ENHANCED FINANCIAL RECOVERY AND EQUITABLE RETIREMENT TREATMENT ACT OF 2007

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

H.R. 2878

NOVEMBER 1, 2007

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NOVEMBER 1, 2007

ENHANCED FINANCIAL RECOVERY AND EQUITABLE RETIREMENT TREATMENT ACT OF 2007

THURSDAY, NOVEMBER 1, 2007

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

The Subcommittee met, pursuant to notice, at 10:04 a.m., in room 2141, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Waters, Nadler, Johnson, Jackson Lee, Davis, Baldwin, Sutton, Forbes, Coble, and Lungren.

Staff present: Bobby Vassar, Subcommittee Chief Counsel; Ameer Gopalani, Majority Counsel; Mario Dispenza, (Fellow) BATFE Detailee; Veronica Eligan, Majority Professional Staff Member; Caroline Lynch, Minority Counsel; and Kelsey Whitlock, Minority Staff Assistant.

Mr. SCOTT. The Subcommittee will now come to order. I am pleased to welcome you to today's hearing on H.R. 2878, the "Enhanced Financial Recovery and Equitable Treatment Act of 2007."

H.R. 2878 was introduced on June 27 this year by the gentleman from Alabama, Mr. Davis. The legislation currently enjoys bipartisan support of 36 cosponsors, including 10 Members of this Committee. The purpose of the measure is to improve the current set of retirement benefits afforded to Assistant U.S. Attorneys. According to a recent Department of Justice internal memo, the enhancement of the AUSA retirement benefit program is one meaningful way to improve the retention rate. Title II of the bill seeks to implement the change by elevating the current set of benefits to equal those currently offered to other law enforcement officials, including FBI, U.S. Marshals, and Bureau of Prison employees.

Under PAYGO, any bill that increases outlays has to be paid for, and we do have concerns about how this bill is paid for, and we will explore that concern during the hearings.

I would yield the balance of my time to the gentleman from Alabama, Mr. Davis.

[The text of the bill, H.R. 2878, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 2878

To amend titles 18 and 28 of the United States Code to provide incentives for the prompt payments of debts owed to the United States and the victims of crime by imposing surcharges on unpaid judgments owed to the United States and to the victims of crime, to provide for offsets on amounts collected by the Department of Justice for Federal agencies, and to increase the amount of special assessments imposed upon convicted persons; to establish an Enhanced Financial Recovery Fund to enhance, supplement and improve the debt collection activities of the Department of Justice; to amend title 5, United States Code, to provide to assistant United States attorneys the same retirement benefits as are afforded to Federal law enforcements officers, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 27, 2007

Mr. DAVIS of Alabama (for himself, Mr. DELAHUNT, Mr. TOM DAVIS of Virginia, Mr. CANNON, Mr. MCCAUL of Texas, Mr. SCHIFF, Ms. ROS-LEHTINEN, Mr. SHAYS, Mr. UDALL of New Mexico, Mr. MORAN of Virginia, Ms. NORTON, and Mr. CUMMINGS) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Oversight and Government Reform, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend titles 18 and 28 of the United States Code to provide incentives for the prompt payments of debts owed to the United States and the victims of crime by imposing surcharges on unpaid judgments owed to the United States and to the victims of crime, to provide for offsets on amounts collected by the Department of Justice for Federal agencies, and to increase the amount of special assessments imposed upon convicted persons; to establish an Enhanced Financial Recovery Fund to enhance, supplement and improve the debt collection activities of the Department of Justice; to amend title 5, United States Code, to provide to assistant United States attorneys the same retirement benefits as are afforded to Federal law enforcements officers, 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 "Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007".

TITLE I—ENHANCED FINANCIAL RECOVERY

SEC. 101. IMPOSITION OF CRIMINAL SURCHARGE.

(a) IN GENERAL.—Section 3612 of title 18, United States Code, is amended by striking subsection (g) and inserting the following:

"(g) IMPOSITION OF SURCHARGE.—

"(1) IN GENERAL.—A surcharge shall be imposed upon a defendant if there are any unpaid criminal monetary penalties as of the date specified in subsection (f)(1).

"(2) AMOUNT OF SURCHARGE.—The surcharge imposed under paragraph (1) shall be—

"(A) 5 percent of the unpaid principal balance; or

"(B) $50, if the unpaid balance is less than $1,000.

"(3) ALLOCATION OF PAYMENTS.—

"(A) FINE OR SPECIAL ASSESSMENT.—If a surcharge is imposed under paragraph (1) for a fine or special assessment—

"(i) an amount equal to 95 percent of each principal payment made by a defendant shall be credited to the Crime Victims Fund established under section 1402 of the Victims of Crime Act of 1984 (42 U.S.C. 10601); and

"(ii) an amount equal to 5 percent of each principal payment shall be credited to the Department of Justice Enhanced Financial Recovery Fund established under section 104 of the Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007.

"(B) RESTITUTION.—If a surcharge is imposed under paragraph (1) for a restitution obligation—

"(i) an amount equal to 95 percent of each principal payment shall be paid to any victim identified by the court; and

"(ii) an amount equal to 5 percent of each principal payment shall be credited to the Department of Justice Enhanced Financial Recovery Fund established under section 104 of the Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007.

"(C) SURCHARGES.—For any payment made by a defendant after the full amount of a surcharge imposed under paragraph (1) has been satisfied, the full amount of such payment shall be credited to the principal amount due or accrued interest, as the case may be.

"(4) DEFINITIONS.—In this section—

"(A) the term 'criminal monetary penalties' includes the principal amount of any amount imposed as a fine, restitution obligation, or special assessment, regardless of whether any payment schedule has been imposed; and

"(B) the term 'principal payment' does not include any amount that is imposed as interest, penalty, or a surcharge.".

(b) CONFORMING AMENDMENTS.—Section 3612 of title 18, United States Code, is amended—

(1) by striking subsections (d) and (e); and

(2) by redesignating subsections (f) through (i), as amended by this Act, as subsections (d) through (g), respectively.

SEC. 102. IMPOSITION OF CIVIL SURCHARGE.

(a) IN GENERAL.—Section 3011 of title 28, United States Code, is amended to read as follows:

"§ 3011. Imposition of surcharge

"(a) IN GENERAL.—A surcharge shall be imposed on a defendant if there is an unpaid balance due to the United States on any money judgment in a civil matter recovered in a district court as of—

"(1) the fifteenth day after the date of the judgment; or

"(2) if the day described in paragraph (1) is a Saturday, Sunday, or legal public holiday, the next day that is not a Saturday, Sunday, or legal holiday.

"(b) AMOUNT OF SURCHARGE.—A surcharge imposed under subsection (a) shall be—

"(1) 5 percent of the unpaid principal balance; or

"(2) $50, if the unpaid balance is less than $1,000.

"(c) ALLOCATION OF PAYMENTS.—If a surcharge is imposed under subsection (a)—

"(1) an amount equal to 95 percent of each principal payment made by a defendant shall be credited as otherwise provided by law; and

"(2) an amount equal to 5 percent of each principal payment shall be credited to the Department of Justice Enhanced Financial Recovery Fund established under section 104 of the Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007.

"(d) SURCHARGES.—For any payment made by a defendant after the full amount of a surcharge imposed under subsection(a) has been satisfied, the full amount of such payment shall be credited to the principal amount due or accrued interest, as the case may be.

"(e) DEFINITIONS.—In this section—

"(1) the term 'principal payment' does not include any amount that is imposed as interest, penalty, or a surcharge; and

"(2) the term 'unpaid balance due to the United States' includes any unpaid balance due to a person that was represented by the Department of Justice in the civil matter in which the money judgment was entered.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections at the beginning of subchapter A of chapter 176 of title 28, United States Code, is amended by striking the item relating to section 3011 and inserting the following:

"3011. Imposition of surcharge.".

SEC. 103. INCREASE IN THE AMOUNT OF SPECIAL ASSESSMENTS.

Section 3013 of title 18, United States Code, is amended by striking subsection (a) and inserting the following:

"(a) The court shall assess on any person convicted of an offense against the United States—

"(1) in the case of an infraction or a misdemeanor—

"(A) if the defendant is an individual—

"(i) the amount of $10 in the case of an infraction or a class C misdemeanor;

"(ii) the amount of $25 in the case of a class B misdemeanor; and

"(iii) the amount of $100 in the case of a class A misdemeanor; and

"(B) if the defendant is a person other than an individual—

"(i) the amount of $100 in the case of an infraction or a class C misdemeanor;

"(ii) the amount of $200 in the case of a class B misdemeanor; and

"(iii) the amount of $500 in the case of a class A misdemeanor; and

"(2) in the case of a felony—

"(A) the amount of $200 if the defendant is an individual; and

"(B) the amount of $1,000 if the defendant is a person other than an individual.".

SEC. 104. ENHANCED FINANCIAL RECOVERY FUND.

(a) ESTABLISHMENT.—There is established in the Treasury a separate account known as the Department of Justice Enhanced Financial Recovery Fund (in this section referred to as the "Fund").

(b) DEPOSITS.—Notwithstanding section 3302 of title 31, United States Code, or any other law regarding the crediting of collections, there shall be credited as an offsetting collection to the Fund an amount equal to—

(1) 2 percent of any amount collected pursuant to civil debt collection litigation activities of the Department of Justice (in addition to any amount credited under section 11013 of the 21st Century Department of Justice Appropriations Authorization Act (28 U.S.C. 527 note));

(2) 5 percent of all amounts collected as restitution due to the United States pursuant to the criminal debt collection litigation activities of the Department of Justice;

(3) any surcharge collected under section 3612(g) of title 18, United States Code, as amended by this Act, or section 3011 of title 28, United States Code, as amended by this Act; and

(4) 50 percent of any special assessment collected under section 3013(a) of title 18, United States Code, as amended by this Act.

(c) AVAILABILITY.—The amounts credited to the Fund shall remain available until expended.

(d) PAYMENTS FROM THE FUND.—

(1) AMOUNT.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the Attorney General shall use not less than $20,000,000 of the Fund in each fiscal year, to the extent that funds are available, for the civil and criminal debt collection activities of the Department of Justice, including restitution judgments where the beneficiaries are the victims of crime.

(B) EXCEPTIONS.—

(i) ADJUSTMENT OF AMOUNT.—In each fiscal year following the first fiscal year in which deposits into the Fund are greater than $20,000,000, the amount to be used under paragraph (1) shall be increased by a percentage equal to the change in the Consumer Price Index for the calendar year preceding that fiscal year.

(ii) LIMITATION.—In any fiscal year, amounts in the Fund shall be available to the extent that the amount appropriated in that fiscal year for the purposes described in subparagraph (A) is not less than an amount equal to the amount appropriated for such activities in fiscal year 2006, adjusted annually in the same proportion as increases reflected in the amount of aggregate level of appropriations for the Executive Office of United States Attorneys and United States Attorneys.

(2) USE OF FUNDS.—

(A) IN GENERAL.—Funds used under paragraph (1) shall be used to enhance, supplement, and improve civil and criminal debt collection litigation activities of the Department of Justice, primarily such activities by United States attorneys' offices. A portion of such sums may be used by the Department of Justice to provide legal, investigative, accounting, and training support to the United States attorneys' offices.

(B) LIMITATION ON USE.—Funds used under paragraph (1) may not be used to determine whether a defendant is guilty of an offense or liability to the United States (except incidentally for the provision of assistance necessary or desirable in a case to ensure the preservation of assets or the imposition of a judgment which assists in the enforcement of a judgment or in a proceeding directly related to the failure of a defendant to satisfy the monetary portion of a judgment).

(e) OTHER USE OF FUNDS.—After using funds under subsection (d), the Attorney General may use amounts remaining in the Fund for additional civil or criminal debt collection activities, for personnel expenses, for personnel benefit expenses incurred as a result of this Act or the amendments made by this Act, or for other prosecution and litigation expenses. The availability of amounts from the Fund shall have no effect on the implementation of title II or the amendments made by title II.

(f) DEFINITION.—In this section, the term "United States"—

(1) includes—

(A) the executive departments, the judicial and legislative branches, the military departments, and independent establishments of the United States; and

(B) corporations primarily acting as instrumentalities or agencies of the United States; and

(2) except as provided in paragraph (1), does not include any contractor of the United States.

SEC. 105. EFFECTIVE DATES.

(a) IN GENERAL.—The amendments made by section 101 and section 103 shall apply to any offense committed on or after the date of enactment of this Act, including any offense involving conduct that continued on or after the date of enactment of this Act.

