U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 25, 2006

The Honorable J. Dennis Hastert
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

We are transmitting herewith a legislative proposal entitled, the "Restitution for Victims of Crime Act of 2006," to improve restitution for victims of crime. According to the Crime Victims' Rights Act of 2004, every victim is entitled to "the right to full and timely restitution." The Department of Justice believes that the legislative changes contained in this proposal will help further the Department of Justice's current efforts to afford victims this important right.

Title I: The Collection of Restitution Improvement Act

The bill contains three titles. The first title is the "Collection of Restitution Improvement Act of 2006." This proposed Act amends the Mandatory Victims' Restitution Act ("MVRA") to improve collection procedures, with the major changes proposed to 18 U.S.C. § 3664(f). Most importantly, revised paragraph 3664(f)(2) clarifies that the Attorney General may enforce restitution judgments immediately upon imposition. Although various statutes provide the Attorney General with this authority, some circuit courts of appeal have interpreted one clause within 18 U.S.C. § 3664(f)(2), providing that "the court shall . . . specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid," to require that a mandatory payment schedule be set at the time of sentencing. Therefore, the current legislative scheme impedes the effective enforcement of criminal monetary penalties, including restitution. The enforcement of restitution would be enhanced substantially if Congress were to amend 18 U.S.C. § 3664(f)(2) to clarify that restitution is due immediately upon the imposition of a restitution order, as is the case with an ordinary civil judgment.

Another major change to the statute clarifies that a payment schedule set by a court at sentencing is only a minimum obligation of the offender. Current 18 U.S.C. § 3664(f)(2) has undermined the efforts of the United States to enforce restitution because courts of appeal have interpreted it to require the imposition, at every sentencing, of an exclusive court-imposed payment plan. This limits the ability of the United States to enforce restitution using other available civil and administrative enforcement methods. As a result, district courts generally impose minimal payment plans upon the defendant that cannot thereafter be changed except by the court and upon a showing of a substantial change in the defendant's economic circumstances. Proposed paragraph 3664(f)(6) therefore deletes from the statute the requirement that the district

court "shall . . . specify in the restitution order . . . the schedule according to which, the restitution is to be paid . . ."

Other changes proposed include the following: establishing a checklist for what the court must order from the defendant (*e.g.*, a good faith effort to pay restitution, and notice of any change in residence or financial circumstances) in order to improve collection procedures; allowing Federal prosecutors access to financial information about the defendant in the possession of the United States Probation Office; clarifying the power of a district court to enforce non-supervisory terms of its sentence, including terms imposing a fine or restitution, notwithstanding the fact that a term of probation or supervised release has expired; requiring payment from all defendants who have an outstanding restitution obligation, regardless of whether they are incarcerated or on supervised release or even if their period of supervised release has expired; clarifying that courts should order nominal payments when offenders have no ability to pay the full amount of restitution; clarifying that a district court does not have sole power to enforce restitution obligations and therefore cannot prohibit the Bureau of Prisons from enforcing final restitution orders through its Inmate Financial Responsibility Program; and requiring that if a court imposes some limitation on the ability of the United States to enforce a judgment (such as a stay of enforcement when the defendant pursues an appeal), it must do so expressly, for good cause stated on the record.

Another change is to authorize restitution for victims' attorneys' fees. The Federal courts of appeals currently are divided about the extent to which victims' attorneys' fees may be included in restitution orders. This bill contains changes to title 18 intended to clarify that victims' attorneys' fees are to be included in restitution orders where the fees are a foreseeable result of the commission of the offense. With these changes, attorneys' fees expended by victims to recover damaged, lost, or destroyed property (*e.g.*, hiring an attorney to track down assets stolen by offenders), to obtain counsel during investigation and prosecution of the crime (*e.g.*, to obtain advice regarding their rights and how to safeguard their interests), or to obtain counsel in other actions foreseeably resulting from the crime (*e.g.*, to obtain counsel to defend against third party suits resulting from defendant's crime or, in the case of identity theft, to assist in clearing the victim's credit record) will be covered in restitution orders.

Finally, this title makes conforming amendments to sections of the criminal code that deal with criminal fines and other sections cross-referenced in subsection 3664(f).

