, radio and television appearances, and live presentations) that "include or are based on" the "story" of a felony for which the felon was convicted, except where the materials mention the felony only in "passing . . . , as in a footnote or bibliography."[144] In *Keenan v. Superior Court*,[145] the California Supreme Court invalidated this provision, concluding that it "focuses *directly and solely on income from speech*."[146] As a content-based restriction on speech, it confiscated proceeds from "the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims."[147] The statute was "calculated to confiscate all income from a wide range of protected expressive works by convicted felons, on a wide variety of subjects and themes, simply because those works include substantial accounts of the prior felonies."[148] Interestingly, the California Supreme Court did not address a newer part of the statute – one that confiscated profits deriving from sales of memorabilia, property, things or rights for a

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CODE ANN. § 29-13-403 (adopted in 1994); VA. CODE ANN. § 19.2-368.20 (adopted in 1992).

[140] *See Seres v. Lerner*, 102 P.3d 91, 94 (Nev. 2004).

[141] NEV. REV. STAT. ¢ 217.007(1) (adopted 1993).

[142] *Id.* at (3)(a).

[143] *Seres*, 102 P.3d at 94.

[144] CAL. CIV. CODE § 2225, as described in *Keenan v. Superior Court*, 40 P.3d 718, 730-31 (Cal. 2002).

[145] *Id.* at 718.

[146] *Id.* at 729 n.14 (emphasis added).

[147] *Id.* at 731.

[148] *Id.* at 722.

value enhanced by their crime-related notoriety value.

As one last example, in 2002 the Massachusetts Supreme Judicial Court found that a proposed Massachusetts' "Son of Sam" law violated the First Amendment and a parallel provision in the Massachusetts Declaration of Rights.[149] The proposed statute required "any entity (contracting party) contracting with a 'defendant' to submit a copy of the contract to the [Attorney General's] division within thirty days of the agreement if the contracting party [knew] or reasonably should [have known] that the consideration to be paid to the defendant would constitute 'proceeds related to a crime.'"[150] The statute was not limited to convicted felons, but also swept in persons with pending criminal charges. And it defined "proceeds related to a crime" as "any assets, material objects, monies, and property obtained through the use of unique knowledge or notoriety acquired by means and in consequence of the commission of a crime from whatever source received by or owing to a defendant or his representative, whether earned, accrued, or paid before or after the disposition of criminal charges against the defendant."[151] It then provided the Massachusetts Attorney General's Office the opportunity to determine whether the proceeds under the contract were "substantially related to a crime, rather than relating only tangentially to, or containing only passing references to, a crime," and required the contracting party to pay the Attorney General's Office the monies owed to the defendant under the contract or post a bond covering such amount within fifteen days.[152]

The Supreme Judicial Court concluded the proposed statute was unconstitutional for a number of reasons. First, the statute was overbroad as it applied not only to convicted felons, but also to anyone with pending criminal charges.[153] Second, the statute held the funds in escrow for over three years, during which a claims process was required. The Supreme Judicial Court found this to be overexcessive and lengthy.[154] Finally, the statute called for a final determination by the Attorney General's Office, rather than the court, which the court found to be an invalid prior restraint of expressive speech.[155] The Court noted that the statute "burdens only expression with a particular content, namely, works that describe, reenact or otherwise are related to the commission of a crime."[156] In the alternative, it suggested "less cumbersome and more precise methods of compensating victims and preventing notorious criminals from obtaining a financial windfall from their notoriety."[157] These included "probation conditions, specifically designed to deal with a defendant's future income and obligations, [to] be imposed," while lamenting the statute's targeting of "publishing and entertainment industries and interfering with an entire category of

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[149] *Opinion of the Justices to the Senate*, 764 N.E.2d 343, 352-53 (Mass. 2002). In the interest of full disclosure, I consulted on the drafting of an amicus brief in the case which urged that the proposed statute was constitutional.
[150] *Id.* at 345.
[151] *Id.*
[152] *Id.*
[153] *Id.* at 348-49.
[154] *Id.* at 349-50.
[155] *Id.* at 351-52.
[156] *Id.* at 347.
[157] *Id.* at 350.

speech."[158]

To my mind, the First Amendment problem with these statutes (at least as determined by the courts that invalidated them) is that they continued to "directly and solely" target speech in some way or another. A broader statute aimed at *all* profits from a crime – not just profits from expressive activity – would not suffer from this First Amendment problem. A clear example comes from Arizona, which allows forfeiture of *anything* connected with a racketeering offense. An Arizona statute permits a prosecutor to obtain a forfeiture order for "any property or interest in property acquired or maintained by a person in violation [of the racketeering statute]" and "all proceeds traceable to an offense included in the definition of racketeering . . . [including] all monies, negotiable instruments, securities and other property used or intended to be used in any manner or part to facilitate the commission of the offense."[159] And the statute defines the proceeds "as any interest in property of any kind acquired through or caused by an act or omission, or derived from the act or omission, directly or indirectly, and any fruits of this interest, in whatever form."[160]

The validity of this statute was tested by "Sammy the Bull" Gravano. He was convicted of racketeering and drug distribution, and the state later moved for forfeiture of all of Mr. Gravano's rights to payments, royalties, and other interests in connection with a forthcoming book about his life as a New York mobster. In *Napolitano v. Gravano*,[161] the Arizona Court of Appeals upheld the constitutionality of the forfeiture statute because it was inherently content neutral and required forfeiture of *anything* connected with his racketeering offense.

As the Arizona Court of Appeals found, "Arizona's forfeiture statutes contain[ed] no reference to the content of speech or expressive materials."[162] It also found that the "purposes of these statutes apparently include removing the economic incentive to engage in [criminal racketeering], . . . compensating victims of racketeering, and reimbursing the State for the costs of prosecution." As such, despite the concern "the work from which the Mr. Gravano's royalties arise is expressive in nature," that court found that the "purposes [of the statute were] speech- and content-neutral, and any effect on speech [was] incidental.[163] In addition, the forfeiture would "not occur if the expressive material mentions a crime only tangentially or incidentally; Arizona's law [was] based on a causal connection with racketeering, not just a mention of it in an expressive work."[164] Finally, that court distinguished Arizona's forfeiture statute with the Supreme Judicial Court's decision in *Opinion of the Justices to the Senate* because "Arizona's forfeiture laws require the State to file an action in court and to prove the underlying racketeering and the connection between the racketeering and the property subject to forfeiture."[165] Such a "burden of

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[158] *Id.*
[159] ARIZ. REV. STAT. C 13-2314(G)(1),(3).
[160] *Id.* at (N)(3).
[161] *See, e.g.*, *State ex rel. Napolitano v. Gravano*, 60 P.3d 246, 253 (Ariz. Ct. App. 2002).
[162] *Id.* at 253.
[163] *Id.* at 252.
[164] *Id.* at 255.
[165] *Id.*

proof . . . on the State [would alleviate] the due process concerns expressed by the Massachusetts Supreme Court."[166]

The Arizona forfeiture statute was not only content-neutral, but also dealt with the other concerns raised in cases such as *Seres*, *Keenan*, and *Opinion of the Justices to the Senate*. First, the statute did not target expressive activity, but targeted the "proceeds" of racketeering, including "any interest in property of any kind acquired through or caused by an act or omission, or derived from the act or omission, directly or indirectly." Finding that Mr. Gravano's book royalties "derived from the act" directly or indirectly, the court could reasonably find that such activity was ripe for forfeiture. And the court, rather than the Attorney General's Office, was to make such a determination. Finally, the court ordered forfeiture from the defendant, rather than the publishing company or any other person.

Congress should pass an anti-profiteering statute that follows the approach taken by Arizona. A defendant should not be permitted to profit from a crime. A crime should be an occasion for punishment and restoration of victims, not an occasion for profit – in short, crime shouldn't pay. There appears to be wide agreement on this proposition around the country, as proven by the pervasiveness of Son of Sam statutes.[167] Congress should make sure that federal felonies do not become profit-making ventures.

Congress should therefore adopt an anti-profiteering statute that broadly forbids profiting from a crime in any way – not profiting solely through protected First Amendment activities. Congress should amend the anti-profiteering statute – 18 U.S.C. § 3681 – to cover all profits that a defendant receives from a crime. In addition, the federal statute's coverage should be extended. Currently it applies to offenses under 18 U.S.C. § 794 (delivering defense information to a foreign government) or "an offense against the United States resulting in physical harm to an individual." There is no reason that the statute should be limited to such offense. Victims of *any* felony federal crime should be able to prevent any kind of profiteering by a defendant. The statute should cover serious criminals – e.g., felons – and only after they have been convicted. And, in addition to prosecutors, crime victims should be able to initiate forfeiture actions themselves.

Accordingly, Title 18 U.S.C. § 3681 should be revised to provide:

§ 3681. Order of special forfeiture
(a) Upon the motion of the United States attorney or a victim of a crime, as recognized under section 3771 of this title, made at any time after conviction of a defendant for ~~an~~ a felony offense ~~under section 794 of this title [18 U.S.C. § 794] or for an offense~~ against the United States ~~resulting in physical harm to an individual~~, or upon the court's own motion, and after notice to any interested party, the court shall, if the court determines that ~~the interest of justice~~ the defendant is profiting from the crime or an order of restitution

[166] *Id.*
[167] *See Validity Construction, and Application of "Son of Sam" Laws Regulating or Prohibiting Distribution of Crime-Related Book, Film, or Comparable Revenues to Criminals*, 60 A.L.R.4th 1210 (collecting about 20 state statutes).

~~under this title~~ so requires, order such defendant to forfeit all or any part of funds and property received from any source by a person convicted of a specified crime to the extent necessary to prevent profiting from the crime or to satisfy an order of restitution. ~~proceeds received or to be received by that defendant, or a transferee of that defendant, from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of that defendant's thoughts, opinions, or emotions regarding such crime.~~ A defendant is not profiting from a crime if the financial advantage he or she obtains is only tangentially or incidentally connected with the crime.~~(b) An order issued under subsection (a) of this section shall require that the person with whom the defendant contracts pay to the Attorney General any proceeds due the defendant under such contract.(c)~~ (b)(1) Proceeds paid to the Attorney General under this section shall be retained in escrow in the Crime Victims Fund in the Treasury by the Attorney General for five years after the date of an order under this section, but during that five year period may--(A) be levied upon to satisfy--(i) a money judgment rendered by a United States district court in favor of a victim of an offense for which such defendant has been convicted, or a legal representative of such victim; and(ii) a fine imposed by a court of the United States; and(B) if ordered by the court in the interest of justice, be used to--(i) satisfy a money judgment rendered in any court in favor of a victim of any offense for which such defendant has been convicted, or a legal representative of such victim; and(ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so used.(2) The court shall direct the disposition of all such proceeds in the possession of the Attorney General at the end of such five years and may require that all or any part of such proceeds be released from escrow and paid into the Crime Victims Fund in the Treasury.

~~(d)~~ (c) As used in this section, the term "interested party" includes the defendant and any transferee of proceeds due the defendant under the contract, the person with whom the defendant has contracted, and any person physically harmed as a result of the offense for which the defendant has been convicted.

This reconstructed anti-profiteering statute would require a judicial determination that a convicted felon is "profiting from the crime." The phrase is not further defined, so that the federal courts can construe it broadly but constitutionally.[168] The phrase is negatively defined as *not* including any profits that are only tangentially or incidentally linked to the crime, an exclusion similar to that found in the Arizona statute and highlighted by the Arizona Court of Appeals as an appropriate qualification.[169] (In addition, the statute would allow a crime victim to obtain money

[168] *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' . . . we are obligated to construe the statute to avoid such problems."); *Morrison v. Olson*, 487 U.S. 654, 682 (1990) ("[I]t is the duty of federal courts to construe a statute in order to save it from constitutional infirmities."); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Coun.*, 485 U.S. 568, 575 (1988) (same).

[169] *See Napolitano*, 60 P.3d at 255 ("Forfeiture should not occur if the expressive material mentions a crime only tangentially or incidentally; Arizona's law is based on a causal connection with racketeering,

to satisfy a previously-entered restitution award, but this part of the statute is simply an enhancement of already well-established law.)

Rather than linking to the content of any speech or the expressive activity, the statute attacks more broadly the general problem of criminals profiting from their crimes. As such, this proposed statute – like the Arizona statute – would not target any expressive activity. It therefore does not run afoul of any First Amendment constraints.

This reconstructed statute would retain the constructive trust provision found in current law. Under subsection (b), when the government forfeits profits from a crime, they would go to the Crime Victims Fund. This provision of the statute serves a compelling state interest, further enhancing the constitutionality of the statute.

The relationship between preventing profiteering and awarding restitution deserves brief exploration. Any income source available to a convicted person who has been ordered to pay restitution should be tapped to satisfy the restitution award. An example of the compelling need to attach a defendant's income to satisfy a restitution award comes from the District of Maryland case of *Kimberlin v. Dewalt*.[170] This case dealt with a parolee convicted of detonating eight dynamite bombs in the Speedway, Indiana area in 1978. The victims were grievously injured, and one committed suicide a few years later. One of the victims obtained a $1.61 million jury verdict for her injuries and the wrongful death of her husband. The parolee did not satisfy this award and was released on supervised parole. He then inherited a substantial amount of money from his father. He also entered into a recording and book contract, centering around allegations he had sold marijuana to Dan Quayle and his subsequent treatment by the Bureau of Prisons. The Probation Office imposed a special condition of parole ordering the parolee to make payments to the victim in accordance with the civil judgment. Although the Probation Office required payment by the parolee, it did not cite the federal restitution statute as its authority for the special condition of parole.[171] When challenged, the district court held that the order did not violate *Simon & Schuster* because, the District Court concluded, "the book money was but one of several resources from which the judgment could have been paid."[172]

The situation in *Kimberlin* is addressed, at least to some extent, by current restitution law. The Mandatory Victims' Restitution Act's procedural provision – 18 U.S.C. § 3664(n) – requires any substantial new moneys received by a criminal to go to restitution. Unfortunately, that statute is restricted to situations where a defendant is incarcerated. It thus would not apply to the *Kimberlin* facts, which involved a defendant on supervised release. The restitution provision on this topic should therefore be amended as follows:

> If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment,

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not just a mention of it in an expressive work."); *see also* ARIZ. REV. STAT. § 13-2314(G)(1),(3), (N)(3).

[170] 12 F. Supp. 2d 487 (D. Md. 1998).

[171] *Id.* at 496.

[172] *Id.*

during a period of incarceration, supervised release, or probation, such person shall be required to apply the value of such resources to any restitution or fine still owed.

D. Congress Should Adopt a Federal "Murderabilia" Statute.

The problem of preventing profiteering from crimes will not be completely addressed unless Congress also puts in place a statute preventing criminals from profiting by trafficking in what is known as "murderabilia." In recent years, a number of notorious criminals have tried to make money by selling items that have gained noteriety (and thus value) simply because of their association with the criminal or his crime.[173] For example, numerous items belonging to convicted serial killers, including toenail clippings, hair, autographed t-shirts, and used television sets, among others, have all recently been sold within the last five years.[174] All of these types of items have become known as "murderabilia." A typically used definition for such items is "manufactured items representative of criminals or crimes, such as murderer trading cards or figurines, and non-manufactured items associated with the criminals or crimes themselves."[175]

The proposed revisions to the federal anti-profiteering statute described above may go a long way towards addressing such deplorable money-making by federal felons. After all, selling tangible crime-related items for money is a classic example of "profiting from the crime," which

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[173] Andy Kahan in the City of Houston's Crime Victims' Office deserves special recognition for leading the crusade on this issue. *See* Tracey B. Cobb, *Comment, Making a Killing: Evaluating the Constitutionality of the Texas Son of Sam Law*, 39 HOUS. L. REV. 1483, 1503 n.156 (2003) ("[Andy] Kahan has been a leader in the movement to prevent the trade of murderabilia and worked with the Texas Legislature to draft the murderabilia statute in 2001."); ABC News: 20/20 (ABC television broadcast, Nov. 7, 2001) (interviewing Andy Kahan, who stated that "No one should be able to rob, rape and murder and then turn around and make a buck off it."); Jeff Barnard, *Murderabilia: People Want to get Closer to Killer; Internet Accessible: City Official Wants to Eradicate the Ghoulish Industry*, TELEGRAPH-HERALD (Dubuque, IA), at A4 (Oct. 8, 2000) (crediting the coining of the term "murderabilia" to Andy Kahan, and crediting him as a key player in the "crusade to wipe [the murderabilia market] out.").

[174] *See* Eric Berger, *Lawmakers Seek to Halt Killer Sales*, HOUS. CHRON., Feb. 28, 2001, at 31 (reporting that Angel Maturino Resendiz, who murdered twelve people in a five-state killing spree, agreed to offer feet scrapings for sale); John Ellement, *SJC Offers Warning on Proposed Crime-Profits Law*, BOSTON GLOBE, Mar. 16, 2002, at B3 (noting that nails and hair clippings from admitted murderer Coral Eugene Watts were all sold via an Internet auction); *see also* Rog-Gong Lin II & Wendy Lee, *Unabomber "Murderabilia" for Sale*, LOS ANGELES TIMES, July 26, 2005 at A1 (noting following for sale on "murderabilia" websites: William George Bonin, known as the "Freeway Killer" -- 13-inch Sony stereo sound and color television, offered for $750; John William "Possum" King, who dragged to death a black man in Texas -- autographed T-shirt, offered for $2,000; Charles Manson -- Manson's handprint, signed, and a drawing done by another inmate depicting Manson behind bars with a saw, offered for $900; Scott Peterson, killer of his wife, Laci, and their unborn son -- a letter written from the county jail during his trial, sold for $500; Richard Ramirez, the "Night Stalker" serial killer -- photocopy of two childhood pictures of Ramirez with his inscription, "On a tricycle rolling on a highway to Hell, Richard," offered for $200; Aileen Wuornos, serial killer and subject of the movie "Monster" -- a handwritten envelope mailed from death row, offered for $300).

[175] Cobb, *supra* note 173.

would lead to forfeiture under my proposal. But to avoid any misunderstanding, a federal statute squarely addressing the point should be put on the books.

A federal statute addressing murderabilia should have several features. First, it should be limited to serious crimes – felony crimes seems like a reasonable approach. Second, it should cover federal offenses (unless Congress determines to stamp out the inter-state market in muderabilia, as discussed below). Third, it should cover not only a criminal but also his representatives and assignees, lest a criminal be able to profit by the simple expedient of using a family member or friend. Fourth, to avoid First Amendment complications, it should not cover book or movie rights, but rather should focus primarily on tangible, non-expressive items.

One way of drafting such a federal statute would be as follows, based on the California provision:[176]

> Title 18 U.S.C. § 3681A. Forfeiture of Proceeds from Sale of Memorabilia by Convicted Felon
>
> (a) Upon a motion of the United States attorney or a victim of a crime, made at any time after conviction of a defendant for a felony offense against the United States, or upon the court's own motion, and after notice to any interested party, the court shall, if the court determines that the defendant, his representative, or assignee, is profiting from the sale or transfer for profit any memorabilia or other property or thing of the felon, the value of which is enhanced by the notoriety gained from the commission of the felony for which the felon was convicted, order the proceeds received by the defendant, his representatives, or assignees, forfeited to the extent necessary to prevent profiting from the crime or to satisfy an order of restitution. Memorabilia and property shall include any tangible memorabilia, property, autograph, or other similar tangible thing, but not including any book, movie, painting, or similar rights addressed in 18 U.S.C. § 3681. An order of restitution shall not to apply to sale of materials where the defendant is exercising his or her First Amendment rights, and shall not apply to the sale or transfer of any other expressive work protected by the First Amendment, unless the sale or transfer is primarily for a commercial or speculative purpose.
> (b)(1) Proceeds paid to the Attorney General under this section shall be retained in escrow in the Crime Victims Fund in the Treasury by the Attorney General for five years after the date of an order under this section, but during that five year period may--(A) be levied upon to satisfy--(i) a money judgment rendered by a United States district court in favor of a victim of an offense for which such defendant has been convicted, or a legal representative of such victim; and(ii) a fine imposed by a court of the United States; and(B) if ordered by the court in the interest of justice, be used to--(i) satisfy a money judgment rendered in any court in favor of a victim of any offense for which such defendant has been convicted, or a legal representative of such victim; and(ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so

[176] *See* CAL. CIV. CODE § 2225.

used.(2) The court shall direct the disposition of all such proceeds in the possession of the Attorney General at the end of such five years and may require that all or any part of such proceeds be released from escrow and paid into the Crime Victims Fund in the Treasury.

(c) As used in this section, the term "interested party" includes the defendant and any transferee of proceeds due the defendant under the contract, the person with whom the defendant has contracted, and any person physically harmed as a result of the offense for which the defendant has been convicted.

As discussed above, the California Supreme Court declared certain provisions of the California Son of Sam law facially invalid under the Free Speech Clause of the First Amendment and the California Constitution.[177] The salient provision of that statute imposed an involuntary trust, in favor of crime victims, on a convicted felon's "proceeds" from expressive "materials" (books, films, magazine and newspaper articles, video and sound records, radio and television appearances, and live presentations).[178] Concluding that the statute "focuse[d] *directly and solely on income from speech*," the California Supreme Court declared it unconstitutional.[179] Indeed, that statute was "calculated to confiscate all income from a wide range of protected expressive works by convicted felons, on a wide variety of subjects and themes, simply because those works include substantial accounts of the prior felonies."[180] But, as also noted above, the California Supreme Court failed to address the issue at play in this murderabilia proposal – confiscation of the profits derived from sales of memorabilia, property, things, or rights enhanced by their crime-related notoriety value. Narrowly drafting this proposed statute to solely target tangible items that do not constitute expressive activity or speech would enable it to survive constitutional review. It would also allow district court judges to insure that convicted felons do not profit further from their crimes, or the notoriety of their crimes.

Another possible way of drafting the federal statute would be to follow the approach taken in Texas.[181] A federal statute drafted to track that statute might look like the following:

Title 18 U.S.C. § 3681A. Forfeiture of Proceeds from Sale of Memorabilia by Convicted Felon

(a) Upon a motion of the United States attorney or a victim of a crime, made at any time after conviction of a defendant for a felony offense against the United States, or upon the court's own motion, and after notice to any interested party, the court shall determine whether a sale has occurred of tangible property belonging to the defendant, the value of which is increased by the notoriety gained from the conviction. Upon a finding by the court that such a sale has occurred, the court shall transfer to the Crime Victims Fund in the Treasury all income from the sale of tangible property the value of which is increased by the notoriety gained from the conviction of an offense by the person convicted of the crime. The court shall determine the fair market value of the property that is substantially

[177] *See supra* note 144-148; *Keenan*, 40 P.3d 718 (Cal. 2002).
[178] CAL. CIV. CODE § 2225, as described in *Keenan v. Superior Court*, 40 P.3d 718, 730-31 (Cal. 2002).
[179] *Id.* at 729 n.14 (emphasis added).
[180] *Id.* at 722.
[181] TEX. CODE. CRIM. PROC. art. 59.06(k)(1)-(2).

similar to that property that was sold but that has not increased in value by the notoriety and deduct that amount from the proceeds of the sale. After transferring the income to the Crime Victims Fund, the United States attorney shall transfer the remainder of the proceeds of the sale to the owner of the property.

(b)(1) Proceeds paid to the Attorney General under this section shall be retained in escrow in the Crime Victims Fund in the Treasury by the Attorney General for five years after the date of an order under this section, but during that five year period may--(A) be levied upon to satisfy--(i) a money judgment rendered by a United States district court in favor of a victim of an offense for which such defendant has been convicted, or a legal representative of such victim; and(ii) a fine imposed by a court of the United States; and(B) if ordered by the court in the interest of justice, be used to--(i) satisfy a money judgment rendered in any court in favor of a victim of any offense for which such defendant has been convicted, or a legal representative of such victim; and(ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so used.(2) The court shall direct the disposition of all such proceeds in the possession of the Attorney General at the end of such five years and may require that all or any part of such proceeds be released from escrow and paid into the Crime Victims Fund in the Treasury.

(c) As used in this section, the term "interested party" includes the defendant and any transferee of proceeds due the defendant under the contract, the person with whom the defendant has contracted, and any person physically harmed as a result of the offense for which the defendant has been convicted.

This approach, mirroring the Texas murderabilia statute, would essentially tax the profits of the convicted felon's sale of tangible property as long as the profit arose from the notoriety of the conviction. It would not prohibit convicted felons from selling their tangible property, but would only forfeit the proceeds of any sale based on the value of similar items. The Texas murderabilia provision has yet to be challenged in the Texas courts, but recent commentary concludes that the "murderabilia provision [is the] Texas Son of Sam law's strongest element."[182] That commentary indicates that by "shifting the focus away from speech and toward a more generalized category of notoriety for profit, the murderabilia provision lends acceptability to the Texas Son of Sam law under the [*Simon & Schuster, Inc.*] framework."[183] As the proposed statute avoids content-based speech, does not consider whether the content of what is sold is related to the crime, and allows for felons to reap fair market value for the sale, the proposed statute would pass constitutional muster as well.

One last note is worth briefly mentioning. Congress might reasonably conclude that the problem of trafficking in "murderabilia" is an inter-state problem that warrants a federal prohibition. Congress might reasonably conclude that in this age of the Internet, the only way to truly stamp out the gruesome trade is to pass a federal law forbidding not only criminals but all

[182] Cobby, *supra* note 173, at 1514.
[183] *Id.*

persons from dealing in murderabilia. Such a statute would go beyond the scope of my testimony today, which focuses on sentencing issues related to criminals. I simply highlight the point here in case Congress is interested in pursuing it.

CONCLUSION

Restitution to crime victims ought to be the norm in the federal criminal justice system. When a victim has suffered a loss at the hands of convicted criminal, the criminal should bear that loss – not the victim. In my testimony today, I have tried to offer a number of specific suggestions about how Congress could reform the federal restitution statutes to move in that direction. There has been considerable rhetoric about the importance of restitution to crime victims. To ensure that the rhetoric becomes a reality, Congress should act quickly to ensure that victims receive full and enforceable restitution awards.

Mr. SCOTT. Thank you very much, professor. I recognize myself for 5 minutes of questions. And in follow up, Judge Cassell, as I understand your testimony, you want the judge on a case-by-case basis to make these decisions not at automatic pretrial in every case?

Mr. CASSELL. I think it depends on what we are talking about. But in general, the bills that are in front of the Committee would authorize discretionary decisions by judges to create more restitution opportunities.

Mr. SCOTT. Mr. Weissmann, your reading of the case, if the U.S. attorney has probable cause of a case, can they get order—does a judge have to enter an order freezing assets?

Mr. WEISSMANN. Under the language of the bill, yes, the judge has very limited discretion. They have to——

Mr. SCOTT. What discretion?

Mr. WEISSMANN. First if the showing is made that there is an indictment and that that statute——

Mr. SCOTT. Wait a minute. No indictment. Pre-indictment.

Mr. WEISSMANN. Okay. If there is pre-indictment, the judge has to make the finding of probable cause. But if there is probable cause for a crime for which restitution is a penalty, then there is no discretion.

Mr. SCOTT. He has to enter the order at the request of the U.S. attorney upon probable cause to freeze enough assets to satisfy any potential restitution?

Mr. WEISSMANN. Yes. And it can cover any assets that may be necessary.

Mr. SCOTT. And this is not just fruits of the crime asset, any assets?

Mr. WEISSMANN. That is right. Unlike the current rule with respect to forfeiture, where it only covers tainted asset this is for any assets.

Mr. SCOTT. One of the problems with the criminal justice system is that the same system applies to those that are guilty and those that are innocent, it would be nice to have one set, kind of streamline set for those we know are guilty and another more burdensome process conviction for those who are innocent. Unfortunately, everybody has to go down the same highway. Now, if you are factually innocent of the charge and they come in with probable cause, do your assets get freezed?

Mr. WEISSMANN. Yes.

Mr. SCOTT. When do you have an opportunity to present your evidence of innocence?

Mr. WEISSMANN. Under this bill, it is hard for me to divine a circumstance where a defendant would have the opportunity in your hypothetical to have a hearing because if there is—a probable cause determination by the court, whether it is pre- or post indictment and it is for a crime for which restitution is available, then it is impossible for that defendant to make a showing that there is a bona fide reason to believe that there was error at the time of the *ex parte* order, which is a requirement in order for the hearing to be available. The court has no discretion.

Mr. SCOTT. Professor Turley, do you see the same result? If you are factually innocent, when do you get an opportunity to reopen your bank account?

Mr. TURLEY. Well, on the *ex parte*, you get 10 days on the *ex parte* and then you can request a hearing. But the problem with the standards is we are talking probable cause that this is a crime if proven that you would have to pay forfeiture. But the bills, at least one of them, would make all crimes subject to forfeiture. So the standard is somewhat misleading because it is almost impossible to miss that target.

So when you finally get up in front of a hearing, you have got very little basis under these laws to say you shouldn't seize my assets. One possibility would be instead of making all of these laws subject to forfeiture, it is one of the other two that simply extends it to six more laws, and you could argue that this isn't a law that is subject to assets being frozen. But it is a hearing that begins with an *ex parte* filing which obviously you have no role——

Mr. SCOTT. And if you have outstanding checks and they start bouncing, when can you get access to your checking account again?

Mr. TURLEY. It is even worse——

Mr. SCOTT. There is notice, right?

Mr. TURLEY. Yeah, it is even worse. I mean, as a criminal defense attorney, I can tell you the most important part of a case, in my view, is pre-indictment. It is when you know your person is a target, you have got a lot of work to do. They need counsel. That is probably when they are most vulnerable. But at that very moment, their assets can be frozen. They will have a hard time getting an attorney. But they are supposed to get an attorney in order to contest the fact that they have no money to hire an attorney.

Now, the reason they will have no money is since you are expanding the definition of victims and because we still have the original indictment, maybe a superseding indictment with maybe a larger number of accounts if a judge is looking at that, she is going to say, well, here is 20 counts which may or may not be the ones at trial.

On those 20 counts, there is an expanded number of victims now, each of which can seek your assets. You know, a blind squirrel would find that nut as a prosecutor. It would be hard not to get 100 percent of assets on that standard.

Mr. SCOTT. Thank you. The gentleman from Texas.

Mr. GOHMERT. Thank you, Mr. Chairman. I do appreciate y'all's testimony. And by the way, Professor Turley, I guess this is the first time I have seen you since the Supreme Court's recent decision about which you testified earlier. I would say congratulations on being right, but I knew you were right before. I would say congratulations, the Supreme Court got it right.

Mr. TURLEY. God bless you.

Mr. GOHMERT. And there is so much confusion as to what that really meant and nobody is trying to protect anybody that is a criminal. They are just trying to preserve the Constitution. And I appreciate the points that people here have made about their concerns in this bill. And I have not read the bill in full. I guarantee you I will before you know we were to take it up in mark up. But I can see like on preservation of assets for restitution, this just

says on the government's *ex parte* application and a finding of probable cause that the defendant, if convicted, will be ordered to pay an approximate amount of restitution for an offense, then you could enter these orders and immediately I am going wait a minute, that might be real easy to say, well, yeah, if he is convicted then he is going to certainly have to pay restitution.

So there is your finding and it doesn't have a requirement that probable cause be found that he committed the offense. So I can see a number of things that need to be worked on here. But I am curious about some other things that have been brought up. For example, yeah, there is a potential set-aside of fraudulent transfers, and I am just trying to think out loud based on some of the things that have been said. But what about a provision that basically provided for a set-aside with a presumption that if a transfer is made—and again, I am just thinking out loud here—presumption that if a transfer is made after the time someone has been named a target and up until so many months, 6 months or something after conviction, that there is a presumption that was a fraudulent transfer so the burden is not there. Or if it is a purchase. Because it is not always a transfer as you all know.