(b) FUND AND SURCHARGES.—

(1) IN GENERAL.—Section 104 and the amendments made by section 102 shall take effect 30 days after the date of enactment of this Act.

(2) PENDING CASES.—The amendments made by section 102 shall apply to any case pending on or after the date of enactment of this Act.

TITLE II—EQUITABLE RETIREMENT TREATMENT OF ASSISTANT UNITED STATES ATTORNEYS

SEC. 201. RETIREMENT TREATMENT OF ASSISTANT UNITED STATES ATTORNEYS.

(a) CIVIL SERVICE RETIREMENT SYSTEM.—

(1) ASSISTANT UNITED STATES ATTORNEY DEFINED.—Section 8331 of title 5, United States Code, is amended—

(A) in paragraph (28), by striking "and" at the end;

(B) in paragraph (29) relating to dynamic assumptions, by striking the period and inserting a semicolon;

(C) by redesignating paragraph (29) relating to air traffic controllers as paragraph (30);

(D) in paragraph (30), as so redesignated, by striking the period and inserting "; and"; and

(E) by adding at the end the following:

"(31) 'assistant United States attorney' means an assistant United States attorney appointed under section 542 of title 28.".

(2) RETIREMENT TREATMENT.—Chapter 83 of title 5, United States Code, is amended by adding after section 8351 the following:

"§ 8352. Assistant United States attorneys

"Except as provided under the Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007 (including the provisions relating to the non-appli-

cability of mandatory separation requirements under section 8335(b) and 8425(b) of this title), an assistant United States attorney shall be treated in the same manner and to the same extent as a law enforcement officer for purposes of this chapter.".

(3) TECHNICAL AND CONFORMING AMENDMENTS.—

(A) TABLE OF SECTIONS.—The table of sections for chapter 83 of title 5, United States Code, is amended by inserting after the item relating to section 8351 the following:

"8352. Assistant United States attorneys.".

(B) MANDATORY SEPARATION.—Section 8335(a) of title 5, United States Code, is amended by striking "8331(29)(A)" and inserting "8331(30)(A)".

(b) FEDERAL EMPLOYEES' RETIREMENT SYSTEM.—

(1) ASSISTANT UNITED STATES ATTORNEY DEFINED.—Section 8401 of title 5, United States Code, is amended—

(A) in paragraph (34), by striking "and" at the end;

(B) in paragraph (35), by striking the period and inserting "; and"; and

(C) by adding at the end the following:

"(36) 'assistant United States attorney' means an assistant United States attorney appointed under section 542 of title 28.".

(2) RETIREMENT TREATMENT.—Section 8402 of title 5, United States Code, is amended by adding at the end the following:

"(h) Except as provided under the Enhanced Financial Recovery and Equitable Treatment Act of 2006 (including the provisions relating to the non-applicability of mandatory separation requirements under section 8335(b) and 8425(b) of this title), an assistant United States attorney shall be treated in the same manner and to the same extent as a law enforcement officer for purposes of this chapter.".

(c) MANDATORY SEPARATION.—Sections 8335(b)(1) and 8425(b)(1) of title 5, United States Code, are each amended by adding at the end the following: "This subsection shall not apply in the case of an assistant United States attorney.".

SEC. 202. PROVISIONS RELATING TO INCUMBENTS.

(a) DEFINITIONS.—In this section—

(1) the term "assistant United States attorney" means an assistant United States attorney appointed under section 542 of title 28, United States Code; and

(2) the term "incumbent" means an individual who is serving as an assistant United States attorney on the 120th day after the date of enactment of this Act.

(b) NOTICE REQUIREMENT.—Not later than 9 months after the date of enactment of this Act, the Department of Justice shall take measures reasonably designed to provide notice to incumbents on—

(1) their election rights under this title; and

(2) the effects of making or not making a timely election under this title.

(c) ELECTION AVAILABLE TO INCUMBENTS.—

(1) IN GENERAL.—An incumbent may elect, for all purposes, to be treated—

(A) in accordance with the amendments made by this title; or

(B) as if this title had never been enacted.

(2) FAILURE TO ELECT.—Failure to make a timely election under this subsection shall be treated in the same way as an election under paragraph (1)(A), made on the last day allowable under paragraph (3).

(3) TIME LIMITATION.—An election under this subsection shall not be effective unless the election is made not later than the earlier of—

(A) 120 days after the date on which the notice under subsection (b) is provided; or

(B) the date on which the incumbent involved separates from service.

(d) LIMITED RETROACTIVE EFFECT.—

(1) EFFECT ON RETIREMENT.—In the case of an incumbent who elects (or is deemed to have elected) the option under subsection (c)(1)(A), all service performed by that individual as an assistant United States attorney shall—

(A) to the extent performed on or after the effective date of that election, be treated in accordance with applicable provisions of subchapter III of chapter 83 or chapter 84 of title 5, United States Code, as amended by this title; and

(B) to the extent performed before the effective date of that election, be treated in accordance with applicable provisions of subchapter III of chapter 83 or chapter 84 of title 5, United States Code, as if the amendments made by this title had then been in effect.

Any service performed by the incumbent pursuant to an appointment under section 515, 541, 543, or 546 of title 28, United States Code, shall, for purposes

of subparagraph (B), be treated in the same manner as if performed as an assistant United States attorney; this sentence shall not be taken into account for purposes of determining whether or not an individual is an incumbent.

(2) NO OTHER RETROACTIVE EFFECT.—Nothing in this title (including the amendments made by this title) shall affect any of the terms or conditions of an individual's employment (apart from those governed by subchapter III of chapter 83 or chapter 84 of title 5, United States Code) with respect to any period of service preceding the date on which such individual's election under subsection (c) is made (or is deemed to have been made).

(e) INDIVIDUAL CONTRIBUTIONS FOR PRIOR SERVICE.—

(1) IN GENERAL.—An individual who makes an election under subsection (c)(1)(A) shall, with respect to prior service performed by such individual, deposit, with interest, to the Civil Service Retirement and Disability Fund the difference between the individual contributions that were actually made for such service and the individual contributions that would have been made for such service if the amendments made by this title had then been in effect.

(2) EFFECT OF NOT CONTRIBUTING.—If the deposit required under paragraph (1) is not paid, all prior service of the incumbent shall remain fully creditable as law enforcement officer service, but the resulting annuity shall be reduced in a manner similar to that described in section 8334(d)(2)(B) of title 5, United States Code.

(3) PRIOR SERVICE DEFINED.—In this subsection, the term "prior service" means, with respect to any individual who makes an election (or is deemed to have made an election) under subsection (c)(1)(A), all service performed as an assistant United States attorney, but not exceeding 20 years, performed by such individual before the date as of which applicable retirement deductions begin to be made in accordance with such election.

(f) REGULATIONS.—The Office of Personnel Management shall prescribe regulations necessary to carry out this title, including provisions under which any interest due on the amount described under subsection (e) shall be determined.

SEC. 203. EFFECTIVE DATE.

The amendments made by section 201 shall take effect on the first day of the first applicable pay period beginning on or after the 120th day after the date of enactment of this Act.

○

Mr. DAVIS. Thank you, Mr. Chairman, for convening this hearing.

And let me thank all the witnesses who are here. I have had a chance to work with the Executive Office of U.S. Attorneys and the U.S. Attorneys Association in formulating this bill, and we thank them for their good work. I am particularly glad to see the former Deputy Attorney General of the United States, former United States attorney in Atlanta, Larry Thompson, who is here, and I thank him for his insight today.

Mr. Chairman, this bill has two simple thrusts. The first one deals with an issue that may seem narrow to some people, but it is important, related to financial recovery in cases where the government seeks to recoup money. In many instances when we have these cases, there is a financial victim. In some cases the government is the financial victim. We have struggled to collect debts. We have struggled to collect revenues over the last several years. Estimates vary widely from 14 percent to 33 percent, but I think we all agree that we can do better.

This bill gets at that problem by imposing a late fee on unpaid criminal penalties. In effect, if a defendant is late in making a principle payment, there is a surcharge of 5 percent that would be added if the judgment is not paid within 15 days of judgment as

it should be. What we would do is to gather the money from these late assessment fees and to use them for primarily two purposes, part of it to enhance the victims' recovery fund and part of it to enhance what DOJ calls its enhanced financial recovery fund.

The enhanced financial recovery fund, in plain English, is the pocket of money that goes to U.S. attorneys offices to help them collect debt, to help them go out and collect these resources that may be owed to the government. It is interesting to me. You know, Washington, DC. is not good at putting numbers in perspective and numbers that they think are small are massive to our constituents. In the last several years, DOJ has collected between $3 billion and $5.8 billion every year in collections from defendants, corporate and individual, more than most of us would have thought.

As I said, some numbers indicate that even with those amounts of money—$3 billion to $5.8 billion—the collection rate is 14 percent. An increase of one-quarter of 1 percent would recoup an additional $10 million. So we can bring in good amounts of money for a relatively small amount of additional collection activity. That is the first part of this bill.

The second part of it is something that I think we all can appreciate. As of today, assistant United States attorneys, career assistant United States attorneys who choose to retire from that job are in a worse-off position financially than every other class of Federal law enforcement officer. I don't think there is a justification for that.

If you are a career assistant United States attorney, you make the decision to serve the public over a period of time, and the average lifespan, career-span of these individuals is 8 to 9 years. That includes the big giant offices where people come and go, and allow the small offices like the one that I served in in the Middle District of Alabama, where it is not uncommon at all for AUSAs to serve the whole span of their career. I always think of my old friend Broward Siegrist in Montgomery, Alabama, who was an assistant U.S. attorney for 35 years. He would not have done anything else.

Some people say, well, there are other ways to get at this problem. Some people say why not just raise the pay for assistant U.S. attorneys. We should do that, but as a practical matter, people don't do this work because of the pay. You can never pay assistants in Atlanta what Alston Bird is going to pay them. You can't pay assistants in Birmingham what Maynard Cooper would pay them.

What you can do, however, is to take the ones who have decided to stay in the system and give them an equitable retirement that matches that of other law enforcement officers. That is all that provision of this bill does, to move career prosecutors into line with FBI agents, DEA agents and other Federal law enforcement officers.

I will say finally, Chairman Scott, this Committee, every now and then, we have occasional disagreements. The good thing about this bill is it has strong bipartisan support. It has a chance at movement, and I welcome the opportunity to have a good uncontentious discussion in the Judiciary Committee today.

I yield back.

Mr. SCOTT. Thank you. The gentleman's time has expired.

I yield now to my colleague, the Ranking Member of the Subcommittee, Mr. Forbes.

Mr. FORBES. Thank you, Chairman Scott, for holding this hearing.

I want to thank all the witnesses as well. We know how busy your schedules are and thank you for taking the time to share with us your expertise and knowledge on this.

Mr. Chairman, I commend you for holding this hearing today on H.R. 2878, the "Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007." It is an understatement to recognize the incredible contribution that Federal prosecutors play in our criminal justice system. There are over 5,000 assistant United States attorneys who prosecute criminal cases in 93 judicial districts.

The AUSAs handle some of the most important prosecutions in our communities. They work in the trenches to dismantle terrorist cells, violent gangs, sophisticated fraud rings and drug trafficking organizations. Some of the most significant Federal prosecutions of members of al-Qaeda, organized crime syndicates, the Oklahoma City bombing, the Unibomber and countless other cases were conducted by career prosecutors.

But these cases do not represent the day-in and day-out responsibility of Federal prosecutors who handle cases important to protecting our communities from terrorists, drug traffickers, violent criminals and sexual predators. To put it simply, the AUSAs are the backbone of our criminal justice system and they are dedicated public servants who make real and significant sacrifices every day.

In the last few years, we have seen unprecedented levels of threats and actual violence against prosecutors. In recognition of these threats, the House passed this year H.R. 660, the "Court Security Improvement Act of 2007," and included a specific provision requiring the Justice Department to submit to Congress a lengthy report on security measures needed to protect AUSAs and their families. Federal prosecutors deserve the same protections that judges receive.

H.R. 2878, the "Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007," recognizes the important contribution that career prosecutors make. It would provide career AUSAs with retirement benefits equal to those of Federal law enforcement agents. The act would provide an incentive for some career prosecutors to remain in the public sector.

H.R. 2878 also proposes a new and innovative financing mechanism to pay for the cost of the new retirement system. I want to commend representatives from the National Association of Assistant United States Attorneys for their proposal. It is innovative and merits serious consideration by the Judiciary Committee. I look forward to hearing from today's witnesses about this new proposal, and look forward to working with Chairman Scott on this important issue.

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

Mr. SCOTT. Thank you.

