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

Prosecutorial Authority to "Preserve Assets" for Restitution

Mr. Andrew Weissmann
Partner, Jenner & Block LLP

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

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

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

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

Third, the confluence of these two problems in the proposed bill would virtually eviscerate in many corporate criminal investigations the protections supposedly afforded by the Department of Justice in its recent McNulty Memorandum governing corporate charging decisions. Such a result would be both unwarranted and, surely, unintended.

Finally, there is insufficient evidence that the current lack of pre-conviction restitution provisions applicable to untainted assets is the cause of the growing number of

uncollected restitution judgments entered in criminal cases. Thus, the proposed bill is unnecessary to remedy this perceived problem.

A. The Abolition of the Taint Requirement

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

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

The bill completely removes this "taint" nexus. Indeed, the government may freeze *all* of an individual's or corporation's assets if they "may" be used to pay a restitution order.

---

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

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

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

This is a dramatic departure from current forfeiture policy, with enormous potential for abuse. For instance, pre-conviction, a prosecutor could exert enormous leverage over a current or even prospective corporate defendant by obtaining an order freezing all of its assets that "may" be used to satisfy a restitution order. Such a result is particularly unfair and Draconian when one remembers that criminal corporate liability can under current law attach based on the errant acts of a single low-level employee – even if the employee's actions are in contravention of a strong corporate compliance program.[3] Furthermore, because 18 U.S.C. § 3664(h) permits courts to make defendants jointly and severally liable for the full amount of restitution, the proposed bill would enable the prosecution to obtain *ex parte* an order wiping out all assets of a defendant completely, based on the alleged conduct of *other* people.

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

B. Procedural Unfairness in the Bill

The bill sets an initial threshold standard to seize a person's assets pre-conviction that could always be met by the prosecution. By its terms, the proposed bill would enable a prosecutor to show, *ex parte* and merely by "probable cause," that a person, if convicted, would be ordered to satisfy an order of restitution for an offense punishable by imprisonment for more than one year. Section 202(a)(a)(1). This minimal "showing" could always be satisfied by (a) reference to the indictment or criminal complaint – both

[3] A corporation can be held criminally liable as a result of the criminal actions of a single, low-level employee if only two conditions are met: the employee acted within the scope of her employment, and the employee was motivated at least in part to benefit the corporation. No matter how large the company and no matter how many policies a company has instituted in an attempt to thwart the criminal conduct at issue, if a low-level employee nevertheless commits such a crime, the entire company can be prosecuted. New York Central & Hudson River Railroad v. United States, 212 U.S. 481 (1909) (upholding constitutionality of statute that permitted imputation of agents' conduct to create criminal liability for the carrier itself); Dollar S.S. Co. v. United States, 101 F.2d 638 (9th Cir. 1939) (affirming steamship corporation's conviction for dumping refuse in navigable waters despite the company's extensive efforts to prevent its employees from engaging in that very conduct); United States v. Twentieth Century Fox Film Corp., 882 F.2d 656 (2d. Cir. 1989) (affirming conviction despite the fact that bona fide compliance program was in effect at company); United States v. George F. Fish, Inc., 154 F. 2d. 798 (2d Cir. 1946) (affirming corporation's conviction based on criminal acts of a salesman); Riss & Co. v. United States, 262 F.2d 245 (8th Cir. 1958) (clerical worker); Texas-Oklahoma Express, Inc. v. United States, 429 F.2d 100 (10th Cir. 1970) (truck driver); United States v. Dye Constr. Co., 510 F.2d 78 (10th Cir. 1975). *See generally* Weissmann, Andrew, "Rethinking Criminal Corporate Liability," Indiana Law Journal, Vol. 82, No. 2, Spring 2007, available at SSRN: http://ssrn.com/abstract=979055.

of which conclusively establish probable cause – and (b) reading the statutory penalties for the offense. Moreover, the bill would forbid the district court from choosing in its discretion not to take action in favor of the prosecution, mandating that "the court . . . *shall* (i) enter a restraining order or injunction; (ii) require the execution of a satisfactory performance bond; or (iii) take any other action necessary to preserve the availability of any property traceable to the commission of the offense charged." Section 202(a)(a)(1)(A) (emphasis added).

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

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

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

This standard is virtually insurmountable. First, a defendant has to have "no" assets left to pay counsel or to provide for "necessary" living expenses. A defendant with *any* assets to retain counsel or pay necessary expenses – even if clearly insufficient funds for either or both – could be found to fail this test. Second, and more importantly, even the defendant who is left completely indigent after the *ex parte* restraint will not prevail in challenging the restraint. In order to obtain a hearing, the proposed bill requires *in addition* that the defendant establish that there is a *bona fide* reason for finding the

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

C. Impact on the Debate Regarding the McNulty Memorandum

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

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

Second, by causing a seismic shift in the already disproportionate power of the prosecution in corporate cases, any company subject to an *ex parte* asset restraint would waive any and all rights in order to survive such a freeze. The current congressional interest in legislative responses to the McNulty Memorandum would be rendered meaningless. Once prosecutors have the power to seek control of all or a significant

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

portion of a corporation's assets pre-conviction and *ex parte*, the corporation will take any steps to have the government avoid that result or remove that restraint. Thus, the proposed bill, by giving unprecedented powers to the prosecutor before a defendant is convicted or even indicted, tips the scale dramatically and unfairly in the government's favor.

D. Disregard of Current Prosecutorial Powers

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

Current forfeiture law assists those wrongfully deprived of their property in obtaining it via the government's forfeiture tools. Many federal statutes contain explicit provisions allowing property owners to make claims on forfeited assets before they are obtained by the prosecution. In that sense, restitution aims are achieved through the traditional means of freezing and seizing tainted assets. Moreover, by statute, the Attorney General's ability to enforce restitution awards is linked to its forfeiture tools. Under 21 U.S.C. § 853(i)(1), the Attorney General is authorized to "grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this title, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section." The Attorney General may also direct the sale of property ordered forfeited and direct the disposition of those funds, as well as to "take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition." 21 U.S.C. § 853(i)(5).

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

Finally, there is scant evidence that the large amount of uncollected restitution payments – cited as a reason for the proposed bill – is a result of defendants' improperly dissipating assets pre-conviction. An equally plausible reason for the growing size of uncollected restitution orders is that courts are currently required to enter such orders regardless of a defendant's ability to pay, and thus impose large restitution orders but set reasonable

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

payment schedules. That scheme, which currently governs restitution orders, would of course result in what currently appears to be a large unpaid restitution bill, when in reality it may bear no resemblance to a defendant's avoiding restitution payments at all. In short, the proposed bill may be seeking to remedy a problem that does not exist, and does so by a means that fails to accord procedural safeguards to protect the public.

Thank you for the opportunity to testify.