I mean, sometimes you buy an asset that you can hide somewhere, or perhaps stick it in some purchase. But if you had a presumption that was a fraudulent purchase, then maybe you would have a set aside of not just transfers but purchases, boy, it would put people on notice that if somebody is named a target, you better feel real comfortable before you make the sale or make the buy that this may not be set aside later on.

Anyway, I am wondering if something like that might be of assistance. But Judge Cassell, you made some excellent recommendations and some good points, and I will need to do more looking to make sure that we adequately address the things that you brought up.

But Professor Turley, you mentioned it reduces the discretion for the judge and we shouldn't take away all discretion, it would extend litigation and we have got dockets getting longer. Of course I fought with my colleagues over the patent law venue because we had some venues where they were getting to trial in 18 months, like in the Eastern District of Texas. But that is horrible because we need it in jurisdictions where we can have 4 or 5 years to drag them out. Go figure. But anyway, one of the things that has amazed me is I remember back in the early '80's when the sentencing guidelines came in and the Federal judges, you know, were furious that you took away—the Congress took away all of that discretion and when within a matter of 20 years, now they say, you know what, it makes it easier because as a judge, some of my toughest decisions were what to do on sentencing because I had tremendously broad discretion.

But anyway, it seems like some have not minded having discretion taken away. I don't want to see discretion taken away from the courts. I would not want to see anything mandatory, but I sure would like them to have the tools in the appropriate cases. So anyway, can I get comments on the possibility of a presumption of fraudulent transfer or purchase, Professor Turley?

Mr. TURLEY. First of all, it is, once again, an honor to appear before you. You are unique in that you have played a role in both the judicial and legislative branch, which makes your service on this Committee so valuable. And I actually was thinking along the same lines in terms of what this body could do to give courts not less discretion but simply more ability to use that discretion. And actually a thing I was thinking of was that we could look at—or actually you could look at the possibility of——

Mr. GOHMERT. We is okay. We welcome your input.

Mr. TURLEY. Look at the possibility of having a more systemic approach to an early identification of assets of targets, where the prosecutors can come in and require the court to make a determination of asset worth, asset locations and to put that into a court order. Because what you are speaking of in terms of presumption is it actually achieves the same thing. That if a court comes in and says, look, we have identified this as a possibility for fraudulent transfer, and we have a serious question about restitution for victims because of the size of these allegations, you could have them come in and say I want an identification, a sworn identification of all assets.

Their identification, their amounts, joint bank accounts and to put that into an order and to say that if there is transfers from here, we are going to look at whether there is a fraudulent effort. And you can also ask for the court to be informed of any large transfers off that base. So the court will have a chance to monitor it and so will the prosecutors without freezing the assets but can—and then if there is a violation—if you go and you submit that information to the court and there is any hidden assets or any transfers without informing the court, you would be in contempt, which would be even better than a presumption. You know, those are possibilities that I think that the Committee could look at.

Mr. GOHMERT. Could I get one more comment from Judge Cassell on that issue? What do you think about that?

Mr. CASSELL. I think certainly a step forward is better than no step at all. But the problem is that this presumption of transfer isn't going to apply in many of the situations where the problems are most serious. We heard from Senator Dorgan about the problems of somebody taking a trip to Europe or something like that. Of course, some presumption against transfers isn't going to get money back on plane tickets or hotel rooms or jewelry or whatever it is that has been spent out there that has come and gone. So that is why more comprehensive authority needs to be given to judges to address this problem.

Mr. GOHMERT. Thank you. Thank you, Mr. Chairman.

Mr. SCOTT. Thank you. The gentleman from Georgia.

Mr. JOHNSON. Thank you, Mr. Chairman. With the chart—they say that a picture is worth a thousand words and the chart was a wonderful picture of, I believe, a big mansion and the white sand dunes of a far away beach in an exotic local and maybe an exotic automobile or something like that, the rich and famous. And that is the real target of this—of these pieces of legislation, isn't it? I will ask you Professor Cassell; isn't that correct?

Mr. CASSELL. I think that is certainly the most serious problem. I don't think prosecutors are going to try to get a restraining order

to prevent somebody from spending $500 on something. As a practical matter, you are exactly right.

Mr. JOHNSON. But yet under all three proposals, isn't it a fact that the prosecutor would indeed have that power over a blue collar or a no-collar criminal defendant with little or nor assets?

Mr. CASSELL. Certainly it's the case, whenever there is a crime committed, that prosecutors would have the power to use the tools in this bill to protect assets. And let's remember, it is not just—I think sometimes the mistake is to think about low income criminals—and there are certainly low income criminals—but who are they victimizing? Low income victims because typically crimes are committed among the same social class, many crimes are interracial for example.

So I think it is a mistake to focus just on the criminal half of the equation and forget about the victim half of the equation.

Mr. JOHNSON. When we are talking about restitution, though, we are talking about that coming from the defendant and we are talking about expanding the number of people who would be entitled to restitution under these pieces of legislation. And given that fact, Professor Cassell, I would like to do something that I have always wanted to do ever since law school, and that is to pose a hypothetical to a law professor.

Professor, I would like for you to assume that a man is convicted of conspiracy to distribute marijuana, and I want you to further assume that a girlfriend of a man who purchased marijuana from the defendant claims to be a victim and to have suffered loss because her boyfriend became abusive to her as a result of smoking the marijuana. I want to ask you now, under existing law, this victim, the female, would not be entitled to restitution, correct?

Mr. CASSELL. Correct.

Mr. JOHNSON. And assuming that she could prove her claim under this new law, should it pass or any of these three proposals should they pass, she would be entitled to restitution; isn't that correct?

Mr. CASSELL. I don't think the laws change the definition of victim that broadly. You are talking about——

Mr. JOHNSON. Okay. Let me ask whether or not anyone would disagree with that on the panel.

Mr. TURLEY. I am afraid I would disagree. I mean, the hypothetical is less than a hypothetical because it is the facts from the Sharp case, I believe. And in the Sharp case, Professor Nowicki, who now teaches at Tulane, was the person asking for precisely that type of victim status. And indeed, the court said that it did not meet the standard of being directly and proximately harmed under the definition of victims. The definition of victims under these laws are exceptionally broad. I must disagree with the suggestion that it is a close matter.

In my view, they are almost without limitation when you talk about identifiable person or entity that suffer pecuniary loss is one—I reference. I can't see the significant limitations of that definition, and I certainly can't see why the Sharp case would not have fallen within it.

Mr. JOHNSON. Thank you, Professor. Mr. Weissmann.

Mr. WEISSMANN. I agree with that. Once you take out the words direct and proximate, you are going to have significant issues facing the courts as to who a victim is in any particular case.

Mr. JOHNSON. And Mr. Smith?

Mr. SMITH. I would agree with these gentlemen, but I think it could be argued either way. I will concede that. But it shouldn't be argued either way. I mean, to me there is no way that that lady should be able to get status as a victim. And remember there is a——

Mr. JOHNSON. Under current law or under the new law?

Mr. SMITH. Under the new law, it could be argued either way. And that just goes too far. Remember, there is also provisions in all of these bills that the defendant has to pay the victim's attorneys as well for their representation. And to me that is another terribly ill-conceived provision which is just going to get the courts bogged down in endless battles over attorney fees, whether you are entitled to them and whether the fees are reasonable.

And again, you know, as you said, Congressman, we are talking about, you know, the Federal system here where 85 percent of the defendants are already deemed indigent and represented by public defenders. And the most important point about this entire bill is that you are going to take the remaining 15 percent and put them into the public defender system as well because, you know, this bill will make every defendant subject to being pauperized at the whim of any prosecutor. And if that is not done, that is because the prosecutor was a nice guy and he exercised restraint. And there are still good prosecutors around.

But the problem is you don't want to give this nuclear weapon to every single line prosecutor with no supervision by higher-ups and that is the case in today's Justice Department. There is no supervision by higher-ups. You can't complain to anybody up the chain and expect to get the AUSA's decision reversed on anything.

So it is insane to give this much discretion to every prosecutor. And that is what you are being asked to do. And it is just—to me this is not even—you know, this is not something that reasonable people can differ about. It is just shockingly bad legislation, which has the potential—the very likely potential to undermine the entire criminal justice system that we have come to know and respect over centuries.

Mr. JOHNSON. Thank you.

Mr. CASSELL. Could I exercise a point of personal privilege? Because I guess I have just been called an unreasonable person here. This legislation doesn't give any power to prosecutors to do anything other than make applications to judges who in the proper circumstances can then issue appropriate orders. If prosecutors are making outlandish requests, judges won't grant them.

Mr. SMITH. But those requests are not going to be outlandish under this legislation, because they are going to be authorized. And, in fact, as was said by my colleagues at this side of the table, the judge will be forced to grant these restraint orders because he is not given discretion once the prosecutor makes the probable cause showing, which is very easy to do.

Mr. JOHNSON. So whether or not to do this or not vests the discretion into the hands of the prosecutor as opposed to the judge?

Mr. SMITH. Exactly. And that is just what was wrong our sentencing system before Booker, which probably Judge Cassell would be the first one to agree with me about invest the discretion in the hands of the prosecutors and not the judge. And the prosecutor was really calling the shots about sentencing, not judges. And by the way, even if you do vest discretion in the hands of the judge, I am sorry, but I don't have great faith in the average Federal judge to get it right because, you know, based on my experience for 30 years, I have just seen too many judges act as rubber stamps, particularly in *ex parte* proceedings where—you know, where even the best of judges unfortunately has to rely on everything that the prosecutor or the case agent tells them because it is an *ex parte* proceeding.

The problem with these proceedings is the defense doesn't even get to know what the basis for the *ex parte* order is. This is all done in secret and it is sealed. You don't have any right to see what the basis was for that *ex parte* restraint order that was entered, so how do you challenge it? It makes it very difficult to challenge if you don't even know what the factual basis for the order was.

Mr. JOHNSON. Thank you.

Mr. SCOTT. The gentleman's time has expired. The gentleman from Ohio.

Mr. CHABOT. I thank the gentleman for yielding. You just indicated that you had little or no faith in the Federal judges to set the bond and get this right—excuse me—not set the bond—but set this right relative to this issue. But what is your position on whether the judges should have the discretion in criminal sentencing?

Mr. SMITH. I am all in favor of that because look, it is not an *ex parte* proceeding.

Mr. CHABOT. So judges can get it right on the one but not the other?

Mr. SMITH. Yes. I think judges for the most part—as was said before, you know, we have a very good Federal bench. If they are given all the facts, they can get it right. But when they are only given a one-sided presentation of the facts and then the other side is then barred from even seeing what the presentation was——

Mr. CHABOT. Let me get on to my next question. I have only a limited amount of time. Let me ask each of the witnesses, and I will start with you, Professor, if I can. Relative to victims rights, especially as it relates to restitution, do you think that the Federal—at this time, the Federal laws relative to restitution are sufficient or do you think that they should be strengthened with respect to what victims can acquire? And If you could be relatively brief because I am going just go down the line.

Mr. TURLEY. I would say it could be improved. We had an exchange. I think there might be some room for improvement, but not with the mandatory aspects. I think where the improvement needs to be is to ramp up the collection of restitution funds and I think that is where you will see the most result for victims.

Mr. CHABOT. Mr. Weissmann?

Mr. WEISSMANN. I agree with that. I think there are ways to improve what is going on. It can include having more people at DOJ. It can include having provisions in the bail statute to make it clear

that this can be one of the factors for bail assuming that it goes to risk of flight or dangerousness. You can expand the definition of victims as one of the proposals. I just think that the current bill is ill-advised because I don't think it has the procedural protections for defendants that I think are necessary for due process.

Mr. CHABOT. Mr. Smith?

Mr. SMITH. The question is can we find ways to improve collection of——

Mr. CHABOT. Do you think that restitution at the Federal level is sufficient at this time or do you think there is room for improvements?

Mr. SMITH. Oh, I definitely think there is room for improvement and I have suggested a couple of ways in which it could be improved. And I think the Committee's staff suggested another way which hasn't been talked about here. And that is on the idea of making—setting up a restitution fund. I think the Chairman talked about this in his opening statement, set up a restitution fund where all the restitution money and maybe funds from fines or forfeitures can also go and then it is sort of like an insurance pool. The victims in one particular case wouldn't be dependent on making a recovery from that defendant.

Instead they could share in the restitution monies that had been collected in this entire restitution fund so that it wouldn't be haphazard. Victims in one case may get 100 percent restitution and in another case because the government wasn't able to recover anything maybe because the defendant was indigent, the victims get nothing. So it is a way of evening out the benefits to the victims and I think that is an excellent proposal.

Mr. CHABOT. Thank you. Judge Cassell.

Mr. CASSELL. There are ways we could improve the restitution laws. And unfortunately at hearings like this, we focus on the 10 percent that is controversial, not the 90 percent that is uncontroversial. The Justice Department testimony, for example, lists a whole range of things that I think just about everyone in this room could agree with, like putting together a check list for judges on what should be ordered, giving Federal prosecutors access to information that the probation office has about the finances of a defendant, extending terms of supervised release to collect restitution and the list goes on and on.

Nobody has offered any objection to any of those things. So I hope the Subcommittee will take those noncontroversial parts of the bill and move forward on that regardless of what it chooses to do on the other pieces of it.

Mr. CHABOT. Let me follow up if I can, Professor Cassell. This was described as going to undermine the criminal justice system and being shocking and that type of thing. Could you—getting back to what actually happens here, we are talking about having a probable cause hearing in which there is a judge that ultimately makes the decision. Whether or not we have great faith in those Federal judges, there is going to be a hearing before a judge before any of this occurs. Is that not correct? And also, what about this issue about whether or not the defendant is likely to not have any funds available to him or her in order to acquire counsel? As a practical

matter, you know, what is likely to happen under those circumstances?

Mr. CASSELL. Right. Well, I guess maybe I am a bit biased on this. I got a chance to work with Federal judges for 5 years while I was serving as a Federal district court judge in Utah and I think I have great confidence that the men and women that serve on the Federal bench around this country will take the provisions of this bill, if it becomes law, and apply it in a fair and appropriate way. They are going to look at situations like the one you describe. And if there is an asset freezing provision that is in place, they are then going to look and see whether the defendant can make a showing that funds really are needed to retain counsel.

And if so, the bill authorizes release of those funds if the other conditions are met in order to secure counsel. So this isn't going to be a situation where someone isn't able to hire a lawyer because of the fact that there has been an asset freezing provision entered.

Mr. CHABOT. As Senator Dorgan described before, if the defendant is talking about taking expensive trips to Europe or putting money in trust accounts or starting new businesses to the detriment of the victims, those are the types of things that the judge is not likely to allow; is that correct?

Mr. CASSELL. I think that is exactly right. I guess one of the things I am a little bit disappointed about when I hear some of the opposition testimony is they will find one word in the bill and they will say this word is unclear. And it may be there are some words that are unclear. But many of these things can be simplified very quickly with some drafting. And with as many smart people as there are on this panel, it is disappointing to me that they haven't offered critiques of the language and suggestions in the language in order to fix it. I mean, Mr. Smith, Professor Turley, Mr. Weissmann, I think we could take all of their concerns that they have raised today and put a few tweaks into the bill and those problems would be completely eliminated.

Mr. CHABOT. Thank you very much. Yield back.

Mr. SCOTT. The gentleman from Alabama.

Mr. DAVIS. Thank you, Mr. Chairman. Gentlemen, part of what strikes me as unusual about this legislation is that a lot of it involves restraints on the liberty of a defendant or a potential defendant. And I emphasize the word potential. Obviously, once someone is indicted, there are a variety of contexts on which we will allow restraints on their liberty. We will allow them, for example, to be detained upon a showing of flight risk or danger to the community, at least with certain classes of cases.

We give the courts a fair amount of discretion and authority to restrain assets for defendants, people who have been indicted. What is unusual about this legislation is it its very sharp focus on people who are suspects, people who have not faced any determination of their guilt or innocence in court.

Professor Turley, it has been 6 years since I walked in a courtroom and argued a case. So refresh me a little bit. My understanding of the law today is that for individuals pre-indictment, criminal forfeiture proceedings are still available; is that correct?

Mr. TURLEY. That is correct.

Mr. DAVIS. What is the standard of proof in a criminal forfeiture proceeding pre-indictment?

Mr. TURLEY. First of all, the current law gives the Federal judge the discretion to take steps to protect assets. And when it comes to forfeiture, it is a probable cause standard. But the judge actually has the ability to take steps today. We might create new ways that might help her do that. But the difference here is that it would be become a mandatory process effectively.

Mr. DAVIS. Is there also one other distinction that the way the forfeiture law works today, you have to make an allegation that the proceeds are tainted in some way; is that correct?

Mr. TURLEY. That is correct. And that is the big difference between restitution and forfeiture. When the Supreme Court said in its famous statement that you don't have the right to use other people's money, what they were saying was that a showing has been made that what you claim is yours is tainted by your crime. That is not what we are talking about with restitution. We are talking about stuff that is yours that you have to make people whole with. So it is a very different process. Because with forfeiture, you are talking about grabbing a boat that was used in a drug crime.

Mr. DAVIS. Let me stop you for 1 second because our time is so limited. Judge Cassell, what I think Professor Turley has just said may be the most important distinction and one that needs to be underscored. It strikes me as being a very Draconian power to give the prosecutors—to allow them to say to someone who has not been indicted, someone who has not been bound over to a grand jury, someone who has not met any weighty standard of proof, that on a light showing of probable cause, we are going to take assets that may be lawful—that is not even part of the standard that they be unlawful—but we are going to infringe on your use of lawful assets because under the light standard of probable cause, you may owe damages to someone. That strikes me as pretty Draconian. And let me put the real world consequence around this. I agree with you that—because I was a prosecutor. The majority of prosecutors make reasonable, decent, prudent choices. A substantial number don't. And it would seem to me that to give this new power to the government to use against a class of people who have not been indicted at all frankly becomes a very huge bargaining chip for a prosecutor.

It, also as a practical matter, given that these are public hearings—I haven't heard anything in these bills that suggest that these hearings would be private hearings, they wouldn't be hearings available to the public. It would seem to me that if I were a prosecutor looking to pressure my defendant, going after that defendant's assets pre-indictment might become a very good tool. Professor Turley, am I on to something with this idea that this becomes a major pressure lever for the government.

Mr. TURLEY. I agree entirely. I have got to tell you, there will be many prosecutors who will drop the hammer on this as a point of pressure.

Mr. DAVIS. And doesn't this also become a way for a prosecutor to almost have a little pretrial, a way that in effect will say to the press, look, we are really closing in on this target, don't have

enough yet for an indictment, don't have enough for a criminal complaint, but I would like to do a little bit of discovery? So what I am going to do is, in effect, go after this person's assets on a probable cause theory and that is the least weighty standard the judge ever has to apply. And I know that when the person gets his hearing to challenge that, my guys will get to cross-examine him.

So I have almost got a little mini trial. Does that concern, Judge Cassell, the possibility of prosecutors using this to generate mini trials to conduct discovery?

Mr. CASSELL. No, I don't think it is going to create mini trials. And I guess one of the things that——

Mr. DAVIS. Why wouldn't it?

Mr. CASSELL. Well, one of the things to remember about this bill is it doesn't take anyone's assets away. It simply preserves those assets.

Mr. DAVIS. But you have got to have a hearing.

Mr. CASSELL. That is true.

Mr. DAVIS. The defendant is entitled to contest that. There will be a public hearing, will there not?

Mr. CASSELL. Yes.

Mr. DAVIS. There will be an opportunity to cross-examine or to question the defendant's witnesses because the defendant has got to make a showing. The defendant can't sit silent, can he?

Mr. CASSELL. No.

Mr. DAVIS. So the defendant has got to make a showing. That means cross-examination, doesn't it, Professor Turley?

Mr. TURLEY. It does. And it is true it doesn't take your assets away. But by freezing them, it is like saying we are not taking your house, you just can't go inside.

Mr. DAVIS. But, Judge, my point is by doing something to the defendant and making the defendant have to meet a burden to keep control of his assets, you have a hearing. The defendant has got to put some showing as a burden of production and persuasion. That subjects that defendant to cross-examination and to questioning. If I am a diligent, aggressive prosecutor, I would love to have been able to do that because it would give me a shot at free discovery. Do the other three of you gentlemen see my point about free discovery?

Mr. CASSELL. You could bring the same defendant in right now, though, into the grand jury room and ask questions——

Mr. DAVIS. He could invoke his fifth amendment right.

Mr. CASSELL. Or he could invoke his fifth amendment right if this hearing——

Mr. DAVIS. But that means he would be sacrificing his assets. He would be giving up his property or control of his property.

Mr. CASSELL. And then I guess the one other point I would emphasize, Congressman, is you think the probable cause showing is some light showing. I think it is difficult to show that someone is probably a serious Federal criminal and probably has taken assets that should rightly go to a victim.

Mr. DAVIS. We can argue about that. But if the Chair would indulge me to make one last quick point. I have another big broad concern, Judge. We struggle right now to collect restitution under the law that we have today. We have $46 billion unpaid Federal

restitution. And by the way, most of it is not owed by small fish; it is owed by big major corporate defendants who have resources and get around it. So let me tell you what I have some instinct may be motivating these bills. It is almost as if we have a reverse—we have some kind of redistribution here of the burden because we are not getting all of these resources from our big well-heeled defendants. It is almost as if we are broadening the category of restitution.

So If I am a prosecutor in a typical midsized U.S. Attorney's office that has to get our numbers on restitution up to show DOJ we are doing a good job and to get a good evaluation and I am struggling to collect from my big fish defendants, what do I do? I go out and bring more expansive restitution claims against other defendants. Is there anything to that theory, Mr. Smith?

Mr. SMITH. Absolutely. As a matter of fact, Congressman, I think everything you have said is right on point. And it takes——

Mr. DAVIS. I am going to quit while I am ahead.

Mr. SMITH. And thank God you are a former AUSA because you know exactly what goes on. And everything you have said strikes me as totally realistic. That will happen. And I don't think you have heard any good answers to your questions.

Mr. DAVIS. Mr. Chairman, I shall quit while I am ahead.

Mr. SCOTT. Thank you. The gentleman from Texas.

Mr. GOHMERT. Mr. Chairman, I would just like to ask unanimous consent to make this written submission by the U.S. Department of Justice before our Committee on this bill part of the record.

Mr. SCOTT. Without objection. The gentleman from California.

Mr. LUNGREN. Thank you very much, Mr. Chairman. This has been a most interesting hearing. Mr. Smith, you have enlightened me that—this is the first time I have heard on this panel that the U.S. Justice Department or downtown Justice Department doesn't have any control over its U.S. attorneys. I mean, I heard just the opposite. That is the complaint we got, that they have got too much control of the U.S. attorneys but you have enlightened me that in fact they used a laissezfaire approach. You have also told me that you don't trust Federal judges to get it right, except when you do trust Federal judges to get it right.

Mr. SMITH. When they know the facts.

Mr. LUNGREN. And you have also told me that this bill by itself is going to undermine our whole system of justice. So this must be a pretty big bill. Let met ask any of you out there. In 1996, when I was attorney general of California, we worked with the California legislature to pass a preconviction asset-freezing law dealing with white-collar crime. It was limited, as I recall it, to white-collar crimes and it had to be involving two felonies and it had to be over a certain amount and so forth. I was just wondering—and that was on an *ex parte* order based on a showing of probable cause. And it resulted in the freezing of defendant's assets. And I have been gone for quite a while there so I have not followed it. But since you are giving us an opinion with respect to this bill that, in some ways, seems to be similar what happened in California, have any of you seen whether the concerns you have expressed here have actually seen fulfillment in the enforcement of the California act?

Mr. CASSELL. If I could just comment on that, Congressman. The bill that you put into was put into effect more than 10 years ago has been on the books in California. There have been some defense challenges and those defense challenges have been rejected. California courts have found that that law is constitutional and it has been used effectively, as I understand it, by prosecutors all over the State there to restrain assets. And then if a defendant is convicted, to provide restitution to crime victims. So I think the burden should be on those who are in this room that suggest that this kind of legislation is unconstitutional to prove why laws in California, Minnesota, my home State of Utah and Pennsylvania that do essentially the same thing have all been on the books and have all survived constitutional challenges.

Mr. LUNGREN. Maybe I would ask the question this way. The allegation has been put forward that if this bill goes forward, it would result in virtually all of these defendants being placed in a position of indigency such that they would not be able to afford their lawyers. Does anybody know what has happened in those States such as my home State or Utah or the others that have this, where it has been put into place, do we have the reality that that has rendered these defendants incapable of hiring their own counsel and therefore essentially getting indigent lawyers?

Mr. CASSELL. That has not happened in Utah, Congressman.

Mr. LUNGREN. Okay. Any of the other three, could you give me some advice on that?

Mr. WEISSMANN. I can address that on the Federal level because right now there is the ability to obtain an *ex parte* order with respect to forfeiture. The difference in this bill is that post indictment with respect to restitution, the procedural protections that are in place currently with respect to pretrial, preconviction, pre-indictment restraints of forfeiture do not exist with respect to what would be put in place——

Mr. LUNGREN. I understand that. But I am saying we have at least four States as I understand it that have this with respect to—not all crimes. I understand this is broader. But with respect to certain categories of white-collar crimes. So—and it is pre-indictment as I understand it. And it follows many of the parameters of this bill. Look, I don't want to see abuses by prosecutors. But I am trying to find out if the criticisms that you have registered have proven out in the experiences of the States that have similar statutes or you can argue to me if you will that these are different types of statutes than what we are talking about here. I am just trying to figure out——

Mr. WEISSMANN. I don't know the answer with respect to the specific States, but I would tell you that the things to look at to see whether there are sufficient procedural protections are is there a limited period of time after an *ex parte* order is entered after which it sunsets and that the defendant has a real opportunity to have a hearing. Neither of those are true with respect to the provision that is proposed here.

Mr. LUNGREN. Well, let me ask you that. This bill—at least H.R. 845, at least on page 21 has the defendant's right to a hearing. And it says in the case of a pre-indictment protective order entered under subsection such and such, the defendant's right to a post re-

straint hearing shall be governed by paragraphs 1(b)b and 2 of section 413(e) of the Controlled Substance Act. And I looked at the Controlled Substance Act and it says that you have a right to a hearing and I believe it is within 10 or 15 days.

Mr. WEISSMANN. Yes, it is within 10 days. And there is a 10-day and a 90-day provision. One of the anomalies with the current bill is that for somebody where it is pre-indictment, it just tracks the current forfeiture provisions for an *ex parte* restraint. If it is post indictment, almost all of the protections that currently exist are wiped out. So it is not a limited opportunity—a limited period where the order is in place. The opportunity for the defense to challenge it is virtually nil. There is no requirement to show that the assets would be dissipated. That is not even something that the prosecutor has to even show a judge is possible, which is, of course, something that is required in the civil context. So that many of the procedural requirements that currently exist in the—that are tracked here with respect to forfeiture pre-indictment do not exist post indictment in this bill.

Mr. SCOTT. Will the gentleman yield?

Mr. LUNGREN. Well, I am confused because what I read was specifically that it said post restraint hearing, the right to a post restraint hearing, which is still pre-indictment but it is after the freezing. They refer to it as a restraint occurs. Then as I understand it, you have governed by this section of the Code which says a hearing requested concerning an order entered into this paragraph shall be heard at the earliest possible time. And so that is what I am——

Mr. SCOTT. Will the gentleman yield?

Mr. LUNGREN. Yes. I would be happy to.

Mr. SCOTT. You get the hearing. The next step is what happens at the hearing.

Mr. LUNGREN. I understand that. But I am just saying as I understand it——

Mr. SCOTT. And I think one of the complaints is that at the hearing the prosecutor says we have probable cause and that is the beginning and the end of the hearing.

Mr. TURLEY. To answer both of the questions—I am sure everyone's answer as well—first of all, your first question, I know of no law in any of the States that you mentioned as broad as this law and I know of no law that deals with restitution.

Mr. LUNGREN. I understand about broad. And I said that as part of my question. But I said the way it actually has worked in that universe of offenses to which it applies has what you have suggested would result if this went into effect taken place with that universe of defendants.

Mr. TURLEY. Yeah. If you shrink the universe—actually, there is a smaller universe in Federal law. There are some provisions involving asset hearings in Federal law as well. But I think the point that is made by the Chairman is really the correct one, that the reference that you are making, the pour-over clause to controlled substances defines essentially the framework of the hearing and once you get the hearing. Once you get there, the standard is basically answered by the subject of the hearing that—because all you

have to do is show that you have probable cause that if convicted you would be subject to restitution under these offenses.

Well, particularly if you make restitution applicable, the probable cause standard—you have to show that there is a probable cause standard error, that there was an error that you would not be subject to restitution. Otherwise I don't know what the purpose of the hearing is because it is not a mini trial.

Mr. LUNGREN. What I am saying, though, is I understand that that is the same standard used in the California law. It is upon the showing of probable cause. It is nothing more than that. So my point is, if that is such an insurmountable impediment for the defendant, that it is almost inevitable that he or she will always lose and will have these consequences that you have talked about—and I am trying to think of that as legitimate potential consequences. If that has not occurred in the application of the law, maybe it is not as inevitable as you suggest.

And again I am trying to figure out a way—I mean, when I came to Congress in 1979, I worked with Ab Mikva to try to make restitution a significant working part of the Federal criminal justice system. I have, with real enthusiasm, hoped that that would be a part of our system. And when I see a GAO report that shows that it is not working well, I am willing to look at different mechanisms to make it work. And it would be helpful if in addition to opposing this—I realize you have just been asked to testify about this—in addition to opposing this, you might give us some recommendations as to how it might actually work such that the guys that—we all agree, you know, at the time that they are convicted and, man, their assets are gone, they have been secreted somewhere, they can't get them. That is not only unfair to the overall justice system, it is unfair to the victims.

And how do we deal with it in a way that is also fair to people that have the presumption of innocence before trial and is there not a—both a practical and legal difference between forfeiting that asset and freezing that asset or at least as I take it from three of you on the panel, there is no real practical difference, you are denying that person that property. One of the arguments of the proponents is there is a significant difference between the two. And I guess you were arguing that there really is not a difference between forfeiting it and freezing it as far as the ability to defend——

Mr. TURLEY. I think that there is no practical difference when you freeze assets in a proceeding like this. I think what it does—I think it will be a nightmare for judges, because what it does is once the assets are frozen—I have got to tell you, I could not imagine a prosecutor worth any, you know, worth not being able to freeze all of the assets under some of these theories of a normal case. But once those assets are frozen, you can come back and say, look, I need some of that money for attorneys. And the judge is in the position to say, well, how much do you need? How much do you have? And the judge is going to be essentially treating your assets like you were an indigent defendant. They will be treating your assets because the judge is allowed under these rules to release funds if it considers that you are showing that indeed you need the money for counsel.

Mr. SCOTT. Will the gentleman yield?

Mr. LUNGREN. Sure.

Mr. SCOTT. One of the bills—you get the hearing if you need the money for the attorneys, but I don't see where you can——

Mr. SMITH. You are right, Mr. Chairman, there is no provision. Mr. Turley is wrong about this one. There is no provision in here which allows the judge to release assets to pay attorneys or for necessary living expenses. And that is one of the major—one of the most obvious reasons why this provision is dreadful.