We have been joined by the gentleman from California, Mr. Lungren, and the gentleman from North Carolina, Mr. Coble. Without

objection, all Members may include opening statements in the record at this point.

We have a distinguished panel of witnesses here to help us consider the important issues before us today. Our first witness will be the former Deputy Attorney General of the United States, Department of Justice, Mr. Larry Thompson. He currently works in the private sector as senior vice president of government affairs, general counsel and secretary of PepsiCo. In this capacity, he is responsible for the company's worldwide legal functions, as well as its government affairs organization and the corporation's charitable foundation.

Prior to joining PepsiCo, former Deputy Attorney General Thompson had a distinguished career in public service. In addition to serving in the number two position at the Department of Justice, he also led the National Security Coordination Council and chaired the department's Corporate Fraud Task Force. He holds a BA in sociology from Culver-Stockton College, and MA in sociology from Michigan State, and a JD from the University of Michigan.

Our next witness will be Steve Cook, who is currently the vice president of the National Association of Assistant U.S. Attorneys. Since 1986, he has also served as assistant U.S. attorney in the Eastern District of Tennessee. In the Eastern District, he has the proud distinction of serving as the section chief of the narcotics and violent crime section, the anti-gang coordinator, and the coordinator of the office's Project Safe Neighborhoods program. Prior to becoming an AUSA, he served as law clerk in the Sixth Circuit Court of Appeals.

Third we have Mr. Kenneth Melson, who currently serves as the director of the Executive Office of the United States Attorneys at the Department of Justice. He has also served as a Federal prosecutor for more than 24 years, initially joining the U.S. attorney's office in the Eastern District of Virginia in 1983. Prior to joining the department, he worked as an assistant commonwealth's attorney in Arlington, Virginia where he rose to the position of chief assistant commonwealth attorney. He holds a BA degree from Dennison University and a JD from the National Law Center at George Washington University.

Our final witness will be Ms. Amy Baron-Evans. Ms. Evans currently serves as National Sentencing Resource Counsel at the Federal Public and Community Defenders Office. In this capacity, she represents defenders' interests in matters of policy and provides litigation support in cases before the United States Supreme Court. She is the former co-chair of both the Federal Sentencing Guidelines Committee of the National Association of Criminal Defense Lawyers and the Practitioners Advisory Group to the U.S. Sentencing Commission. She received her JD from Harvard Law School.

Each of our witnesses' written statements will be made a part of the record, each statement in its entirety. I would ask that each witness summarize his or her testimony in 5 minutes or less. To help stay within that time, I think all of you are familiar with the timing device at the table. When you have 1 minute left, the light will go from green to yellow, and then finally to red when 5 minutes are up.

Mr. Thompson?

TESTIMONY OF LARRY D. THOMPSON, ESQUIRE, SENIOR VICE PRESIDENT, GOVERNMENT AFFAIRS, PEPSICO, INC., PURCHASE, NY

Mr. THOMPSON. Good morning, Chairman Scott, Ranking Member Forbes and Members of the Crime Subcommittee. I appreciate the opportunity this morning to appear before the Subcommittee in support of this important legislation.

Before I begin, I would like to sort of reintroduce to the Members of the Subcommittee my colleague and coworker Daniel Bryant, who spent many years in a professional capacity working for the Subcommittee. Dan?

I hope that doesn't affect my testimony. [Laughter.]

I would like to begin by just noting that I completely agree with the remarks of Congressman Davis that he presented to the Subcommittee. You have my prepared statement. I am not going to read it. I would like to amplify my prepared statement to the Subcommittee with some additional observations based on my 33 years of practicing law in both the private sector and in government service.

Our justice system is the envy of the world for a number of reasons, not the least of which is that it is an adversary system. No one is presumed guilty in our system of justice. People accused of wrongdoing have an absolute right to the very best legal representation that they can obtain or afford. That is the way it should be. But the legislation under consideration makes certain that the people of this great country are not shortchanged in this equation.

I cannot emphasize enough to the Members of this Subcommittee how complex and sensitive many of the cases are in the Federal courts throughout the system, in small districts and in large districts. Federal investigations and litigation is very, very complex and sensitive. AUSA's day-in and day-out face experienced and talented lawyers with tremendous resources available to them. Again, this is the way it should be, but quite frankly it is a continuing struggle for the Department of Justice to meet this challenge.

During my two stints in the Department of Justice, I have witnessed AUSAs undertake literally heroic acts of dedication and professionalism in the face of better resourced and more experienced adversaries, and prevail on behalf of justice.

Chairman Scott, permit me to give you two examples really from each end of the chronological spectrum of my career. In the early 1980's, four Federal prosecutors took on a literal army of talented and experienced defense lawyers in Operation Southern Comfort in the Northern District of Georgia, which at the time involved the largest drug smuggling case ever brought by the Federal Government. The case, which had a nexus to organized crime in the U.S. and terrorism in Colombia, went to trial with 13 or 14 defendants. The trial, which I participated in, lasted 2½ months.

Extensive evidence of racketeering and even murder was introduced at trial. All but one of the defendants, an admittedly minor player, were found guilty, and several of the defendants remain in prison today. This was a terrific effort on behalf of dedicated career

prosecutors. Three of these professionals left government shortly after this trial. Today, all are now in the private sector.

More recently, let me bring your attention to 2002, in which our financial markets were rocked with a spate of corporate scandals. The most notable of these scandals was the collapse of the Enron Corporation. The fraud involved in the Enron case was massive and complex. Again, in the face of experienced and well-resourced adversaries, the key participants in the Enron fraud case have been brought to justice.

This single case in my judgment has helped to restore Americans' confidence both in their financial markets and in their justice system. It demonstrates that no one, even powerful executives, is above the law. Now, several of the Enron prosecutors have left government service for the private sector.

Today following 9/11, we need experienced and balanced AUSAs in the Department of Justice ranks. These prosecutors and civil AUSAs day-in and day-out help to lead investigations and give sensitive counsel to investigators to help prevent terrorist activity in our homeland and help secure the public safety.

These AUSAs work alongside dedicated Federal law enforcement officials in the trenches, but their retirement benefits are not the same. I could say that this is not fair, but I will use a legal term. It is not equitable. For these reasons, I support this legislation.

One of the reasons—if I could just have 1 second, Mr. Chairman—one of the reasons that we have this disparity is that in the past, AUSAs were, when the retirement system was initially set up, AUSAs were in some instances political appointees. That is not the case today. When I was a U.S. attorney, for example, I hired a young lawyer. I didn't ask him about his politics. I was in the Reagan administration. He went on to serve with distinction as a United States attorney in the Clinton Administration, Kent Alexander, and for all these reasons I wholeheartedly support this important legislation.

Thank you.

Sorry—5 minutes is very difficult for a lawyer.

[The prepared statement of Mr. Thompson follows:]

PREPARED STATEMENT OF LARRY D. THOMPSON

Chairman Scott, Ranking Member Forbes and Members of the Crime Subcommittee.

I appreciate the opportunity to appear before the Crime Subcommittee today to address the need to ensure that Assistant United States Attorneys have the necessary tools and resources to do their jobs and in so doing receive equitable retirement benefits that recognize their critical role in federal law enforcement.

I would like to share with the Members of the Subcommittee three simple observations based on my experience over the years both in government service and in the private sector.

First, attracting and retaining top talent is essential for organizations to excel, whatever their mission.

Second, the U.S. federal law enforcement system is rightly the envy of the world in terms of its effectiveness, professionalism, and values. That success is largely a function of the quality of the professionals who serve in it—both federal agents and Assistant United States Attorneys.

Third, we cannot relax in our commitment to maintaining and building on the federal law enforcement system's legacy of success, especially in view of the increasing and necessary convergence of the law enforcement and national security missions in recent years.

The legislation under consideration, the Enhanced Financial Recovery and Equitable Retirement Treatment Act, H.R. 2878, would help strengthen a key part of our law enforcement community—Assistant United States Attorneys—by ensuring their equitable treatment and promoting the retention of talent. Of course, Assistant United States Attorneys aren't principally motivated by the salary: Most of them could quickly and appreciably increase their compensation by heading to the private sector. But we should always be pursuing reasonable steps that might increase the incentives to serve longer, allowing them to gain invaluable experience and thereby strengthening the federal law enforcement system. This bill represents such a step.

H.R. 2878 makes civil and criminal monetary judgments entered in favor of the United States, or the victims of crime, more collectible. In addition, the bill establishes for Assistant United States Attorneys a pension that is equitable to the pension received by the other federal law enforcement officers with whom federal prosecutors work. I think linking these two laudable objectives in this way represents a creative way to improve key aspects of the federal law enforcement mission.

Prior to serving as Deputy Attorney General from 2001 to 2003, I served as the United States Attorney for the Northern District of Georgia and led the Southeastern Organized Crime Drug Enforcement Task Force. These varied experiences allowed me to work directly and closely with scores of Assistant United States Attorneys through the years. It is an understatement to observe that their work in both the criminal and civil arenas is critically important and ever more complex. And September 11, 2001 has only accelerated the challenges they face. Their mission today demands increasing skill and sophistication in investigating and prosecuting a wide range of criminal activities, including domestic and international terrorism, organized drug trafficking, firearms crimes, and sophisticated white collar offenses. On the civil side as well, the role of Assistant United States Attorneys is increasingly demanding, whether defending federal government agencies or officials, initiating civil actions against individuals or corporations which commit fraud, or enforcing civil and criminal judgments entered in favor of the United States, or the victims of crime.

If there were ever a time when experience and good judgment were demanded within our federal law enforcement ranks, it is today.

The legislation under consideration would confer upon Assistant United States Attorneys a retirement benefit equal to that received by federal law enforcement officers with whom Assistant United States Attorneys work shoulder-to-shoulder in the investigation and enforcement of federal law. The original reason for the disparity between law enforcement officer and Assistant United States Attorney retirement benefits—due to the status of Assistant United States Attorneys as political appointees when the law enforcement officer retirement credit was first created more than 50 years ago—has long been superseded by the change in hiring of Assistant United States Attorneys as nonpolitical, merit-appointed civil servants. In fact, a report of the Attorney General's Advisory Committee in 1989 concluded:

> "Clearly, career AUSAs should be authorized to receive retirement benefits afforded all of the other members of the federal law enforcement community since the majority of AUSA responsibilities relate to the investigation, apprehension or detention of individuals suspected or convicted of criminal laws of the United States."

I believe it is crucial that there be the greatest equity possible regarding retirement benefits throughout the federal law enforcement community. The legislation under consideration today will recognize Assistant United States Attorneys for the key role they play in enforcing our nation's laws, and provide a well-deserved boost to their morale. An improved Assistant United States Attorney retirement benefit will assist United States Attorney Offices to more effectively recruit and retain skilled prosecutors, thereby developing the talent in its ranks more effectively. Such an outcome would undoubtedly strengthen their ability to perform their mission.

I would note that while I strongly support the aim of this legislation, there may be additional avenues available to Congress to promote the important objectives of equity and talent retention. I am aware that there have been constructive conversations ongoing for some time about addressing underlying compensation questions for Assistant United States Attorneys generally. I think such a review is appropriate.

The specific mechanism provided in this bill for supporting the financial basis for an improved Assistant United States Attorney retirement benefit advances another important aspect of the Justice Department's mission: Promoting the interests of victims of crime.

American taxpayers have a right to expect that those who commit fraud, harm our citizens, or commit other criminal or civil wrongdoing will be punished and that the federal government will make every reasonable effort to recover any ill-gotten

gains and other assets necessary to make the victims whole. The Department of Justice has the sole responsibility to collect criminal monetary judgments, including restitution to victims, and the primary responsibility to collect civil judgments. This responsibility falls chiefly upon United States Attorney Offices. Yet, as the Government Accountability has pointed out, the amount of outstanding criminal and civil debt to be collected is large and growing.

The collection of outstanding criminal and civil debt is inherently difficult to accomplish as many debtors are incarcerated and have long since dissipated their assets. The most sophisticated debtors, generally owing the largest debts, have hidden their assets under corporate shells, the names of their close friends or associates, or the laws of foreign countries. Competing priorities and limited resources further complicate the efforts of Assistant United States Attorneys to enforce judgments entered in favor of the United States or the victims of crime. Finally, current law gives defendants no real incentive to promptly satisfy, to the best of their ability, judgments entered in federal court when they are imposed. I do think the Justice Department has made real strides in recent years to facilitate improved collection efforts and I commend their efforts.