Title II: Preservation of Assets for Restitution Act

The second title of the bill, the "Preservation of Assets for Restitution Act of 2006," provides prosecutors tools to restrain defendants' assets prior to trial. These changes are based on existing procedures for asset forfeiture, but are directed toward

improving restitution, in which defendants' assets are provided directly to victims rather than forfeited first to the Government.

Under current law, there are no statutory provisions that require a defendant charged with an offense for which restitution is likely to be ordered to preserve his assets for restitution. Even if those assets are the proceeds of the offense charged and traceable to the victims of the offense charged, prosecutors have no way to restrain them for the purpose of fulfilling a restitution order (although assets may be restrained under forfeiture procedures, as explained below). Indeed, the Government Accountability Office has stated the lack of procedures available to ensure that assets are preserved for restitution is a major impediment to the effective collection of restitution. *See* CRIMINAL DEBT: COURT ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES, GAO-05-80 (January 2005). Defendants can dissipate their assets because the United States does not obtain any enforcement right for restitution until after the defendant has been sentenced and judgment has been entered. Upon the entry of judgment, the United States is not authorized even to seek a writ of garnishment – the most common method of securing assets in restitution cases – until more than 30 days after the entry of judgment.

However, in a standard civil case, such as a defaulted student loan or a contract dispute, where there is evidence that the defendant is concealing or dissipating assets or taking similar action, the United States may obtain a prejudgment remedy against the defendant. Remedies available include attachment, receivership, garnishment or sequestration. These prejudgment remedies exist as part of the Federal Debt Collections Procedures Act of 1990, 28 U.S.C. § 3001 et seq., but do not apply to criminal cases because, as noted above, in criminal cases, there is no debt due the United States prior to judgment.

Similarly, under the Anti-Fraud Injunction statute, in health care fraud and banking cases the United States may file a separate civil action to obtain an order preventing the defendant from dissipating assets if the defendant "is alienating or disposing of property, or intends to alienate or dispose of property." However, prosecutors do not employ this statute frequently because it applies only to a few offenses, requires the prosecutor to maintain a separate civil action in addition to the main criminal action, and subjects the United States to pre-indictment discovery.

As noted above, preservation of assets is possible in criminal forfeiture cases. The United States Code provides:

> Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action necessary to preserve the availability of property described in subsection (a) of this section for forfeiture . . .

21 U.S.C. § 853(e)(1).

These criminal forfeiture procedures, including the use of prejudgment restraints, have been used widely to seize and restrain assets and to return assets to crime victims. The Supreme Court has found such prejudgment restraints to be constitutional – and indeed mandatory – when the Government applies to the court for them. United States v. Monsanto, 491 U.S. 600 (1989). In fact, between Fiscal Year 1998 and Fiscal Year 2005, the Attorney General distributed more than $72 million derived from forfeited assets to more than 11,000 crime victims. But forfeiture procedures cannot be used in every case for which restitution may be imposed and forfeited assets legally belong to the United States, rather than to victims themselves.

Thus, in order to preserve assets for restitution directly to victims, changes to the United States Code are required. The Preservation of Assets for Restitution Act includes three distinct items. These changes would give prosecutors, who are charged with enforcing restitution on behalf of victims, enhanced tools to help victims.

First, the proposed Act contains a new section 18 U.S.C. § 3664A, which provides that a district court "shall enter a restraining order or injunction, require the execution of a satisfactory performance bond or take any other action necessary to preserve the availability of any property traceable to the commission of the offense(s) charged." Additionally, the court "may issue any order necessary" to restrain assets that are not traceable to the offense charged. An order entered pursuant to this section will remain in effect through the conclusion of the criminal case, including sentencing, unless modified by the court. However, defendants' rights are also assured. The section provides that a defendant can challenge the restraint if he has no other assets to retain defense counsel or provide for reasonable living expenses and he makes a prima facie showing that there is no probable cause to justify the restraint. Furthermore, third parties who have a legal interest in the restrained property may move to modify or vacate the restraining order on the ground that the order causes a substantial hardship to them and that less intrusive means exist to preserve property for restitution.