Mr. LUNGREN. Mr. Cassell, would you object to that?

Mr. CASSELL. I am looking right at here. It says that if there are assets available to the defendant to retain counsel in a criminal case or to provide for reasonable living allowances——

Mr. SCOTT. That gets you the hearing. Then where further down do you get to use—once you are—that gets you to the hearing.

Mr. SMITH. That gets you to the hearing. Exactly.

Mr. SCOTT. Now, once you are in the hearing, the judge doesn't have any authority to actually release the money.

Mr. CASSELL. That is not my reading of the bill. And if that is what the law says, that is a drafting issue.

Mr. LUNGREN. Professor Cassell, would you object to that?

Mr. CASSELL. No, of course not. I mean, it has been the law in California—I guess . . . maybe what we should do is take the California law you wrote or helped to write 10 years ago, Xerox that and put that into the Federal statutes, because that seems to have worked well for 10 or 11 years out in California to allow prosecutors to seize assets without creating this parade of horribles that we hear from the——

Mr. LUNGREN. This is another example, Professor Cassell, why I am so opposite that I can't refer to you as Judge Cassell anymore. I yield back.

Mr. SCOTT. The gentleman's time has expired. We will have another round of questions. One of the problems, Professor Cassell, is with tweaking is the entire basis of the bill is an *ex parte* pre-indictment, no notice freezing of assets without discretion on the judge to release the assets so long as there is a facial showing of probable cause. You could have the situation in a criminal case where the defendant can show by the preponderance of the evidence that he is innocent. But if there is still probable cause, his assets are frozen until he can get to court. This is pre-indictment. So it is kind of hard to tweak when that is the basis of the bill. Mr. Smith, are you familiar with the Virginia victims compensation law?

Mr. SMITH. No, I am not, your honor. I mean Mr. Chairman. I am not.

Mr. SCOTT. What would happen in partnership assets if one of the—if the partnership is being charged with a crime, do all the partners and all of their personal assets get caught up in this?

Mr. SMITH. If a partnership is charged with a crime, yeah, sure, all of their assets could be frozen under this provision. You see, this asset freeze provision is modeled after the Federal forfeiture laws. And to me it is also a shame that the Federal forfeiture laws do not have any provision to allow to give a judge discretion to release funds needed to support one's family or to pay counsel. In other words, if the government makes that probable cause showing

that these assets are subject to forfeiture, that is the end of the matter.

Mr. SCOTT. In these bills?

Mr. SMITH. No. Not just under this bill, but under current forfeiture law, that is also the law.

Mr. SCOTT. But that is after conviction?

Mr. SMITH. No, that is before conviction.

Mr. SCOTT. But that is with fruits of the crime?

Mr. SMITH. By probable cause.

Mr. SCOTT. Fruits of the crime, not——

Mr. SMITH. An *ex parte* showing a probable cause is enough to freeze the assets in the Federal forfeiture case. And then even if the defendant, let's say, needs the money to pay for his wife's cancer operation, the judge has absolutely no authority to order that money to be released for that purpose because it is subject to forfeiture.

Mr. SCOTT. But that is only fruits of the crime assets.

Mr. SMITH. Excuse me?

Mr. SCOTT. Is that just fruits of the crime assets?

Mr. SMITH. Yes. In other words, it has to be tainted money. And this provision goes, you know, enormously further because it allows the government to freeze all of the defendant's assets, clean money, dirty money and anything in between.

Mr. SCOTT. Now, if you are on appeal—you have been convicted and on appeal, what is the present law on liquidating your assets and what would these bills do to that law in liquidating your assets unrelated to the crime?

Mr. SMITH. On appeal under this statute?

Mr. SCOTT. Right.

Mr. SMITH. Well, again, one of the provisions in these bills takes away a Federal judge's power to allow the defendant to not pay restitution during—while his case is on appeal. He can be compelled to pay the restitution. And so that even if he wins his appeal, he doesn't get his money back because he can't compel the victims to whom the money has been paid, the supposed victims, to give it back. And I think that is a very ill-conceived provision as well. It is unfair because there is no way to undo the damage if the defendant wins his appeal and is exonerated.

Mr. SCOTT. How are innocent third parties protected if you have a construction firm, somebody has prepaid for the building of the house, how are they protected under this freezing of assets? Because if you have been prepaid for the house, the contractor can't build the house if his checking account is frozen, he can't pay the workers. What happens—do innocent third parties get to come in——

Mr. SMITH. They are out of luck because as—there are no special provisions in these bills for innocent third parties. In fact, they have even fewer rights than the pathetically limited rights they have under the Federal forfeiture statutes. Here——

Mr. CASSELL. That is just not right. The provision I am looking at it says third party's right to post restraint hearing. There it is right there.

Mr. SCOTT. Read that section so we know what a third party—innocent third party would have to prove to get their money kind of unfrozen.

Mr. CASSELL. A person other than a defendant who has a legal interest in a property affected by a protective order issued under this law may move to modify the order on the grounds that the order causes an immediate and irreparable hardship to the moving party and less intrusive means exist to preserve the property for restitution. If after considering the evidence, the judge is entitled to modify the order.

Mr. SCOTT. So the third party would have to come in and argue the case?

Mr. CASSELL. Right. But remember, though, what the other interests are.

There are crime victims that are involved here who are entitled to recover restitution, and the money is being spent on trips to Europe or things like that. This says a third party can come in and say, wait a minute, I have a stronger claim than the crime victim does and then it lets the judge sort out all——

Mr. SCOTT. The problem with this is this is all pre-indictment.

Mr. Weissmann.

Mr. WEISSMANN. There is one provision that my colleague just didn't mention. Once that third party comes in and makes that showing, what the court is allowed to do, if a third party comes in and makes those two showings, basically the court has this discretion. The court shall modify the order to mitigate the hardship to the extent that it is possible to do so while preserving the asset for restitution.

With that language, what exactly can a court do? The asset needs to be restrained for restitution. So I don't know how the court satisfies that prong and grant relief.

Mr. SMITH. That is the point I wanted to make. That provision is not in Federal forfeiture statutes.

In other words, a third party can come in a forfeiture case and say, judge, you've restrained my assets, and I am innocent. It is a mistake. I actually own this property, not the defendant. The judge has the power to lift the restraining order and return those assets to the third party.

But as you just heard from Mr. Weissmann, under these provisions in the bills in front of you, the judge does not have that authority. He can't return the asset to the third party because that would make the property unavailable to pay a future restitution order.

Mr. SCOTT. Mr. Turley.

Mr. TURLEY. Actually, this hits on one of the main problems in this design; and it is that you expand the pool of people that can make claims upon the assets by expanding the victims. You actually make the defendant pay for attorneys fees for other attorneys. So if you challenge that, you are running up fees you may ultimately have to pay.

But, in the end, the court is in a weird position. He is sort of like a special master. He has to sit there and decide who gets what out of the asset pool. And there is not many guidelines here.

And I also want to note, if I would, about the disagreement earlier. Part of this all folds into the same problem with regard to the power of the court to release money for attorneys. And that is, if you take a look at the post-indictment provision, the very purpose of the hearing is that you have established by a preponderance of the evidence that indeed you need this money for counsel.

So the point—you are having a hearing on that subject, but when you get to the hearing it doesn't say anything about that as the basis for releasing assets, and so you have two provisions that are in conflict.

My guess is that a court would probably resolve it to mean that, actually, they have a fair amount of authority to determine that not all these assets are needed to protect victims, and they would probably resolve it. Because that is the subject of the hearing, is your right to get attorneys fees.

But all of these show what madness may lie at the end of this road. Because you are going to have a lot of people making claims on limited assets, a judge who is going to have to try to manage that as well as requests for attorneys fees and determine what her authority is to grant them, and at the end of that road that court is going to have to sit there and divide up this pie. And I have to tell you I would not want to be there for that event.

Mr. CASSELL. I don't think it would be that difficult to sort some of these things out. What is madness here is we let criminals go off to Europe, squander assets, and at the end of the day say to crime victims, I am sorry, we've let the criminals spend all the money. There is nothing left for you. That is what is madness here, and that is what the Subcommittee should change.

Mr. SCOTT. That is one of my original points. You have the same provision for the guilty as well as the innocent. Someone who is subsequently found to be not guilty cannot spend his own money.

Mr. CASSELL. For the limited period of time, 69 days under the Speedy Trial Act while they are awaiting trial.

Mr. SCOTT. Wait a minute. That is after indictment. How long—let me ask somebody. Mr. Weissmann, how long can they go with one of these things? After they have frozen your assets, when do they have to indict you?

Mr. WEISSMANN. They don't. But the other is post-indictment to say that you go to trial in 70 days because of the Speedy Trial Act is—in my experience in 15 years I never saw a case go to trial in 70 days. That just doesn't happen. The Speedy Trial Act has so many exclusions, so you could have this kind of pretrial restraint for years. Enron is a good example of that.

Mr. SCOTT. And then once the trial starts, how long does a trial take?

Mr. WEISSMANN. It could take a week. It could take 6 months.

Mr. SCOTT. During which time your assets are frozen?

Mr. WEISSMANN. Yes, and it could be assets you want to use for counsel.

Mr. SCOTT. And if you are trying to run a business, the corporate checking account or the business checking account is frozen. It is in your name.

Mr. WEISSMANN. Yes. Right. And that is where the difference between seizure and freezing is really illusory when you need the money.

Mr. TURLEY. The great moment, actually, in sports for this statute actually comes when you have a transfer of property, when you have a defendant who is deceased. So under one of the sort of accidents waiting to happen is that if you have a defendant who dies and so property transfers, let's say, to his family, under these provisions it would seem to read that the government can go after that family and say, we know you have this house in fee simple transfer, but we have determined that this was a really bad guy, and so we are going to come after you. And that would—you are talking about all this end pipe problems. That really would be an extraordinary act.

Mr. SCOTT. Let me ask one other question. Do you have—I will yield to the gentleman from Georgia for 5 minutes.

Mr. JOHNSON. Yes, thank you, Mr. Chairman.

I want to make sure I have this correct. A pre-indictment asset, or the pre-indictment asset restraint provision kicks in upon an *ex parte* showing of probable cause that the indictment will allege an offense which requires restitution to be paid. Is that correct?

Mr. CASSELL. That's correct; and then there is, of course, the right to a hearing very rapidly.

Mr. JOHNSON. And the defendant then can request a hearing. And the government would simply show—they would simply show by probable cause that the indictment that will come will allege a crime for which restitution must be ordered.

Mr. CASSELL. And that the amount of restitution in question is necessary——

Mr. JOHNSON. No, no, no, I don't want to go that far. I just want to say that the only thing that the government has to prove by probable cause is that they will charge, in an indictment, that the defendant has committed a crime which requires that restitution be ordered.

Mr. TURLEY. And if 845 is enacted, all crimes will be subject to restitution.

Mr. JOHNSON. So it doesn't matter how much restitution. It is just a fact that restitution can be ordered or must be ordered as a result of an indictment to come.

Mr. TURLEY. It would be the world's shortest probable cause hearing. The prosecutor will walk in and——

Mr. JOHNSON. And it won't be probable cause that the defendant committed the offense to be alleged against him.

Mr. TURLEY. Right. It can't be.

Mr. JOHNSON. It is simply that the species of the allegation to be leveled in the future is one that would require restitution to be ordered.

Mr. TURLEY. That's right. The language of the statute would answer the question of the hearing. And as Judge Cassell was going to point out about the size of the award, you have to remember at this stage you're pre-indictment. But even if you are post-indictment pretrial, that indictment is very likely in many cases subject to a superseding indictment. Counsel will be dropped.

You are talking about the earliest possible stage. So you have the maximum number of counts, and all the prosecutor has to show the judge is this huge universe of potential victims under this act and say all of these people can ask for these assets. That's a fluid standard that you can easily stretch the limits of anyone's asset.

Mr. CASSELL. I guess I would say why hasn't this happened in California in the last 12 years? At Page 29 in my testimony, I recount the California law that Congressman Lungren helped draft. It has the same language, including pre-indictment language, as I understand it, and this parade of horribles that we keep hearing is going to happen—it is going to threaten the sixth amendment; it is going to lead to persons kicked out on the street without a roof over their heads—none of this has happened in California.

What has happened in California is that crime victims have been able to get money back to them that criminals have taken from them. That's the fundamental issue here.

And there are certainly some drafting issues that can be looked at, and you may have put your finger on some words that need to be tightened up. But the goal here should be to ensure that crime victims get compensation in a fair way, not to simply say, well, there are drafting problems here, and we will throw the whole thing out.

Mr. SCOTT. In your testimony, you cite at the hearing the court is directed to consider relevant factors as follows: Shall weigh the relevant degree of certainty of outcome on the merits, the consequences to each of the parties of granting interim relief. If the prosecution is likely to prevail on the merits and the risk of dissipation outweighs potential harm to the defendants and interested parties, the court shall grant relief, shall give significant weight to the following factors and so on and so forth.

This says once probable cause attaches, you don't consider anything. There is no weighing. It's a done deal.

In fact, on the initial thing, all the defendant knows is his check has bounced. The U.S. Attorney says, I have an *ex parte*. You go in. You don't even know what you're defending. How do you prepare for a hearing?

I mean, I guess you got to get a continuance after you get a little bit of what the allegations are, and you still can't write a check. There is no weighing. There is no public interest in preserving the property. There is no public interest measure.

Mr. JOHNSON. In reclaiming my time, the universe of the charges that are possible is infinite.

Mr. CASSELL. I guess my point would be this. If you think the California language is better—and there are certainly some things in the California statute that aren't in this statute, there are things in this statute that aren't in the California statute—but if you like the California statute better, you couild just copy that and put that into the Federal Code. Because that will at least give prosecutors a tool that they could use to freeze assets when it was necessary. Right now, they don't have that tool at all.

Mr. SMITH. I would like the raise a point about this reliance on State law. I am not familiar with this California statute that Professor Cassell is talking about. But in my experience with State forfeiture laws, which is very extensive, I have found that generally

the States are very, very unaggressive in white-collar cases, assuming they do them at all. And that is what we are talking about here. There is no restitution money to be raised in anything but white-collar cases.

I would like to know—I would like to see statistics on how much money California has actually recovered for victims through this statute and how much increase there was once the statute was enacted. And I will bet you it is very small. Because they just don't have the resources to do these big white-collar cases that the Feds do, and so I really doubt that one can learn very much from whatever State experience is out there.

Mr. SCOTT. Well, one of the cases that I think would—one of the first things you would see in a controversy, you have some businessman, a contractor or something, charged with a drug crime, charged with some theft or some conspiracy or something; and the first thing they go in and freeze the business assets.

Let me ask one final question. Mr. Smith, can you talk about the effect of all of this on your right to choose counsel and the constitutional implications of freezing your assets and your right to choose a counsel?

Mr. SMITH. Can I speak to that? Absolutely.

I think it will have a devastating effect on your ability to choose counsel or to obtain any private counsel. And one of the questions that we pose, which nobody really answered, was how in the world do you get the necessary money to even challenge one of these restraint orders if all your assets are frozen? I mean, it is like a chicken-egg problem. How do you get the money to—and believe me, I know from experience it takes a lot of money to challenge one of these orders. Because you have got to learn the case. And how are you going to learn the case? It is basically all secret at this point.

Mr. SCOTT. Because all you know is your checks bounced.

Mr. SMITH. Exactly. You know your checks bounced, and they have your money. But you don't know what their theory is or what their evidence is, and you're not going to. And it is going to be difficult to find out. So how do you get a lawyer to take your case to challenge the restraint order when you don't have any money to do so? Nobody answers that question.

One of the points I make in my statement, which we didn't really mention here, is that Congress has several times rejected the Department of Justice's proposals to extend pretrial asset restraint to what are called substitute assets, meaning clean or legitimate assets that are subject to forfeiture under our forfeiture statutes. But Congress is quite smart, wisely refused to allow the government to freeze those assets prior to trial. And why is that?

Every time the government has proposed that, even in the Patriot Act of 2001, which just sailed through under the pressure of 9/11, that provision, when they stuck it into the Patriot Act, because they figured, well, everything in this act is going to pass, but, guess what, Senator Leahy took it out. It is not in there because he knew exactly what would happen if you give the government this tremendous authority to freeze clean assets prior to trial. It would basically mean the end of our adversary system of justice or at least the replacement of the private bar with public defenders

in pretty much every case unless for whatever reason the prosecutor was nice enough to just ignore his powers under this statute. And if you want to do that, then just go ahead and do it. Abolish the defense bar. Make everybody a public defender.

But is it really worth it? How much money has been—is going to be obtained for victims that way, by abolishing the private practice of criminal defense work? Not very much.

And, to me, it is just—the two things are so out of proportion that that is why I say, you know—at least I am not talking about the rest of the bill. Obviously, reasonable people can differ about a lot of the provisions in this bill. I am talking about this provision, the pretrial asset restraint provision.

I don't really see what reasonable argument can be made that this is so necessary to raise money for victims that we need to jeopardize the existence of a private defense bar and basically put everybody—every criminal defendant at the mercy of every prosecutor. And that is why Congress has repeatedly rejected this idea. In the forfeiture context, why in the world—where, by definition, assets are supposed to be subject to forfeiture, why in the world would we allow this in the restitution context where, you know, all that is at stake is money, basically. We are not talking about the—you are sacrificing the sixth amendment right to counsel to a victim's desire to be compensated.

There are much better ways, and I think the Chair has suggested some better ways to compensate the victims. Let's let the Treasury compensate them, if necessary. But don't allow the government to pauperize every defendant in order to pursue this will of the wisp.

Mr. CASSELL. Can I correct Mr. Smith on one point?

Mr. SCOTT. Just a minute. Mr. Turley.

Mr. TURLEY. Thank you, Mr. Chairman.

Just to respond to the question you asked about the sixth amendment, there is a misunderstanding I think with some supporters of the bill that Caplin Drysdale would support this bill. Because in Caplin Drysdale was where the Court—the Supreme Court and in Monsanto said that you can, in fact, have forfeiture of assets that are claimed for attorneys fees and that it is not a violation of the sixth amendment. But that is indeed the difference between forfeiture and a restitution. The reason you can freeze that money is because the money is not yours because they are showing that it is tainted money.

And the only other point I would raise is everyone is talking about dividing this up for victims. In my view, this is not going to get more money to victims, but it may very well get some money to attorneys. Because if you're talking about the 15 percent that actually has assets, they are going to have their assets thrown into these pots, the defendant has to pay for the attorneys who are going after the assets. Those attorneys will have agreements, I assure you, from their clients that they will get paid. They will get a priority interest in those assets or they will be paid directly.

I think the most likely result is that these victims funds are going to go largely to lawyers.

Mr. SCOTT. Final comment, Professor.

Mr. CASSELL. Yes, thank you, Mr. Chairman. I appreciate that.

It is simply not true to say Congress has repeatedly rejected this. This bill comes before this Committee having passed the Senate already.

And with regard to how much money is at stake here, Senator Dorgan's example has gone unchallenged today. More than $10 million was transferred by the defendants in those cases, transferred away from victims that could have desperately used that money for their legitimate losses. And so I would urge this Subcommittee to move forward with the bill.

Mr. SCOTT. Thank you.

A letter from Thomas Hillier from the Federal Public Defender be entered into the record. Without objection.

I want to thank all of our witnesses, and I would like to thank you for your testimony today.

Members may have additional questions which we will forward to you and ask that you answer as promptly as you can so they be made part of the record.

Without objection, the hearing record will remain open for 1 week for the submission of additional materials.

Without objection, the Subcommittee stands adjourned. Thank you very much.

[Whereupon, at 4:30 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Statement of the Honorable John Conyers, Jr.
for the Legislative Hearing on the Proposals Before the 110th
Congress to Amend Federal Restitution Laws
Before the
Subcommittee on Crime, Terrorism, and Homeland Security

Thursday, April 3, 2008, at 2:00 p.m.
2141 Rayburn House Office Building

The Government Accountability Office estimates that at least $25 billion in outstanding restitution debts are owed to crime victims.

The proposals to reform the Federal restitution laws that we are discussing today, however, are troubling to me because they may have far-reaching negative consequences and not achieve the intended benefit of compensating victims of crime.

Here are just three concerns they present.

First, these proposals appear to rely too much on the idea that defendants choose not to pay their restitution liability when the reality is that they

simply cannot.

Second, these proposals would substantially increase the types of crimes that would mandate restitution. They would require restitution for those not only just directly harmed, but require restitution for those who are proximately harmed.

Third, these proposals broaden the types of costs recoverable through restitution such as the victim's attorneys fees.

Fourth, these proposals mandate stronger enforcement of restitution orders, which means hiring more probation officers and more court oversight. They even delegate authority to the U.S. Attorney and to Bureau of Prison Officials.

Further, they require a defendant to pay restitution *before* he or she could be released from

probation.

Finally, the proposals would authorize the U.S. Attorney to freeze a citizen's assets *before* the citizen is even charged with a crime, which causes me great concern. Once the assets are frozen, these defendants would have to justify to a court that the government should let them use their assets for their criminal defense. This is an unfair encroachment on the right to counsel and I do not see any compelling government interest to do so.

Do not get me wrong. I very much want victims of crime to be fully compensated for their loss and suffering.

But, the reason that there is so much unpaid restitution debt is that *85 percent of Federal defendants are indigent and have no means to pay the restitution.*

Creating more restitution orders may only add to the amount of unpaid restitution because defendants have little or no assets to pay the restitution. Strengthening enforcement may do little or nothing except increase taxpayer costs to hire more probation officers and court employees. Freezing assets could affect one's right to counsel. And, after all of this, the victims will probably not recover any more than they're recovering now.

Although laudable in intent, these proposals have far-reaching negative effects. We must ensure that we develop remedies that will actually benefit victims of crime.

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Mr. Chairman, thank you for your leadership in convening today's very important hearing legislative proposals before the 110th Congress to amend federal restitution laws. I would also like to thank the ranking member, the Honorable Louie Gohmert. Welcome to our distinguished panelists.

Since 1925, with the enactment of the Federal Probation Act, restitution has been an accepted form of punishment with the federal criminal justice system. Simply put restitution is the money a judge orders an offender to pay to the victim(s) to compensate for damages related to the crime.

Restitution is part of the offender's sentence and can be ordered in both adult and juvenile cases following a conviction or a plea of guilty. The amount of restitution ordered by the judge is contingent upon the victim's expenses related to the crime and the offender's ability to pay.

Presently, restitution can only be requested for out-of-pocket expenses incurred by the victim as the result of a crime. If the entire amount of the victim's loss is unknown at the time of sentencing, the amount of restitution ordered may be determined at a later date.

All requested restitution costs must be directly related to the criminal act perpetrated by the charged defendant(s). Expenses incurred by another critical incident will not be considered for payment. Some judges will only order restitution for expenses not covered by insurance.

Payment for physical pain and/or emotional trauma can not be ordered by the criminal court. Victims who seek additional financial compensation for this type of loss must retain a civil attorney for representation. The offender's financial resources and ability to pay should be considered when assessing this recovery option.

Restitution can be mandatory or discretionary. Once the court determines the restitution amount, the resulting amount is the restitution that the court must impose in mandatory restitution cases. Offenses which mandate the imposition of the full restitution amount are those listed in 18 U.S.C. sections 3663A, 2248, 2259, 2264, and 2327. Discretionary restitution is authorized as a separate order for any offense listed in section 3663.

In discretionary restitution cases, the restitution amount imposed is the result of balancing the harm with a consideration of the defendant's ability to pay restitution for that harm. In deciding whether to impose discretionary restitution, the court must consider the statutory "factors" provided in section 3663(a)(1)(B)(i), which are: "The court, in determining whether to order restitution under this section, shall consider—(I) the amount of the loss sustained by each victim as a result of the offense; and (II) the financial resources of the defendant, financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." Determining the defendant's ability to pay is also relevant in determining the amount of a fine to impose, and it is relevant to determining the manner of payment of any restitution order, pursuant to 18 U.S.C. section 3663(f)(2).

The Subcommittee will examine proposed legislation that would make substantial changes in federal restitution law. Three legislative proposals, two before the House and one before the Senate, have the potential of imposing sweeping changes to restitution requirements on defendants, altering the discretion of judges, and freezing the assets of citizens even before they are charged with a crime. The Subcommittee will examine the proposals and hear arguments concerning them.

Mr. Chairman, the Subcommittee will hear testimony about S.973, H.R. 845, the "Criminal Restitution Improvement Act," sponsored by Honorable Steve Chabot (OH) and H.R. 4110, the "Restitution for Victims of Crime Act of 2007", sponsored by the Honorable Carol Shea-Porter (NH). These proposals call for the expansion of prosecutorial authority to freeze a defendant's assets in anticipation that the defendant will have to pay restitution to a crime victim.

Reform is needed because uncollected federal restitution and fine payments totaled nearly $46 billion at the end of fiscal year 2006, the latest total available from the Justice Department, an increase of $5 billion over the year before. While reform is needed, these legislative proposals are not the answer. Instead, their enactment will lead to increased claims of restitution and more uncollected funds.

The legislative proposals that we are examining today call for three kinds of adjustments to ensure control over a defendant's assets: expanding the universe of crime victims entitled to restitution, expanding the government's ability to control a defendant's assets procedurally, and creating a new avenue of controlling a defendant's assets by authorizing pre-conviction asset freezing.

These proposals expand the universe of potential victims by expanding the number of offenses for which restitution would be ordered. S. 973 and H.R. 4100 would add six statutes to those already authorizing the court to order restitution at its discretion.

H.R. 845 is more far-reaching because it would mandate restitution for all federal offenses. This would lead to a large volume of crime victims who would qualify for restitution.

These proposals also expand the universe of potential crime victims by expanding the definition of a crime victim. Currently, the law defines victims for mandatory restitution as (1) those designated in a plea bargain, (2) the estate of a victim, (3) those harmed directly and proximately by the offense, (4) those harmed by the scheme or pattern of the offense when the offense has a scheme or pattern as one of its elements, and (5) guardians when the victim is a minor or disabled. 18 USC section 3663A(a)(1)(2006). H.R. 845 would provide for broader categories of victims and includes successors.

H.R. 845 would amend the law to require restitution payments to be made immediately. Specifically, H.R. 845 states that "upon determination of the amount of restitution owed to each victim, the court shall order that the full amount of restitution is due and payable immediately" H.R. 845 sec. 3664(j)(1).

All of the proposals provide that the court retains its authority to provide for payments based upon installments according to a schedule. The proposals also add that the Attorney General may collect and apply unreported or otherwise newly available assets to the payment due the victim without regard to the court's installment payment provision. This could have serious effects if the defendant does not have the money.

S. 973 and H.R. 4110 add increased provisions for enforcement. Under these proposals, the defendant would be required to pay a minimum of $100 per year in restitution. Because prisoners get paid so little in prison and because prisoners are required to pay for their own personal hygiene products, it is unlikely that many inmates would be able to meet the $100 minimum payment for restitution.

The Senate proposal amends current law by requiring defendants to pay restitution during an appeal, absent good cause. If the case is vacated or overturned on appeal, the government cannot compel the victim to return the restitution he or she was paid by the defendant. Rather, the defendant has the burden of recovering these funds from the victim.

These proposals would also allow for pre-indictment freezing of a defendant's assets to ensure their availability should a defendant be convicted and ordered to pay restitution. This might be considered a seizure, which is abhorred by the law and is arguably unconstitutional.

The proposals before us today do little in the way of ensuring that the $46 billion in uncollected federal restitution and fine payments will ever be collected. Instead, these proposals add further strain to a weak system, make uncollected federal restitution grow to even more staggering heights, and severely curtail the constitutional rights of defendants. These proposals expand the number of offenses for which restitution would be ordered and it expands the number of crime victims who would qualify for restitution. Additionally, these proposals make the full amount of restitution due and payable immediately. They require a defendant to pay restitution while appeals are ongoing. They also allow pre-indictment freezing of a defendant's assets to ensure their availability should a defendant be convicted and ordered to pay restitution. These expanded restitution proposals amount to debtors prison and will have the effect of either keeping defendants in prison because they are unable to meet their restitution obligations or because they must resort to a criminal activity to pay for the restitution owed to victims.

I welcome today's hearing and I look forward to hearing from today's panelists. This problem of uncollected restitution is a big one and Congress must address it. However, these proposals are not the vehicle for addressing the problem.

Thank you. Mr. Chairman, I yield the remainder of my time.

United States Government Accountability Office

GAO

Report to the Honorable Byron L. Dorgan, U.S. Senate

January 2005

CRIMINAL DEBT

Court-Ordered Restitution Amounts Far Exceed Likely Collections for the Crime Victims in Selected Financial Fraud Cases

GAO-05-80

GAO
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Highlights

Highlights of GAO-05-80, a report to the Honorable Byron L. Dorgan, U.S. Senate

January 2005

CRIMINAL DEBT

Court-Ordered Restitution Amounts Far Exceed Likely Collections for the Crime Victims in Selected Financial Fraud Cases

Why GAO Did This Study

In the wake of a recent wave of corporate scandals, Senator Byron L. Dorgan noted that the American taxpayers have a right to expect that those who have committed corporate fraud and other criminal wrongdoing will be punished, and that the federal government will make every effort to recover assets held by the offenders. Recognizing that GAO previously reported on deficiencies in the Department of Justice's (Justice) criminal debt collection processes (GAO-01-664), Senator Dorgan asked GAO to review selected criminal white-collar financial fraud cases for which large restitution debts have been established but little has been collected. Specifically, GAO was asked to determine (1) the status of Justice's efforts to collect on the outstanding debt, (2) the prospects for future collections, and (3) whether specific problems have affected Justice's ability to collect the debt.

What GAO Recommends

GAO recommends that the Attorney General (1) include in the criminal debt strategic plan, which is called for by recent congressional action, legislative initiatives, operational initiatives, or both that are directed toward maximizing opportunities for collection; and (2) report annually in Justice's *Accountability Report* on the progress toward developing and implementing the strategic plan. Justice stated it is taking steps to develop a strategic plan to improve criminal debt collection.

www.gao.gov/cgi-bin/getrpt?GAO-05-80.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Gary T. Engel at (202) 512-3406 or engelg@gao.gov.

What GAO Found

The court-ordered restitution for the five selected white-collar financial fraud criminal debt cases GAO reviewed far exceeded amounts likely to be collected and paid to the victims. These offenders, who had either been high-ranking officials of companies or operated their own business, pled guilty to crimes for which the courts ordered restitution totaling about $568 million to victims. As of the completion of GAO's fieldwork, which was up to 8 years after the offenders' sentencing, court records showed that amounts collected for the victims in these cases totaled only about $40 million, or about 7 percent of the ordered restitution.

At some point prior to the judgments establishing the restitution debts, each of the five offenders either reported having wealth or significant financial resources to the courts or to Justice, or there were indicators of such. However, following the judgments, the offenders claimed that they were not financially able to pay full restitution to their victims. Justice's Financial Litigation Units (FLU) that were responsible for collection performed certain activities to collect the debts after the judgments, but the debts had not been significantly reduced as a result of the FLUs' identification and liquidation of additional assets of the offenders.

The FLUs' prospects are not good for collecting additional restitution amounts on these cases. A major problem hindering the FLUs' ability to collect restitution debt in the selected cases was the long time intervals between the criminal offense and the judgment. Court records show that 5 to 13 years passed between when the offenders began to engage in the criminal activity for which they were sentenced and the date of their judgments. For each of the selected cases, by the time the court rendered the judgment establishing the restitution debt, certain of the offenders' assets had been, among other things, transferred to family members or others, involved in forfeiture actions, subject to bankruptcy, or moved to a foreign account. In addition, one of the selected cases involved an offender who was jointly and severally liable for the debt with another offender who had been deported. Justice acknowledged that such dispositions or circumstances are not uncommon and create major debt collection challenges for the FLUs. Moreover, there were minimal, if any, apparent negative consequences to these offenders for not paying their restitution debts.