The legislation under consideration today addresses some of these problems by authorizing a significant infusion of resources—at least $20 million per year—to strengthen the Department's judgment enforcement efforts and to add additional Assistant United States Attorneys to the Department's judgment enforcement efforts. The funding for these resources is generated by surcharges, or late fees, that will be imposed on unpaid judgments, as an effective way to encourage defendants to satisfy their judgments promptly. Those late fees, along with a small increase in the offsets applied against recoveries made by the Justice Department for other federal agencies, will be deposited into an Enhanced Financial Recovery Fund. That Fund will pay for enhanced judgment enforcement efforts by the United States Attorneys Offices. I think this is a sensible public policy, promoting equity, incentivizing more prompt payments by debtors, and serving the interests of the victims of crime.

In conclusion, I believe that the aims of the legislation under consideration today are deserving of the Subcommittee's consideration and support. Restoring equity to the retirement benefits of Assistant United States Attorneys is overdue, and is the right thing to do. Enhancing the Department's judgment enforcement resources will improve the collection of outstanding judgments, including fines and restitution, and will advance the administration of justice.

Thank you very much for the opportunity to share these views with the Subcommittee.

Mr. SCOTT. I didn't make the rules.

Mr. THOMPSON. I know. Thank you. [Laughter.]

Mr. SCOTT. Mr. Cook?

TESTIMONY OF STEVEN H. COOK, ESQUIRE, VICE PRSEIDENT, NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS, LAKE RIDGE, VA

Mr. COOK. Thank you, Mr. Chairman and Members of the Subcommittee. On behalf of the 5,600 assistant United States attorneys serving across the country, I would like to express our deep and sincere appreciation to you for holding this hearing on H.R. 2878.

We are especially appreciative of the leadership of Congressman Davis, and we would also like to acknowledge the fact that he is a former assistant United States attorney, and we are proud to have had him among our ranks.

Likewise, we would like to express our appreciation to the other Members of the Committee who are cosponsors of our bill.

As has already been indicated, I certainly serve as the vice president of the National Association of Assistant United States Attorneys, and I am required to emphasize that I am here in that capacity, not in my capacity as a Department of Justice employee.

With that background, I would like to turn to H.R. 2878, that is the "Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007." This act has two subparts which I would like to address in turn. The first part calls for certain simple and straightforward improvements in financial recovery. I would like to begin by pointing out, as did Mr. Melson in his written comments, that the United States attorneys offices collect over $4 billion a year on average in outstanding judgments or civil settlements, that is between fiscal years 2003 and 2006. That is twice the total budget of all United States attorneys' offices.

Despite that, over $50 billion remains uncollected. We also agree with Mr. Melson's observation in his statements that a substantial majority of this is uncollectible. But we also agree, as is reflected in his statement, that billions remain uncollected that could be collected.

This bill would give United States attorneys offices the resources necessary to importantly improve the collection and enhancement recovery of money for our victims, for funds for the crime victims fund, as well as for the Federal agencies which ultimately represent monies to our taxpayers.

In a nutshell, it works by reforming debt collection procedures, capturing $20 million which is then used to enhance judgment enforcement. In particular, the bill does this with surcharges and late fees and offsets—surcharges or a 5 percent late fee imposed on judgments which are not paid within 15 days. Offsets are a 5 percent Federal restitution in addition to 2 percent on civil judgments.

I wish to emphasize that there is no offset on Federal victims nor the crime victims fund. These offsets simply associate the cost of collection with the agency that incurs the debt. Through the use of these two reforms, we estimate an increased revenue of approximately $175 million. The first $20 million of that would be used to provide resources to the United States attorneys' offices to enhance recovery efforts, essentially doubling the potential efforts that are currently focused on that.

There is, as I have said, $50 billion in outstanding debt. Funds after that would be used to offset the cost of equitable retirement to which I would like to turn now, the Equitable Retirement Treatment Act of 2007. First, I would like to thank former Deputy Attorney General Larry Thompson for his support of this important legislation. Make no mistake about it, the 5,600 assistant United States attorneys I referred to earlier are loyal, dedicated professionals who are proud to serve this country.

In doing so, however, they make many sacrifices. They make many sacrifices by working long hours under high pressure conditions. These are heavy litigation positions requiring them to spend many, many, many hours away from their families. They make sacrifices in terms of the wages. The law firms—I have a son who just graduated from law school—many law firms have offered and do offer salaries that far exceed what I am paid after 20 years of service.

Sacrifices in terms of the danger from the job—death threats are a routine part of our job. The very real nature of these threats can be demonstrated by Tom Wales, who was shot to death in his home on October 11, 2001. But AUSAs don't come to the job expecting

the same pay or benefits as private practice, and they aren't doing so now. This bill would simply bring retirement for AUSAs in line with the retirement provided to many others with whom they work in the criminal justice system—probation officers, pretrial services officers, U.S. marshals' employees, Bureau of Prisons employees, FBI agents, DEA agents, IRS agents.

As it stands now, the retirement provisions included in this bill are available to everyone with whom we serve on a daily basis in the criminal justice system. This bill would fill a long-open gap and provide the same benefits to dedicated assistant United States attorneys, and importantly do so with no burden on the taxpayer.

Mr. Chairman, I respectfully submit that extending these benefits to assistant United States attorneys is fair, equitable, and simply the right thing to do.

Thank you again for providing us with this hearing and this opportunity to be heard on this very important issue.

[The prepared statement of Mr. Cook follows:]

STATEMENT OF

STEVEN H. COOK

VICE PRESIDENT
NATIONAL ASSOCIATION OF ASSISTANT
UNITED STATES ATTORNEYS

H.R. 2878
THE ENHANCED FINANCIAL RECOVERY
AND
EQUITABLE RETIREMENT TREATMENT
ACT OF 2007

BEFORE THE
SUBCOMMITTEE ON CRIME
COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

NOVEMBER 1, 2007

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Mr. Chairman and Members of the Subcommittee:

On behalf of the National Association of Assistant United States Attorneys, thank you for holding today's hearing on H.R. 2878, the Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007. We are especially appreciative of the leadership of Rep. Artur Davis, a former Assistant United States Attorney and the chief sponsor of this legislation, as well as others on the Subcommittee who have joined as co-sponsors.

My name is Steve Cook and I serve as the Vice-President of the National Association of Assistant United States Attorneys[1], a non-profit professional association. There are 5,600 Assistant United States Attorneys who serve in the Department of Justice ("DOJ"). I am an Assistant United States Attorney in the United States Attorney's Office for the Eastern District of Tennessee in Knoxville. I currently serve as Section Chief of the Narcotics and Violent Crime Section, as well as the Anti-Gang Coordinator

[1] The National Association of Assistant United States Attorneys (NAAUSA) was founded in 1993 to protect, promote, foster and advance the mission of Assistant United States Attorneys ("AUSAs") and their responsibilities in promoting and preserving the Constitution of the United States, encouraging loyalty and dedication among AUSAs in support of the Department of Justice and encouraging the just enforcement of laws of the United States. NAAUSA is the voluntary "bar association" for the more than 5,600 AUSAs throughout the country and the U.S. territories. NAAUSA's nineteen-member Board of Directors is comprised of criminal and civil AUSAs from large and small offices around the country. The Association's membership includes AUSAs who are acknowledged experts on immigration, terrorism, social security, health care fraud, gang and narcotics prosecutions, bankruptcy litigation, asset forfeiture and collection of debts owed to the United States. From time to time, Congress has sought the Association's advice on numerous legislative proposals addressing crime, prosecutorial latitude and effectiveness and other law enforcement issues.

and the Project Safe Neighborhoods Coordinator. Prior to joining the United States Attorney's Office in 1986, I served as a law clerk to The Honorable H. Ted Milburn, judge of the United States Court of Appeals for the Sixth Circuit and was a police officer in Knoxville at the local and county levels for seven years.

I appear here today in my personal capacity. The views expressed herein are those of the National Association of Assistant United States Attorneys, and not necessarily the Department of Justice.

Assistant United States Attorneys on the Frontline of Justice

As the nation's principal litigators, the 5,600 Assistant United States Attorneys serve on the frontline of our justice system. They are integrally involved in a wide range of civil and criminal litigation responsibilities to enforce our federal laws and fight crime. To appreciate fully the impact of the legislation before you today, it is important to understand the role that Assistant United States Attorneys play in the nation's law enforcement system.

Each United States Attorney is the chief federal law enforcement officer of the United States within his or her particular jurisdiction. Assistant United States Attorneys conduct the vast majority of the trial work in which the United States is a party. According to the United States Attorneys Annual Statistical Report for 2006, Assistant United States Attorneys constituted 56

percent of all DOJ attorneys and about 70 percent of DOJ attorneys with prosecution or litigation responsibilities.

The United States Attorneys have four primary responsibilities under the United States Code:

- The prosecution of criminal cases brought by the Federal government;
- The litigation and defense of civil cases in which the United States is a party;
- The handling of criminal and civil appellate cases before the United States Courts of Appeals; and
- The enforcement of judgments entered in favor of the United States of the victims of crime.

It is this last responsibility – judgment enforcement – that is addressed by Title I of H.R. 2878.

Why Reform of DOJ Judgment Enforcement is Crucial

The Department of Justice has delegated operating responsibility for the collection of debts owed to the United States, or to the victims of crime, to Financial Litigation Units ("FLUs") within United States Attorney Offices. This primarily consists of enforcing judgments already entered, in civil or criminal cases, but also sometimes involves assisting in the entry of criminal judgments or obtaining civil judgments. The overwhelming amount of the debt due, for which the FLUs are responsible, is for restitution to non-federal victims.

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On average, between Fiscal Year 2003 and Fiscal Year 2006, the FLUs collected over $4 billion a year in outstanding judgments or civil settlements, an amount that is more than twice the total budget of all United States Attorney Offices. These proceeds ultimately are paid to the victims of crime, the Crime Victim Fund, the affected federal agency, or the United States Treasury.

Despite these significant sums collected, substantial sums remain uncollected. In fact, the historical collection rate by FLUs is only about 10 percent. Nearly $50 billion in outstanding judgments, criminal and civil, remains uncollected. The majority of the outstanding debt is likely uncollectible. A 50-year-old corporate executive who fraudulently obtains $10 million, but uses most of that money to further the scheme and squanders the rest, may be imprisoned for 10 years. Except in rare cases, a FLU will collect only a fraction of that debt.

But some similarly situated individuals have not spent or squandered all of their ill-gotten gains. Rather, they have fraudulently transferred or hidden their assets. The fraudulent transfers, or the hidden locations, are not advertised by the defendant. It takes hard work to uncover and unravel their deceit.

Other defendants have the ability to pay at least some of their debt, but they have insufficient motivation to do so. They may owe a $1000 fine and also have a cable bill for $100. If they don't pay the fine, next month

they still owe $1000. If they don't pay their cable bill, next month they have no TV. Not surprisingly, many defendants would rather watch repeats of *Law and Order* rather than satisfy their own debt to society.

What the United States Attorneys' Offices primarily need are additional resources to investigate and determine which debtors have the resources to satisfy their outstanding judgments but refuse to do so, and then to enforce the judgments already entered against those defendants. What many defendants need is an incentive to pay the judgments entered against them as promptly as they reasonably can pay.

How H.R. 2878 Reforms DOJ Judgment Enforcement

The Government Accountability Office has criticized DOJ's judgment enforcement efforts. [2] H.R. 2878 responds to that criticism by authorizing at least an additional $20 million annually for enhanced judgment enforcement efforts, and also by reforming federal debt collection procedures.

The collection reforms in H.R. 2878 rely upon a series of surcharges or late fees, which provide an incentive to defendants to pay more promptly,

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[2] *See, e.g.*, GAO, *Criminal Debt: Court-Ordered Restitution Amounts Far Exceed Likely Collections for the Crime Victims in Selected Financial Fraud Cases*, GAO-05-80 (Washington, D.C.: January 31, 2005); GAO, *Criminal Debt: Actions Still Needed to Address Deficiencies in Justice's Collection Processes*, GAO-04-338 (Washington, D.C.: Mar. 5, 2004); GAO, *Criminal Debt: Oversight and Actions Needed to Address Deficiencies in Collection Processes*, GAO-01-664 (Washington, D.C.: July 16, 2001).

and offsets, or collection fees, to be subtracted from debts collected for federal agencies by DOJ.

The surcharges -- constituting a five percent late fee on debts not paid within 15 days of the judgment -- will provide a modest, proportionate incentive that will encourage defendants to satisfy their judgments promptly. In criminal cases, when the defendant is indigent, both the Court and DOJ will retain the ability to reduce or remit interest on the judgment, to impose or agree to a payment schedule, or in some cases to remit the unpaid portion of the underlying judgment. In civil cases, when the defendant is indigent, DOJ retains the ability to compromise the judgment. These automatic surcharges will replace a complicated web of delinquent and default penalties that are difficult to administer, rarely imposed, and almost never collected.