In certain cases, expansion of the already existing Anti-Fraud Injunction Statute or the Federal Debt Collection Procedures Act prejudgment remedies would be the most effective means to ensure the preservation of assets for restitution. Thus, second, the proposed Act contains two changes to the Anti-Fraud Injunction Statute: an amendment to the statute that permits the Attorney General to commence a civil action to enjoin a person who is "committing or about to commit a Federal offense that may result in an order of restitution"; and an amendment to 18 U.S.C. § 1345(a)(2) to permit the court to restrain the dissipation of assets in any case where it has the power to enjoin the commission of an offense, not just, as current law authorizes, in banking or health care fraud offenses.

Third, 28 U.S.C. § 3101(a)(1), the Federal Debt Collection Procedures Act provision that permits the issuance of prejudgment remedies in civil cases, would be amended to allow the United States to use in criminal cases the same procedures available to it in ordinary civil cases, where necessary to preserve a criminal defendant's assets for restitution.

Title III: The Environmental Crimes Restitution Act

The third title of the bill is the "Environmental Crimes Restitution Act of 2006." This legislation would solve the problem of delayed restitution in environmental felony cases. The proposal would amend 18 U.S.C. § 3663(a)(1)(A) by adding environmental felonies to the list of crimes for which courts are authorized, in their discretion, to award immediate restitution to victims for their losses. The proposal would make it possible for victims of environmental felonies to receive restitution immediately following a defendant's conviction.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella
Assistant Attorney General

Attachment

IDENTICAL LETTER SENT TO THE HONORABLE RICHARD B. CHENEY, PRESIDENT OF THE SENATE

U.S. Department of Justice

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Washington, D.C. 20530

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Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Attachment

IDENTICAL LETTER SENT TO THE HONORABLE J. DENNIS HASTERT, SPEAKER OF THE HOUSE OF REPRESENTATIVES

Legislative Proposal on Improving Restitution for Victims of Crimes

Bill Text

A bill to improve restitution for victims of crime.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE – This Act may be cited as the "Restitution for Victims of Crime Act of 2006."

(b) TABLE OF CONTENTS – The table of contents for this Act is as follows:

SECTION 101: SHORT TITLE

This title may be cited as the "Collection of Restitution Improvement Act of 2006."

SECTION 102. AMENDMENTS TO 18 U.S.C. § 3664(f)

Subsection 3664(f) of title 18 of the United States Code is amended by striking current subparagraph 3664(f)(2) and all of the succeeding text and inserting, after ". . . in determining the amount of restitution" the following:

"(C) Each restitution order shall a) contain information sufficient to identify each victim to whom restitution is owed, b) require that a copy of the court order be sent to each such victim,

and c) inform the same of his obligations to notify the appropriate entities of any change in his address. It shall be the responsibility of each victim to notify the Attorney General, or the appropriate entity of the court, by means of a form to be provided by the Attorney General or the court, of any change in the victim's mailing address while restitution is still owed the victim. The confidentiality of any information relating to a victim shall be maintained.

"(f)(2) The court shall order that the restitution imposed is due in full immediately upon imposition.

"(f)(3) The court shall direct the defendant –

"(A) to make a good-faith effort to satisfy the restitution order in the shortest time in which full restitution can be reasonably made and to refrain from taking any action that conceals or dissipates the defendant's assets or income. Compliance with all payment directions imposed as provided by subparagraphs (f)(4) and (f)(5) shall be prima facie evidence of a good faith effort, unless it is shown that the defendant has concealed or dissipated assets;

"(B) to notify the court of any change in residence; and,

"(C) to notify the United States Attorney for the district in which the defendant was sentenced of any change in residence, and of any material change in economic circumstances that might affect the defendant's ability to pay restitution.

"(f)(4) For the purpose of enforcing the restitution order, the United States Attorney may receive, without the need for a court order, any financial information concerning the defendant obtained by the grand jury that indicted the defendant for the crime for which restitution has been awarded, the United States Probation Office, or the Bureau of Prisons. A victim may also provide financial information concerning the defendant to the United States Attorney.

"(f)(5) At sentencing or at any time prior to the termination of the restitution obligation under section 3613 of this title, the court may impose special payment directions upon the defendant or modify such directions. The court may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. The length of time over which scheduled payments are established shall be the shortest time in which full payment reasonably can be made. In-kind payments may be in the form of the return of property, replacement of property, or, if the victim agrees, services rendered to the victim or a person or organization other than the victim. The court may direct the defendant to repatriate any property that constitutes proceeds of the offense of conviction, or property traceable to such proceeds. The court may direct the defendant to surrender to the United States, or to the victim(s) named in the restitution order, any interest of the defendant in any non-exempt asset. The court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property for restitution.

