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

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SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
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I.
INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.
RESTRICTING JUDICIAL DISCRETION

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

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

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

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

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

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

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

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

8 18 U.S.C. § 3663(a)(1)(B)(i)(II).

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

10 18 U.S.C. § 3663A.

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

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

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

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

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

13 18 U.S.C. § 3663A(c)(1).

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

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

16 H.R. 845, § 2.

problems become potentially prohibitive.

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

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

III.
PRE-INDICTMENT ASSET ORDERS

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

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

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

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

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

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

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

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

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

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

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

IV.
PRE-APPEAL RESTITUTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI.
PAYMENT OF ATTORNEYS' FEES AND STATUS OF SURVIVORS

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

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

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

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

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

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

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

VII.
EXTENSION OF THE PROBATIONARY OR SUPERVISION PERIOD

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

VIII.
CONCLUSION

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

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

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

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