The offsets from the debts collected by DOJ for other federal agencies will provide a collection fee that will associate the cost of collection with the ultimate recipient. The offsets will not apply to non-federal victims, nor to the Crime Victim Fund. In civil litigation, it will increase the current three percent offset by an additional two percent. In addition, the measure will add a five percent offset in cases involving federal restitution.

These surcharges and offsets will be used to fund the $20 million annual increase for enhanced judgment enforcement in the United States Attorneys Offices.

The funding also will be used to provide a sufficient source for DOJ to pay for the additional cost it will incur as a result of Title II of the Bill, which provides for an equitable AUSA pension.

Parity Between the Pensions of AUSAs and Law Enforcement Officers

H.R. 2878 provides parity between the retirement benefits of Assistant United States Attorneys and those of federal law enforcement officers,[3] and in so doing, strengthens the Department of Justice's ability to enforce federal laws and pursue justice by better ensuring the retention of skilled, experienced federal prosecutors.

Improving the retirement benefit of Assistant United States Attorneys confronts the growing exodus of outstanding prosecutors from the Department of Justice, a trend that is harming the Department's ability to prosecute terrorists, gang leaders, drug kingpins, intellectual property pirates, and white collar criminals.

DOJ internal studies and surveys have identified the Assistant United States Attorney retention rate as a significant problem and the enhancement of the AUSA retirement benefit as a singularly attractive remedy. This is because the average AUSA remains with DOJ for only eight years, and these

[3] The legislation provides to AUSAs the same retirement benefit that law enforcement officers receive: for those under FERS, a basic annuity of 34% of salary after 20 years of service at age 50; and for those under CSRS, an annuity of 50% of salary, with no social security benefits, after 20 years of service at age 50. AUSAs under FERS currently receive a basic annuity of 20% of salary after 20 years of service at age 60; those under CSRS receive an annuity of 36.25% of salary, with no social security benefits, after 20 years of service at age 60.

early departures cause a critical loss of litigation skill and experience to the Government. The retention problem varies from district to district, and is most dramatic in higher-cost districts. In the larger offices and in the metropolitan areas, the United States Attorneys Offices are the boot camp for the litigation divisions of private law firms, who then use the trained former AUSAs in litigation against the government.

Bringing the pension benefits of Assistant United States Attorneys into line with the retirement benefit package received by the other tens of thousands of federal law enforcement employees[4] will prompt a significant number of younger AUSAs to remain with the Department for a career. This process will help assure the government's retention of a greater number of skilled litigators to handle increasingly complex cases. Elevating the AUSA retirement benefit will assist DOJ more immediately in its current effort to realign the skill base of the AUSA workforce. Recent DOJ workforce realignment efforts have been only modestly successful, with cash incentive retirement offers prompting a limited response among eligible AUSAs.

Numerous United States Attorneys informally have praised the legislation for these and other reasons, and are increasingly supportive

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[4] Assistant United States Attorneys regularly and routinely coordinate and collaborate with law enforcement officers in the investigation, apprehension and detention of persons suspected or convicted of offenses against the criminal laws of the United States. These law enforcement officers, all of whom receive an enhanced pension benefit, include Special Agents of the Federal Bureau of Investigation, Secret Service, Internal Revenue Service and Drug Enforcement Administration, Deputy United States Marshals, United States Postal Inspectors, probation and pretrial service officers and Bureau of Prison employees.

because of the judgment enforcement reforms included in Title I of the measure.

Mr. Chairman, thank you for your leadership and concern for the challenges facing federal prosecutors and for the opportunity to appear before you today. I will be happy to answer any questions you may have.

Mr. SCOTT. Thank you.
Mr. Melson?

TESTIMONY OF KENNETH E. MELSON, DIRECTOR OF THE EXECUTIVE OFFICE FOR U.S. ATTORNEYS FOR THE EASTERN DISTRICT OF VIRGINIA, U.S. DEPARTMENT OF JUSTICE

Mr. MELSON. Thank you, Chairman Scott, Congressman Forbes and Members of the Committee. Thank you very much for giving me the opportunity to address this bill, and thank you all for your favorable comments concerning the great work that assistant United States attorneys do every single day of every single year.

The department considers the collection of debts owed to the Federal Government and to victims of crime to be a high priority. But by its very nature, collecting criminal debt is difficult, and significantly improving the process requires additional resources and legislative changes. Nevertheless, I believe that the steps the department has taken and those that we plan to take will go a long way toward the difference in the lives of Federal crime victims.

Let me first say that we work vigorously to collect debts on behalf of the government and nonfederal victims. We collected more than $19 billion in criminal and civil debts from 2002 to 2006. Over the last 3 years, we have collected well over $1 billion for victims of crime, with over $1.5 billion collected for victims of crime in fiscal year 2006 alone, a significant increase over the prior years.

While these are impressive results, we all know that there is more work to be done. By the end of fiscal year 2006, the amount of outstanding debt was reported to have grown to $46 billion. But it is important to note that some 90 percent of that debt is uncollectible for a variety of reasons, according to an independent study.

In the 2001 report, GAO made 13 recommendations to improve the efficiency and effectiveness of the criminal debt collection process. The Executive Office for United States Attorneys and the Department of Justice have addressed all 13 recommendations, and on January 5 of 2005, the Attorney General established the Task Force on Improving the Collection of Criminal Debt, as suggested by the GAO report.

The task force proposed legislation called the Restitution for Victims of Crime Act of 2006, which I am happy to say Congressman Forbes and Smith incorporated into their House bill, H.R. 3156. This proposal amends the Mandatory Victims Restitution Act to improve collection procedures by addressing obstacles encountered by U.S. attorneys' offices in the enforcement of restitution orders.

Among the three important changes is the provision of tools to restrain defendants' assets prior to trial to prevent the dissipation of resources otherwise available for restitution. The task force's legislative proposal has been included as an amendment to the 2008 CJS appropriations bill, which was recently passed by the Senate. I hope the conference committee will also see the importance of this legislation to the lives of crime victims.

With regard to H.R, 2878, the department is reviewing this complicated piece of legislation and the department has not yet taken a formal position on it. However, I would like to describe some of

the areas where the department has questions and concerns regarding H.R. 2878 as currently drafted.

The legislation does not address the fact that the Civil Service retirement and disability fund must cover $1.2 billion in retroactive agency contributions. Furthermore, the cost of ongoing increased agency contributions to the fund would be on the order of $75 million to $85 million a year. Although the legislation proposes a means for funding these costs through surcharges on unpaid debts and additional offsets, if collections are not sufficient to cover these costs, they would instead be borne by the U.S. attorneys' offices operating appropriations, a potentially significant vulnerability for our budget.

In addition, the legislation as now drafted delays, in our opinion, and at worst appears to permanently reduce by 5 percent the amounts that would otherwise be credited to victims of crime. We are also concerned about the fairness of providing expanded retirement benefits to AUSAs, but not to others in the department, many of whom perform substantially the same work as AUSAs. In addition, non-attorney staffs that support law enforcement would also be unfairly left out of this legislation.

The costs for this additional personnel and law enforcement officer retirement plan cannot be fiscally supported by the current proposal.

In closing, I want to stress that I identify the above concerns not because of any objection to improving assistant U.S. attorney compensation or benefits. I was an AUSA for 24 years, and I am committed to supporting the work of AUSAs and the work that they do. Recognizing the invaluable role of AUSAs in their law enforcement mission, the department's leadership is committed to and has been actively exploring ways to ensure we recruit and retain the best and most talented assistant United States attorneys.

Thank you.

[The prepared statement of Mr. Melson follows:]

PREPARED STATEMENT OF KENNETH E. MELSON

Testimony
Of

Kennneth E. Melson

Director, Executive Office for United States Attorneys

Before the

Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives

At the hearing entitled

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

November 1, 2007

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

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

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

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

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

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

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

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

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

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

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

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

components.

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

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

objectives set forth in the strategic plan.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. SCOTT. Thank you, Mr. Melson.
Ms. Baron-Evans?

TESTIMONY OF AMY BARON-EVANS, SENTENCING RESOURCE COUNCIL, FEDERAL PUBLIC AND COMMUNITY DEFENDERS, FEDERAL DEFENDER OFFICE, BOSTON, MA

Ms. BARON-EVANS. Thank you, Mr. Scott, Members of the Committee. Thank you for inviting me to share the views of the Federal public and community defenders on this bill, the Enhanced Financial Recovery and Equitable Retirement Treatment Act.

The Federal defenders exist because more than 80 percent of all Federal defendants are indigent and they require appointed counsel. Looking at this bill, it seems quite unrealistic that the bill could generate any more money than is currently being generated, given that 80 percent of Federal defendants are indigent, and that they become more so when they are prosecuted and convicted and go to prison.

That is not our major concern. Our major concern is more fundamental. First of all, there are three major concerns. First of all, this is a tax on the poor. Second of all, Mr. Thompson said that our justice system is the envy of the world. One of the reasons it is the envy of the world, if indeed it is, is because we have a public prosecutor system, a system in which—and before the revolution, this choice was made—a system in which the public prosecutor has no financial or other personal interest in the cases that he brings. This bill would give prosecutors a financial interest, and even if not acted upon, has the distinct appearance of impropriety.

The third problem is that it would create inequity vis-&-vis Federal defenders. This is not a problem that could be fixed by this bill because we could not possibly imagine asking for us to be making our living or our retirement benefits on the backs of our clients. That would be an obvious and direct conflict of interest.

Getting back to why it is a tax on the poor. We haven't really focused on those details. Any defendant who hasn't paid every bit of his or her monetary obligations by 15 days after judgment gets an automatic 5 percent surcharge. This is even if the judge imposed a payment schedule, which the judge has every authority to do by statute, even if the judge has imposed a specific date for payment and the person is not out of compliance with that schedule, even if the person is participating in the BOP's financial recovery system where they take a little bit of money out of their meager prison earnings regularly to pay off financial obligations.

This is a tax on the poor because the only people who can possibly pay it 15 days after judgment are people with funds, and we know that 80 percent of Federal defendants don't have funds. Also, increasing the special assessment by doubling it or factors also of three or four depending on what type of misdemeanor or felony it is—by the time a person gets out of prison and has paid off his monetary obligations, the very next $100 should not be going to a prosecutor's retirement fund. It should be going to that person's ability to get back on their feet and have a second chance to be a productive member of society. We shouldn't be telling people that their next $100 is going to support the prosecutor who put you in prison. It doesn't look good. It is not right.

As to the inequity with the Federal defenders, I am the only Federal defender here. We have offices in 89 of 94 judicial districts. The system couldn't function without us. There is a statute that Congress passed a long time ago which says Federal defenders shall not be paid more than AUSAs. The Judicial Conference adopted a policy saying that Federal defenders and Federal prosecutors, that there should be parity in their salaries and in their benefits for the very same reasons that are justifying this bill, which are that we have to be able to keep qualified and diversified assistant Federal public defenders.

Ask any judge and they would much prefer a well trained and smart Federal defender's office than a lack of one any day. It really helps the system move smoothly and it is the only way to effective assistance of counsel, which is part of our system, just as much as prosecution.

I might add, and this is no slam on my brothers here, but I might add that prosecutors rarely go out into the field, and when they go out into the field, they are accompanied by an agent with a gun. Federal public defenders, we only have one or two investigators in every one of our offices. That means that the lawyers are regularly going out and interviewing witnesses and going to dangerous places, and nobody has a gun, and even if we are accompanied by an investigator, the investigator doesn't have a gun.

Again, I am not suggesting that we should be given higher retirement benefits on the backs of our clients, and we would definitely oppose any plan like that. And you know, all things being equal, I would think it is great for everybody to get paid more money. But things cannot be equal under this bill.

Thank you.

[The prepared statement of Ms. Baron-Evans follows:]

PREPARED STATEMENT OF AMY BARON-EVANS

Mr. Chairman and Members of the Committee:

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

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

We oppose the bill because it amounts to a tax on the poor to fund retirement benefits for the relatively rich. Giving prosecutors a financial interest in the cases they bring would create a conflict of interest, and at least the appearance of injus-

[1] http://jnet.ao.dcn/Reports/Criminal__Justice__Reports/Good__Practices__for__Federal__Panel__Attorney__Program.html.

tice. The bill also has *ex post facto* problems. Further, the reason law enforcement officers receive the retirement package they do—hazardous duty—is entirely inapplicable to federal prosecutors. The bill would create inequity in compensation between AUSAs and Assistant Federal Public Defenders (AFPDs), which is unwarranted and would be detrimental to the system. To be perfectly clear, we are not seeking higher retirement benefits to be paid from funds recouped from our clients, an obvious conflict of interest.