"(f)(6) In determining whether to impose or modify specific payment directions, the court may consider the need to provide restitution to the victims of the offense; the financial ability of the defendant; the economic circumstances of the defendant, including the financial resources and other assets of the defendant and whether any of those assets are jointly controlled; projected earnings and other income of the defendant; any financial obligations of the defendant, including obligations to dependents; whether the defendant has concealed or dissipated assets or income; and any other appropriate circumstances. Any substantial resources from any source, including inheritance, settlement, or other judgment, shall be applied to any outstanding restitution obligation.

"(f)(7) If the court finds from the facts on the record that the economic circumstances of the defendant do not allow the payment of any substantial amount as restitution, the court may direct the defendant to make nominal payments of at least $100 per year toward the restitution obligation. Provided, however, that any money received from the defendant shall be disbursed so that any outstanding assessment imposed under section 3013 of this title is paid first in full.

"(f)(8) Court-imposed special payment directions shall not limit the ability of the Attorney General to maintain an Inmate Financial Responsibility Program that encourages sentenced inmates to meet their legitimate financial obligations.

"(f)(9) The ability of the Attorney General to enforce restitution obligations as provided in subsection 3664(f)(2) shall not be limited by an appeal, or the possibility of a correction, modification, amendment, adjustment, or re-imposition, unless the court expressly so orders for good cause shown and stated on the record. Absent exceptional circumstances as determined by the court, the court's order limiting enforcement shall – (i) require the defendant to deposit, in the registry of the district court, any amount of the restitution that is due; (ii) require the defendant to post a bond or other security to ensure payment of the restitution that is due; or (iii) impose additional restraints upon the defendant to prevent the defendant from transferring or dissipating assets. No such order shall restrain the ability of the United States to continue its investigation of the defendant's financial circumstances, conduct discovery, record a lien, or seek any injunction or other relief from the court."

SECTION 103. AMENDMENTS TO 18 U.S.C. § 3572(d)

Subsection 3572(d) of title 18 is amended by striking current subsection 3572(d) and inserting the following:

"(d)(1) This subsection shall also apply to the imposition and enforcement of all assessments imposed pursuant to section 3013 of this title.

"(d)(2) The court shall order that the fine and assessment imposed be due in full immediately upon imposition.

"(d)(3) The court shall

"(A) direct the defendant to make a good-faith effort to satisfy the fine and assessment in the shortest time in which full payment can be reasonably made and to refrain from taking any action that conceals or dissipates the defendant's assets or income. Compliance with all payment directions imposed by subparagraphs (d)(4) and (d)(5) shall be prima facie evidence of a good faith effort, unless it is shown that the defendant has concealed or dissipated assets;

"(B) direct the defendant to notify the court of any change in residence; and

"(C) order the defendant to notify the United States Attorney for the district in which the defendant was sentenced of any change in residence, and of any material change in economic circumstances that might affect the defendant's ability to pay restitution.

"(d)(4) For the purpose of enforcing the fine or assessment, the United States Attorney may receive, without the need for a court order, any financial information concerning the defendant obtained by a grand jury, the United States Probation Office, or the Bureau of Prisons.

"(d)(5) At sentencing or at any time prior to the termination of the obligation under section 3613 of this title, the court may impose special payment directions upon the defendant or modify such directions. The court may direct the defendant to make a single, lump-sum payment, or partial payments at specified intervals. The length of time over which scheduled payments are established shall be the shortest time in which full payment can reasonably be made. The court may direct the defendant to repatriate any property that constitutes proceeds of the offense of conviction, or property traceable to such proceeds. The court may direct the defendant to surrender to the United States any interest of the defendant in any non-exempt asset. If the court directs the defendant to repatriate or surrender any property in which it appears that any person other than the defendant may have a legal interest, the court must take such action as is necessary to protect such third party interest and may direct the United States to initiate any ancillary proceeding to determine such third party interests in accordance with the procedures specified in 21 U.S.C. § 853(n). Except as provided in this section, no person may commence an action against the United States concerning the validity of the party's alleged interest in the property subject to reparation or surrender. The court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property for payment of the fine or assessment.