Recently, to further implementation of a related recommendation made in 2001 by GAO, the Congress directed the Attorney General to develop a strategic plan with certain other federal agencies to improve criminal debt collection. Given the significant upward trend in outstanding criminal debt and the difficulty experienced by Justice in collecting criminal restitution debt, it is important that Justice include in such a plan legislative initiatives, operational initiatives, or both to enhance the federal government's capacity to collect restitution for victims of financial crimes. Justice's comments on a draft of this report are consistent with this conclusion.

Contents

Letter

Results in Brief	1
Background	2
Scope and Methodology	6
Restitution Amounts Far Exceed Likely Collections for the Crime Victims	7
Recent Congressional Action	9
Conclusion	16
Recommendations for Executive Action	17
Agency Comments and Our Evaluation	17

Appendixes

Appendix I:	**Comments from the Department of Justice**	18
	GAO's Comments	20
Appendix II:	**Staff Acknowledgments**	23
		24

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United States Government Accountability Office
Washington, D.C. 20548

January 31, 2005

The Honorable Byron L. Dorgan
United States Senate

Dear Senator Dorgan:

In March 2004, we reported that the Department of Justice's (Justice) unaudited records indicated that the total amount of outstanding criminal debt had more than quadrupled over a 6-year period, growing from about $6 billion as of September 30, 1996, to almost $25 billion as of September 30, 2002.[1] This significant upward trend started with enactment of the Mandatory Victims Restitution Act of 1996 (MVRA).[2] One feature of that law substantially increased the restitution amounts the courts were required to order for certain offenses.[3] Our 2004 report included detailed information on the reported amount and growth of criminal debt for fiscal years 2000 through 2002, including specific amounts related to white-collar financial fraud.[4] As discussed in that report, Justice's unaudited records indicate that for each of these 3 fiscal years, about two-thirds or more of criminal debt was related to white-collar financial fraud. About 80 percent of the white-collar financial fraud debt as of September 30, 2002, was categorized as nonfederal restitution, which is criminal debt owed to other than the federal government and for which Justice has a significant responsibility to collect on behalf of crime victims.

[1]GAO, *Criminal Debt: Actions Still Needed to Address Deficiencies in Justice's Collection Processes*, GAO-04-338 (Washington, D.C.: Mar. 5, 2004). For this report, the latest reported data from Justice as of the completion of our fieldwork in mid-December 2003 were for fiscal year 2002. Justice was still in the process of compiling and summarizing criminal debt information for fiscal year 2003.

[2]Pub. L. No. 104-132, Title II, Subtitle A, 110 Stat. 1214, 1227.

[3]18 U.S.C. § 3663A (2000) requires the court to order restitution for offenders, regardless of the offender's ability to pay, who are convicted of (1) a crime of violence as defined by 18 U.S.C. § 16 (2000); (2) an offense against property under title 18 of the U.S.C., including any offense committed by fraud or deceit; or (3) an offense related to tampering with consumer products (18 U.S.C. § 1365 (2000)), in which an identifiable victim has suffered a physical injury or pecuniary loss. See also 18 U.S.C. §§ 2248, 2259, 2264, and 2327 (2000).

[4]White-collar financial fraud is criminal activity involving various types of unlawful, nonviolent conduct committed by corporations, individuals, or both, including theft or fraud and other violations of trust, for example, securities fraud and financial institution fraud.

We noted in our earlier July 2001 report, and reaffirmed in our 2004 report,[5] that the collection of outstanding criminal debt is inherently difficult due to a number of factors, including the nature of the debt, in that it involves criminals who may be incarcerated, may have been deported, or may have minimal earning capacity; the MVRA requirement that the assessment of restitution be based on actual loss and not on an offender's ability to pay; and the significant amount of time that may pass between offenders' arrest and sentencing, thus affording opportunities for offenders to hide fraudulently obtained assets in offshore accounts, shell corporations, family members' names and accounts, or other ways. Our 2001 report also noted as contributing factors to the growth of reported uncollected criminal debt Justice's inadequate policies and procedures for collecting criminal debt, lack of adherence to established criminal debt collection procedures in certain judicial districts, and Justice's insufficient coordination with other entities involved in the collection of criminal debt.

In the wake of a recent wave of corporate scandals, you noted that the American taxpayers have a right to expect that those who have committed corporate fraud and other criminal or civil wrongdoing will be punished, and that the federal government will make every effort to recover assets and the ill-gotten gains held by such offenders. Recognizing that we previously reported on specific deficiencies in Justice's and other federal agencies' criminal debt collection processes and had made recommendations to improve collections, you asked us to study several specific criminal restitution debt cases to shed additional light on the difficulties involved in attempting to collect restitution for victims of crime. Specifically, for selected criminal white-collar financial fraud cases for which large restitution debts have been established but little has been collected, you asked that we determine (1) the status of Justice's efforts to collect on the outstanding debt, (2) the prospects for future collections, aud (3) whether specific problems have affected Justice's ability to collect the debt.

Results in Brief

The restitution assessed the offenders by the courts for the five selected criminal debt cases we reviewed that involved white-collar financial fraud far exceeds amounts that have been and are likely to be collected and paid to victims of the crimes. Taken together, the five offenders were ordered by

[5]GAO, *Criminal Debt: Oversight and Actions Needed to Address Deficiencies in Collection Processes*, GAO-01-664 (Washington, D.C.: July 16, 2001). GAO-04-338.

the courts to pay restitution totaling about $568 million to their victims, many of whom were corporate shareholders or small investors. The courts also ordered four of the offenders to serve prison terms ranging from 1 to 5 years and placed one offender on several years of probation. The offenders, who had either been high-ranking officials of companies or operated their own business, pled guilty to various white-collar crimes. As of June 2004, which was several years after the offenders were sentenced, court records showed that amounts collected for the victims totaled only about $40 million, or about 7 percent of the ordered restitution.[6]

These limited collections resulted predominantly from asset forfeiture actions[7] or from payments made prior to the offenders' sentencing. For each of these selected cases, Justice's Financial Litigation Units (FLU), which are responsible for criminal debt collection, performed certain activities to attempt to collect the debts after the judgments. However, the FLUs were not able to identify and liquidate additional assets of the offenders to significantly reduce the debts.

Based on information available to us, the FLUs' prospects are not good for collecting additional restitution amounts on these cases. Each of the offenders, at some point prior to the judgments establishing the restitution debts, either reported having wealth or significant financial resources to the courts or to Justice, or there were indicators that this was the case. However, following the judgments, the offenders claimed that they were not financially able to pay full restitution to their victims. At the time of our debt file reviews, the limited payments the offenders had made or were

[6]This low rate of collection for the selected cases coincides with overall collection rates for criminal debt we have previously reported. In 2004, we reported that according to Justice's unaudited records, collections relative to outstanding criminal debt averaged about 4 percent for fiscal years 2000, 2001, and 2002 (GAO-04-338). In 2001, we reported that criminal debt collection averaged about 7 percent for fiscal years 1995 through 1999 (GAO-01-664).

[7]Asset forfeiture is used to seize property associated with criminal activity. The property seized may be illegal for someone to own or it may be the gains resulting from the criminal activity. It is a means of punishing and deterring criminal activity by depriving criminals of property, including items such as monetary instruments, real property, and tangible personal property, that was used or acquired through illegal activities. The federal government seizes such property associated with violations of various federal statutes and takes title to that property (forfeiture) through either an administrative or judicial process. Seized property either can be returned to the owner or forfeited to the government. After federal forfeiture, noncash property may be sold, put into official use, destroyed, or shared with state and local law enforcement agencies participating in the seizure.

then making will do little to significantly reduce the outstanding balance of the restitution debts as initially set by the courts.

For the selected cases, we also found that there were minimal, if any, apparent negative consequences to the offenders for not paying their restitution debts. Court and public records indicated that each of the offenders' lifestyles was, at a minimum, comfortable. Moreover, it is not a crime to willfully fail to pay restitution debt. A court may revoke or modify the terms and conditions of probation or supervised release for an offender's failure to pay restitution;[8] however, these are of little consequence once the offender has successfully completed the term of probation or supervised release, because at that point, the offender cannot be sent to prison for failure to pay a restitution debt.

A major problem hindering the FLUs' ability to collect restitution debt in the selected cases was the long time intervals between the criminal offense and the judgment, a situation that Justice acknowledged is typical. Court records show that 5 to 13 years passed between when the offenders selected in our review began to engage in the criminal activity for which they were sentenced and the date of their judgments. Justice stated that during such intervals, criminals engaged in fraudulent enterprises commonly dissipate their criminal gains quickly and in a manner that cannot be easily traced, such as expending gains on intangible and excess "lifestyle" expenses, including travel, entertainment, gambling, and gifts. In addition, other dispositions and circumstances involving the offenders' assets or the offenders occur that create major debt collection challenges for the FLUs. For example, we found that for the selected cases, by the time the court rendered the judgment establishing the restitution debt, certain of the offenders' assets had been, among other things, transferred through legal or potentially fraudulent means to family members or others, involved in forfeiture actions, subject to bankruptcy, or moved to a foreign account. In addition, one of our selected cases involved an offender who was jointly and severally liable for the debt with another offender who had been deported. Justice acknowledged that such dispositions or circumstances are not uncommon.

[8]Supervised release is a period during which an offender who has completed his or her full prison sentence mandated by federal sentencing guidelines is under supervision by federal probation officers.

Given the significant upward trend in outstanding criminal debt and the difficulty experienced by Justice in collecting criminal restitution debt, which we have previously reported and which is exemplified by the selected cases discussed in this report, it is important that Justice determine how to better maximize opportunities for making offenders' assets available to pay the offenders' victims. In our view, Justice can best accomplish this by addressing our 2001 recommendation that it work with other involved federal agencies to develop a strategic plan to improve criminal debt collection processes and establish an effective coordination mechanism among all such entities. As stated in our 2001 report, effective and efficient criminal debt collection hinges on the ability of the entities involved to work together in assessing and collecting criminal debt, and prompt action is essential for maximizing potential collections.[9]

Our current review of the five selected white-collar financial fraud debts, as supported by our previous work on criminal debt collection, strongly supports the need for Justice, as the agency primarily responsible for collecting criminal debt, to take the lead in promptly addressing and implementing our 2001 recommendation that Justice work with the Administrative Office of the United States Courts (AOUSC), the Office of Management and Budget (OMB), and the Department of the Treasury (Treasury) to develop a strategic plan that would improve interagency processes and coordination with regard to criminal debt collection activities, as well as address managing, accounting for, and reporting criminal debt. Until such a strategic plan is developed and effectively implemented, which could involve legislative as well as operational initiatives, the effectiveness of criminal restitution as a punitive tool may be diminished, and Justice will lack adequate assurance that offenders are not benefiting from ill-gotten gains and that innocent victims are being compensated for their losses to the fullest extent possible.

The conference report accompanying the Consolidated Appropriations Act, 2005, Public Law No. 108-447, which was signed into law on December 8, 2004, included language calling for the Attorney General to take the lead in such a coordinated effort. In tandem with this call for action, we recommend that Justice consider a broad range of legislative and operational initiatives for enhancing the federal government's capacity to collect restitution for victims of financial crimes for inclusion in the strategic plan.

[9]GAO-01-664.

As discussed in the "Agency Comments and Our Evaluation" section at the end of this report, Justice's comments on a draft of this report, which are reprinted in appendix I, are consistent with our conclusion that given such poor prospects for collection of restitution debt for our five selected cases, as well as the overall low collection rates for criminal debt we have previously reported, it is important that Justice determine how to better maximize opportunities to make offenders' assets available to pay crime victims. In its comments, Justice stated that consistent with our recommendation and the conference report that accompanied the Consolidated Appropriations Act of 2005, Justice is in the process of organizing an interagency joint task force to develop a strategic plan for improving criminal debt collection. Justice did not, however, specifically comment on our recommendations.

Background

Justice is responsible for collecting criminal debt and has delegated operating responsibility to its FLUs within all of Justice's U.S. Attorneys' Offices (USAO).[10] Justice's Executive Office for United States Attorneys (EOUSA) provides administrative and operational support, including support required for debt collection, to the USAOs. According to Justice, the FLUs typically become involved in the criminal debt collection process after the judgment, which occurs when an offender is convicted and a judge orders the offender to pay a fine or restitution. The U.S. Courts and their probation offices may also assist in collecting moneys owed. AOUSC provides national standards and promulgates administrative and management guidance, including standards and guidance required for debt collection, to the various U.S. judicial districts.

[10]There are 94 districts throughout the country, but USAOs for 2 of them are combined, resulting in 93 USAOs.

In July 2001, we reported on the growth of uncollected criminal debt through fiscal year 1999. We noted that although some of the key factors that contributed to the increasing amount of criminal debt were beyond Justice's control, certain of Justice's criminal debt collection processes were inadequate.[11] Accordingly, in the 2001 report, we made 14 recommendations to Justice to improve the effectiveness and efficiency of its criminal debt collection processes.[12]

In our March 2004 report, we discussed the extent to which Justice had acted on our previous recommendations to it to improve criminal debt collection. Our follow-up work on Justice's efforts to implement our 2001 recommendations showed that it had completed actions on 7 of the 14 recommendations, most of which were completed about 2 years after we made the recommendations, and had efforts under way to address 6 other recommendations. We noted that because many of these recommendations largely focused on establishing policies and procedures, it is important that they be effectively implemented once they are established, and it will likely take some time for collection results to be realized from full implementation. However, efforts to implement the recommendation that we considered the most critical had not progressed—namely for Justice to participate in a multiagency effort to develop a unified strategy for criminal debt collection. Specifically, we reported that Justice had not yet worked with other agencies, including AOUSC, OMB, and Treasury, to implement a key recommendation to work as a joint task force to develop a strategic plan that addresses managing, accounting for, and reporting criminal debt. We concluded that the long-standing problems in the collection of outstanding criminal debt—including fragmented processes and lack of coordination—continued because there is no united strategy among the major entities involved with the collection process.[13]

Scope and Methodology

Our case study review, on which the results described in this report are based, focused on a nonrepresentative selection of five criminal white-collar financial fraud debts that Justice reported outstanding as of

[11]GAO-01-664.

[12]In the 2001 report, we also made recommendations to address long-standing problems in the collection of outstanding criminal debt to the AOUSC, OMB, and Treasury.

[13]GAO-04-338.

September 30, 2002, each with a judgment prior to fiscal year 2001 that assessed the offender millions of dollars of restitution. We selected debts involving offenders who were not currently in prison and for which the offenders had paid a relatively small amount of the outstanding restitution amounts as of September 30, 2002. Also, our review only involved selected cases for which we could clearly identify the lead debtor in court and Justice records.

We obtained sufficient information to address our three reporting objectives; however, we were not provided all of the details pertaining to each of the five selected cases and thus cannot be assured that there was not additional relevant information. Because Justice still considers these cases to be open law enforcement cases for collection purposes, the information Justice provided for each case was limited primarily to what was included in its debt collection file minus personal identifiers, such as the names of the offenders, their addresses, and their Social Security numbers. Therefore, we are not providing a comprehensive account of any particular case.

For each selected debt, we reviewed Justice's debt collection file or files, minus all personal identifiers. We interviewed appropriate officials from Justice's EOUSA and the responsible FLUs concerning actions taken to collect the debt, obstacles to collection, and prospects for future collections. To supplement or attempt to further corroborate the information obtained from Justice for each case, we obtained and reviewed pertinent information about the selected debts and debtors from certain records made available by the courts and from public sources available through the Internet, such as property records. Also, for reporting purposes, rather than highlighting specific case studies in detail, our discussions focus on specific types of debt collection problems identified during this review, many of which we were aware of from our previous work. This was done to ensure sufficient privacy of those involved in our selected cases, and in consideration of Justice's concern that the release of information on open cases could hinder the department's efforts to collect the debts.

We conducted our review from November 2003 through June 2004 in accordance with U.S. generally accepted government auditing standards.

We received written comments signed by the Director, Executive Office for United States Attorneys, on a draft of this report. Justice's comments are

reprinted in appendix I, and technical comments received from both Justice and AOUSC have been addressed as appropriate in this report.

Restitution Amounts Far Exceed Likely Collections for the Crime Victims

The court-ordered restitution amounts assessed the offenders for the five selected criminal debt cases far exceed likely collections for the crime victims. The offenders' restitution amounts totaled about $568 million. However, according to court records, only about $40 million, or about 7 percent of the total, had been collected several years after the courts sentenced each of the offenders. The vast majority of these collections resulted from asset forfeiture actions and from payments that were made before the offenders were sent to prison or placed on probation. We found that the FLUs, which typically become involved in criminal debt collection after the debt is established at judgment, performed certain debt collection activities; however, they were not able to reduce the restitution debts significantly by identifying and liquidating additional assets of the offenders to pay the victims. Moreover, based on information available to us, the FLUs' prospects are not good for collecting additional restitution amounts from the offenders to compensate their victims to the extent initially ordered by the courts. Following the judgments, despite indications of prior wealth or possession of significant financial resources, the offenders claimed to have limited financial means to pay their restitution debts. Further, there were minimal, if any, apparent negative consequences to the offenders for not paying such debts.

A major debt collection problem for the FLUs for the selected cases was that up to 13 years had passed between the offenders' criminal activities and the related judgments. By the time the FLUs became involved in trying to collect the restitution debts, the offenders' assets had been, among other things, transferred to family members or others, forfeited to the government, or involved in bankruptcy. Justice acknowledged to us that the long intervals between criminal activity and the related judgments, and certain dispositions and circumstances involving the offenders' assets or the offenders that take place during such intervals, make collection difficult for many criminal restitution debt cases.

Most of the Court-Ordered Restitution Has Not Been Collected

As previously mentioned, the offenders' restitution amounts for the selected cases totaled about $568 million. Restitution amounts for individual cases ranged from over $7 million to more than $400 million. Court records show that each of the offenders, who pled guilty to engaging

in criminal activity, had been high-ranking officials of companies and lending institutions or operated their own business. The crimes in these cases consisted of fraudulently manipulating company sales figures and inventories to increase stock values or to obtain loans, engaging in schemes to convert business loan proceeds for personal use, selling securities to private investors under false pretenses, and illegally sharing in loan proceeds from a federally insured financial institution. The victims of the crimes involving the offenders of our selected cases included corporate shareholders, large lending institutions, and small investors—many of whom were elderly and had been harmed financially. In addition to the court-ordered restitution, prison terms ordered by the courts for four of these offenders ranged from 1 to 5 years followed by 3 to 5 years of supervised release. One offender received several years of probation rather than prison. As of June 2004, all of the offenders were out of prison or off probation, but three offenders were still on supervised release.

As noted earlier, only about $40 million, or about 7 percent of the total restitution for the selected cases had been paid as of June 2004, which was from about 4 to 8 years after the courts sentenced each of the offenders. Collections for the individual cases ranged from less than 1 percent to about 10 percent of the restitution amounts owed. About $24 million of these collections resulted from asset forfeiture actions, and over $11 million from payments that were made prior to the offenders' sentencing. After the judgments were rendered, the FLUs performed certain debt collection activities, such as filing liens on the offenders' real property; issuing restraining notices forbidding the transfer or disposition of assets; performing title searches; and requesting, obtaining, and reviewing financial information from the offenders.[11] Performing such activities did not enable the FLUs to further reduce the restitution debts significantly by identifying and liquidating additional assets of the offenders.

[11]Although the FLUs performed certain debt collection actions for each of the selected cases, we found that some of the FLUs' efforts, such as filing liens, were not always done promptly following the judgment. In addition, the asset discovery work performed by the FLUs consisted primarily of requesting, obtaining, and reviewing financial information provided by the offender. We noted in our 2001 report (GAO-01-664) certain problems stemming from a lack of independent verification of financial information provided by offenders. We also noted that prompt collection action, including the performance of asset discovery work, such as researching online property locator services, is critical to minimizing the dilution of assets that could be available for payment of a restitution debt. Accordingly, we offered recommendations to help Justice improve the timeliness and extent of its criminal debt collection efforts.

Prospects Are Not Good for Collecting Additional Restitution to Fully Compensate the Crime Victims

For the selected cases, based on information available to us, the FLUs are not likely to collect sufficient additional restitution amounts from the offenders to compensate their victims to the extent initially ordered by the courts. At some point prior to the judgments establishing the restitution debts, each of the offenders either reported having wealth or significant financial resources to the courts or to Justice, or there were indicators of such. Specifically, prior to sentencing, one or more of the offenders reported earning millions of dollars in annual gross income, having millions of dollars in net worth, or spending thousands of dollars per month on clothing and entertainment. In addition, court records indicate that certain of the offenders converted millions of dollars of fraudulently obtained assets for personal use, established businesses for their children, or held residential properties worth millions that were located in upscale communities. In spite of the reported wealth or financial resources or indications of such, following their judgments, each of the offenders reported to either the courts or Justice a modest income or net worth and claimed to have limited financial means to pay restitution debt. Further, at the time of our file reviews, three of the offenders were on supervised release and making monthly or yearly payments set by the courts that will do little to reduce the outstanding balance of their restitution debts, one offender had stopped making routine monthly payments after supervised release terminated, and one offender had negotiated a settlement with the crime victim, which was approved by Justice and the court, for far less than the initial court-ordered restitution.

There were minimal, if any, apparent negative consequences to the offenders for not paying restitution to their victims as initially ordered by the courts. First, information obtained from the courts and public documents indicated that the offenders were living in reasonable comfort. For example, one offender and his immediate family owned and, at the time of our review, resided in a property worth millions of dollars; another offender owns a home worth over $1 million; and two offenders took overseas trips while on supervised release. Second, after probation or supervised release has expired, the offenders cannot be sent to prison for failure to pay their restitution debts. According to Justice, although it does not apply to restitution, the willful failure to pay a fine is a crime of criminal default, which can result in the offender's receiving an additional fine of not more than twice the amount of the unpaid balance of the fine or $10,000, whichever is greater; being imprisoned not more than 1 year; or both. However, there is no such similar crime for willful failure to pay restitution. A court may revoke or modify the terms and conditions of probation or supervised release for an offender's failure to pay restitution. However,

these are of little consequence once the offender has successfully completed the term of probation or supervised release.

Long Intervals between the Offenders' Criminal Activities and Their Judgments Create Major Debt Collection Challenges for the FLUs

For the selected cases, according to records provided by the courts, at least 5 to 13 years passed between when the offenders began to engage in the criminal activities for which they were sentenced and the date of their judgments. We identified and the FLUs acknowledged that by the time the courts rendered the judgments establishing the restitution debts, certain of the offenders' assets were, among other things, transferred through legal or potentially fraudulent means to a family member or others, involved in forfeiture actions, subject to bankruptcy, or moved to a foreign account. In addition, one of our selected cases involved an offender who was jointly and severally liable for the debt with another offender who had been deported.

Justice stated that after criminal activity occurs, years may pass before the initial investigation of a crime, let alone the arrest, trial, and conviction of an offender. Justice also stated that the primary focus during the criminal investigation, prior to judgment, is on the discovery and prosecution of the offender's criminal acts rather than on the potential future debt recovery by the federal government. During the intervals between criminal activities and the related judgments, Justice acknowledged that dispositions and circumstances involving the offenders' assets or the offenders often occur that create major debt collection challenges for the FLUs. According to Justice, criminals with any degree of sophistication, especially those engaged in fraudulent criminal enterprises, commonly dissipate their criminal gains quickly and in an untraceable manner. Assets acquired illegally are often rapidly depleted on intangible and excess "lifestyle" expenses. Specifically, travel, entertainment, gambling, clothes, and gifts are high on the list of means to rapidly dispose of such assets. Moreover, money stolen from others is rarely invested into easily located or exchanged assets, such as readily identifiable bank accounts, stocks or bonds, or real property. Justice emphasized that the initial efforts by criminal law enforcement investigators, federal prosecutors, and the probation office promise the greatest opportunity for meaningful recovery of illegally obtained assets. Therefore, in our view, coordination among the FLUs and other entities involved in criminal debt collection is critical.

Transfer of Assets

According to Justice, there is no general statutory authority for Justice to obtain pretrial restraint of assets in order to satisfy a potential criminal judgment that may result iu a restitution debt. However, once such a

judgment is imposed, Justice can proceed against a third party by filing a separate federal action to recover the assets or proceeds thereof. Justice emphasized that it must prove by a preponderance of the evidence that the offender fraudulently transferred assets, which often involves a lengthy and time-consuming process. Moreover, even when a valid claim is made against a third party for a fraudulent transfer, the third party may have a "good faith" defense if the transfer was accepted in exchange for a "reasonably equivalent value."

The challenges encountered in collecting restitution debt from offenders who may have transferred assets to others through legal or potentially fraudulent means were evident in our review of selected cases. According to Justice, at least one of the offenders in our selected cases has engaged in a shell game for the purpose of shielding their assets. In addition, Justice stated that at least one of the offenders has not provided full financial disclosure, and that the FLU is currently exploring whether the offender fraudulently conveyed assets to family members and others. Based on information in Justice and court records, certain of the offenders in the selected cases engaged in one or more of the following activities.

- Prior to the judgment, the offender and the offender's family established trusts, foundations, and corporations for their assets at about the same time they closed numerous bank and brokerage accounts.
- Over the course of several years, the offender converted for personal use hundreds of millions of dollars obtained through illegal white-collar business schemes.
- Several years prior to the judgment, the offender's minor child, who is now an adult, was given the offender's company. As of completion of our fieldwork, that company employed the offender.
- Prior to the judgment, the offender placed a multimillion-dollar residence in a trust.
- Prior to the judgment, the offender established a trust worth hundreds of thousands of dollars for the offender's child.
- The offender and the offender's family rent their expensively furnished residence, which they previously owned, from a relative.

Forfeited Assets

Justice stated that forfeited assets are the property of the federal government and do not always go to crime victims. Justice can restore forfeited assets to a victim upon the victim's filing of a petition, but only in those limited cases when it is the victim's actual property that is being restored. According to Justice, the FLUs' coordination with Justice's Asset Forfeiture Unit and others at the outset of the case is invaluable in securing assets for payment of the victims' restitution when such potential exists.

The importance such coordination has to securing forfeited assets for the crime victim was evident in one of our selected cases. Court records showed that about $175 million of the offender's assets that had been identified as related to the case had been forfeited; however, the FLU's records showed that only about $50 million of such assets had been forfeited. At the time of our file review, the FLU was not certain whether any forfeited assets had been, or conld be, applied toward the offender's restitntion debt. Subsequent to our visit to the FLU and our inquiries related to this matter, Justice stated that only about $24 million of the $50 million of forfeited assets in its records may be applied toward the offender's restitution debt as a result of a petition filed by the victim.

Bankruptcy

According to Justice, bankruptcy can impair the FLU's ability to collect criminal restitution debt. When a bankruptcy proceeding is initiated before the criminal judgment, the bankruptcy estate attaches to all of the offender's property and rights to property, which can significantly limit assets available for restitution. When a bankruptcy proceeding is initiated after the criminal judgment, the United States may file a proof of claim in the bankruptcy proceeding and may have secured status if its lien was perfected against any of the defendant's property. However, there may be other creditors seeking payment from the offender's estate, including often the Internal Revenue Service. These other creditors may be just as much victims of the offender as the victims named in the restitution order and may also have valid interests in payment from the estate. Moreover, bankruptcy's automatic stay may limit the FLUs' ability to otherwise enforce the debt.[15]

For one of the selected cases, the offender went into bankruptcy prior to the judgment. Shortly after the judgment, which was rendered over 5 years

[15]The automatic stay mandated by 11 U.S.C. § 362 (2000) prevents the federal government from pursuing collection action against debtors in bankruptcy for certain debts that arise prior to the commencement of the bankruptcy litigation.

ago, the FLU issued a restraining notice to the offender, forbidding the transfer or disposition of his assets, and filed a lien on certain property. However, according to the FLU, the ongoing bankruptcy has prevented it from taking additional collection action. Recently, Justice stated that it had been advised by the bankruptcy trustee that for this case, most of the offender's bankruptcy estate of several million dollars would be distributed to the victim.[16] Justice emphasized that generally for cases in which the offender goes into bankruptcy prior to the judgment, the criminal restitution debt will only be recognized as a general unsecured debt and, therefore, most often will not be satisfied.

Foreign Accounts and Deportation

Justice stated that money obtained illegally is often moved to offshore accounts or to debtor-haven countries. In the absence of a treaty with a foreign government or a provision of law to provide for the repatriation of money transferred to foreign accounts, acquiring such money for the liquidation of an offender's restitution debt is difficult at best. Justice also stated that certain offenders are deported; however, they continue to be liable for the unpaid portion of their restitution debts, as current law requires that the debts stay on the books for 20 years after the period of incarceration ends or after the judgment if no incarceration is ordered. Justice acknowledged that potential collection actions are limited for offenders who have been deported. For example, liens filed in counties where the offender previously held property have little, if any, effect when offenders have moved assets and are living abroad. In addition, FLU officials cannot subpoena financial information from offenders who have been deported or obtain depositions from such offenders regarding their assets.

Debt collection complications due to transfers of assets to foreign accounts and the deportation of offenders were evident in our selected cases. For one case, according to Justice, the FLU's efforts to identify and secure assets of the offender to liquidate the restitution debt have been hampered, in part, because the offender had established, among other things, a foreign bank account for the purpose of shielding his assets. For another case involving two offenders who were jointly and severally liable for the restitution debt, one offender had settled his liability for the debt, with the approval of Justice and the court, by paying the victim far less than the amount initially ordered by the court. With regard to this offender, Justice

[16]It is important to note that a large outstanding restitution balance will remain after the bankruptcy estate is distributed to the victim.

stated that his reported assets and net worth were such that the thought that additional collection efforts would have positive results was not considered by the FLU to be reasonable. The FLU was left with little recourse for additional collection action because the other offender in the case, who is still liable for the remainder of this debt, was deported after serving a prison term.

Recent Congressional Action

Our March 2004 report and ongoing discussions with your office have kept you apprised of progress in implementing the recommendations included in our 2001 report. As discussed more fully in the background section of this report, Justice has made progress in establishing certain policies and procedures to improve criminal debt collection. Unfortunately, the effort we considered key to more substantive progress, namely, development of a strategic plan by all of the involved entities, had not been started. However, very recently, the Congress directed the Attorney General to develop a strategic plan with certain other federal agencies to improve criminal debt collection. Specifically, the conference report that accompanied the Consolidated Appropriations Act, 2005, Public Law No. 108-447, signed into law on December 8, 2004, included language to further the implementation of our 2001 recommendation regarding the establishment of an interagency task force for the purpose of better managing, accounting for, reporting, and collecting criminal debt.

In the conference report, the conferees directed the Attorney General to establish a task force within 90 days of enactment of the act and to include specified federal agencies, such as Treasury, OMB, and AOUSC, to participate in the task force. Led by the Department of Justice, the task force will be responsible for developing a strategic plan for improving criminal debt collection. The strategic plan is to include specific approaches for better managing, accounting for, reporting, and collecting criminal debt. Specifically, the plan is to include steps that can be taken to better and more promptly identify all collectible criminal debt so that a meaningful allowance for uncollectible criminal debt can be reported and used for measuring debt collection performance. Also, the conferees directed the Attorney General to report to the Committees on Appropriations within 180 days of enactment of this act on the activities of the task force and the development of a strategic plan.[17]

[17]H.R. Report No. 108-792, reprinted in 150 Cong. Rec. H10426-H10427 (daily ed. Nov. 19, 2004).