THE PROPOSAL AMOUNTS TO A TAX ON THE POOR.

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

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

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

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

By the advent of the American Revolution, the English model, in which private parties brought criminal prosecutions, was replaced with the system we have today, in which public prosecutors acting solely in the public interest and without financial or other personal motives, prosecute criminal cases.[3] One reason for the switch was that persons acting as private prosecutors often abused the criminal justice system by initiating prosecutions to exert pressure for financial payment.[4] The public prosecution model helps to ensure equal justice, and the appearance of equal justice.

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

Funding prosecutorial activities other than debt collection from funds collected from convicted defendants would also be improper. Sec. 104(d)(2)(A) states that funds may be used by DOJ to provide "legal, investigative, accounting, and training support," without limitation to debt collection activities. While Sec. 104(d)(2)(B)

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

[3] *See* Abraham S. Goldstein, Prosecution: History of the Public Prosecutor, in 3 Encyclopedia of Crime and Justice 1286, 1286–1287 (S. Kadish ed. 1983). Juan Cardenas, The Crime Victim in the Prosecutorial Process, 9 Harv. J.L. & Pub. Pol'y 357, 371 (1986) ("[B]y the time of the American Revolution * * * local district attorneys were given a virtual monopoly over the power to prosecute. Crime victims were no longer allowed to manage and control the prosecution of their crimes."); Joan E. Jacoby, The American Prosecutor: A Search for Identity 19 (1980) ("By the advent of the American Revolution, private prosecution had been virtually eliminated in the American colonies and had been replaced by [a] series of public officers who were charged with handling criminal matters."); Randolph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 Rutgers L.J. 77, 99 (1995) ("By the time of the Revolution, public prosecution in America was standard, and private prosecution, in effect, was gone."); Jack M. Kress, "Progress and Prosecution," in 423 The Annals of the American Academy of Political and Social Science 99, 103 (1976) ("[P]ublic prosecution was firmly established as the American system by the time the Judiciary Act of 1789 created United States district attorneys to prosecute federal crimes."); Robert L. Misner, "Recasting Prosecutorial Discretion," 86 J. Crim. L. & Criminology 717, 729 (1996) ("By the outbreak of the Revolution, private prosecution was replaced by public prosecution through county officials.* * *").

[4] Goldstein, *supra** note 2, 1286–1287.

states that the funds may not be used "to determine whether a defendant is guilty of an offense," this limitation is essentially undone by subsequent text stating, "except incidentally" if "necessary or desirable" to preserve assets or enforce a judgment, and then quite broadly in Sec. 104(e), that the Attorney General may use the funds *"for other prosecution and litigation expenses."*

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

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

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

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

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

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

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

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

In sum, we urge you to reject this bill.

Mr. SCOTT. Thank you.

I thank all of you for your testimony.

I will recognize myself now for 5 minutes for questions.

Mr. Thompson indicated the question of equity and wanted all law enforcement-related attorneys to be getting the same kind of retirement. But Mr. Melson, doesn't this create inequity among U.S. attorneys or other attorneys because either all the assistant

U.S. attorneys would be covered or just those in criminal. Many AUSAs have essentially a civil practice. Is that not true?

Mr. MELSON. Yes, that is correct.

Mr. SCOTT. And would this bill give even those on the civil side who have essentially medical malpractice and those kind of cases, would they get the benefit of this retirement?

Mr. MELSON. As I understand the bill, Congressman Scott, it will give it to both civil and criminal, but I would add that the civil AUSAs often work at some point in their career on the criminal side and have also many of the same issues with respect to health care fraud civil investigations.

Mr. SCOTT. Okay. Well, are there other Department of Justice lawyers who do essentially criminal work that would not be covered by this bill?

Mr. MELSON. There are others in the department that will not be covered by this bill. We fully support what the AUSAs in the field do, but there are a substantial number of criminal litigating and civil litigating attorneys in the Department of Justice that sit side-by-side with U.S. attorneys in the field trying cases.

Mr. SCOTT. And they would not be covered by the bill?

Mr. MELSON. That is my understanding.

Mr. SCOTT. Okay. Can you respond to the comment that public defenders are an integral part of the criminal justice system and they are not included in the bill?

Mr. MELSON. Your honor, we agree that the public defender service does a great amount of work and their service to the community and to the justice system is very important. It is integral and I agree that we could not have an effective system without the public defenders. They are in perhaps a different position. We are looking at solely the bill as it pertains to AUSAs.

Mr. SCOTT. Do we have any indication—a comment was made that the money might not actually come in. How much of the total funds are we now collecting?

Mr. MELSON. We are collecting about 33 percent of the collectible fines and restitution.

Mr. SCOTT. Well, if you added on another 5 percent, what gives anybody the impression that we would increase the amount of money coming in?

Mr. MELSON. As we indicated, to significantly improve the collection process, we would need more resources and some legislative fixes.

Mr. SCOTT. If more money came in under the present system, are the victims being fully compensated? I mean, if more money came in, would we be choosing between a pension for Department of Justice officials or victim compensation? Would we be making a choice, or would victims be first in line?

Mr. MELSON. Well, we agree with your concern that any bill not affect the crime victims fund or victims receiving restitution. That is one of the aspects that we are looking at closely to make sure that there are not any unintended consequences of this bill to the victims of crime.

Mr. SCOTT. If more money came in, presumably the victims would be more likely to get compensated. Is there anything in the bill that puts the victim in front of the U.S. attorney pension fund?

Mr. MELSON. As I understand the bill, most of the money of the principal goes to the victims and the victims crime bill. It is after that is paid that the additional money is given to the retirement fund.

Mr. SCOTT. And after that happens, it is unlikely that there would be much more money left over. Is that not true?

Mr. MELSON. Well, that is one of the areas that we are looking at, and one of our concerns is whether or not there will be a sufficient amount of money to pay for both the ongoing retirement benefits and the $1.2 billion retroactive government contribution to the retirement fund.

Mr. SCOTT. Mr. Cook, could you respond to the concerns that it is inappropriate to have law enforcement have a personal financial interest in the outcome of cases? And whether or not there would be an extra burden for people re-entering? We have a second-chance bill that we hope to bring up next week to help people re-enter. Would this be counterproductive to that effort—those two questions, the conflict of interest, prosecutors having an interest in the outcome of a case, and the extra burden to those trying to re-enter.

Mr. COOK. Let me begin, if I may, with respect to the conflict of interest issue. I hope it goes without saying to this Committee that as our panel of assistant U.S. attorneys who have worked on this looked at this bill, it was of utmost concern that we avoided either any conflict of interest or appearance of any conflict of interest. The integrity of both the United States Department of Justice and the individual assistant U.S. attorneys who work in that system is paramount to us.

Having said that, any appearance of impropriety that has been suggested here could easily be resolved by making sure that any funds beyond those used to offset a retirement—that is to say a surplus—are channeled to a different area, for example Treasury, rather than the Department of Justice.

This bill as it is currently set is not linked. That is to say, a second title provides the retirement benefit that I think most of us would agree is proper and appropriate and fair, and makes the collection reforms to provide funds which would offset it, not directly fund it.

I am sorry. The second question was?

Mr. SCOTT. Extra burden on prisoners trying to re-enter.

Mr. COOK. We are talking about indigent defendants. As we talk about indigent defendants, I think you have to start with the understanding that when a defendant comes into court, the courts are duty-bound and directed by the sentencing guidelines not to impose a fine on that individual to begin with. So when we are talking about a fine, that issue isn't there.

The second category of financial or monetary penalty that might be imposed is a special assessment. We would agree that perhaps it would be appropriate to remove the $200, return back to the $100 special assessment fee, and it has virtually no impact on the amount of income generated or funds generated in this case.

So that leaves one category. There are no fines that are going to be imposed on indigent defendants. Special assessments are unchanged, then, with respect to felonies as a special assessment.

That leaves us only with restitution. With respect to restitution, there are mandatory impositions of restitution. That restitution as a matter of law is imposed whenever there is a defendant who first is found guilty beyond a reasonable doubt, and then secondly we can prove to the court that there is a specific loss.

Many categories of loss to victims are already not recoverable under this process. There is no pain and suffering, for example. There are no attorneys' fees for example. So the victims' return is already artificially reduced, and that is to say that the amount imposed on the offender is already artificially low. This bill would impose a modest—I would even say very modest—increase in that amount. Given that modest imposition, then you have to take now it is imposed, now what? The concern is that it carries with that person and then is a burden to them in the future.

Well, I don't think anybody in this room would think for a minute that the Department of Justice is going to prioritize collections against indigent defendants. It simply isn't rational. The monies that would come into this system, the $20 million to enhanced recovery, that $20 million is rationally going to be focused on going after the large white-collar criminals who have engaged in sophisticated schemes to hide their assets.

Mr. SCOTT. Okay. Well, thank you.

On the conflict of interest, I don't think anybody is going to bring a case because they might think their pension is going to be at risk. Their pension is set. I think the idea that you are going to fund the criminal justice system through fines is probably more of an ideological question that some of us have concerns with.

The gentleman from Virginia, the Ranking Member, Mr. Forbes.

Mr. FORBES. Thank you, Mr. Chairman.

Once again, I want to echo what the Chairman has said, what Mr. Davis has said, how much we appreciate all of you being here and what you do and what you have done and what you are currently doing.

The second thing, it has been said, and we don't need to say this again, how much everybody on a bipartisan basis appreciates what everybody does. That issue we can kind of take and put on the shelf. We all agree with that.

The other thing that, Mr. Cook, you mention is that this is the right thing to do, and maybe it is the right thing to do, but then we have it colored with a whole lot of other reasons why we are doing it. You know, that prosecutors risk their lives; that we are losing good prosecutors to the private sector, et cetera, et cetera.

Mr. Thompson mentioned that the system works good because it is an adversarial system, and we don't want this to be adversarial, but we certainly want to do our job and raise tough questions so we can at least investigate what is going on.

The core question that I asked you guys when you came to my office, and I ask you again today because I don't know the answer to this. Where do we stop as a country? We are continuing to have people sit right where you sit, they sit in the couches in my office, and I am sure they do in the Chairman's office day after day. There is not a group in America that doesn't come in and want to retire at 50 years old—not a group. It is the firefighters, it is the policemen, it is the military—it is every person we see. And on every one

of those, we say they are good people. They are risking their lives. We think the world of them. Mike just told me he wants to do it at 50 years old. [Laughter.]

But on a serious note, I have economists that come in there and they just say, "Folks, you are not going to be competitive with the rest of the world because the reality is we have life expectancies now that have flipped on us in the last 50 or 60 years—80 or 81 years of age. Some people will be retiring longer than they worked. That is just the reality of the situation.

We have Social Security that we know is being stretched to the hilt. We have baby boomers coming on-line next year that is going to stretch our system. We have Medicare that is now 4.5 percent of gross national product. It is going to be 22 percent at a certain period of time. When we look at our military, these people aren't going out and just traveling to Florida. They are getting jobs with corporate America someplace, oftentimes making significantly more money than they made before, and we are still paying those benefits.

Where do we draw the line as a society and say, "We just can't have everybody retiring at 50, as much as we love them, as great a job as they do. We just can't pay benefits at that particular point in time." Because I know that is one of the things that I am wrestling with on this bill and a lot of other ones. I think as a country, we are going down a fiscally scary world because we are going to have our whole population out retired at 50 and doing something else. So what do you think?

Mr. THOMPSON. Congressman Forbes, those are very, very good concerns and questions. The Chair's questions were very appropriate. Those were the kinds of things that I had to deal with when this bill was first brought to my attention when I was in public service. But just before I try to get to your question, may I just suggest one thing here though, is that we still have the fact that the cases and investigations in the Federal system are increasingly more complex. They are increasingly more difficult.

The people, the government requires assistant U.S. attorneys who are highly skilled, highly capable, and experienced. We need to be able to retain our assistant U.S. attorneys.

Mr. FORBES. All right. Let me stop you there, only because I have a time limit, and then I am going to let you answer. But I want to throw my second question out to you because you have segued me into that.

The second question I will ask you, if the Chairman will indulge me maybe just an extra minute or so, we just had an excellent modeling and simulation program brought to me yesterday by Raytheon Corporation. They normally do the national defense stuff. They did one for public education where they did a complex modeling and simulation, and answered the same question you just asked. The question was, how do we put out more math and science students and how do we retain better teachers?