"(d)(6) In determining whether to impose or modify special payment directions, the court may consider the need to satisfy the fine or assessment; the financial ability of the defendant; the economic circumstances of the defendant, including the financial resources and other assets of the defendant and whether any of those assets are jointly controlled; projected earnings and other income of the defendant; any financial obligations of the defendants, including obligations to dependents; whether the defendant has concealed or dissipated assets or income; and any other appropriate circumstances. Any substantial resources from any source, including inheritance, settlement, or other judgment shall be applied to any fine or assessment still owed.

"(d)(7) If the court finds from the facts on the record that the economic circumstances of the defendant do not allow the immediate payment of any substantial amount of the fine or assessment imposed, the court may direct the defendant to make nominal payments of at least $100 per year toward the fine or assessment imposed.

"(d)(8) Court-imposed special payment directions shall not limit the ability of the Attorney General to maintain an Inmate Financial Responsibility Program that encourages sentenced inmates to meet their legitimate financial obligations.

"(d)(9) The ability of the Attorney General to enforce the fines and assessment as provided in subparagraph 3572(d)(2) shall not be limited by an appeal, or the possibility of a correction, modification, amendment, adjustment, or reimposition, unless the court expressly so orders, for good cause shown and stated on the record. Absent exceptional circumstances as determined by the court, the court's order limiting enforcement shall – (i) require the defendant to deposit, in the registry of the district court, any amount of the fine or assessment that is due; (ii) require the defendant to post a bond or other security to ensure payment of the fine or assessment that is due; or (iii) impose additional restraints upon the defendant to prevent the defendant from transferring or dissipating assets. No such order shall restrain the ability of the United States to continue its investigation of the defendant's financial circumstances, conduct discovery, record a lien, or seek any injunction or other relief from the court."

SECTION 104: AMENDMENT TO 18 U.S.C. § 3612(b)

Section 3612(b) of title 18 is amended by striking the current text and inserting:

"(1) A judgment or order imposing, modifying, or remitting a fine or restitution order of more than $100 shall include –

"(A) the name, social security account number, mailing address, and residence address of the defendant;

"(B) the docket number of the case;

"(C) the original amount of the fine or restitution order and the amount that is due and unpaid;

"(D) payment orders and directions imposed pursuant to subsection 3572(d) and subsection 3664(f) of this title; and

"(E) a description of any modification or remission.

"(2) Not later than ten days after entry of the judgment or order, the court shall transmit a certified copy of the judgment or order to the Attorney General."

SECTION 105: AMENDMENTS TO 18 U.S.C. §§ 3663(b) and 3663A(b)

(a) Section 3663 of title 18, United States Code, is amended by:

(1) Striking the word "or" in Section 3663(b)(1)(A)
(2) Inserting the following after the semicolon in 3663(b)(1)(A):

"(B) reimburse the victim for attorneys' fees reasonably incurred in an attempt to retrieve damaged, lost or destroyed property; or"

(3) In Section 3663(b)(1), renumbering existing "(B)" as "(C)";
(4) In Section 3663(b)(1)(C), inserting "or (B)" after "subparagraph (A)" and before "is impossible,";
(5) In Section 3663(b)(4), inserting "including attorneys' fees necessarily and reasonably incurred for representation of the victim" after "other expenses related to participation in the investigation and prosecution of the offense" and before "or attendance at proceedings related to the offense;" and,
(6) Adding the following after Section 3663(b)(5):

"(6) in any case, reimburse the victim for reasonably incurred, attorneys' fees that are necessary and foreseeable results of the defendant's crime.
"(7) Notwithstanding references to restitution for attorneys fees in this subsection, in no case shall restitution be ordered for payment of salaries of Government attorneys.

(b) Section 3663A of title 18, United States Code, is amended by:

(1) Striking the word "or" in Section 3663A(b)(1)(A);
(2) Inserting the following after the semicolon in 3663A(b)(1)(A):

"(B) reimburse the victim for attorneys' fees reasonably incurred in an attempt to retrieve damaged, lost, or destroyed property; or"

(3) In Section 3663A(b)(1), renumbering existing "(B)" as "(C)";
(4) In Section 3663A(b)(1)(C), inserting "or (B)" after "subparagraph (A)" and before "is impossible,"
(5) In Section 3663A(b)(4), inserting "including attorneys' fees necessarily and reasonably incurred for representation of the victim" after "other expenses related to participation in the investigation and prosecution of the offense" and before "or attendance at proceedings related to the offense;" and,
(6) Adding the following after Section 3663A(b)(4):

"(5) in any case, reimburse the victim for reasonably incurred, attorneys' fees that are necessary and foreseeable results of the defendant's crime.