Conclusion

Given such poor prospects for collection for the selected cases, as well as the overall low collection rates for criminal debt we have previously reported, it is important that Justice determine how to better maximize opportunities to make offenders' assets available to pay offenders' victims once judgments establish restitution debts. By taking advantage of all debt collection opportunities, Justice may be able to better achieve the intent of MVRA, which is to compensate crime victims to the extent of their financial loss. Justice can best accomplish this aim by implementing the recommendation we made in 2001 to work with AOUSC, OMB, and Treasury to develop a strategic plan as now also called for by the conference report accompanying the Consolidated Appropriations Act, 2005, to address managing, accounting for, and reporting criminal debt including the collectibility of such debt.

Further, our review of the five selected criminal white-collar financial fraud debts, in conjunction with the findings on our previous criminal debt collection work, strongly supports the need for Justice to take the leadership role in promptly addressing this recommendation. Effective coordination and cooperation is essential for maximizing collections, and as the federal agency primarily responsible for criminal debt collection, Justice's leadership in this effort is vital. The strategic plan should include a determination of how to best maximize opportunities to make offenders' assets available to pay the victims once judgments establish restitution debts. Until such a strategic plan is developed and effectively implemented, which could involve legislative as well as operational initiatives, the effectiveness of criminal restitution as a punitive tool may be diminished, and Justice will lack adequate assurance that offenders are not benefiting from ill-gotten gains and that innocent victims are being compensated for their losses to the fullest extent possible.

Recommendations for Executive Action

To help ensure that the strategic plan called for in the conference report effectively addresses all potential opportunities for collection, we recommend that the Attorney General include in the strategic plan legislative initiatives, operational initiatives, or both that are directed toward maximizing opportunities to make offenders' assets available to pay victims once restitution debts are established by judges.

To monitor progress in leading the development and implementation of the strategic plan, we also recommend that the Attorney General report annually in Justice's *Accountability Report* on progress toward developing

and implementing a strategic plan to improve criminal debt collection. This report should include a discussion of any difficulties or impediments that significantly hinder such progress.

Agency Comments and Our Evaluation

Overall, Justice's EOUSA's comments on a draft of this report, which are reprinted in appendix I, are consistent with our conclusion that given such poor prospects for collection for the selected cases, as well as the overall low collection rates for criminal debt we have previously reported, it is important that Justice determine how to better maximize opportunities to make offenders' assets available to pay offenders' victims once judgments establish restitution debts. EOUSA stated that consistent with our recommendation and the conference report that accompanied the Consolidated Appropriations Act of 2005, Justice is in the process of organizing an interagency joint task force to develop a strategic plan for improving criminal debt collection.

EOUSA did not specifically comment on our recommendations including the recommendation that the Attorney General include in the strategic plan legislative initiatives, operational initiatives, or both that are directed toward maximizing opportunities to make offenders' assets available to pay victims once restitution debts are established by judges. However, EOUSA did emphasize that current statutes do not provide adequate remedies for the collection of criminal debt and cited several examples including the lack of general statutory authority for the United States to obtain pretrial restraint of assets in order to satisfy a potential criminal judgment that may result in a restitution debt. Regarding operational initiatives, as stated in this report, because many of the recommendations we have previously made to Justice to improve criminal debt collection focused on establishing policies and procedures, it is important that the policies and procedures be effectively implemented once they are established. Moreover, any multiagency effort to develop a unified strategy for criminal debt collection will need to address operational issues.

Both EOUSA and AOUSC provided technical comments that have been addressed as appropriate in this report.

As agreed with your office, unless you announce its contents earlier, we plan no further distribntion of this report until 30 days after its issuance date. At that time, we will send copies to the Chairmen and Ranking

Minority Members of the Senate Committee on Homeland Security and Governmental Affairs; the Subcommittee on Financial Management, the Budget and International Security, Senate Committee on Homeland Security and Governmental Affairs; and the Subcommittee on Government Efficiency and Financial Management, House Committee on Government Reform. We will also provide copies to the Attorney General, the Director of the Administrative Office of the U.S. Courts, the Director of the Office of Management and Budget, and the Secretary of the Treasury. Copies will be made available to others upon request. The report will also be available at no charge on GAO's Web site, at http://www.gao.gov.

If you have any questions about this report, please contact me at (202) 512-3406 or engelg@gao.gov or Kenneth R. Rupar, Assistant Director, at (214) 777-5714 or rupark@gao.gov. Staff acknowledgments are provided in appendix II.

Sincerely yours,

Gary T. Engel

Gary T. Engel
Director
Financial Management and Assurance

Appendix I

Comments from the Department of Justice

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

U.S. Department of Justice

Executive Office for United States Attorneys
Office of the Director

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JAN 13 2005

Mr. Gary T. Engel
Director
Financial Management and Assurance
United States Government Accountability Office
441 G Street, NW, Room 5970
Washington, DC 20548

Dear Mr. Engel:

This letter provides comments from the Executive Office for United States Attorneys (EOUSA) on the Government Accountability Office's (GAO) most recent report regarding criminal debt collection.[1] We appreciate the opportunity to provide comments for publication in the final report.

We agree with GAO's conclusion that court ordered restitution amounts far exceed likely collections.[2] According to estimates by the United States Attorneys' Offices (USAOs), approximately 75 per cent of the outstanding balance is currently not collectible. This figure is based, among other things, on a review of each defendant's financial circumstances including information contained in pre-sentence reports; financial statements; credit bureau reports; asset searches; skiptracing reports; tax returns; and/or information gathered as a result of subpoenas, interrogatories, or requests for production of documents.

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[1]The draft report entitled "Criminal Debt: Court-Ordered Restitution Amounts Far Exceed Likely Collections for the Victims in Selected Financial Fraud Cases" follows up on GAO's 2001 and 2004 reports (see GAO-01-664 and GAO-04-338, respectively) by reviewing five criminal white-collar financial fraud cases to determine (1) the status of Justice's efforts to collect on the outstanding debt; (2) the prospects for future collections; and (3) whether specific problems have affected Justice's ability to collect the debt.

[2]This conclusion was based on GAO's review of Justice's debt collection files; interviews with Justice officials; records made available by the courts, including probation; and, independent research of public sources available through the Internet, such as property records.

See comment 1.

- 2 -

As noted in the draft report, there are a number of barriers that exist in the collection of criminal debt. By far, the greatest impediment to collecting full restitution is the lack of relationship between the amount ordered and its corresponding collectibility. Nor is there necessarily a relationship between the amount ordered and the benefit received by the defendant from the criminal activity. The Mandatory Victims Restitution Act of 1996 (MVRA) mandates that restitution amounts be based solely on the full amount of the victims' losses, regardless of the defendant's ability to pay or the amount of actual gain to the defendant. This is especially evident in white-collar financial fraud cases. In the five cases selected by GAO for review, restitution was ordered totaling approximately $568 million, yet there is no evidence to suggest that the defendants currently have, or once had, wealth equal to this amount. In one case, although the defendant, at some point, had several million dollars, the judgment was in excess of $49 million. In another case, while the defendant had substantial assets, most of which were subject to forfeiture, those assets did not come close to satisfying the more than $400 million ordered in restitution.

The draft report also recognizes that current statutes do not provide adequate remedies for the collection of criminal debt. For example, there is no general statutory authority for the United States to obtain pre-trial restraint of assets in order to satisfy a potential criminal judgment that may result in a restitution debt. White-collar financial fraud activity may take years before being discovered, investigated, and successfully prosecuted. Unless statutes are enacted which allow for pre-judgment restraints on a defendant's assets, these assets will continue to be dissipated during a lengthy investigation and/or trial.

Another example is the lack of negative consequences for defendants who willfully fail to pay restitution. Title 18 U.S.C. § 3613A provides remedies for failure to pay, such as revocation of probation or a term of supervised release; modification of the terms or conditions of probation or a term of supervised release; holding the defendant in contempt of court; or entering a restraining order. In addition, 18 U.S.C. § 3614 provides, upon revocation of supervised release, for the re-sentencing of the defendant to any sentence which might have originally been imposed. There is also a separate crime of criminal default as set forth in 18 U.S.C. § 3615 for the willful failure to pay a fine. These remedies, however, do not provide any real consequence if the defendant is no longer on probation or supervised release or if there are no assets to be found in the defendant's name. Without statutory language that clearly sets forth consequences, defendants will continue to resist paying restitution.

A third example in which current statutes fail to provide adequate remedies involves foreign bank accounts. Money obtained illegally is often moved to offshore accounts or to debtor-haven countries. Currently, there is a lack of laws/treaties with foreign governments to provide for the repatriation of monies moved out of the country. Without such laws/treaties, acquiring the money in these accounts for the liquidation of a restitution order is nearly impossible.

Other difficulties encountered in the collection of criminal debt identified in the draft

- 3 -

report include the transfer of assets, bankruptcy, and forfeiture actions. In one case, the court specifically ordered that assets transferred to a family member could not be used to satisfy the defendant's restitution debt. In another case, the defendant filed bankruptcy prior to the criminal judgment, resulting in the U.S. only being recognized as a general unsecured creditor, and thus, unlikely to recover.

See comment 2.

While there are many impediments to the collection of the full amount of a restitution order, the USAOs continue to make their best efforts to collect criminal debts owed to the U.S. and third party victims. As a result of these efforts, over the past five years the USAOs collected over $4 billion on behalf of victims of crime (an additional $8 billion was recovered on civil debts owed to the U.S.). These impressive results occurred in spite of the ever growing caseload and relatively unchanged USAO Financial Litigation Unit staffing levels.[3]

As discussed in GAO's 2001 and 2004 reports, and confirmed through the review of selected cases in GAO's most recent draft report, the collection of criminal debts is difficult. 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, the Department holds the collection of debts owed to the Federal Government and victims of crime as a high priority and is firmly committed to continuously improving the process. Consistent with GAO's recommendation and the conference report that accompanied the Consolidated Appropriations Act of 2005, the Department is in the process of organizing an interagency joint task force to develop a strategic plan for improving criminal debt collection. We are confident that we will meet the statutory deadlines.

Thank you for the opportunity to comment on the draft report. If you have any questions regarding the above, please contact Laurie Levin, Assistant Director, Financial Litigation Staff, Office of Legal Programs and Policy, at (202) 616-6444.

Sincerely,

Mary Beth Buchanan
Director

[3]The MVRA mandated that the United States Attorneys collect on behalf of non-federal victims of crime. While Congress recognized the importance of ensuring that these non-federal victims of crime be compensated, no additional resources were given to the USAOs to carry out this mandate.

The following are GAO's comments on the Department of Justice's letter dated January 13, 2005.

GAO's Comments

1. As discussed in this report, only about $40 million, or about 7 percent, of the $568 million restitution for these five selected cases had been paid as of June 2004, and collections for these individual cases ranged from less than 1 percent to about 10 percent of the restitution amounts owed. Prospects are not good for collecting additional restitution to fully compensate the crime victims for the selected cases in our study. Regardless of whether these offenders currently have, or once had, wealth equal to the restitution amounts, the disparity between restitution owed to the crime victims for the financial losses they incurred as a result of criminal activity and amounts paid to the victims by the offenders makes it necessary for Justice to take advantage of all debt collection opportunities to better achieve the intent of MVRA, which is to compensate crime victims to the extent of their financial loss.

2. EOUSA stated that the USAOs had collected over $4 billion on behalf of victims of crime over the last 5 years. However, as stated in this report, the low collection rate (about 7 percent of the ordered restitution) for the selected cases coincides with overall collection rates for criminal debt as we have previously reported. In 2004, we reported that according to Justice's unaudited records, collections relative to outstanding criminal debt averaged about 4 percent for fiscal years 2000, 2001, and 2002 (GAO-04-338). In 2001, we reported that criminal debt collection averaged about 7 percent for fiscal years 1995 through 1999 (GAO-01-664).

Appendix II

Staff Acknowledgments

Richard T. Cambosos, Michael D. Hansen, Andrew A. O'Connell, Ramon J. Rodriguez, Linda K. Sanders, and Matthew F. Valenta made key contributions to this report.

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WRITTEN SUBMISSION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

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

CONCERNING

"RESTITUTION FOR VICTIMS OF CRIME ACT OF 2007"

PRESENTED

APRIL 3, 2008

Chairman Scott, Ranking Member Gohmert, and Members of the Subcommittee on Crime, Terrorism, and Homeland Security: thank you for the opportunity to provide this statement regarding the "Restitution for Victims of Crime Act of 2007," a proposal designed to improve the ability of crime victims to obtain meaningful and timely restitution. According to the Crime Victims' Rights Act of 2004, every victim is entitled to "the right to full and timely restitution." The Department of Justice believes that the changes contained in this proposal will help further the Department of Justice's current efforts to afford victims this important right.

This submission will discuss the three titles that make up this proposal and explain how each title improves the ability of crime victims to seek restitution from defendants who have harmed them. The first title improves the ability to collect and implement a restitution order. The second title provides prosecutors with greater tools to restrain the assets of certain defendants prior to trial. The third title allows victims of environmental crimes to obtain immediate restitution.

Title I: The Collection of Restitution Improvement Act

The first title is the "Collection of Restitution Improvement Act of 2007." This proposed Act amends the Mandatory Victims' Restitution Act ("MVRA") to improve collection procedures, with the major changes proposed to 18 U.S.C. § 3664(f). Most importantly, revised paragraph 3664(f)(2) clarifies that the Attorney General may enforce restitution judgments immediately upon their imposition. Although various statutes provide the Attorney General with this authority, some circuit courts of appeal have interpreted one clause within 18 U.S.C. §

3664(f)(2) (providing that "the court shall . . . specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid") to require that a mandatory payment schedule be set at the time of sentencing. As a result of these interpretations, the current legislative scheme impedes the effective enforcement of criminal monetary penalties, including restitution. The enforcement of restitution would be enhanced substantially if Congress were to amend 18 U.S.C. § 3664(f)(2) to clarify that restitution is due immediately upon the imposition of a restitution order, as is the case with an ordinary civil judgment.

Another major change to the statute clarifies that a payment schedule set by a court at sentencing is only a minimum obligation of the offender. Current 18 U.S.C. § 3664(f)(2) has undermined the efforts of the United States to enforce restitution because courts of appeal have interpreted it to require the imposition, at every sentencing, of an exclusive court-imposed payment plan. This limits the ability of the United States to enforce restitution using other available civil and administrative enforcement methods. As a result, district courts generally impose minimal payment plans upon the defendant that cannot thereafter be changed except by the court and upon a showing of a substantial change in the defendant's economic circumstances. Proposed paragraph 3664(f)(6) therefore deletes from the statute the requirement that the district court "shall . . . specify in the restitution order . . . the schedule according to which, the restitution is to be paid . . . ."

Other proposed changes include the following:

- establishing a checklist for what the court must order from the defendant (*e.g.*, a good faith effort to pay restitution, and notice of any change in residence or financial circumstances) in order to improve collection procedures;
- allowing Federal prosecutors access to financial information about the defendant in the possession of the United States Probation Office;
- clarifying the power of a district court to enforce non-supervisory terms of its sentence, including terms imposing a fine or restitution, notwithstanding the fact that a term of probation or supervised release has expired;
- requiring payment from all defendants who have an outstanding restitution obligation, regardless of whether they are incarcerated or on supervised release or even if their period of supervised release has expired;
- clarifying that courts should order nominal payments when offenders have no ability to pay the full amount of restitution;
- clarifying that a district court does not have sole power to enforce restitution obligations and therefore cannot prohibit the Bureau of Prisons from enforcing final restitution orders through its Inmate Financial Responsibility Program; and
- requiring that if a court imposes some limitation on the ability of the United States to enforce a judgment (such as a stay of enforcement when the defendant pursues an appeal), it must do so expressly, for good cause stated on the record.

This title also authorizes restitution for victims' attorneys' fees. The Federal courts of appeals currently are divided about the extent to which victims' attorneys' fees may be included in restitution orders. This bill contains changes to title 18 to clarify that victims' attorneys' fees are to be included in restitution orders where the fees are a foreseeable result of the commission of the offense. With these changes, attorneys' fees expended by victims to recover damaged, lost, or destroyed property (*e.g.*, hiring an attorney to track down assets stolen by offenders), to obtain counsel during investigation and prosecution of the crime (*e.g.*, to obtain advice regarding their rights and how to safeguard their interests), or to obtain counsel in other actions foreseeably resulting from the crime (*e.g.*, to obtain counsel to defend against third party suits resulting from defendant's crime or, in the case of identity theft, to assist in clearing the victim's credit record) will be covered in restitution orders.

Finally, this title makes conforming amendments to sections of the criminal code that deal with criminal fines and other sections cross-referenced in subsection 3664(f).

Title II: Preservatiou of Assets for Restitution Act

The second title of the bill, the "Preservation of Assets for Restitution Act of 2007," provides prosecutors with tools to restrain defendants' assets prior to trial. These changes 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 first to the Government.

Under current law, there are no statutory provisions that require a defendant to preserve his assets for restitution when he is charged with an offense for which restitution is likely to be ordered. Even if those assets are the proceeds of the offense charged and are traceable to the victims of the offense charged, prosecutors have no way to restrain them for the purpose of fulfilling a restitution order (although assets may be restrained under forfeiture procedures, as explained below). The Government Accountability Office has stated the lack of procedures available to ensure that assets are preserved for restitution is a major impediment to the effective collection of restitution. See CRIMINAL DEBT: COURT ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES, GAO-05-80 (January 2005). 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. Upon the entry of judgment, the United States is not authorized even to seek a writ of garnishment – the most common method of securing assets in restitution cases – until more than 30 days after the entry of judgment.

By contrast, the United States may obtain a prejudgment remedy against the defendant in a standard civil case, such as a defaulted student loan or a contract dispute, where there is evidence that the defendant is concealing or dissipating assets or taking similar action. Remedies available include attachment, receivership, garnishment, or sequestration. These prejudgment remedies exist as part of the Federal Debt Collections Procedures Act of 1990, 28 U.S.C. § 3001 *et seq.*, but do not apply to criminal cases because, as noted above, in criminal cases, there is no debt due the United States prior to judgment.

Similarly, under the Anti-Fraud Injunction statute, in health care fraud and banking cases the United States may file a separate civil action to obtain an order preventing the defendant from dissipating assets if the defendant "is alienating or disposing of property, or intends to alienate or dispose of property." However, prosecutors do not employ this statute frequently because it applies only to a few offenses, requires the prosecutor to maintain a separate civil action in addition to the main criminal action, and subjects the United States to pre-indictment discovery.

As noted previously, preservation of assets is possible in criminal forfeiture cases. The United States Code provides:

> Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action necessary to preserve the availability of property described in subsection (a) of this section for forfeiture . . .

21 U.S.C. § 853(e)(1).

These criminal forfeiture procedures, including the use of prejudgment restraints, have been used widely to seize and restrain assets and to return assets to crime victims. The Supreme Court has found such prejudgment restraints to be constitutional – and indeed mandatory – when the Government applies to the court for them. United States v. Monsanto, 491 U.S. 600 (1989).

Between Fiscal Year 1998 and Fiscal Year 2005, the Attorney General distributed more than $72 million derived from forfeited assets to more than 11,000 crime victims. But forfeiture procedures cannot be used in every case for which restitution may be imposed. Moreover, forfeited assets legally belong to the United States, rather than to victims themselves.

Thus, in order to preserve assets for restitution directly to victims, changes to the United States Code are required. The Preservation of Assets for Restitution Act includes three distinct items. These changes would give prosecutors, who are charged with enforcing restitution on behalf of victims, enhanced tools to help victims.

First, the proposed Act contains a new section 18 U.S.C. § 3664A. This section provides that, upon an application by the Government and a finding of probable cause that a defendant will have to pay an order of restitution if he is found guilty, a district court "shall enter a restraining order or injunction, require the execution of a satisfactory performance bond or take any other action necessary to preserve the availability of any property traceable to the commission of the offense(s) charged." Additionally, the court "may issue any order necessary" to restrain assets that are not traceable to the offense charged. An order entered pursuant to this section will remain in effect through the conclusion of the criminal case, including sentencing, unless modified by the court.

However, defendants' rights are also assured within Section 3664A. The section provides that a defendant can challenge the restraint if he has no other assets to retain defense counsel or provide for reasonable living expenses and he makes a prima facie showing that there

is no probable cause to justify the restraint. Furthermore, third parties who have a legal interest in the restrained property may move to modify or vacate the restraining order on the ground that the order causes a substantial hardship to them and that less intrusive means exist to preserve property for restitution.

Second, the proposed Act contains two amendments to the Anti-Fraud Injunction Statute: an amendment to the statute that permits the Attorney General to commence a civil action to enjoin a person who is "committing or about to commit a Federal offense that may result in an order of restitution"; and an amendment to 18 U.S.C. § 1345(a)(2) to permit the court to restrain the dissipation of assets in any case where it has the power to enjoin the commission of an offense, not just, as current law authorizes, in banking or health care fraud offenses.

Third, the proposal amends the Federal Debt Collection Procedures Act provision permitting the issuance of prejudgment remedies in civil cases to allow the United States to use in criminal cases the same procedures available to it in ordinary civil cases. *See* 28 U.S.C. § 3101(a)(1).

Title III: The Environmental Crimes Restitution Act

The third title of the bill is the "Environmental Crimes Restitution Act of 2007." This legislation would solve the problem of delayed restitution in environmental felony cases. The problem the Act is intended to address is best illustrated in the case of U.S. v. Elias, 269 F.3d 1003 (9th Cir. 2001) (as amended). In Elias the defendant sent two young men, with no

protective equipment, to clean out a tank that contained a cyanide waste. While working in the tank, one of the young men was overcome by toxic fumes. By the time he was pulled from the tank, he had sustained permanent brain damage. He was left in a state in which he will require costly medical attention throughout his life. The company owner was convicted of knowing endangerment under the federal hazardous waste statute and was sentenced to a substantial term of imprisonment. Because currently, for environmental crimes, restitution may be required of a defendant only as a condition of probation and that cannot occur until Elias has been released from prison (assuming that he does not die while incarcerated), his victim's family must bear all the burden of treatment and care costs for the foreseeable future. The proposal would therefore amend 18 U.S.C. § 3663(a)(1)(A) by adding environmental felonies to the list of crimes for which courts are authorized, in their discretion, to award immediate restitution to victims for their losses. As a result, the proposal would make it possible for victims of environmental felonies, like the victim in the Elias case, to receive restitution immediately following a defendant's conviction.

Thank you again for the opportunity to provide this submission regarding this important and valuable proposal.

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

April 1, 2008

Honorable Robert C. Scott
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
House Judiciary Committee
1201 Longworth House Office Building
Washington, DC 20515

Honorable Louie Gohmert
Ranking Member
Subcommittee on Crime, Terrorism and Homeland Security
House Judiciary Committee
508 Cannon Building
Washington, DC 20515

Re: Legislative Proposals before the 110th Congress to Amend Federal Restitution Laws: HR 845, HR 4110, S 973

Dear Chairman Scott and Ranking Member Gohmert:

I write on behalf of the Federal Public and Community Defenders to oppose HR 845, HR 4110 and S 973.

All of our clients are indigent, as are 85% of all federal defendants at the time of sentencing, even before their earning capacities are further diminished by a criminal record and service of a prison sentence. Blind to this reality, HR 845 would do away with discretionary restitution based on ability to pay and mandate restitution for every federal offense. Compounding the problem, it would mandate restitution to persons not directly harmed by the defendant's commission of the offense of conviction, and for "pecuniary losses" only indirectly resulting from the defendant's conduct and even from the conduct of others. Sentencing proceedings would thus become the preferred forum to litigate money damages claims, and would be trivialized from the serious business of sentencing a human being to contentious and time-consuming battles over money which can never be paid.

All three bills would require judges to order defendants who cannot afford to pay for their own legal representation to pay the fees of private attorneys acting as private prosecutors on behalf of any person with an attenuated pecuniary loss throughout the investigation and prosecution of the criminal case. Further, HR 845 would require disclosure of private information to anyone who claims to be entitled to restitution, violating essential confidentiality standards, privacy laws, and the privacy rights of others. While these provisions may benefit victim lawyers, they would undercut the two-party adversary system enshrined in our Constitution through the back door of a restitution statute. None of this would result in any more restitution for victims, but would impose enormous burdens on the system and ultimately on the taxpayers.

All three bills would allow prosecutors to render indigent those 15% of defendants and their families who are not already indigent by restraining legitimate assets in an unreliable and unconstitutional *ex parte* proceeding before the defendant has been tried or convicted of any crime. All three bills would stymie rehabilitation and reintegration into society, contrary to the Second Chance Act passed just last month.

I. The Breathtaking Expansion of Mandatory Restitution Would Provide No More Benefit to Victims, While Imposing Enormous Burdens on the System and the Taxpayers, Trivializing the Sentencing Proceeding, and Violating the Due Process Clause.

Recognizing that "85 percent of all Federal defendants are indigent at the time of sentencing," that mandatory restitution imposes "costs to the justice system," that criminal sentencings should "not become fora for the determination of facts and issues better suited to civil proceedings," and that "restitution for offenses for which the defendant has neither been convicted nor pleaded guilty may violate the due process clause of the fifth amendment,"[1] Congress placed important limits on mandatory restitution in criminal cases. HR 845 would cast aside each of these limits and convert the sentencing hearing into a complex and time-consuming battle over money which can never be paid, and would violate the Due Process Clause.

First, current law explicitly limits restitution to a victim of the offense of conviction, and defines a victim as a person "directly and proximately" harmed as a result of the defendant's commission of the offense of conviction, or in the case of a conspiracy or scheme, "directly harmed by the defendant's criminal conduct in the course of" such conspiracy or scheme. *See* 18 U.S.C. §§ 3663(a)1)(A), (2); 3663A(a)(1), (2). Congress limited restitution to "the direct victim of the offense" in part for efficiency's sake, and, importantly, because restitution for an uncharged or dismissed offense would violate the Due Process Clause. *See* S. Rep. No. 104-179, Part IV(H); *Hughey v. United States*, 495 U.S. 411, 421 n.5 (1990) (citing H.R. Rep. No. 99-334, p. 7 (1985) and H.R. Rep. No. 98-1017, p. 83, n. 43 (1984)). HR 845 would require the court to order any "convicted defendant" to make restitution to any person or entity suffering "pecuniary loss" -- not as the "direct victim of the offense" -- but "proximately resulting from the offense." *See* proposed 18 U.S.C. § 3663(a), (b). To the extent this is intended or would be read to expand restitution to the results of uncharged or dismissed offenses, or the conduct of others in a conspiracy, it is unconstitutional.

Second, in recognition that few defendants can pay restitution and that restitution proceedings burden the system, Congress made restitution mandatory only if the defendant was convicted of a crime of violence as defined in 18 U.S.C. § 16, a crime against property under Title 18, including an offense committed by fraud or deceit, tampering with consumer products under 18 U.S.C. § 1365, or maintaining drug involved premises under 21 U.S.C. § 856(a).[2] Where the defendant was convicted of a specified offense under Title 21 or Title 49, or in any

[1] S. Rep. No. 104-179, Part IV(A), (B), (H) (1995).

[2] 18 U.S.C. § 3663A(c)(1)(A).

case if agreed by the parties in a plea agreement, the court "may" order restitution, but need not, in consideration of the defendant's financial resources, the needs and earning ability of the defendant's dependents, and whether the complexity and prolongation of the sentencing process outweighs the need for restitution.[3] Thus, current law already requires or allows restitution from that small percentage of defendants with means to pay (and many without means, *i.e.*, Native Americans, who form the vast majority of federal defendants prosecuted for crimes of violence). Nonetheless, HR 845 would expand mandatory restitution to *every* federal offense, thus requiring a futile expenditure of resources.

Third, Congress intended that "losses in which the amount of the victim's losses are speculative, or in which the victim's loss is not *clearly causally linked* to the offense, should not be subject to mandatory restitution."[4] To that end, it required that the crime be one "in which an identifiable victim . . . suffered a physical injury or pecuniary loss,"[5] and defined "victim" as "a person *directly and proximately harmed as a result of the commission of an offense*," or if the offense had as an element a scheme, conspiracy or pattern, as a "person *directly harmed by the defendant's criminal conduct in the course of*" such scheme, conspiracy or pattern.[6] Further, Congress explicitly limited the kind and extent of restitution based on the type of harm "directly" resulting from the defendant's criminal conduct in the offense of conviction: (1) for damage, loss or destruction of "property of a victim of the offense," return of the property, or payment of the value of the property less the value of any part returned; (2) for "bodily injury to a victim," the cost of necessary physical, psychiatric or psychological care, occupational or rehabilitative therapy, and "reimburse[ment of] the victim for income lost by such victim as a result of the offense;" and (3) for "bodily injury that results in the death of the victim," payment of the cost of necessary funeral and related services.[7] Under current law, the family or survivors of a "victim" are not themselves entitled to restitution as "victims."[8]

In a series of moves, HR 845 would remove the "direct" causal link between the defendant's criminal conduct and physical injury or pecuniary loss to a victim, would create civil damages claims for persons who were not directly harmed by the defendant's conduct, and would require speculative and burdensome factfinding. First, it would delete the requirement that the harm be "directly" caused. Second, it would define "victim" as anyone who suffered "pecuniary loss (and any successor to that person or entity)," "including pecuniary loss *resulting from physical injury to, or the death of, another*." (emphasis supplied) Third, it would require the court to order the defendant to "compensate" such "victims" for "all of the victim's

[3] 18 U.S.C. § 3663(a).

[4] S. Rep. No. 104-179, Part IV(B) (emphasis supplied).

[5] 18 U.S.S. § 3663A(c)(1)(B).

[6] 18 U.S.S. § 3663A(a)(2).

[7] 18 U.S.S. § 3663A(a)(2).

[8] 18 U.S.S. § 3663A(a), (b)(1), (2) & (3).

pecuniary losses" regardless of the type of harm directly caused by the defendant's conduct. *See* proposed § 3663(a), (b) & (c). Taken together, these changes would require restitution based on a mere "but for" theory of causation, rather than the "direct" causation theory Congress has thus far wisely chosen. As the Supreme Court has said in civil RICO cases: "Allowing suits by those injured only indirectly would open the door to massive and complex damages litigation, which would not only burden the courts, but would also undermine the effectiveness of" the law. *Holmes v. Security Investor Protection Corp.*, 503 U.S. 258, 274, 276 (1992) (internal punctuation and citations omitted); *see also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006) (rejecting civil RICO claim by "parties who have been injured only indirectly").

Under HR 845, however, a person defrauded in an investment scheme would be entitled to criminal restitution for psychological counseling. A landlord who did not receive his rent because his tenant was injured and out of work would be entitled to restitution. A woman claiming to have been emotionally abused by her boyfriend because he smoked marijuana purchased from the defendant would be entitled to restitution for psychological counseling and lost income for missing work. *Cf. United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006) (denying victim status to such a person because she was not "'directly and proximately harmed' as a result of the commission of the Defendant's federal offense."). Moreover, HR 845 would require judges in every case involving a death to determine and order the payment of projected future income of the deceased, a speculative enterprise that "has no place in criminal sentencing."[9] *United States v. Fountain*, 768 F.2d 790, 802 (7th Cir. 1985).