The first solution they thought was going to be there was raise the salary, and they bumped the salary up in their model from $33,000 to $50,000, thinking that was the answer. When they ran the model out, though, it didn't have the impact because industry raised their prices and, to make a long story short, it offset. What

really answered the question, they said when they did the model, they went in after the second year and got the bad teachers out and then that increased it.

When I look at people who are prosecutors and they leave, they never tell me it is because of the retirement system. Do you know what they tell me? It is because "my kids are going to college" or "because I have weddings coming up" or "because I have cash-flow problems." And if I did a retirement system, they are still going to have kids going to college and they are going to have the weddings.

So I am not against what you are doing. I am just trying to make sure we are intellectually asking, is this really the way we keep the good people there.

Mr. THOMPSON. And congressman, I do think we ought to take a look at the retirement system, as you suggest, in the Federal law enforcement system. But as long as we have the retirement system the way it is, and you have men and women in the trenches working alongside Federal law enforcement officers doing very difficult and dangerous work, you have this inequity. I don't think that is appropriate. I don't think it is fair. This legislation offers a creative solution to a piece of that puzzle. It is only a piece.

I totally agree with Ms. Baron-Evans that the Federal defenders are very important to our justice system. I would support Congress undertaking a comprehensive look at Federal law enforcement. We need to do that. This legislation, though, I think is an important first step in the puzzle as to how do we improve our system, because the cases are increasingly complex, increasingly difficult, and that is not going to stop.

Mr. FORBES. Anybody else? Ms. Evans?

Ms. BARON-EVANS. I would just say if we need increasingly skilled and experienced prosecutors, they should be staying longer. I mean, leaving at 50, that is when I started. I actually came from private practice into public service, and, well, I mean, most of the supervisors in my office and in other offices in Federal defenders' offices are in their 40's, 50's, or 60's. It seems that the more experience you have, the better, rather than encouraging people to leave at 50.

Mr. FORBES. My time is up, but I would just ask if any of you could submit in writing to us a response. Because I think those two questions are kind of at the core of what we are wrestling with, not that we don't like anybody, we don't want to do this, but how do we answer those two questions.

Thank you again for what you do and for being here and for putting up with our questions.

Mr. SCOTT. Thank you, Mr. Forbes.

In a follow up to that question, I think if there has been any analysis of salaries, if people don't feel they are getting paid sufficiently, what the salary ought to be for these positions. I think that would be an interesting thing to hear.

The gentleman from Alabama, Mr. Davis?

Mr. DAVIS. Thank you, Mr. Chairman.

Let me thank my friend from Texas for letting me skip ahead of her. I have explained to her I have a Ways and Means hearing going on, so I thank her for her generosity.

I don't have the time to engage Mr. Forbes' in his philosophical discussion. I would advocate retirement age of 70 for U.S. senators so they could come back into the private sector and spend more time with us, and there would be more movement over there. [Laughter.]

But let me turn, in all seriousness, to several concerns that have been raised. I want to start out, Ms. Baron-Evans, with your concerns. The Chairman was more modulated than you were, but you made some observations I think worthy of addressing for a moment about the potential conflict of interest in AUSAs bringing collection cases, pursuing collection actions and some of the revenues potentially going to their retirement funds.

On a broad philosophic level, I think I understand your point. Let me frame it another way. Members of Congress routinely vote on things that affect us financially. The markup I am about to go to is about the alternative minimum tax. That affects Members of Congress who are making $168,000 a year in many communities.

I suppose somebody somewhere might suggest there is a problem with a committee of people who are going to pay the tax voting on it, but the normal theory that we use in this institution is if a policy issue is of generalized concern, and you are part of a broadly affected class of people, there is no conflict of interest.

Now, if it is something where for whatever reason just affects you, or there is a direct tie-in between your vote and your finances that is unique, well, that is a conflict of interest concern. And we struggle even with those definitions.

I would submit in the context of AUSAs obviously if the money from a particular collection were going into an escrow account for that lawyer, that is enormously problematic, so problematic nobody would advocate it. But if there is a generalized pot of money where some portion of it is going to AUSAs around the country, I think that undercuts to me any conflict of interest concerns. I will give you a chance when I am done to debate that if you want, but it is my first observation.

The second observation I want to pick up on your observation that this is a tax on the poor, as you described it. Mr. Cook, good lawyer that he is, said exactly what I was going to say, that from my recollections being a prosecutor and a defense lawyer, if someone is indigent, you can't fine them anyway.

Now, we know there is a class of people who are not declared to be indigent, but who still really don't have any disposable resources, or if they do, they spent them all on their lawyer. But I want to inject a little bit of reality into this. The Government Accountability Office in 2005 found that amazingly only 7 percent of white-collar restitution is collected. White collar restitution is not poor people. It is CFOs who defrauded their company and their investors, such as the folks with HealthSouth in Birmingham a few years ago.

White collar restitution is big massive companies who have cheated people out of millions of dollars and who are exceptionally well-heeled. Mr. Cook is exactly right that any effort to collect this money is going to be pointed at those kinds of institutional players, not at John Jones who lives with Miss Sally.

So I want to ask you, Mr. Melson, if you would address the question of what the department can do to increase that 7 percent amount, and let us not quibble about the amount. There may be some dispute about that. But what can be done to give us a better crack and recouping money from high-class defendants with a lot of money such as big corporations?

Mr. MELSON. Thank you, congressman. There are several things that we can do. One is more resources and the other is legislative fixes. I have mentioned one of the potential legislative fixes that is already in the hopper, the bill that Congressman Scott and Congressman Forbes have introduced which allows us to restrain these assets that these fat cats have before they learn that they have to dissipate them in order to avoid the restitution.

The GAO study found that there was between 5 and 13 years that would usually elapse between the time defendants started their criminal activity and the time that a restitution judgment is imposed. During that time, a smart white-collar defendant is going to transfer the assets to the spouses or to others so that we can't get a hold of it. With this new legislation, we will be able to go after them and the corporations, restrain their assets while they are being investigated, before they are indicted, and before the restitution judgment is finally imposed at the very, very end of the system.

Mr. DAVIS. Mr. Melson, let me stop you at that point. Obviously, my time is very limited. I want to make one other observation.

I would encourage you, and I support that bill that you just described—I think it is a very good approach—I would encourage DOJ to really work with this Committee to try to see what we can do to strengthen collection against well-heeled white-collar defendants. The 7 percent number we would all agree is too low. We have a stake in doing something about it.

The last point that I want to make is this one. I want to address briefly the point that Mr. Forbes made and that the Chairman made, the question why. Why do we single out AUSAs? This bill does make distinctions between AUSAs and some other class of Federal lawyers. Maybe this is the best reason that I could end with today. The day-in and day-out decision to charge people doesn't get made by attorneys general of the United States or even U.S. attorneys, frankly. The day-in and day-out decisions get made by lawyers who are sitting in small offices who answer to the title of assistant United States attorney.

And the civil cases Mr. Thompson described, the Federal Government doesn't typically handle garden variety civil cases. The Federal Government handles massive cases where there is a claim of government liability and government culpability. It is complex work and enormously important work. It deals with the public trust.

My belief is that if we want to make these jobs as apolitical as possible, if we want to make these jobs professional and not political—and by the way, Mr. Thompson is right. Twenty years ago, you became an AUSA in a lot of places if you were kind of connected to the guy who had the job, and sometimes good people came out of that, and sometimes they didn't.

If we want to move toward an environment where the politics is drained from it and a Larry Thompson and a Democrat U.S. attorney can have the same kinds of people, one way that you do that is to treat the job as being more of a career profession and no, it is not just about what we pay people more and more people will do it. You will never pay AUSAs enough for that to be the reason they do the work. But what you can do is to reward the people who make the decision and who make the choice and who decide to stay. If you decide to reward them, you make it more likely that apolitical people will do this kind of work.

I yield back.

Mr. SCOTT. Thank you, Mr. Davis.

The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. Chairman, would you advise your colleague from Virginia that when I get to be 50, I also want to retire? Would you let him know that? [Laughter.]

Mr. Thompson, we are going to hold you harmless in spite of your association with Dan Bryant. That may be questionable. [Laughter.]

It is good to have you all with us.

Mr. Melson, perhaps my frugality is showing, but if this bill is enacted, would it not open the door to other groups of Federal employees who would also make good causes to increase their retirement benefits?

Mr. MELSON. Well, certainly that is a concern that we have, that there are other elements in the Department of Justice, even in addition to the trial attorneys who would be subject to the same type of rationale and reasoning to become part of the law enforcement officers' retirement plan.

Mr. COBLE. Mr. Cook, what other employment groups in the Federal Government have identical retirement benefits as the AUSAs, and they, too, might say, well you know, how about us?

Mr. COOK. Congressman, if I could begin by pointing out maybe the obvious, and that is we are already drawing lines. There are in the system that I am working in, the lines have unfortunately been drawn at my doorstep. That is to say that everybody I work with on a daily basis has this benefit. This benefit isn't going to be enough for me to retire, frankly, but it is going to be enough for me to go home at night and say I am being treated fairly by my employer because I now receive the same benefit as everybody I work with on a day-in and day-out basis.

As to the second part of your question, and that is who else in the system might also ask for these benefits, I would respectfully submit to you that there are probably plenty, but we can continue to draw the lines that we have. As it is, assistant United States attorneys are the ones who serve you on the front line of the criminal justice system and we are the only ones on that front line that I deal with on a daily basis who don't receive these benefits.

Mr. COBLE. I thank you, sir.

Mr. COOK. Yes, sir.

Mr. COBLE. Ms. Baron-Evans, do Federal public defenders receive the same retirement and salary benefits as do AUSAs?

Ms. BARON-EVANS. Yes, Mr. Coble. My understanding from the AO is that our salaries and benefit package adds up to the same thing, and that is the Judicial Conference policy.

Mr. COBLE. Thank you.

Mr. Thompson, this is not a directly relevant question perhaps, but I know there is some concern across the country about the disparity between State district attorneys and assistant State district attorneys, as opposed to their Federal counterparts, and that won't be addressed here today, but it does concern people.

Let me ask you this: How about retirement disparities within the Justice Department? For example, if this bill were enacted, would it result in certain members of the department receiving more money as AUSAs, as opposed to their counterparts, say for example in the Criminal Division?

Mr. THOMPSON. Yes, there is a difference in the proposed legislation, Congressman. But the fact of the matter is, you have to look at the team on the front line, as Mr. Cook pointed out. And the men and women on the front line who are working beside DEA agents, FBI agents, doing the same kind of thing, putting the same hours in, it is important as a first step to make this as the title of the legislation implies, more equitable.

Mr. COBLE. Well, I thank you all for being with us.

Mr. Chairman, I have a transportation hearing. I may have to go back and forth, but I yield back my time.

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

The gentlelady from Texas, Ms. Jackson Lee?

Ms. JACKSON LEE. Let me thank the Chairman and the Ranking Member, and thank the witnesses. It is good to see my good friend Mr. Thompson, though I am certainly prepared to hold him in contempt for rejecting the pleas and cries of many to subject himself to the grueling nomination process for the Attorney General of the United States of America. [Laughter.]

I am still contemplating that, since the process is still ongoing you may have still an opportunity. [Laughter.]

But let me thank my colleagues. Let me pose a question to the Chairman. Mr. Chairman, is there a bill that you and the Ranking Member have on this same issue? Mr. Chairman? Mr. Chairman? I am sorry. Let me try to clear the record. Is there a bill that you and Mr. Forbes have on this same issue?

Mr. SCOTT. I am not sure which one he was citing. Yes.

Ms. JACKSON LEE. So therefore I don't need to try and probe that bill.

So let me probe this and try to raise questions in the context of the idea. I think the idea is a good idea. I certainly think that we need to refine it and, Ms. Baron-Evans, I am going to probe you because frankly I want the public defenders included. I appreciate your moral and principled stance, but let me try to work with you to see how it can clarify.

Mr. Thompson, what I may be disturbed about is how it will be perceived, which is that you are denying victims their full compensation. But I do think there is something if Mr. Davis's citation is correct, you might help me with that, having been in the Justice Department, as to the poor collection rate of the monies that are due the government in the first place. So say, for example, we were

able to maximize three-fold, certainly I would like to see career assistant U.S. attorneys find their life's work in building knowledge and working on behalf of the people of the United States.

So my question to you is, the first issue is what would you propose, and I think it would need to be language in this legislation if it was to move, on the recovery percentage? And why are we not collecting?

