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Before The Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee

Legislative Proposals to Amend Federal Restitution Laws
April 3, 2008

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 restitution legislation introduced this Congress. 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 expressing 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

My concerns about this legislation are not limited to the pre-trial asset restraint provisions. However, I have been asked to focus my remarks on those provisions as they are, by far, the most objectionable provisions in the legislation from the standpoint of the criminal defense bar.[1]

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 legislation 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 legislation 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

[1] Section references are to the "Restitution for Victims of Crime Act of 2007" (S. 973 and H.R. 4140). Section 7 of the "Criminal Restitution Improvement Act of 2007" (H.R. 845) includes virtually identical pretrial restraint provisions.

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 legislation 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[2] 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.

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[2] *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.

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 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.[3]

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[3] 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

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 legitimate assets.[4] 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.[5]

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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.

[4] 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).

[5] 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 inappropriate slush fund. Chairman Henry Hyde and many other members of the House Judiciary

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.[6] 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 legislation 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 legislation 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 legislation automatically exempt assets needed to pay reasonable attorney's fees, litigation expenses, and necessary living expenses of the defendant and his immediate family.[7] The legislation's pre-trial restraint provision is blatantly skewed against the defendant and third parties.

Committee wanted to abolish this "earmarking" system as part of the CAFRA but the law enforcement community was adamantly opposed to any such reform.

[6] 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).

[7] 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

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 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

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substitute assets (*i.e.*, in the Fourth Circuit only). However, prosecutors ignore this "policy" as often as not.

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 legislation'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. Subsection (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).[8] That civil anti-fraud injunction statute reaches "clean" assets of the defendant ("property of equivalent value") and thus poses

[8] All three bills contain the identical expansion of the Anti-Fraud Injunction Statute.

the same problem as sec. 742.[9] 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 legislation 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 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

[9] 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.

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.