Moreover, HR 845, while making restitution exceedingly complex, would at the same time diminish the possibility of correct legal determinations of what is or is not subject to restitution by removing the provision directing the prosecutor to consult with the victims and provide a listing of amounts subject to restitution to the probation officer. *Compare* current § 3664(d)(1) *with* proposed § 3664(c).

Fourth, because Congress intended "that highly complex issues related to the cause or amount of a victim's loss not be resolved under the provisions of mandatory restitution,"[10] it provided that the MVRA does not apply if the number of identifiable victims is so large that restitution is impracticable or resolution of the issues is so complex and time consuming that the

[9] In two cases involving indigent Native American defendants convicted of manslaughter (one for a driving accident while under the influence resulting in the death of a friend, another for recklessly killing his own baby), Judge Cassell hired his own expert, at taxpayer expense, to project the future income of the deceased victims, ordered the defendants to pay the survivors $446,000 and $325,000 respectively, then sentenced them to prison. Neither the prosecutor nor any survivor sought such restitution, and the prosecutor initially opposed the judge's actions until being accused by the judge of violating his duties. *See United States v. Serawop*, 303 F.Supp.2d 1259 (D. Utah Feb. 18, 2004) (Cassell, J.); *United States v. Bedonie, United States v. Serawop*, 317 F.Supp.2d 1285 (D. Utah May 11, 2004) (Cassell, J.); *United States v. Serawop*, 409 F.Supp.2d 1356, 1357-58 (D. Utah 2006) (Cassell, J.); *United States v. Bedonie*, 413 F.3d 1126 (10th Cir. 2005) (reversing order against Bedonie); *United States v. Serawop*, 505 f.3d 1112 (10th Cir. 2007) (upholding order against Serawop).

[10] S. Rep. No. 104-179, Part IV(B).

need to provide restitution is outweighed by the burden on the sentencing process.[11] HR 845 would require, in those same circumstances, that the court nonetheless "provide as complete a restitution to as many victims as possible." *See* proposed § 3663(e). Similarly, it would require probation officers to "estimate the loss and identify the victims" even though "the number or identity of victims cannot be ascertained, or other circumstances exist that make [it] impracticable" to do so. *See* proposed § 3664(a)(2).

II. Ordering Indigent Defendants to Pay Victims' Attorneys' Fees To Represent Them in Criminal Cases Would Offend the Constitution, Would Be Costly and Wasteful, and Would Not Benefit Victims.

Sec. 2 of HR 845 would require the court to order every defendant (85% of whom cannot afford their own attorneys) to reimburse victims for attorneys' fees "necessarily and reasonably incurred for representation of the victim . . . related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." The same would be required (under § 3663A) or allowed (under § 3663) under Sec. 105 of HR 4110 and S 973, and also reimbursement for "reasonably incurred attorneys' fees that are necessary and foreseeable results of the defendant's crime," and attorneys' fees "reasonably incurred in an attempt to retrieve damaged, lost, or destroyed property."

In other words, defendants would be ordered to pay the fees of an attorney acting as a private prosecutor in the criminal case and in any other "foreseeable" civil or regulatory matter. The prospect of collecting fees would encourage real and putative victims to hire attorneys at exorbitant cost to do the job that the public prosecutor is already required to do in criminal cases, and to do whatever else might be "foreseeable" beyond the criminal case, only to receive no reimbursement. While this may support the aspiring victim lawyers' industry, it would be harmful to everyone else, including victims, and the system as a whole.

This private prosecution scheme is unwise and inconsistent with the two-party adversary system enshrined in our Constitution. As noted by Senators Leahy, Kennedy, Kohl, Feingold, Schumer and Durbin in opposing a victim rights constitutional amendment, the "colonies shifted to a system of public prosecutions because . . . victims abused the system by initiating prosecutions to exert pressure for financial reparation," and "the system of private prosecutions [was] 'inefficient, elitist, and sometimes vindictive.'" *See* S. Rep. No. 108-191 at 68-69, 70 (2003). The two-party adversary system was then embedded in the Constitution. In every reference to criminal procedure in the original Constitution and in the Bill of Rights, the Framers defined and protected the rights of the accused as against the State. The Framers did not intend that third parties represented by private prosecutors could impinge on those rights by forcing the defendant to face two adversaries, and to be ordered to pay for it as well!

Further, this scheme would be an enormous burden on the system and costly to the taxpayers. Some of the most contentious, complex and prolonged litigation in federal civil cases is over what constitutes "reasonable" attorneys' fees. These unseemly disputes would now occur

[11] 18 U.S.S. § 3663A(c)(3).

in proceedings whose purpose is supposed to be the solemn business of criminal sentencing. Ludicrously, the prosecutor would be required to fight for fees to pay a private attorney to do the prosecutor's job.[12] The federal government would then be required to collect such attorneys' fees from defendants, at least 85% of whom are indigent and cannot afford to hire their own lawyers. The system could not tolerate this burden without increasing the number of taxpayer-supported judges, probation officers, defense counsel, and prosecutors, and if so, to what end? The only beneficiaries of this scheme would be lawyers paid by victims, the cost of which would never be reimbursed.

III. Removal of Provisions that Allow Equitable and Realistic Restitution

Current law recognizes that in crimes committed by more than one person, different defendants play different roles, do not all cause the same degree of harm and may not directly cause any harm, and do not all have the same ability to pay. *See* 18 U.S.C. § 3663A(a)(2) (defendant's own criminal conduct in the course of a scheme, conspiracy or pattern must have "directly" caused harm); 18 U.S.C. § 3664(h) (court may apportion liability among defendants "to reflect the level of contribution to the victim's loss and economic circumstances of each defendant"). Indeed, many of our clients, all of whom are indigent, play extremely minor roles and have no knowledge of or direct involvement in the activities of those higher up in the chain. HR 845 would hold all defendants accountable for any "pecuniary loss proximately," *not* directly, "resulting from the offense," and would replace the provision encouraging the court to apportion liability based on contribution to losses and economic circumstances with one encouraging the court to impose joint and several liability. *See* proposed §§ 3663(a), 3664(l). This approach is both unfair and unrealistic.

Current law also allows the court to order restitution "to the extent agreed to by the parties in a plea agreement," thus encouraging voluntary and realistic restitution and saving court resources. *See* 18 U.S.C. § 3663(a)(3). HR 845 would delete this salutary provision and deny the parties, who are in the best position to understand the strengths and weaknesses of the case and the economic realities, the ability to negotiate appropriate restitution agreements.

IV. Disclosure of Confidential Information to "Potential Recipients of Restitution"

HR 845 would require the court to disclose to "potential recipients of restitution," "all portions" of the presentence report pertaining to "a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant."

This provision would violate the essential confidentiality of the presentence report, various privacy laws, and the privacy of identified victims, the defendant, the defendant's family, and others. At the same time, it would serve no legitimate purpose that is not served under existing rules and statutes, but would provide open discovery of private information to any person who claims a "potential" right to restitution.

[12] 18 U.S.C. § 3664(e) (burden on government to demonstrate loss).

Under current law, an "identified victim" -- as opposed to anyone who claims to be a "potential recipient of restitution" -- receives notice of the initial amount of restitution submitted by the prosecutor for that victim, has the opportunity to submit information directly to the probation officer regarding the amount of the victim's losses, including an affidavit provided to the victim, and is notified of the date, time and place of the sentencing hearing. 18 U.S.C. § 3664(d)(2). If a victim discovers further losses, s/he can petition for an amended order at any time, as long as it is no more than 60 days after discovery of the additional losses and there is good cause for not including it in the initial claim. 18 U.S.C. § 3664(d) (5). Finally, the court determines the amount in an adversarial proceeding, with the burden on the government to establish the amount of the victim's loss. 18 U.S.C. § 3664(e). This procedure is more than sufficient for the victim to establish and revise his own losses.

Importantly, "the privacy of any records filed, or testimony heard" throughout restitution process, including financial information of the defendant, his or her family, and other victims, "shall be maintained to the greatest extent possible." 18 U.S.C. § 3664(d)(4).

The pre-sentence report itself is disclosed only to the defendant, the defendant's attorney, and the attorney for the government. *See* Fed. R. Crim. P. 32(e)(2); 18 U.S.C. § 3552(d); 18 U.S.C. § 3664(b). It is not disclosed to third parties, including real or alleged victims, for good reason. As the courts have uniformly held, the presentence report must be kept confidential to protect (1) the privacy interests of the defendant, the defendant's family, and crime victims, (2) the court's interest in receiving full disclosure of information relevant to sentencing, and (3) the interest of the government in the secrecy of information related to ongoing criminal investigations and grand jury proceedings.[13]

The report contains myriad sensitive and private information about the defendant, his family, witnesses and victims. *See* Fed. R. Crim. P. 32(d); 18 U.S.C. § 3664(a), (d)(3). The information comes from the defendant, the defendant's family, employers and friends, medical, psychiatric and social services providers, financial institutions, cooperating witnesses, grand jury minutes, law enforcement reports, and victims. Some of these sources, *e.g.*, financial institutions and medical providers, are subject to strict privacy laws and are not permitted to disclose without a release. Grand jury minutes are subject to strict limits on disclosure under Fed. R. Crim. P.

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[13] *See In re Brock*, slip op., 2008 WL 268923 (4th Cir. Jan. 31, 2008); *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006);*United States v. Huckaby*, 43 F.3d 135 (5th Cir. 1995); *United States v. Corbitt*, 879 F.2d 224 (7th Cir. 1989); *United States v. Anzalone*, 886 F.2d 229 (9th Cir. 1989); *United States v. McKnight*, 771 F.2d 388 (8th Cir. 1985); *United States v. Anderson*, 724 F.2d 596 (7th Cir. 1984); *United States v. Charmer Industries, Inc.*, 711 F.2d 1164 (2d Cir. 1983); *United States v. Martinello*, 556 F.2d 1215 (5th Cir. 1977); *United States v. Cyphers*, 553 F.2d 1064 (7th Cir. 1977); *United States v. Dingle*, 546 F.2d 1378 (10th Cir. 1976); *United States v. Figurski*, 545 F.2d 389 (4th Cir. 1976); *United States v. Walker*, 491 F.2d 236 (9th Cir. 1974); *United States v. Greathouse*, 484 F.2d 805 (7th Cir. 1973); *United States v. Evans*, 454 F.2d 813 (8th Cir. 1972); *United States v. Citgo Petroleum*, slip op. 2007 WL 2274393 (S.D. Tex. Aug. 8, 2007); *United States v. Boesky*, 674 F.Supp. 1128 (S.D.N.Y. 1987); *United States v. Krause*, 78 F.R.D. 203 (E.D. Wis. 1978); *Hancock Bros. v. Jones*, 293 F. Supp. 1229 (N.D. Cal. 1968).

6(e). Other sources are unwilling to provide information without the assurance that it will be kept confidential. An important study concluded that "third-party disclosure may adversely affect the court's ability to obtain information," and recommended that "district courts should restrict noncorrectional parties' access to the presentence report.'" *See also* Fennell and Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv.L.Rev. 1613, 1684, 1696 (1980). The defendant's right of access to the pre-sentence report, itself of fairly recent vintage and based on the defendant's right to due process of law, provides no basis for disclosing it to anyone else. *See United States Dept. of Justice v. Julian*, 486 U.S. 1, 9-10, 12 (1988).

V. Interference with Rehabilitation and Re-Integration

HR 845 would not only prohibit early termination of a term of probation or supervised release while a restitution order remains unsatisfied, but would mandate the extension of such term beyond any term otherwise provided by law until the order is satisfied or the court determines that the defendant's economic circumstances do not allow the payment of "any further restitution." *See* proposed 18 U.S.C. §§ 3664(m), 3564(f). HR 845 would allow the court to order nominal periodic payments, *see* proposed § 3664(o), but it also would require the application of any additional funds in any amount to restitution. *See* proposed § 3664(t).

It would be difficult for a court to conclude that the defendant could never pay any further restitution, yet, if the defendant cannot make even a nominal periodic payments at the moment, he would be violating a condition for which he could be imprisoned. Many of our clients live at a mere subsistence level. They have a difficult time finding a stable residence, employment, transportation, treatment, and other essentials. They have little or no money and are followed throughout their lives by their status as convicted felons. These defendants would be faced with the choice of handing over their rent money and living on the street, or going to prison, a new sort of debtor's prison.

Supervised release has traditionally served to further the chances of a defendant's rehabilitation, not to indefinitely extend the defendant's punishment or increase the chances that s/he will be reincarcerated.[14] Indeed, "the congressional policy in providing for a term of supervised release after incarceration is to improve the odds of a successful transition from prison to liberty."[15] Yet for many if not most defendants, the proposed legislation would undermine their ability to rehabilitate and reintegrate into society by requiring them to dedicate what little resources they have to paying a restitution order, rather than stabilizing or improving their own and their families' lives.

This is directly contrary to the recently-passed Second Chance Act of 2007, intended "to break the cycle of criminal recidivism" by "assist[ing] offenders reentering the community from

[14] *United States v. Johnson*, 529 U.S. 53, 59 (2000) ("Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.").

[15] *Johnson v. United States*, 529 U.S. 694, 708-09 (2000).

incarceration to establish a self-sustaining and law-abiding life."[16] Part of that cycle of recidivism is caused by the destitution most prisoners face upon release, as reflected by the congressional findings contained in the Second Chance Act. Over one third of inmates nationwide suffer from some sort of physical or mental disability, 70% function at the lowest literacy levels, and less than 32% have completed high school (compared to 82 % of the general population).[17] Between 15 and 27% of prisoners go directly to homeless shelters,[18] and up to 60% of former inmates may not be employed even a year after their release.[19] The Second Chance Act recognizes that "educational, literacy, vocational and job placement services" should be used "to facilitate reentry into the community."[20] Given that, it makes no sense to force courts to impose a financial penalty in the form of a restitution order on the 85% of federal defendants who are indigent when they enter the system, and to use supervised release or probation as a means to coerce payment of that penalty.

VI. Procedural Unfairness and Irregularity

HR 845 would eliminate certain procedural protections for defendants and create procedural irregularities that would be unwise and unfair.

First, it would allow the United States to enforce a restitution order by "all other available and necessary means," rather than, as now, "all other available and reasonable means." *See* proposed § 3664(s)(1). This suggests that a restitution debt could be collected by otherwise illegal means.

Second, it would direct the Attorney General to completely bypass the court in applying unreported or newly available assets to the payment of restitution, "without regard to any installment provisions" set by the court. *See* proposed § 3664(j)(4). This would be highly inappropriate, and is inconsistent with the requirement under existing law, *see* 18 U.S.C. § 3664(k) and in the proposed legislation, *see* proposed § 3664(q), that the United States notify the *court* of any material change in the defendant's economic circumstances, and that the *court* shall adjust the payment schedule or require immediate payment in full as the interests of justice require.

Third, proposed § 3664(q) would eliminate the requirement that the order of restitution provide notice to the defendant of his obligation to notify the court and the Attorney General of any material change in economic circumstances. This would serve no legitimate purpose.

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[16] *See* Second Chance Act of 2007: Community Safety Through Recidivism Prevention, H.R. 1593, sec. 3(a)(1), (5).

[17] *Id.* at sec. 3(b)(12), (14), (15).
[18] *Id.* at sec. 3(b)(9).
[19] *Id.* at sec.3(b)(18).
[20] *Id.* at sec. 3(a)(6).

Fourth, HR 845 would delete existing subsection (c) of § 3664, stating that the provisions of chapters 227 and 232, and Fed. R. Crim. P. 32(c), are the only rules applicable to mandatory restitution proceedings. It is unclear what the purpose of this deletion is, but the purpose of § 3664(c) was to recognize that the same due process protections apply to restitution as to any other part of the sentencing process.[21] Because restitution is a criminal "penalty," *see* 18 U.S.C. § 3663A(a)(1),[22] a defendant has "the right not to be sentenced [to restitution] on the basis of invalid premises or inaccurate information."[23] The Supreme Court recently reiterated that the defendant is entitled to "thorough adversarial testing" at sentencing, including "notice and a meaningful opportunity to be heard." *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007).

VII. The Provisions Allowing Prior Restraint of Legitimate Assets Would Be Unconstitutional and Costly to Taxpayers.

All three bills would permit prosecutors to render indigent those 15% of defendants and their families who are not already indigent by restraining legitimate assets in an unreliable and unconstitutional *ex parte* proceeding before the defendant has been tried or convicted of any crime. We agree with the National Association of Criminal Defense Lawyers that these provisions would violate the Sixth Amendment right to counsel, and the Fifth Amendment Due Process Clause.

In addition, our offices or CJA counsel would have to be appointed to represent defendants who could otherwise afford counsel and who do not want appointed counsel. Defenders and CJA counsel would also be forced to represent these clients in proceedings relating to their property -- an area of representation with which we are unfamiliar and which would violate our mandate to represent *indigent* defendants.

Moreover, the cost of these provisions would ultimately be borne by the taxpayers. The Sixth Amendment guarantees every indigent defendant the right to appointed counsel and every defendant the right to effective assistance of counsel. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *Strickland v. Washington*, 466 U.S. 668 (1984). Defender Offices, already strained, cannot provide effective representation without hiring more lawyers, and CJA counsel cannot provide effective assistance if they are not paid. To accommodate these provisions, more funds would have to be appropriated for defense counsel.

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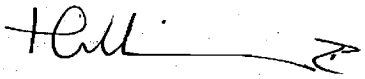
[21] S. Rep. No. 104-179, Part IV(D).

[22] *See, e.g.*, *United States v. Ross*, 279 F.3d 600, 609 (8th Cir. 2002); *United States v. Edwards*, 162 F.3d 87, 92 (3d Cir. 1998); *United States v. Dubose*, 146 F.3d 1141, 1144 (9th Cir. 1998).

[23] S. Rep. No. 104-179, Part IV(D).

For all these reasons, we urge you to reject these proposals. Thank you for the opportunity to comment on this legislation.

Very truly yours,



Thomas W. Hillier, II
Federal Public Defender

cc: Members of the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee

II

110TH CONGRESS
1ST SESSION

S. 973

To amend the Mandatory Victims' Restitution Act to improve restitution for victims of crime, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 22, 2007

Mr. DORGAN (for himself, Mr. GRASSLEY, Mr. DURBIN, and Ms. COLLINS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Mandatory Victims' Restitution Act to improve restitution for victims of crime, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Restitution for Victims of Crime Act of 2007".

TITLE I—COLLECTION OF RESTITUTION

SEC. 101. SHORT TITLE.

This title may be cited as the "Collection of Restitution Improvement Act of 2007".

SEC. 102. PROCEDURE FOR ISSUANCE AND ENFORCEMENT OF RESTITUTION.

Section 3664(f) of title 18, United States Code, is amended by striking paragraphs (2) through (4) and inserting the following:

"(C)(i) Each restitution order shall—

"(I) contain information sufficient to identify each victim to whom restitution is owed;

"(II) require that a copy of the court order be sent to each such victim; and

"(III) inform each such victim of the obligation to notify the appropriate entities of any change in address.

"(ii) It shall be the responsibility of each victim to whom restitution is owed to notify the Attorney General, or the appropriate entity of the court, by means of a form to be provided by the Attorney General or the court, of any change in the victim's mailing address while restitution is still owed to the victim.

"(iii) The confidentiality of any information relating to a victim under this subparagraph shall be maintained.

"(2) The court shall order that the restitution imposed is due in full immediately upon imposition.

"(3) The court shall direct the defendant—

"(A) to make a good-faith effort to satisfy the restitution order in the shortest time in which full

1 restitution can be reasonably made, and to refrain
2 from taking any action that conceals or dissipates
3 the defendant's assets or income;
4 "(B) to notify the court of any change in resi-
5 dence; and
6 "(C) to notify the United States Attorney for
7 the district in which the defendant was sentenced of
8 any change in residence, and of any material change
9 in economic circumstances that might affect the de-
10 fendant's ability to pay restitution.
11 "(4) Compliance with all payment directions imposed
12 under paragraphs (6) and (7) shall be prima facie evidence
13 of a good faith effort under paragraph (3)(A), unless it
14 is shown that the defendant has concealed or dissipated
15 assets.
16 "(5) Notwithstanding any other provision of law, for
17 the purpose of enforcing a restitution order, a United
18 States Attorney may receive, without the need for a court
19 order, any financial information concerning the defendant
20 obtained by the grand jury that indicted the defendant for
21 the crime for which restitution has been awarded, the
22 United States Probation Office, or the Bureau of Prisons.
23 A victim may also provide financial information con-
24 cerning the defendant to the United States Attorney.

"(6)(A) At sentencing, or at any time prior to the termination of a restitution obligation under section 3613 of this title, the court may—

"(i) impose special payment directions upon the defendant or modify such directions; or

"(ii) direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

"(B) The period of time over which scheduled payments are established for purposes of this paragraph shall be the shortest time in which full payment reasonably can be made.

"(C) In-kind payments may be in the form of the return of property, replacement of property, or, if the victim agrees, services rendered to the victim or a person or organization other than the victim.

"(D) In ordering restitution, the court may direct the defendant to—

"(i) repatriate any property that constitutes proceeds of the offense of conviction, or property traceable to such proceeds; and

"(ii) surrender to the United States, or to the victim named in the restitution order, any interest of the defendant in any nonexempt asset.

"(E) The court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property for restitution.

"(7)(A) In determining whether to impose or modify specific payment directions, the court may consider—

"(i) the need to provide restitution to the victims of the offense;

"(ii) the financial ability of the defendant;

"(iii) the economic circumstances of the defendant, including the financial resources and other assets of the defendant and whether any of those assets are jointly controlled;

"(iv) the projected earnings and other income of the defendant;

"(v) any financial obligations of the defendant, including obligations to dependents;

"(vi) whether the defendant has concealed or dissipated assets or income; and

"(vii) any other appropriate circumstances.

"(B) Any substantial resources from any source, including inheritance, settlement, or other judgment, shall be applied to any outstanding restitution obligation.

"(8)(A) If the court finds that the economic circumstances of the defendant do not allow the payment of

1 any substantial amount as restitution, the court may di-
2 rect the defendant to make nominal payments of not less
3 than $100 per year toward the restitution obligation.
4 "(B) Any money received from the defendant under
5 subparagraph (A) shall be disbursed so that any out-
6 standing assessment imposed under section 3013 is paid
7 first in full.
8 "(9) Court-imposed special payment directions shall
9 not limit the ability of the Attorney General to maintain
10 an Inmate Financial Responsibility Program that encour-
11 ages sentenced inmates to meet their legitimate financial
12 obligations.
13 "(10)(A) The ability of the Attorney General to en-
14 force restitution obligations ordered under paragraph (2)
15 shall not be limited by appeal, or the possibility of a cor-
16 rection, modification, amendment, adjustment, or reim-
17 position of a sentence, unless the court expressly so orders
18 for good cause shown and stated on the record.
19 "(B) Absent exceptional circumstances, as deter-
20 mined by the court, an order limiting the enforcement of
21 restitution obligations shall—
22 "(i) require the defendant to deposit, in the
23 registry of the district court, any amount of the res-
24 titution that is due;

"(ii) require the defendant to post a bond or other security to ensure payment of the restitution that is due; or

"(iii) impose additional restraints upon the defendant to prevent the defendant from transferring or dissipating assets.

"(C) No order described in subparagraph (B) shall restrain the ability of the United States to continue its investigation of the defendant's financial circumstances, conduct discovery, record a lien, or seek any injunction or other relief from the court.".

SEC. 103. IMPOSITION OF CRIMINAL FINES AND PAYMENT DIRECTIONS.

Subsection 3572(d) of title 18, United States Code, is amended to read as follows:

"(d) PAYMENT.—

"(1) IN GENERAL.—The court shall order that any fine or assessment imposed be due in full immediately upon imposition.

"(2) EFFORTS TO MAKE PAYMENT.—The court shall—

"(A) direct the defendant to make a good-faith effort to satisfy the fine and assessment in the shortest time in which full payment can be reasonably made, and to refrain from taking

any action that conceals or dissipates the defendant's assets or income;

"(B) direct the defendant to notify the court of any change in residence; and

"(C) order the defendant to notify the United States Attorney for the district in which the defendant was sentenced of any change in residence, and of any material change in economic circumstances that might affect the defendant's ability to pay restitution.

"(3) GOOD FAITH.—Compliance with all payment directions imposed by paragraphs (5) and (6) shall be prima facie evidence of a good faith effort under paragraph (2)(A), unless it is shown that the defendant has concealed or dissipated assets;

"(4) ACCESS TO INFORMATION.—Notwithstanding any other provision of law, for the purpose of enforcing a fine or assessment, a United States Attorney may receive, without the need for a court order, any financial information concerning the defendant obtained by a grand jury, the United States Probation Office, or the Bureau of Prisons.

"(5) PAYMENT SCHEDULE.—

"(A) IN GENERAL.—At sentencing, or at any time prior to the termination of a restitu-

tion obligation under section 3613 of this title, the court may—

"(i) impose special payment directions upon the defendant or modify such directions; or

"(ii) direct the defendant to make a single, lump sum payment, or partial payments at specified intervals.

"(B) PERIOD OF TIME.—The period of time over which scheduled payments are established for purposes of this paragraph shall be the shortest time in which full payment can reasonably be made.

"(C) REPATRIATION.—The court may direct the defendant to repatriate any property that constitutes proceeds of the offense of conviction, or property traceable to such proceeds.

"(D) SURRENDER.—In ordering restitution, the court may direct the defendant to surrender to the United States any interest of the defendant in any non-exempt asset.

"(E) THIRD PARTIES.—If the court directs the defendant to repatriate or surrender any property in which it appears that any person

other than the defendant may have a legal interest—

"(i) the court shall take such action as is necessary to protect such third party interest; and

"(ii) may direct the United States to initiate any ancillary proceeding to determine such third party interests in accordance with the procedures specified in section 413(n) of the Controlled Substances Act (21 U.S.C. 853(n)).

"(F) EXCLUSIVITY OF REMEDY.—Except as provided in this section, no person may commence an action against the United States concerning the validity of the party's alleged interest in the property subject to reparation or surrender.

"(G) PRESERVATION OF PROPERTY.—The court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property for payment of the fine or assessment.

"(6) CONSIDERATIONS.—In determining whether to impose or modify special payment directions, the court may consider—

"(A) the need to satisfy the fine or assessment;

"(B) the financial ability of the defendant;

"(C) the economic circumstances of the defendant, including the financial resources and other assets of the defendant, and whether any of those assets are jointly controlled;

"(D) the projected earnings and other income of the defendant;

"(E) any financial obligations of the defendant, including obligations to dependents;

"(F) whether the defendant has concealed or dissipated assets or income; and

"(G) any other appropriate circumstances.

"(7) USE OF RESOURCES.—Any substantial resources from any source, including inheritance, settlement, or other judgment shall be applied to any fine or assessment still owed.

"(8) NOMINAL PAYMENTS.—If the court finds that the economic circumstances of the defendant do not allow the immediate payment of any substantial amount of the fine or assessment imposed, the court

may direct the defendant to make nominal payments of not less than $100 per year toward the fine or assessment imposed.

"(9) INMATE FINANCIAL RESPONSIBILITY PROGRAM.—Court-imposed special payment directions shall not limit the ability of the Attorney General to maintain an Inmate Financial Responsibility Program that encourages sentenced inmates to meet their legitimate financial obligations.

"(10) ENFORCEMENT.—

"(A) IN GENERAL.—The ability of the Attorney General to enforce the fines and assessment ordered under paragraph (1) shall not be limited by an appeal, or the possibility of a correction, modification, amendment, adjustment, or reimposition of a sentence, unless the court expressly so orders, for good cause shown and stated on the record.

"(B) EXCEPTIONS.—Absent exceptional circumstances, as determined by the court, an order limiting enforcement of a fine or assessment shall—

"(i) require the defendant to deposit, in the registry of the district court, any

amount of the fine or assessment that is due;

"(ii) require the defendant to post a bond or other security to ensure payment of the fine or assessment that is due; or

"(iii) impose additional restraints upon the defendant to prevent the defendant from transferring or dissipating assets.

"(C) OTHER ACTIVITIES.—No order described in subparagraph (B) shall restrain the ability of the United States to continue its investigation of the defendant's financial circumstances, conduct discovery, record a lien, or seek any injunction or other relief from the court.

"(11) SPECIAL ASSESSMENTS.—The requirements of this subsection shall apply to the imposition and enforcement of any assessment imposed under section 3013 of this title.".

SEC. 104. COLLECTION OF UNPAID FINES OR RESTITUTION.

Section 3612(b) of title 18, United States Code, is amended to read as follows:

"(b) INFORMATION TO BE INCLUDED IN JUDGMENT; JUDGMENT TO BE TRANSMITTED TO THE ATTORNEY GENERAL.—

"(1) IN GENERAL.—A judgment or order imposing, modifying, or remitting a fine or restitution order of more than $100 shall include—

"(A) the name, social security account number, mailing address, and residence address of the defendant;

"(B) the docket number of the case;

"(C) the original amount of the fine or restitution order and the amount that is due and unpaid;

"(D) payment orders and directions imposed under section 3572(d) and section 3664(f) of this title; and

"(E) a description of any modification or remission.

"(2) TRANSMITTAL OF COPIES.—Not later than 10 days after entry of the judgment or order described in paragraph (1), the court shall transmit a certified copy of the judgment or order to the Attorney General.".

SEC. 105. ATTORNEY'S FEES FOR VICTIMS.

(a) ORDER OF RESTITUTION.—Section 3663(b) of title 18, United States Code, is amended—

(1) in paragraph (1)—

(A) in subparagraph (A), by striking "or" at the end;

(B) by redesignating subparagraph (B) as subparagraph (C);

(C) by inserting after subparagraph (A) the following:

"(B) reimburse the victim for attorneys' fees reasonably incurred in an attempt to retrieve damaged, lost, or destroyed property (which shall not include payment of salaries of Government attorneys); or"; and

(D) in subparagraph (C), as so redesignated by this subsection, by inserting "or (B)" after "subparagraph (A)";

(2) in paragraph (4)—

(A) by inserting "(including attorneys' fees necessarily and reasonably incurred for representation of the victim, which shall not include payment of salaries of Government attorneys)" after "other expenses related to participation in the investigation or prosecution of the offense"; and

(B) by striking "and" at the end;

(3) in paragraph (5), by striking the period and inserting "; and"; and

(4) by adding at the end the following:

"(6) in any case, reimburse the victim for reasonably incurred attorneys' fees that are necessary and foreseeable results of the defendant's crime (which shall not include payment of salaries of Government attorneys).".

(b) MANDATORY RESTITUTION TO VICTIMS OF CERTAIN CRIMES.—Section 3663A(b) of title 18, United States Code, is amended—

(1) in paragraph (1)—

(A) in subparagraph (A), by striking "or" at the end;

(B) by redesignating subparagraph (B) as subparagraph (C);

(C) by inserting after subparagraph (A) the following:

"(B) reimburse the victim for attorneys' fees reasonably incurred in an attempt to retrieve damaged, lost, or destroyed property (which shall not include payment of salaries of Government attorneys); or"; and

(D) in subparagraph (C), as so redesignated by this subsection, by inserting "or (B)" after "subparagraph (A)";

(2) in paragraph (3), by striking "and" at the end;

(3) in paragraph (4)—

(A) by inserting "(including attorneys' fees necessarily and reasonably incurred for representation of the victim, which shall not include payment of salaries of Government attorneys)" after "other expenses related to participation in the investigation or prosecution of the offense"; and

(B) by striking the period and inserting "; and"; and

(4) by adding at the end the following:

"(5) in any case, reimburse the victim for reasonably incurred attorneys' fees that are necessary and foreseeable results of the defendant's crime (which shall not include payment of salaries of Government attorneys).".