I will come to Ms. Baron-Evans because I think we should distinguish, and I haven't looked at the fine points, but I don't think the bill suggests that we are getting money out of a turnip. It is talking about defendants that come with assets that are illegally secured. So therefore let me fine out how we can do better on the recovery, particularly on the white-collar crimes.

Mr. Thompson?

Mr. THOMPSON. I would suggest two fundamental points, Congresswoman. That is, number one, nothing should be done to take advantage of victims. Victims should always be first in line in terms of having restitution as victims of crime. That is number one.

Number two, we certainly shouldn't adversely impact those defendants who cannot pay, and when I say "adversely impact" to the Chair's question, allow them to have some meaningful re-entry into society. So the point will be——

Ms. JACKSON LEE. Very important point.

Mr. THOMPSON. So the point will be how can we go after the uncollected fines and debts from corporations, wealthy individuals, that are apparently not being collected. One of the things I think this legislation will do is these are very sophisticated kinds of litigation proceedings, albeit on the civil side. And one of the things I think this legislation will allow is for retention of assistant United States attorneys, because I think the effect of this bill will be to allow AUSAs to stay in service longer. You will get more experienced individuals to handle these kinds of cases. I think that is the long-term solution to the problem that you raise.

Ms. JACKSON LEE. Thank you.

Let me ask Mr. Melson and then Ms. Baron-Evans. Mr. Melson, it seems that the Department of Justice may not have taken a position. You might correct me if I came in and that is not the case. But what I would appreciate if you would sort of peruse the question, if the legislation was written, that public defenders who are in essence—I know they are independent under the Federal system, and they sort of work in tandem to a certain extent, to be included. And if this bill could be done in a way that you could not be charged with violating the victims fund, would you be interested in such a bill? And Ms. Baron-Evans would you respond to the idea of public defenders, either through the enhanced compensation?

And I do understand that you might be concerned with being compromised. I don't think that would be the case, but you can answer that because these are Federal funds that would be owed to you, so they couldn't be taken on the basis of you are pressing the case of your clients.

Mr. Melson?

Mr. MELSON. Yes, you are correct that the department has not yet been able to take a position, has not formulated any position

on the bill. We are concerned with not affecting the victims' funds, and because of any amendments to the bill as it now stands, as you are suggesting, that might include the public defenders, we would have to again look at that and make sure there are not any unintended consequences either toward the victims or victims' funds. It would be premature for us to give you a position on that at this point.

Ms. JACKSON LEE. Well, you will keep that in mind?

Mr. MELSON. Absolutely.

Ms. JACKSON LEE. We may want to look in that direction.

Ms. Baron-Evans? Try to be as broad-thinking as possible. Don't deny yourselves rightful compensation. We will put up a firewall for you.

Ms. BARON-EVANS. I would very much not like to deny us rightful compensation, but I know that the defenders have been asked informally about this before, and there is no way in the world, really, that we could accept any funds that came from our clients. It is just a conflict.

You know, a conflict of interest, and now I am talking about the prosecutors too, in the conflict or apparent conflict that happens when a prosecutor has a financial interest in the case. I know Mr. Scott, you said, it is not really a conflict. A conflict exists even if you don't act on it, and I am not suggesting anybody necessarily or in the vast majority of cases would act on it.

But when you think about it, imagine the report in the building the next day after you pass this bill, if you were to pass it. Congress just passed a bill that is going to up our retirement benefits based on how much we can collect from defendants. Come on. That has an effect. And it looks bad. The reason I say it looks bad, we want defendants to respect the system. We want defendants to respect the judges. We even want the defendants to respect the prosecutor, if at all possible. And sometimes they do.

But it is not going to help matters to have people thinking that retirement benefits of prosecutors are being funded on their backs.

Ms. JACKSON LEE. Thank you. I look forward to working with you on this issue. Thank you very much.

I yield back.

Mr. SCOTT. The gentleman from California, Mr. Lungren?

Mr. LUNGREN. Thank you very much, Mr. Chairman, for the courtesy of being able to ask some questions.

I am a cosponsor of this bill, but I have some concerns after listening to some of the testimony here. The major one is, I guess, I should have looked a little more closely at the language of the bill, because while I support increased retirement benefits for assistant U.S. attorneys, I do not support the idea of somehow suggesting that, since prosecutors work in the same office with guys who carry guns, men and women who carry guns and go out every day, they ought to be treated the same way exactly.

Let us go back in history to understand why we allowed retirement for law enforcement personnel at an earlier age. Part of it was based on the physical demands of the job. I mean, you can say that is not the case, but go back and look at it. The whole argument that we have gone through in California over law enforcement personnel is because of the physical and emotional stress that

takes place and also the fact we want younger people in who are physically capable of doing the job.

Now, I know that there are exceptions to that, when you get to be detective when you were sitting at your desk and doing your thing. I don't want to suggest that is not true, but I think the gentleman from Virginia made a very good point. When we established an early retirement age for people for a particular reason because there was a physical connection to that, to then say because you work in the same office you are being treated unfairly because you can't retire at the same age is just nonsense.

I am all for improving the retirement benefits of assistant U.S. attorneys. But this idea that we move from saying we are going to allow people to retire early because they are law enforcement, they carry a gun, they have certain stresses in their lives, and then we say because we work in the same office with them, we are doing the same job, is just not true. I don't care how many times you want to say it. It is not true.

I hope that we could come up with a different formula that would improve the retirement benefits of assistant U.S. attorneys, but do not give them the ability to retire. I mean, you have a contrary argument here before us. You are saying we need to do this to keep people on the job, and the reason we are going to keep them on the job is we are going to let them retire earlier. Now, I am a lawyer and I can use words well, but the average person is going to have a lot of difficulty figuring that out.

And then as far as Ms. Baron-Evans is concerned, I understand your concern, and if what you are suggesting is we could somehow make it easier for you and your brethren to apply for carry permits because you are in dangerous situations, I would probably support that. Your comment was you go in dangerous places, you are not protected nor are you investigators, and if you need something like that, I will be one to help you do that.

And the third thing is, we have Mr. Chabot's bill to reform the restitution procedures on the Federal level that I believe was offered as an amendment to a previous bill. I would hope that as we go forward on this bill, we might consider incorporating Mr. Chabot's ideas into any final product that we put here.

If I could just ask, am I wrong to say that assistant U.S. attorneys don't have quite the physical stress and quite the problems that we have with folks that are carrying guns and going out in the field as DEA agents and FBI agents and others?

Mr. COOK. Let me back up even one step further on your premise. The premise is that we want to have the same retirement benefits as have been accorded only people who carry firearms because the class that is covered is much broader than that. We have pretrial services officers, probation officers, many of whom write pre-sentence reports and never have any——

Mr. LUNGREN. I know. We extended it those cases, so therefore if we were wrong in extending it in those cases, we should extend it even further?

Mr. COOK. Well, let me say first, I don't think you were wrong in extending those benefits. To return to the other point you made, and that is with respect to the stresses and dangers of the job, the stresses of the job of being an assistant United States attorney I

would say is equal to, in fact I would respectfully submit substantially greater than that posed to the typical agent.

The stresses of working a 12-or 14-hour day, 7 days a week, to prepare for a trial like Mr. Thompson described, and that is a trial that is going to extend over a many month period of time is substantial. And it is important to understand, and I think that you are right when you say there is a conflict between the position, and if I could describe it this way. In many districts we have a retention issue. That is to say, we want to keep people beyond the 8 years, 4 years, 5 years that they come in. This bill we think would help with that part of retention.

Mr. LUNGREN. I understand. Let me just say, though, about what you said about assistant U.S. attorneys. When I was attorney general of California, I had 1,000 lawyers working for me. We were the only law firm in California on the prosecution side that handled death penalty cases. You talk about strain and stress of cases.

Those cases last for years and years and years. I would put those people up against any assistant U.S. attorney that you are talking about in terms of stress, but I still wouldn't argue that they would be considered the same as law enforcement officials. I am just sorry. We have a very big disagreement on this.

Mr. COOK. Well, then I would have to say to you that, as I come to the table, I would say that as I grow older I have quickly found that my ability to maintain the level of performance has paled beside what I was able to do when I was 30 and 40.

Mr. SCOTT. The gentleman's time has expired. Thank you.

We have a little more work to do, and we have a vote in about 6 minutes, so I would like to thank the witnesses for their testimony. Members may have additional questions which they will forward you, and we ask that you answer them as promptly as you can so your answers may 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 Committee stands adjourned.

[Whereupon, at 11:24 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

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, I thank you for holding this very important hearing regarding this Committee's consideration of H.R. 2878, the "Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007." H.R. 2878 will increase the retirement benefits of Assistant U.S. Attorneys to the level of federal law enforcement officers, which is intended to strengthen the Department of Justice's ability to win critical cases by ensuring the retention of skilled, experienced federal prosecutors.

I am pleased to welcome our witnesses who have gathered here today to give us guidance and insights in our efforts to evaluate the merits of H.R. 2878. We certainly must be mindful that the Department of Justice has a void to fill from the loss of very qualified attorneys and must implement a system that yields incentives that will lead to the retention of skilled, experienced, federal prosecutors.

Mr. Chairman, the purpose of this hearing is to consider the merits of H.R. 2878, the "Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007." H.R. 2878 will increase the retirement benefits of Assistant U.S. Attorneys to the level of federal law enforcement officers, which aims to strengthen the Department of Justice's ability to win critical cases by ensuring the retention of skilled, experienced federal prosecutors.

We know that with the presence of terrorist threats, violent crimes, and white-collar crime, there is an ever-growing need for skilled federal prosecutors. The growing attrition rate of top-flight prosecutors from the Department of Justice is harming the Department's ability to prosecute the perpetrators of these crimes and thus potentially exposing the American society to even more unsafe conditions. The average line Assistant United States Attorney (AUSA) remains with DOJ for only 8 years, a critical loss of litigation skill and experience by the government and recent DOJ workforce realignment efforts have been only modestly successful, with cash incentive retirement offers prompting a limited response among eligible AUSAs. A report of the Attorney General's Advisory Committee concluded that career AUSAs should be authorized to receive similar retirement benefits to those of all other members of the federal law enforcement community since the majority of AUSA responsibilities relate to the investigation, apprehension or detention of individuals suspected or convicted of criminal laws of the United States.

Title II brings the retirement benefits of AUSAs into line with the retirement benefits of thousands of federal law enforcement employees, including Special Agents of the FBI, Secret Service, IRS and DEA, deputy U.S. Marshals, probation and pretrial service officers and Bureau of Prison employees. H.R. 2878 provides that AUSAs receive the same retirement benefits received by law enforcement officers.

H.R. 2878 proposes to pay for the cost of increased retirement benefits by debt collection reform. The 93 United States Attorney Offices are responsible for criminal and civil debt collection efforts that result in billions of dollars a year collected for federal agencies and the victims of crime. On average, the USAOs collect over $4 billion a year, more than twice the total budget of all USAOs.

However, the Government Accountability Office has criticized the Department of Justice for deficiencies in the collection of civil and criminal judgments. There are still tens of billions of dollars left in uncollected debt, due in part to inefficiencies in the law and competing priorities. Title I responds to GAO's criticism by reforming federal debt collection procedures, making criminal fines, criminal restitution obligations, and civil judgments payable to the United States more collectible.

We need to continue to seek solutions that will put in place effective guidelines that create vehicles to recruit and maintain our skilled, and experienced federal

prosecutors sop that we can combat the criminal element that threatens the safety of our society. Consideration of H.R. 2878 is before us today as a potential solution to that problem. While we seek solutions to the debt collection process and attempt to fund the retirement programs of U.S. Attorneys with such funds, we must ensure that we do not interfere with the compensation resources for crime victims. It is also important for us to consider the important contributions of federal public defenders as we provide incentives for recruiting and retaining federal attorneys. I look forward to hearing from our witnesses today in our attempt to gain some guidance on this very important matter.

Thank you, Mr. Chairman. I yield back the balance of my time.

Larry D. Thompson
24 Lakewood Circle North
Greenwich, CT 06830

December 5 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Conyers:

Thank you for inviting me to testify before the Subcommittee on Crime, Terrorism, and Homeland Security regarding H.R. 2878, the "Enhanced Financial Recovery and Equitable Treatment Act of 2007," held on November 1, 2007. I trust that members of the Subcommittee found my comments helpful.

I write to clarify that the views I expressed at the hearing are my own, based on my tenure as a former Deputy Attorney General of the United States and federal prosecutor, and do not reflect the views of PepsiCo, Inc.

I appreciate your commitment to justice and our nation's Assistant United States Attorneys.

Sincerely,

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