TITLE II—PRESERVATION OF ASSETS FOR RESTITUTION

SEC. 201. SHORT TITLE.

This title may be cited as the "Preservation of Assets for Restitution Act of 2007".

SEC. 202. AMENDMENTS TO THE MANDATORY VICTIMS RESTITUTION ACT.

(a) IN GENERAL.—Chapter 232 of title 18, United States Code, is amended by inserting after section 3664 the following:

"§ 3664A. Preservation of assets for restitution

"(a) PROTECTIVE ORDERS TO PRESERVE ASSETS.—

"(1) IN GENERAL.—Upon the Government's ex parte application and a finding of probable cause to believe that a defendant, if convicted, will be ordered to satisfy an order of restitution for an offense punishable by imprisonment for more than 1 year, the court—

"(A) shall—

"(i) enter a restraining order or injunction;

"(ii) require the execution of a satisfactory performance bond; or

"(iii) take any other action necessary to preserve the availability of any property traceable to the commission of the offense charged; and

"(B) if it determines that it is in the interests of justice to do so, shall issue any order necessary to preserve any nonexempt asset (as

1 defined in section 3613) of the defendant that
2 may be used to satisfy such restitution order.
3 "(2) PROCEDURES.—Applications and orders
4 issued under paragraph (1) shall be governed by the
5 procedures under section 413(e) of the Controlled
6 Substances Act (21 U.S.C. 853(e)) and in this sec-
7 tion.
8 "(3) MONETARY INSTRUMENTS.—If the prop-
9 erty in question is a monetary instrument (as de-
10 fined in section 1956(c)(5)) or funds in electronic
11 form, the protective order issued under paragraph
12 (1) may take the form of a warrant authorizing the
13 Government to seize the property and to deposit it
14 into an interest-bearing account in the Registry of
15 the Court in the district in which the warrant was
16 issued, or into another such account maintained by
17 a substitute property custodian, as the court may di-
18 rect.
19 "(4) POST-INDICTMENT.—A post-indictment
20 protective order entered under paragraph (1) shall
21 remain in effect through the conclusion of the crimi-
22 nal case, including sentencing and any post-sen-
23 tencing proceedings, until seizure or other disposi-
24 tion of the subject property, unless modified by the

1 court upon a motion by the Government or under
2 subsection (b) or (c).
3 "(b) DEFENDANT'S RIGHT TO A HEARING.—
4 "(1) IN GENERAL.—In the case of a
5 preindictment protective order entered under sub-
6 section (a)(1), the defendant's right to a post-re-
7 straint hearing shall be governed by paragraphs
8 (1)(B) and (2) of section 413(e) of the Controlled
9 Substances Act (21 U.S.C. 853(e)).
10 "(2) POST-INDICTMENT.—In the case of a post-
11 indictment protective order entered under subsection
12 (a)(1), the defendant shall have a right to a post-re-
13 straint hearing regarding the continuation or modi-
14 fication of the order if the defendant—
15 "(A) establishes by a preponderance of the
16 evidence that there are no assets, other than
17 the restrained property, available to the defend-
18 ant to retain counsel in the criminal case or to
19 provide for a reasonable living allowance for the
20 necessary expenses of the defendant and the de-
21 fendant's lawful dependents; and
22 "(B) makes a prima facie showing that
23 there is bona fide reason to believe that the
24 court's ex parte finding of probable cause under
25 subsection (a)(1) was in error.

"(3) HEARING.—

"(A) IN GENERAL.—If the court determines that the defendant has satisfied the requirements of paragraph (2), it may hold a hearing to determine whether there is probable cause to believe that the defendant, if convicted, will be ordered to satisfy an order of restitution for an offense punishable by imprisonment for more than 1 year, and that the seized or restrained property may be needed to satisfy such restitution order.

"(B) PROBABLE CAUSE.—If the court finds probable cause under subparagraph (A), the protective order shall remain in effect.

"(C) NO PROBABLE CAUSE.—If the court finds under subparagraph (A) that no probable cause exists as to some or all of the property, or determines that more property has been seized and restrained than may be needed to satisfy a restitution order, it shall modify the protective order to the extent necessary to release the property that should not have been restrained.

"(4) REBUTTAL.—If the court conducts an evidentiary hearing under paragraph (3), the court

shall afford the Government an opportunity to present rebuttal evidence and to cross-examine any witness that the defendant may present.

"(5) PRETRIAL HEARING.—In any pretrial hearing on a protective order issued under subsection (a)(1), the court may not entertain challenges to the grand jury's finding of probable cause regarding the criminal offense giving rise to a potential restitution order. The court shall ensure that such hearings are not used to obtain disclosure of evidence or the identities of witnesses earlier than required by the Federal Rules of Criminal Procedure or other applicable law.

"(c) THIRD PARTY'S RIGHT TO POST-RESTRAINT HEARING.—

"(1) IN GENERAL.—A person other than the defendant who has a legal interest in property affected by a protective order issued under subsection (a)(1) may move to modify the order on the grounds that—

"(A) the order causes an immediate and irreparable hardship to the moving party; and

"(B) less intrusive means exist to preserve the property for the purpose of restitution.

"(2) MODIFICATION.—If, after considering any rebuttal evidence offered by the Government, the court determines that the moving party has made the showings required under paragraph (1), the court shall modify the order to mitigate the hardship, to the extent that it is possible to do so while preserving the asset for restitution.

"(3) INTERVENTION.—

"(A) IN GENERAL.—Except as provided in subparagraph (B) or paragraph (1), a person other than a defendant has no right to intervene in the criminal case to object to the entry of any order issued under this section or otherwise to object to an order directing a defendant to pay restitution.

"(B) EXCEPTION.—If, at the conclusion of the criminal case, the court orders the defendant to use particular assets to satisfy an order of restitution (including assets that have been seized or restrained pursuant to this section) the court shall give persons other than the defendant the opportunity to object to the order on the ground that the property belonged in whole or in part to the third party and not to the defendant, as provided in section 413(n) of

1 the Controlled Substances Act (21 U.S.C.
2 853(n)).
3 "(d) GEOGRAPHIC SCOPE OF ORDER.—
4 "(1) IN GENERAL.—A district court of the
5 United States shall have jurisdiction to enter an
6 order under this section without regard to the loca-
7 tion of the property subject to the order.
8 "(2) OUTSIDE THE UNITED STATES.—If the
9 property subject to an order issued under this sec-
10 tion is located outside of the United States, the
11 order may be transmitted to the central authority of
12 any foreign state for service in accordance with any
13 treaty or other international agreement.
14 "(e) NO EFFECT ON OTHER GOVERNMENT AC-
15 TION.—Nothing in this section shall be construed to pre-
16 clude the Government from seeking the seizure, restraint,
17 or forfeiture of assets under the asset forfeiture laws of
18 the United States.
19 "(f) LIMITATION ON RIGHTS CONFERRED.—Nothing
20 in this section shall be construed to create any enforceable
21 right to have the Government seek the seizure or restraint
22 of property for restitution.
23 "(g) RECEIVERS.—
24 "(1) IN GENERAL.—A court issuing an order
25 under this section may appoint a receiver under sec-

tion 1956(b)(4) to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, that have been restrained in accordance with this section.

"(2) DISTRIBUTION OF PROPERTY.—The receiver shall have the power to distribute property in its control to each victim identified in an order of restitution at such time, and in such manner, as the court may authorize.".

(b) CONFORMING AMENDMENT.—The section analysis for chapter 232 of title 18, United States Code, is amended by inserting after the item relating to section 3664 the following:

"Sec. 3664A. Preservation of assets for restitution.".

SEC. 203. AMENDMENTS TO THE ANTI-FRAUD INJUNCTION STATUTE.

Section 1345(a) of title 18, United States Code, is amended—

(1) in paragraph (1)—

(A) in subparagraph (B), by striking "or" at the end; and

(B) by inserting after subparagraph (C) the following:

"(D) committing or about to commit a Federal offense that may result in an order of restitution;"; and

(2) in paragraph (2)—

(A) by striking "a banking violation" and all that follows through "healthcare offense" and inserting "a violation or offense identified in paragraph (1)"; and

(B) by inserting "or offense" after "traceable to such violation".

SEC. 204. AMENDMENTS TO THE FEDERAL DEBT COLLECTION PROCEDURES ACT.

(a) PROCESS.—Section 3004(b)(2) of title 28, United States Code, is amended by inserting after "in which the debtor resides." the following: "In a criminal case, the district court for the district in which the defendant was sentenced may deny the request.".

(b) PREJUDGMENT REMEDIES.—Section 3101 of title 28, United States Code, is amended—

(1) in subsection (a)(1) by inserting after "the filing of a civil action on a claim for a debt" the following: "or in any criminal action where the court may enter an order of restitution"; and

(2) in subsection (d)—

(A) by inserting after "The Government wants to make sure [name of debtor] will pay if the court determines that this money is owed.' " the following:

1 " 'In a criminal action, use the following opening
2 paragraph: You are hereby notified that this [property]
3 is being taken by the United States Government [the Gov-
4 ernment], which says that [name of debtor], if convicted,
5 may owe as restitution $ [amount]. The Government says
6 it must take this property at this time because [recite the
7 pertinent ground or grounds from section 3101(b)]. The
8 Government wants to make sure [name of debtor] will pay
9 if the court determines that restitution is owed.' ";
10 (B) by inserting after "a statement that different
11 property may be so exempted with respect to the State
12 in which the debtor resides.]' " the following:
13 " '[In a criminal action, the statement summarizing
14 the types of property that may be exempt shall list only
15 those types of property that may be exempt under section
16 3613 of title 18.]' "; and
17 (C) by inserting after "You must also send a copy
18 of your request to the Government at [address], so the
19 Government will know you want the proceeding to be
20 transferred.' " the following:
21 " 'If this Notice is issued in conjunction with a crimi-
22 nal case, the district court where the criminal action is
23 pending may deny your request for a transfer of this pro-
24 ceeding.' ".

(c) ENFORCEMENT.—Section 3202(b) of title 28, United States Code, is amended—

(1) by inserting after "a statement that different property may be so exempted with respect to the State in which the debtor resides.]' " the following:

" '[In a criminal action, the statement summarizing the types of property that may be exempt shall list only those types of property that may be exempt under section 3613 of title 18.]' "; and

(2) by inserting after "you want the proceeding to be transferred.' " the following:

" 'If this notice is issued in conjunction with a criminal case, the district court where the criminal action is pending may deny your request for a transfer of this proceeding.' ".

TITLE III—ENVIRONMENTAL CRIMES RESTITUTION

SEC. 301. SHORT TITLE.

This title may be cited as the "Environmental Crimes Restitution Act of 2007".

SEC. 302. IMMEDIATE AVAILABILITY OF RESTITUTION TO VICTIMS OF ENVIRONMENTAL CRIMES.

Section 3663(a)(1)(A) of title 18, United States Code, is amended by striking "or section 5124, 46312,

46502, or 46504 of title 49," and inserting "paragraph (2) or (3) of section 309(c) of the Federal Water Pollution Control Act (33 U.S.C. 1319(c)), section 105(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1415(b)), section 9(a) of the Act to Prevent Pollution from Ships (33 U.S.C. 1908(a)), section 1423 or subsection (a) or (b) of section 1432 of the Safe Drinking Water Act (42 U.S.C. 300h–2 and 300i–l), subsection (d) or (e) of section 3008 of the Solid Waste Disposal Act (42 U.S.C. 6928), paragraph (1) or (5) of section 113(c) of the Clear Air Act (42 U.S.C. 7413(c)), or section 46312, 46502, or 46504 of title 49,".

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110TH CONGRESS
1ST SESSION

H. R. 4110

To amend the Mandatory Victims' Restitution Act to improve restitution for victims of crime, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 7, 2007

Ms. SHEA-PORTER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Mandatory Victims' Restitution Act to improve restitution for victims of crime, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Restitution for Victims of Crime Act of 2007".

TITLE I—COLLECTION OF RESTITUTION

SEC. 101. SHORT TITLE.

This title may be cited as the "Collection of Restitution Improvement Act of 2007".

SEC. 102. PROCEDURE FOR ISSUANCE AND ENFORCEMENT OF RESTITUTION.

Section 3664(f) of title 18, United States Code, is amended by striking paragraphs (2) through (4) and inserting the following:

"(C)(i) Each restitution order shall—

"(I) contain information sufficient to identify each victim to whom restitution is owed;

"(II) require that a copy of the court order be sent to each such victim; and

"(III) inform each such victim of the obligation to notify the appropriate entities of any change in address.

"(ii) It shall be the responsibility of each victim to whom restitution is owed to notify the Attorney General, or the appropriate entity of the court, by means of a form to be provided by the Attorney General or the court, of any change in the victim's mailing address while restitution is still owed to the victim.

"(iii) The confidentiality of any information relating to a victim under this subparagraph shall be maintained.

"(2) The court shall order that the restitution imposed is due in full immediately upon imposition.

"(3) The court shall direct the defendant—

"(A) to make a good-faith effort to satisfy the restitution order in the shortest time in which full

1 restitution can be reasonably made, and to refrain
2 from taking any action that conceals or dissipates
3 the defendant's assets or income;
4 "(B) to notify the court of any change in resi-
5 dence; and
6 "(C) to notify the United States Attorney for
7 the district in which the defendant was sentenced of
8 any change in residence, and of any material change
9 in economic circumstances that might affect the de-
10 fendant's ability to pay restitution.
11 "(4) Compliance with all payment directions imposed
12 under paragraphs (6) and (7) shall be prima facie evidence
13 of a good faith effort under paragraph (3)(A), unless it
14 is shown that the defendant has concealed or dissipated
15 assets.
16 "(5) Notwithstanding any other provision of law, for
17 the purpose of enforcing a restitution order, a United
18 States Attorney may receive, without the need for a court
19 order, any financial information concerning the defendant
20 obtained by the grand jury that indicted the defendant for
21 the crime for which restitution has been awarded, the
22 United States Probation Office, or the Bureau of Prisons.
23 A victim may also provide financial information con-
24 cerning the defendant to the United States Attorney.

"(6)(A) At sentencing, or at any time prior to the termination of a restitution obligation under section 3613 of this title, the court may—

"(i) impose special payment directions upon the defendant or modify such directions; or

"(ii) direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

"(B) The period of time over which scheduled payments are established for purposes of this paragraph shall be the shortest time in which full payment reasonably can be made.

"(C) In-kind payments may be in the form of the return of property, replacement of property, or, if the victim agrees, services rendered to the victim or a person or organization other than the victim.

"(D) In ordering restitution, the court may direct the defendant to—

"(i) repatriate any property that constitutes proceeds of the offense of conviction, or property traceable to such proceeds; and

"(ii) surrender to the United States, or to the victim named in the restitution order, any interest of the defendant in any nonexempt asset.

"(E) The court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property for restitution.

"(7)(A) In determining whether to impose or modify specific payment directions, the court may consider—

"(i) the need to provide restitution to the victims of the offense;

"(ii) the financial ability of the defendant;

"(iii) the economic circumstances of the defendant, including the financial resources and other assets of the defendant and whether any of those assets are jointly controlled;

"(iv) the projected earnings and other income of the defendant;

"(v) any financial obligations of the defendant, including obligations to dependents;

"(vi) whether the defendant has concealed or dissipated assets or income; and

"(vii) any other appropriate circumstances.

"(B) Any substantial resources from any source, including inheritance, settlement, or other judgment, shall be applied to any outstanding restitution obligation.

"(8)(A) If the court finds that the economic circumstances of the defendant do not allow the payment of

1 any substantial amount as restitution, the court may di-
2 rect the defendant to make nominal payments of not less
3 than $100 per year toward the restitution obligation.
4 "(B) Any money received from the defendant under
5 subparagraph (A) shall be disbursed so that any out-
6 standing assessment imposed under section 3013 is paid
7 first in full.
8 "(9) Court-imposed special payment directions shall
9 not limit the ability of the Attorney General to maintain
10 an Inmate Financial Responsibility Program that encour-
11 ages sentenced inmates to meet their legitimate financial
12 obligations.
13 "(10)(A) The ability of the Attorney General to en-
14 force restitution obligations ordered under paragraph (2)
15 shall not be limited by appeal, or the possibility of a cor-
16 rection, modification, amendment, adjustment, or reim-
17 position of a sentence, unless the court expressly so orders
18 for good cause shown and stated on the record.
19 "(B) Absent exceptional circumstances, as deter-
20 mined by the court, an order limiting the enforcement of
21 restitution obligations shall—
22 "(i) require the defendant to deposit, in the
23 registry of the district court, any amount of the res-
24 titution that is due;

"(ii) require the defendant to post a bond or other security to ensure payment of the restitution that is due; or

"(iii) impose additional restraints upon the defendant to prevent the defendant from transferring or dissipating assets.

"(C) No order described in subparagraph (B) shall restrain the ability of the United States to continue its investigation of the defendant's financial circumstances, conduct discovery, record a lien, or seek any injunction or other relief from the court.".

SEC. 103. IMPOSITION OF CRIMINAL FINES AND PAYMENT DIRECTIONS.

Subsection 3572(d) of title 18, United States Code, is amended to read as follows:

"(d) PAYMENT.—

"(1) IN GENERAL.—The court shall order that any fine or assessment imposed be due in full immediately upon imposition.

"(2) EFFORTS TO MAKE PAYMENT.—The court shall—

"(A) direct the defendant to make a good-faith effort to satisfy the fine and assessment in the shortest time in which full payment can be reasonably made, and to refrain from taking

1 any action that conceals or dissipates the de-
2 fendant's assets or income;
3 "(B) direct the defendant to notify the
4 court of any change in residence; and
5 "(C) order the defendant to notify the
6 United States Attorney for the district in which
7 the defendant was sentenced of any change in
8 residence, and of any material change in eco-
9 nomic circumstances that might affect the de-
10 fendant's ability to pay restitution.
11 "(3) GOOD FAITH.—Compliance with all pay-
12 ment directions imposed by paragraphs (5) and (6)
13 shall be prima facie evidence of a good faith effort
14 under paragraph (2)(A), unless it is shown that the
15 defendant has concealed or dissipated assets;
16 "(4) ACCESS TO INFORMATION.—Notwith-
17 standing any other provision of law, for the purpose
18 of enforcing a fine or assessment, a United States
19 Attorney may receive, without the need for a court
20 order, any financial information concerning the de-
21 fendant obtained by a grand jury, the United States
22 Probation Office, or the Bureau of Prisons.
23 "(5) PAYMENT SCHEDULE.—
24 "(A) IN GENERAL.—At sentencing, or at
25 any time prior to the termination of a restitu-

tion obligation under section 3613 of this title, the court may—

"(i) impose special payment directions upon the defendant or modify such directions; or

"(ii) direct the defendant to make a single, lump sum payment, or partial payments at specified intervals.

"(B) PERIOD OF TIME.—The period of time over which scheduled payments are established for purposes of this paragraph shall be the shortest time in which full payment can reasonably be made.

"(C) REPATRIATION.—The court may direct the defendant to repatriate any property that constitutes proceeds of the offense of conviction, or property traceable to such proceeds.

"(D) SURRENDER.—In ordering restitution, the court may direct the defendant to surrender to the United States any interest of the defendant in any non-exempt asset.

"(E) THIRD PARTIES.—If the court directs the defendant to repatriate or surrender any property in which it appears that any person

other than the defendant may have a legal interest—

"(i) the court shall take such action as is necessary to protect such third party interest; and

"(ii) may direct the United States to initiate any ancillary proceeding to determine such third party interests in accordance with the procedures specified in section 413(n) of the Controlled Substances Act (21 U.S.C. 853(n)).

"(F) EXCLUSIVITY OF REMEDY.—Except as provided in this section, no person may commence an action against the United States concerning the validity of the party's alleged interest in the property subject to reparation or surrender.

"(G) PRESERVATION OF PROPERTY.—The court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property for payment of the fine or assessment.

"(6) CONSIDERATIONS.—In determining whether to impose or modify special payment directions, the court may consider—

"(A) the need to satisfy the fine or assessment;

"(B) the financial ability of the defendant;

"(C) the economic circumstances of the defendant, including the financial resources and other assets of the defendant, and whether any of those assets are jointly controlled;

"(D) the projected earnings and other income of the defendant;

"(E) any financial obligations of the defendant, including obligations to dependents;

"(F) whether the defendant has concealed or dissipated assets or income; and

"(G) any other appropriate circumstances.

"(7) USE OF RESOURCES.—Any substantial resources from any source, including inheritance, settlement, or other judgment shall be applied to any fine or assessment still owed.

"(8) NOMINAL PAYMENTS.—If the court finds that the economic circumstances of the defendant do not allow the immediate payment of any substantial amount of the fine or assessment imposed, the court

may direct the defendant to make nominal payments of not less than $100 per year toward the fine or assessment imposed.

"(9) INMATE FINANCIAL RESPONSIBILITY PROGRAM.—Court-imposed special payment directions shall not limit the ability of the Attorney General to maintain an Inmate Financial Responsibility Program that encourages sentenced inmates to meet their legitimate financial obligations.

"(10) ENFORCEMENT.—

"(A) IN GENERAL.—The ability of the Attorney General to enforce the fines and assessment ordered under paragraph (1) shall not be limited by an appeal, or the possibility of a correction, modification, amendment, adjustment, or reimposition of a sentence, unless the court expressly so orders, for good cause shown and stated on the record.

"(B) EXCEPTIONS.—Absent exceptional circumstances, as determined by the court, an order limiting enforcement of a fine or assessment shall—

"(i) require the defendant to deposit, in the registry of the district court, any

amount of the fine or assessment that is due;

"(ii) require the defendant to post a bond or other security to ensure payment of the fine or assessment that is due; or

"(iii) impose additional restraints upon the defendant to prevent the defendant from transferring or dissipating assets.

"(C) OTHER ACTIVITIES.—No order described in subparagraph (B) shall restrain the ability of the United States to continue its investigation of the defendant's financial circumstances, conduct discovery, record a lien, or seek any injunction or other relief from the court.

"(11) SPECIAL ASSESSMENTS.—The requirements of this subsection shall apply to the imposition and enforcement of any assessment imposed under section 3013 of this title.".

SEC. 104. COLLECTION OF UNPAID FINES OR RESTITUTION.

Section 3612(b) of title 18, United States Code, is amended to read as follows:

"(b) INFORMATION TO BE INCLUDED IN JUDGMENT; JUDGMENT TO BE TRANSMITTED TO THE ATTORNEY GENERAL.—

"(1) IN GENERAL.—A judgment or order imposing, modifying, or remitting a fine or restitution order of more than $100 shall include—

"(A) the name, social security account number, mailing address, and residence address of the defendant;

"(B) the docket number of the case;

"(C) the original amount of the fine or restitution order and the amount that is due and unpaid;

"(D) payment orders and directions imposed under section 3572(d) and section 3664(f) of this title; and

"(E) a description of any modification or remission.

"(2) TRANSMITTAL OF COPIES.—Not later than 10 days after entry of the judgment or order described in paragraph (1), the court shall transmit a certified copy of the judgment or order to the Attorney General.".

SEC. 105. ATTORNEY'S FEES FOR VICTIMS.

(a) ORDER OF RESTITUTION.—Section 3663(b) of title 18, United States Code, is amended—

(1) in paragraph (1)—

(A) in subparagraph (A), by striking "or" at the end;

(B) by redesignating subparagraph (B) as subparagraph (C);

(C) by inserting after subparagraph (A) the following:

"(B) reimburse the victim for attorneys' fees reasonably incurred in an attempt to retrieve damaged, lost, or destroyed property (which shall not include payment of salaries of Government attorneys); or"; and

(D) in subparagraph (C), as so redesignated by this subsection, by inserting "or (B)" after "subparagraph (A)";

(2) in paragraph (4)—

(A) by inserting "(including attorneys' fees necessarily and reasonably incurred for representation of the victim, which shall not include payment of salaries of Government attorneys)" after "other expenses related to participation in the investigation or prosecution of the offense"; and

(B) by striking "and" at the end;

(3) in paragraph (5), by striking the period and inserting "; and"; and

(4) by adding at the end the following:

"(6) in any case, reimburse the victim for reasonably incurred attorneys' fees that are necessary and foreseeable results of the defendant's crime (which shall not include payment of salaries of Government attorneys).".

(b) MANDATORY RESTITUTION TO VICTIMS OF CERTAIN CRIMES.—Section 3663A(b) of title 18, United States Code, is amended—

(1) in paragraph (1)—

(A) in subparagraph (A), by striking "or" at the end;

(B) by redesignating subparagraph (B) as subparagraph (C);

(C) by inserting after subparagraph (A) the following:

"(B) reimburse the victim for attorneys' fees reasonably incurred in an attempt to retrieve damaged, lost, or destroyed property (which shall not include payment of salaries of Government attorneys); or"; and

(D) in subparagraph (C), as so redesignated by this subsection, by inserting "or (B)" after "subparagraph (A)";

(2) in paragraph (3), by striking "and" at the end;

(3) in paragraph (4)—

(A) by inserting "(including attorneys' fees necessarily and reasonably incurred for representation of the victim, which shall not include payment of salaries of Government attorneys)" after "other expenses related to participation in the investigation or prosecution of the offense"; and

(B) by striking the period and inserting "; and"; and

(4) by adding at the end the following:

"(5) in any case, reimburse the victim for reasonably incurred attorneys' fees that are necessary and foreseeable results of the defendant's crime (which shall not include payment of salaries of Government attorneys).".

TITLE II—PRESERVATION OF ASSETS FOR RESTITUTION

SEC. 201. SHORT TITLE.

This title may be cited as the "Preservation of Assets for Restitution Act of 2007".

SEC. 202. AMENDMENTS TO THE MANDATORY VICTIMS RESTITUTION ACT.

(a) IN GENERAL.—Chapter 232 of title 18, United States Code, is amended by inserting after section 3664 the following:

"§ 3664A. Preservation of assets for restitution

"(a) PROTECTIVE ORDERS TO PRESERVE ASSETS.—

"(1) IN GENERAL.—Upon the Government's ex parte application and a finding of probable cause to believe that a defendant, if convicted, will be ordered to satisfy an order of restitution for an offense punishable by imprisonment for more than 1 year, the court—

"(A) shall—

"(i) enter a restraining order or injunction;

"(ii) require the execution of a satisfactory performance bond; or

"(iii) take any other action necessary to preserve the availability of any property traceable to the commission of the offense charged; and

"(B) if it determines that it is in the interests of justice to do so, shall issue any order necessary to preserve any nonexempt asset (as

1 defined in section 3613) of the defendant that
2 may be used to satisfy such restitution order.
3 "(2) PROCEDURES.—Applications and orders
4 issued under paragraph (1) shall be governed by the
5 procedures under section 413(e) of the Controlled
6 Substances Act (21 U.S.C. 853(e)) and in this sec-
7 tion.
8 "(3) MONETARY INSTRUMENTS.—If the prop-
9 erty in question is a monetary instrument (as de-
10 fined in section 1956(c)(5)) or funds in electronic
11 form, the protective order issued under paragraph
12 (1) may take the form of a warrant authorizing the
13 Government to seize the property and to deposit it
14 into an interest-bearing account in the Registry of
15 the Court in the district in which the warrant was
16 issued, or into another such account maintained by
17 a substitute property custodian, as the court may di-
18 rect.
19 "(4) POST-INDICTMENT.—A post-indictment
20 protective order entered under paragraph (1) shall
21 remain in effect through the conclusion of the crimi-
22 nal case, including sentencing and any post-sen-
23 tencing proceedings, until seizure or other disposi-
24 tion of the subject property, unless modified by the

1 court upon a motion by the Government or under
2 subsection (b) or (c).
3 "(b) DEFENDANT'S RIGHT TO A HEARING.—
4 "(1) IN GENERAL.—In the case of a
5 preindictment protective order entered under sub-
6 section (a)(1), the defendant's right to a post-re-
7 straint hearing shall be governed by paragraphs
8 (1)(B) and (2) of section 413(e) of the Controlled
9 Substances Act (21 U.S.C. 853(e)).
10 "(2) POST-INDICTMENT.—In the case of a post-
11 indictment protective order entered under subsection
12 (a)(1), the defendant shall have a right to a post-re-
13 straint hearing regarding the continuation or modi-
14 fication of the order if the defendant—
15 "(A) establishes by a preponderance of the
16 evidence that there are no assets, other than
17 the restrained property, available to the defend-
18 ant to retain counsel in the criminal case or to
19 provide for a reasonable living allowance for the
20 necessary expenses of the defendant and the de-
21 fendant's lawful dependents; and
22 "(B) makes a prima facie showing that
23 there is bona fide reason to believe that the
24 court's ex parte finding of probable cause under
25 subsection (a)(1) was in error.

"(3) HEARING.—

"(A) IN GENERAL.—If the court determines that the defendant has satisfied the requirements of paragraph (2), it may hold a hearing to determine whether there is probable cause to believe that the defendant, if convicted, will be ordered to satisfy an order of restitution for an offense punishable by imprisonment for more than 1 year, and that the seized or restrained property may be needed to satisfy such restitution order.

"(B) PROBABLE CAUSE.—If the court finds probable cause under subparagraph (A), the protective order shall remain in effect.

"(C) NO PROBABLE CAUSE.—If the court finds under subparagraph (A) that no probable cause exists as to some or all of the property, or determines that more property has been seized and restrained than may be needed to satisfy a restitution order, it shall modify the protective order to the extent necessary to release the property that should not have been restrained.

"(4) REBUTTAL.—If the court conducts an evidentiary hearing under paragraph (3), the court

shall afford the Government an opportunity to present rebuttal evidence and to cross-examine any witness that the defendant may present.

"(5) PRETRIAL HEARING.—In any pretrial hearing on a protective order issued under subsection (a)(1), the court may not entertain challenges to the grand jury's finding of probable cause regarding the criminal offense giving rise to a potential restitution order. The court shall ensure that such hearings are not used to obtain disclosure of evidence or the identities of witnesses earlier than required by the Federal Rules of Criminal Procedure or other applicable law.

"(c) THIRD PARTY'S RIGHT TO POST-RESTRAINT HEARING.—

"(1) IN GENERAL.—A person other than the defendant who has a legal interest in property affected by a protective order issued under subsection (a)(1) may move to modify the order on the grounds that—

"(A) the order causes an immediate and irreparable hardship to the moving party; and

"(B) less intrusive means exist to preserve the property for the purpose of restitution.

"(2) MODIFICATION.—If, after considering any rebuttal evidence offered by the Government, the court determines that the moving party has made the showings required under paragraph (1), the court shall modify the order to mitigate the hardship, to the extent that it is possible to do so while preserving the asset for restitution.

"(3) INTERVENTION.—

"(A) IN GENERAL.—Except as provided in subparagraph (B) or paragraph (1), a person other than a defendant has no right to intervene in the criminal case to object to the entry of any order issued under this section or otherwise to object to an order directing a defendant to pay restitution.

"(B) EXCEPTION.—If, at the conclusion of the criminal case, the court orders the defendant to use particular assets to satisfy an order of restitution (including assets that have been seized or restrained pursuant to this section) the court shall give persons other than the defendant the opportunity to object to the order on the ground that the property belonged in whole or in part to the third party and not to the defendant, as provided in section 413(n) of

1 the Controlled Substances Act (21 U.S.C.
2 853(n)).
3 "(d) GEOGRAPHIC SCOPE OF ORDER.—
4 "(1) IN GENERAL.—A district court of the
5 United States shall have jurisdiction to enter an
6 order under this section without regard to the loca-
7 tion of the property subject to the order.
8 "(2) OUTSIDE THE UNITED STATES.—If the
9 property subject to an order issued under this sec-
10 tion is located outside of the United States, the
11 order may be transmitted to the central authority of
12 any foreign state for service in accordance with any
13 treaty or other international agreement.
14 "(e) NO EFFECT ON OTHER GOVERNMENT AC-
15 TION.—Nothing in this section shall be construed to pre-
16 clude the Government from seeking the seizure, restraint,
17 or forfeiture of assets under the asset forfeiture laws of
18 the United States.
19 "(f) LIMITATION ON RIGHTS CONFERRED.—Nothing
20 in this section shall be construed to create any enforceable
21 right to have the Government seek the seizure or restraint
22 of property for restitution.
23 "(g) RECEIVERS.—
24 "(1) IN GENERAL.—A court issuing an order
25 under this section may appoint a receiver under sec-

tion 1956(b)(4) to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, that have been restrained in accordance with this section.

"(2) DISTRIBUTION OF PROPERTY.—The receiver shall have the power to distribute property in its control to each victim identified in an order of restitution at such time, and in such manner, as the court may authorize.".

(b) CONFORMING AMENDMENT.—The section analysis for chapter 232 of title 18, United States Code, is amended by inserting after the item relating to section 3664 the following:

"Sec. 3664A. Preservation of assets for restitution.".

SEC. 203. AMENDMENTS TO THE ANTI-FRAUD INJUNCTION STATUTE.

Section 1345(a) of title 18, United States Code, is amended—

(1) in paragraph (1)—

(A) in subparagraph (B), by striking "or" at the end; and

(B) by inserting after subparagraph (C) the following:

"(D) committing or about to commit a Federal offense that may result in an order of restitution;"; and

(2) in paragraph (2)—

(A) by striking "a banking violation" and all that follows through "healthcare offense" and inserting "a violation or offense identified in paragraph (1)"; and

(B) by inserting "or offense" after "traceable to such violation".

SEC. 204. AMENDMENTS TO THE FEDERAL DEBT COLLECTION PROCEDURES ACT.

(a) PROCESS.—Section 3004(b)(2) of title 28, United States Code, is amended by inserting after "in which the debtor resides." the following: "In a criminal case, the district court for the district in which the defendant was sentenced may deny the request.".

(b) PREJUDGMENT REMEDIES.—Section 3101 of title 28, United States Code, is amended—

(1) in subsection (a)(1) by inserting after "the filing of a civil action on a claim for a debt" the following: "or in any criminal action where the court may enter an order of restitution"; and

(2) in subsection (d)—

(A) by inserting after "The Government wants to make sure [name of debtor] will pay if the court determines that this money is owed.' " the following:

1 "'In a criminal action, use the following opening
2 paragraph: You are hereby notified that this [property]
3 is being taken by the United States Government [the Gov-
4 ernment], which says that [name of debtor], if convicted,
5 may owe as restitution $ [amount]. The Government says
6 it must take this property at this time because [recite the
7 pertinent ground or grounds from section 3101(b)]. The
8 Government wants to make sure [name of debtor] will pay
9 if the court determines that restitution is owed.' ".

10 (B) by inserting after "a statement that
11 different property may be so exempted with re-
12 spect to the State in which the debtor re-
13 sides.]' " the following:

14 "'[In a criminal action, the statement summarizing
15 the types of property that may be exempt shall list only
16 those types of property that may be exempt under section
17 3613 of title 18.]' "; and

18 (C) by inserting after "You must also send
19 a copy of your request to the Government at
20 [address], so the Government will know you
21 want the proceeding to be transferred.' " the
22 following:

23 "'If this Notice is issued in conjunction with a crimi-
24 nal case, the district court where the criminal action is

pending may deny your request for a transfer of this proceeding.' ".

(c) ENFORCEMENT.—Section 3202(b) of title 28, United States Code, is amended—

(1) by inserting after "a statement that different property may be so exempted with respect to the State in which the debtor resides.]' " the following:

" '[In a criminal action, the statement summarizing the types of property that may be exempt shall list only those types of property that may be exempt under section 3613 of title 18.]' "; and

(2) by inserting after "you want the proceeding to be transferred.' " the following:

" 'If this notice is issued in conjunction with a criminal case, the district court where the criminal action is pending may deny your request for a transfer of this proceeding.' ".

TITLE III—ENVIRONMENTAL CRIMES RESTITUTION

SEC. 301. SHORT TITLE.

This title may be cited as the "Environmental Crimes Restitution Act of 2007".

SEC. 302. IMMEDIATE AVAILABILITY OF RESTITUTION TO VICTIMS OF ENVIRONMENTAL CRIMES.

Section 3663(a)(1)(A) of title 18, United States Code, is amended by striking "or section 5124, 46312, 46502, or 46504 of title 49," and inserting "paragraph (2) or (3) of section 309(c) of the Federal Water Pollution Control Act (33 U.S.C. 1319(c)), section 105(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1415(b)), section 9(a) of the Act to Prevent Pollution from Ships (33 U.S.C. 1908(a)), section 1423 or subsection (a) or (b) of section 1432 of the Safe Drinking Water Act (42 U.S.C. 300h–2 and 300i–l), subsection (d) or (e) of section 3008 of the Solid Waste Disposal Act (42 U.S.C. 6928), paragraph (1) or (5) of section 113(c) of the Clear Air Act (42 U.S.C. 7413(c)), or section 46312, 46502, or 46504 of title 49,".

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110TH CONGRESS
1ST SESSION

H. R. 845

To improve and consolidate the law relating to restitution in criminal cases.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 6, 2007

Mr. CHABOT (for himself, Mr. SMITH of Texas, Mr. GALLEGLY, Mr. FRANKS of Arizona, and Mr. PENCE) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To improve and consolidate the law relating to restitution in criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Criminal Restitution Improvement Act of 2007".

SEC. 2. MANDATORY RESTITUTION FOR FEDERAL OFFENSES.

Title 18, United States Code, is amended by striking section 3663 and all that follows through section 3664 and inserting the following:

1 **"§ 3663. Mandatory restitution**

2 "(a) RESTITUTION REQUIRED.—The court shall
3 order a convicted defendant to make restitution for all pe-
4 cuniary loss to identifiable victims, including pecuniary
5 loss resulting from physical injury to, or the death of, an-
6 other, proximately resulting from the offense.

7 "(b) TO WHOM MADE.—

8 "(1) GENERALLY.—The court shall order res-
9 titution be made to each victim of the offense.

10 "(2) DEFINITION OF VICTIM.—As used in this
11 section and section 3664, the term 'victim' means—

12 "(A) each identifiable person or entity suf-
13 fering the pecuniary loss (and any successor to
14 that person or entity); and

15 "(B) others, as agreed to in a plea agree-
16 ment or otherwise provided by law.

17 "(c) EXTENT OF RESTITUTION.—Restitution shall
18 compensate the victim for all of the victim's pecuniary
19 loss, including—

20 "(1) an amount equal to the greater of the
21 value of the property on the date of the damage,
22 loss, or destruction or the value of the property on
23 the date of sentencing;

24 "(2) an amount equal to the cost of necessary
25 medical and related professional services and devices
26 relating to physical, psychiatric, and psychological

1 care, including nonmedical care and treatment ren-
2 dered in accordance with a method of healing recog-
3 nized by the law of the place of treatment;
4 "(3) an amount equal to the cost of necessary
5 physical and occupational therapy and rehabilitation;
6 and
7 "(4) income lost by such victim as a result of
8 such offense;
9 "(5) lost income and necessary child care,
10 transportation, and other expenses incurred during
11 participation in the investigation or prosecution of
12 the offense or attendance at proceedings related to
13 the offense, including attorneys' fees necessarily and
14 reasonably incurred for representation of the victim
15 except for payment of salaries of government law-
16 yers; and
17 "(6) in the case of an offense resulting in the
18 death of the victim, an amount equal to the cost of
19 necessary funeral and related services.
20 "(d) SPECIAL RULE FOR MISDEMEANORS.—In the
21 case of a misdemeanor, an order of restitution may be in
22 lieu of any other penalty.
23 "(e) ALTERNATIVE ARRANGEMENTS IN LIGHT OF
24 PRACTICAL PROBLEMS.—The court shall provide as com-
25 plete a restitution to as many victims as possible, though

not the full restitution to all victims otherwise required by this section, to the extent the court finds on the record that—

"(1) the number of identifiable victims is so large as to make restitution impracticable; or

"(2) determining complex issues of fact related to the cause or amount of a victim's losses would complicate or prolong the sentencing process to such a degree that the need to provide restitution to that victim is outweighed by the burden on the sentencing process.

"§ 3664. Procedure for issuance and enforcement of order of restitution

"(a) REPORT BY PROBATION OFFICER.—

"(1) DUTY TO MAKE.—The probation officer shall obtain and include in the presentence report, or in a separate report, as the court may direct, information sufficient for the court to fashion a restitution order.

"(2) CONTENTS.—The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably

ascertained, or other circumstances exist that make this requirement impracticable, the probation officer shall so inform the court and make the best efforts possible to estimate the loss and identify the victims.

"(b) DISCLOSURE TO PARTIES.—The court shall disclose to the defendant, the attorney for the Government, and, upon request, potential recipients of restitution, all portions of the presentence or other report pertaining to the matters described in subsection (a).

"(c) INFORMATION FROM ATTORNEY FOR THE GOVERNMENT.—The attorney for the Government shall provide to the probation officer any information the Attorney for the Government has relevant to the matters required to be reported under subsection (a).

"(d) NOTICE TO VICTIMS.—The probation officer shall, before submitting the presentence report under subsection (a), to the extent practicable—

"(1) provide notice to all identified victims of—

"(A) the offense or offenses of which the defendant was convicted;

"(B) the amounts subject to restitution submitted to the probation officer;

"(C) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

"(D) the scheduled date, time, and place of the sentencing hearing;

"(E) the availability of a lien in favor of the victim; and

"(F) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

"(2) provide the victim with an affidavit form to submit pursuant to paragraph (1)(F).

"(e) DEFENDANT'S AFFIDAVIT AS TO FINANCES.—Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

"(f) ADDITIONAL DOCUMENTATION OR TESTIMONY.—After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained

1 to the greatest extent possible, and such records may be
2 filed or testimony heard in camera.

3 "(g) DATE FOR FINAL DETERMINATION.—If a vic-
4 tim's losses are not ascertainable by the date that is 10
5 days before sentencing, the attorney for the Government
6 or the probation officer shall so inform the court, and the
7 court shall set a date for the final determination of the
8 victim's losses, not to exceed 90 days after sentencing. If
9 the victim subsequently discovers further losses, the victim
10 shall have 60 days after discovery of those losses in which
11 to petition the court for an amended restitution order.
12 Such order may be granted only upon a showing of good
13 cause for the failure to include such losses in the initial
14 claim for restitution.

15 "(h) REFERRAL TO MAGISTRATE OR SPECIAL MAS-
16 TER.—The court may refer any issue arising in connection
17 with a proposed order of restitution to a magistrate judge
18 or special master for proposed findings of fact and rec-
19 ommendations as to disposition, subject to a de novo de-
20 termination of the issue by the court.

21 "(i) BURDENS OF PROOF.—Any dispute as to the
22 proper amount or type of restitution shall be resolved by
23 the court by the preponderance of the evidence. The bur-
24 den of demonstrating the amount of the loss sustained by
25 a victim of restitution as a result of the offense shall be

on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

"(j) ORDER OF PAYMENT.—

"(1) Upon determination of the amount of restitution owed to each victim, the court shall order that the full amount of restitution is due and payable immediately.

"(2) The court shall specify in the restitution order the manner in which the restitution is to be paid. The court may provide for payment in installments according to a schedule. The length of time over which scheduled payments are established shall be the shortest time in which full payment reasonably can be made and based on—

"(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

"(B) projected earnings and other income of the defendant; and

"(C) any financial obligations of the defendant; including obligations to dependents.

"(3) The court may direct the defendant to take any action, including the repatriation of assets or the surrender of the interest of the defendant in any asset, in order to pay restitution in accordance with this section.

"(4) The Attorney General may collect and apply unreported or otherwise newly available assets to the payment of restitution, without regard to any installment payment provisions.

"(k) ORDER AS FINAL JUDGMENT.—A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

"(1) such a sentence can subsequently be—

"(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

"(B) appealed and modified under section 3742;

"(C) amended under subsection (g); or

"(D) adjusted under section 3664(q), 3572, or 3613A; or

"(2) the defendant may be resentenced under section 3565 or 3614.

"(l) JOINT AND SEVERAL RESPONSIBILITY.—If the offense involves more than one defendant, the court may

1 order each defendant jointly and severally liable for any
2 or all of the restitution.

3 "(m) SUPERVISED RELEASE.—A court shall not ter-
4 minate a term of supervised release under section 3583(e)
5 before the order to pay restitution has been completely
6 satisfied. A court shall extend a term of supervised release
7 beyond that otherwise imposed under other provisions of
8 law, until the defendant has paid the restitution in full
9 or the court determines the economic circumstances of the
10 defendant do not allow the payment of any further restitu-
11 tion. Such determination is only for the purposes of this
12 subsection and does not affect the obligation to pay res-
13 titution or the ability of any entity to enforce restitution
14 under any other provision of law. If the supervised release
15 is extended under this subsection, the court shall order
16 that the sole condition of supervised release shall be pay-
17 ment of restitution.

18 "(n) EFFECT OF INSURANCE AND OTHER COM-
19 PENSATION.—

20 "(1) INSURANCE.—In no case shall the fact
21 that a victim receives or is entitled to receive com-
22 pensation with respect to a loss from insurance or
23 any other source be considered in determining the
24 amount of restitution. If a victim receives compensa-
25 tion from insurance or any other source with respect

to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all victims be paid before such a provider of compensation.

"(2) OTHER COMPENSATION.—Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

"(A) any Federal civil proceeding; and

"(B) any State civil proceeding, to the extent provided by the law of the State.

"(o) DETAILS OF PAYMENTS.—

"(1) MINIMUM PAYMENT REQUIRED.—A restitution order may direct the defendant to make nominal periodic payments if the court finds on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

"(2) IN-KIND PAYMENTS.—An in-kind payment may be in the form of return of property, replace-

1 ment of property, or if the victim agrees, services
2 rendered to the victim or a person or organization
3 other than the victim.

4 "(p) DIFFERENT PAYMENT SCHEDULES FOR MUL-
5 TIPLE VICTIMS.—If the court finds that more than 1 vic-
6 tim has sustained a loss requiring restitution by a defend-
7 ant, the court may provide for a different payment sched-
8 ule for each victim, based on their individual losses and
9 economic circumstances. In any case in which the United
10 States is a victim, the court shall ensure that all other
11 victims receive full restitution before the United States re-
12 ceives any restitution.

13 "(q) MATERIAL CHANGE IN DEFENDANT'S ABILITY
14 TO PAY.—The defendant shall notify the court and the
15 Attorney General of any material change in the defend-
16 ant's economic circumstances that might affect the de-
17 fendant's ability to pay restitution. The court may also
18 accept notification of a material change in the defendant's
19 economic circumstances from the United States or from
20 the victim. The Attorney General shall certify to the court
21 that the victims have been notified of the change in cir-
22 cumstances. Upon receipt of the notification, the court
23 may, on its own motion, or the motion of any party, in-
24 cluding the victim, adjust the payment schedule, or require

1 immediate payment in full, as the interests of justice re-
2 quire.

3 "(r) NAME AND ADDRESS CHANGES.—It is the re-
4 sponsibility of the victim to provide any change in name
5 or mailing address to the court while restitution is still
6 owed. Not later than 30 days after any change in name
7 or mailing or residence address, a person owing restitution
8 shall promptly report the change to the court. The con-
9 fidentiality of any information relating to a victim shall
10 be maintained.

11 "(s) ENFORCEMENT.—

12 "(1) GENERALLY.—An order of restitution may
13 be enforced by the United States in the manner pro-
14 vided for in subchapter C of chapter 227 and sub-
15 chapter B of chapter 229 of this title, or by all other
16 available and necessary means.

17 "(2) ABSTRACT OF JUDGMENT.—At the request
18 of a victim named in a restitution order, the clerk
19 of the court shall issue an abstract of judgment cer-
20 tifying that a judgment has been entered in favor of
21 such victim in the amount specified in the restitution
22 order. Upon registering, recording, docketing, or in-
23 dexing such abstract in accordance with the rules
24 and requirements relating to judgments of the court
25 of the State where the district court is located, the

1 abstract of judgment shall be a lien on the property
2 of the defendant located in such State in the same
3 manner and to the same extent and under the same
4 conditions as a judgment of a court of general juris-
5 diction in that State.
6 "(3) SPECIAL RULE FOR IN-KIND ORDERS.—An
7 order of in-kind restitution in the form of services
8 shall be enforced by the probation officer.
9 "(t) EFFECT OF ADDITIONAL RESOURCES.—If a per-
10 son obligated to provide restitution, or pay a fine, receives
11 additional resources from any source, including inherit-
12 ance, settlement, or other judgment, such person shall be
13 required to apply the value of such resources to any res-
14 titution or fine still owed.
15 "(u) RIGHTS OF VICTIMS.—
16 "(1) NOT REQUIRED TO PARTICIPATE.—No vic-
17 tim shall be required to participate in any phase of
18 a restitution order.
19 "(2) ASSIGNMENT TO FUND.—A victim may at
20 any time assign an interest in restitution payments
21 to the Crime Victims Fund in the Treasury without
22 in any way impairing the obligation of the defendant
23 to make such payments.
24 "(v) NO CAUSE OF ACTION CREATED AGAINST THE
25 UNITED STATES OR ITS OFFICERS OR EMPLOYEES.—

1 Nothing in this section or section or 3663 shall be con-
2 strued to create a cause of action not otherwise authorized
3 in favor of any person against the United States or any
4 officer or employee of the United States.

5 "(w) COLLATERAL ESTOPPEL.—A conviction of a de-
6 fendant for an offense involving the act giving rise to an
7 order of restitution shall estop the defendant from denying
8 the essential allegations of that offense in any subsequent
9 Federal civil proceeding or State civil proceeding, to the
10 extent consistent with State law, brought by the victim.".

11 **SEC. 3. TABLE OF SECTIONS AMENDMENT.**

12 The table of sections at the beginning of chapter 232
13 of title 18, United States Code, is amended by striking
14 the item relating to sections 3663 and all that follows the
15 item relating to section 3664 and inserting the following:

"3663. Mandatory restitution.
"3664. Procedure for issuance and enforcement of order of restitution.".

16 **SEC. 4. EFFECT OF RESTITUTION ORDER ON SENTENCE OF**
17 **PROBATION.**

18 Section 3564 of title 18, United States Code, is
19 amended by adding at the end the following:

20 "(f) RELATION TO RESTITUTION ORDER.—The court
21 shall not terminate a term of probation under section
22 3564(c) if the defendant has an unsatisfied order of res-
23 titution. The court shall extend probation for such a de-
24 fendant beyond any term otherwise provided by law until

the order is satisfied or the court determines the economic circumstances of the defendant do not allow the payment of any further restitution. Such determination is only for the purposes of this subsection and does not affect the obligation to pay restitution or the ability of any entity to enforce restitution under any other provision of law. The sole condition of such extended probation shall be the satisfaction of that order.".

SEC. 5. CONFORMING AMENDMENTS AND REPEALS.

(a) ELIMINATION OF SPECIALIZED MANDATORY RESTITUTION PROVISIONS.—

(1) IN TITLE 18.—Title 18, United States Code, is amended by striking—

(A) section 1593;

(B) section 2248;

(C) section 2259;

(D) section 2264; and

(E) section 2327.

(2) CONFORMING AMENDMENTS TO TABLES IN TITLE 18.—The table of sections for each of the chapters of title 18, United States Code, from which a section is stricken by subsection (a) is amended by striking the item relating to that section.

(3) IN THE CONTROLLED SUBSTANCES ACT.—The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended—

(A) in section 413(q), by striking "shall—" and all that follows through "3663A of title 18, United States Code." and inserting "order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in."; and

(B) in section 416, by striking subsection (c).

(b) ELIMINATION OF PROCEDURAL MATTERS MOVED TO RESTITUTION SECTIONS.—Section 3612(b)(1) of title 18, United States Code, is amended—

(1) by striking subparagraphs (F) and (G);

(2) by inserting "and" at the end of subparagraph (D); and

(3) by striking the semicolon at the end of subparagraph (E) and inserting a period.

(c) CROSS REFERENCE CORRECTIONS.—

(1) Section 3563(a)(6)(A) of title 18, United States Code, is amended by striking "2248, 2259, 2327, 3663, 3663A, and 3664" and inserting "3663 and 3664".

(2) Section 3613(c) of title 18, United States Code, is amended by striking "2248" and all that follows through "3664" and inserting "3663 and 3664".

SEC. 6. SPECIAL FORFEITURE OF COLLATERAL PROFITS FROM CRIME.

Subsection (a) of section 3681 of title 18, United States Code, is amended by striking " the interest of justice or an order of restitution" and all that follows through the end of the subsection and inserting "the compelling interest of preventing wrongdoers from profiting from their crimes or of providing restitution to the victims of those crimes so requires, order the offender (or any transferee of that defendant) to forfeit any profits made possible by the offense.".

SEC. 7. AMENDMENTS TO THE MANDATORY VICTIMS RESTITUTION ACT.

(a) IN GENERAL.—Chapter 232 of title 18, United States Code, is amended by inserting after section 3664 the following:

"§ 3664A. Preservation of assets for restitution

"(a) PROTECTIVE ORDERS TO PRESERVE ASSETS.—

"(1) IN GENERAL.—Upon the Government's ex parte application and a finding of probable cause that a defendant, if convicted, will be ordered to pay an approximate amount of restitution for an offense punishable by imprisonment for more than 1 year, the court—

"(A) shall—

"(i) enter a restraining order or injunction;

"(ii) require the execution of a satisfactory performance bond; or

"(iii) take any other action necessary to preserve the availability of any property traceable to the commission of the offense charged; and

"(B) if it determines that it is in the interests of justice to do so, shall issue any order necessary to preserve any nonexempt asset (as

1 defined in section 3613) of the defendant that
2 may be used to satisfy such restitution order.
3 "(2) EFFECT OF PROBABLE CAUSE FINDING.—
4 Any probable cause finding by the court under para-
5 graph (1) shall not limit the amount of restitution
6 the court may impose at the time of sentencing.
7 "(3) PROCEDURES.—Applications and orders
8 issued under paragraph (1) shall be governed by the
9 procedures under section 413(e) of the Controlled
10 Substances Act (21 U.S.C. 853(e)) and in this sec-
11 tion.
12 "(4) MONETARY INSTRUMENTS.—If the prop-
13 erty in question is a monetary instrument (as de-
14 fined in section 1956(c)(5)) or funds in electronic
15 form, the protective order issued under paragraph
16 (1) may take the form of a warrant authorizing the
17 Government to seize the property and to deposit it
18 into an interest-bearing account in the Registry of
19 the Court in the district in which the warrant was
20 issued, or into another such account maintained by
21 a substitute property custodian, as the court may di-
22 rect.
23 "(5) POST-INDICTMENT.—A post-indictment
24 protective order entered under paragraph (1) shall
25 remain in effect through the conclusion of the crimi-

nal case, including sentencing and any post-sentencing proceedings, until seizure or other disposition of the subject property, unless modified by the court upon a motion by the Government or under subsection (b) or (c).

"(b) DEFENDANT'S RIGHT TO A HEARING.—

"(1) IN GENERAL.—In the case of a preindictment protective order entered under subsection (a)(1), the defendant's right to a post-restraint hearing shall be governed by paragraphs (1)(B) and (2) of section 413(e) of the Controlled Substances Act (21 U.S.C. 853(e)).

"(2) POST-INDICTMENT.—In the case of a post-indictment protective order entered under subsection (a)(1), the defendant shall have a right to a post-restraint hearing regarding the continuation or modification of the order if the defendant—

"(A) establishes by a preponderance of the evidence that there are no assets, other than the restrained property, available to the defendant to retain counsel in the criminal case or to provide for a reasonable living allowance for the necessary expenses of the defendant and the defendant's lawful dependents; and

"(B) makes a prima facie showing that there is bona fide reason to believe that the court's ex parte finding of probable cause under subsection (a)(1) was in error.

"(3) HEARING.—

"(A) IN GENERAL.—If the court determines that the defendant has satisfied the requirements of paragraph (2), it may hold a hearing to determine whether there is probable cause to believe that the defendant, if convicted, will be ordered to satisfy an order of restitution for an offense punishable by imprisonment for more than 1 year, and that the seized or restrained property may be needed to satisfy such restitution order.

"(B) PROBABLE CAUSE.—If the court finds probable cause under subparagraph (A), the protective order shall remain in effect.

"(C) NO PROBABLE CAUSE.—If the court finds under subparagraph (A) that no probable cause exists as to some or all of the property, or determines that more property has been seized and restrained than may be needed to satisfy a restitution order, it shall modify the protective order to the extent necessary to re-

lease the property that should not have been restrained.

"(4) REBUTTAL.—If the court conducts an evidentiary hearing under paragraph (3), the court shall afford the Government an opportunity to present rebuttal evidence and to cross-examine any witness that the defendant may present.

"(5) PRETRIAL HEARING.—In any pretrial hearing on a protective order issued under subsection (a)(1), the court may not entertain challenges to the grand jury's finding of probable cause regarding the criminal offense giving rise to a potential restitution order. The court shall ensure that such hearings are not used to obtain disclosure of evidence or the identities of witnesses earlier than required by the Federal Rules of Criminal Procedure or other applicable law.

"(c) THIRD PARTY'S RIGHT TO POST-RESTRAINT HEARING.—

"(1) IN GENERAL.—A person other than the defendant who has a legal interest in property affected by a protective order issued under subsection (a)(1) may move to modify the order on the grounds that—

"(A) the order causes an immediate and irreparable hardship to the moving party; and

"(B) less intrusive means exist to preserve the property for the purpose of restitution.

"(2) MODIFICATION.—If, after considering any rebuttal evidence offered by the Government, the court determines that the moving party has made the showings required under paragraph (1), the court shall modify the order to mitigate the hardship, to the extent that it is possible to do so while preserving the asset for restitution.

"(3) INTERVENTION.—

"(A) IN GENERAL.—Except as provided in subparagraph (B) or paragraph (1), a person other than a defendant has no right to intervene in the criminal case to object to the entry of any order issued under this section or otherwise to object to an order directing a defendant to pay restitution.

"(B) EXCEPTION.—If, at the conclusion of the criminal case, the court orders the defendant to use particular assets to satisfy an order of restitution (including assets that have been seized or restrained pursuant to this section) the court shall give persons other than the de-

fendant the opportunity to object to the order on the ground that the property belonged in whole or in part to the third party and not to the defendant, as provided in section 413(n) of the Controlled Substances Act (21 U.S.C. 853(n)).

"(d) GEOGRAPHIC SCOPE OF ORDER.—

"(1) IN GENERAL.—A district court of the United States shall have jurisdiction to enter an order under this section without regard to the location of the property subject to the order.

"(2) OUTSIDE THE UNITED STATES.—If the property subject to an order issued under this section is located outside of the United States, the order may be transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement.

"(e) NO EFFECT ON OTHER GOVERNMENT ACTION.—Nothing in this section shall be construed to preclude the Government from seeking the seizure, restraint, or forfeiture of assets under the asset forfeiture laws of the United States.

"(f) LIMITATION ON RIGHTS CONFERRED.—Nothing in this section shall be construed to create any enforceable

1 right to have the Government seek the seizure or restraint
2 of property for restitution.
3 "(g) RECEIVERS.—
4 "(1) IN GENERAL.—A court issuing an order
5 under this section may appoint a receiver under sec-
6 tion 1956(b)(4) to collect, marshal, and take cus-
7 tody, control, and possession of all assets of the de-
8 fendant, wherever located, that have been restrained
9 in accordance with this section.
10 "(2) DISTRIBUTION OF PROPERTY.—The re-
11 ceiver shall have the power to distribute property in
12 its control to each victim identified in an order of
13 restitution at such time, and in such manner, as the
14 court may authorize.".
15 (b) CONFORMING AMENDMENT.—The table of sec-
16 tions at the beginning chapter 232 of title 18, United
17 States Code, is amended by inserting after the item relat-
18 ing to section 3664 the following:

"Sec. 3664A. Preservation of assets for restitution.".

19 **SEC. 8. AMENDMENTS TO THE ANTI-FRAUD INJUNCTION**
20 **STATUTE.**
21 Section 1345(a) of title 18, United States Code, is
22 amended—
23 (1) in paragraph (1)—
24 (A) in subparagraph (B), by striking "or"
25 at the end; and

(B) by inserting after subparagraph (C) the following:

"(D) committing or about to commit a Federal offense that may result in an order of restitution;"; and

(2) in paragraph (2)—

(A) by striking "a banking violation" and all that follows through "healthcare offense" and inserting "a violation or offense identified in paragraph (1)"; and

(B) by inserting "or offense" after "traceable to such violation".

SEC. 9. AMENDMENTS TO THE FEDERAL DEBT COLLECTION PROCEDURES ACT.

(a) PROCESS.—Section 3004(b)(2) of title 28, United States Code, is amended by inserting after "in which the debtor resides." the following: "In a criminal case, the district court for the district in which the defendant was sentenced may deny the request.".

(b) PREJUDGMENT REMEDIES.—Section 3101 of title 28, United States Code, is amended—

(1) in subsection (a)(1) by inserting after "the filing of a civil action on a claim for a debt" the following: "or in any criminal action where the court may enter an order of restitution"; and

(2) in subsection (d)—

(A) by inserting after "The Government wants to make sure [name of debtor] will pay if the court determines that this money is owed.' " the following:

" 'In a criminal action, use the following opening paragraph: You are hereby notified that this [property] is being taken by the United States Government [the Government], which says that [name of debtor], if convicted, may owe as restitution $ [amount]. The Government says it must take this property at this time because [recite the pertinent ground or grounds from section 3101(b)]. The Government wants to make sure [name of debtor] will pay if the court determines that restitution is owed.' ";

(B) by inserting after "a statement that different property may be so exempted with respect to the State in which the debtor resides.]' " the following:

" '[In a criminal action, the statement summarizing the types of property that may be exempt shall list only those types of property that may be exempt under section 3613 of title 18.]' "; and

(C) by inserting after "You must also send a copy of your request to the Government at [address], so the Government will know you

want the proceeding to be transferred.' " the following:

" 'If this Notice is issued in conjunction with a criminal case, the district court where the criminal action is pending may deny your request for a transfer of this proceeding.' ".

(c) ENFORCEMENT.—Section 3202(b) of title 28, United States Code, is amended—

(1) by inserting after "a statement that different property may be so exempted with respect to the State in which the debtor resides.]' " the following:

" '[In a criminal action, the statement summarizing the types of property that may be exempt shall list only those types of property that may be exempt under section 3613 of title 18.]' "; and

(2) by inserting after "you want the proceeding to be transferred.' " the following:

" 'If this notice is issued in conjunction with a criminal case, the district court where the criminal action is pending may deny your request for a transfer of this proceeding.' ".

SEC. 10. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Attorney General for enhancing the enforcement and litigation

1 of criminal debts owed to victims of Federal criminal of-
2 fenses $20 million for each of the fiscal years 2008
3 through 2012.

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