(6) Notwithstanding references to restitution for attorneys fees in this subsection, in no case shall restitution be ordered for payment of salaries of Government attorneys.

SECTION 201: SHORT TITLE

This title may be cited as the "Preservation of Assets for Restitution Act of 2006."

SECTION 202: CREATION OF 18 U.S.C. § 3664A

(a) IN GENERAL.- Chapter 232 of title 18, United States Code, is amended by inserting the following section after section 3664:

"3664A. Preservation of Assets for Restitution.

"(a) Protective orders to preserve assets.

"(1) Upon the Government's *ex parte* application and a finding of probable cause to believe that a defendant, if convicted, will be ordered to satisfy an order of restitution for an offense punishable by imprisonment for more than one year, the court shall enter a restraining order or injunction, require the execution of a satisfactory performance bond or take any other action necessary to preserve the availability of any property traceable to the commission of the offense(s) charged. Additionally, the court, if it determines that it is in the interests of justice to do so, shall issue any order necessary to preserve any non-exempt asset (as defined in 18 U.S.C. § 3613) of the defendant that may be used to satisfy such restitution order.

"(2) Applications and orders issued under (1) shall be governed by the procedures in Section 413(e) of the Controlled Substances Act (21 U.S.C. § 853(e)) and in this section.

"(3) If the property in question is a monetary instrument (as defined in Section 1956(c)(5) of this title) or funds in electronic form, the protective order issued pursuant to (1) may take the form of a warrant authorizing the Government to seize the property and to deposit it into an interest-bearing account in the Registry of the Court in the district in which the warrant was issued, or into another such account maintained by a substitute property custodian, as the court may direct.

"(4) A post-indictment protective order entered pursuant to (1) shall remain in effect through the conclusion of the criminal case, including sentencing and any post-sentencing proceedings, until seizure or other disposition of the subject property, unless modified by the court upon a motion by the Government or pursuant to subsections (b) or (c).

"(b) Defendant's right to a hearing.

"(1) In the case of a pre-indictment protective order entered pursuant to (a)(1), the defendant's right to a post-restraint hearing shall be governed by Sections 413(e)(1)(B) and (2) of the Controlled Substances Act (21 U.S.C. § 853(e)(1)(B) and (2)).

"(2) In the case of a post-indictment protective order entered pursuant to (a)(1), the defendant shall have a right to a post-restraint hearing regarding the continuation or modification of the order if the defendant —

"(A) establishes by a preponderance of the evidence that there are no assets, other than the restrained property, available to the defendant to retain counsel in the criminal case or to provide for a reasonable living allowance for the necessary expenses of the defendant and the defendant's lawful dependents; and

"(B) makes a prima facie showing that there is bona fide reason to believe that the court's *ex parte* finding of probable cause under (a)(1) was in error.

"(3) If the court determines that the defendant has satisfied the requirements of (2)(A) and (B), it may hold a hearing to determine whether there is probable cause to believe that the defendant, if convicted, will be ordered to satisfy an order of restitution for an offense punishable by imprisonment for more than one year, and that the seized or restrained property may be needed to satisfy such restitution order. If the court finds probable cause, the protective order must remain in effect. If the court finds that no probable cause exists as to some or all of the property, or determines that more property has been seized and restrained than may be needed to satisfy a restitution order, it must modify the protective order to the extent necessary to release the property that should not have been restrained.

"(4) The court must afford the Government an opportunity to present rebuttal evidence and to cross-examine any witness that the defendant may present if the court conducts an evidentiary hearing on these issues.

"(5) In any pre-trial hearing on protective orders issued under (a)(1), the court may not entertain challenges to the grand jury's finding of probable cause regarding the criminal offense giving rise to a potential restitution order. The court must also take whatever steps may be necessary to prevent the use of such hearings to obtain disclosure of evidence or the identities of witnesses earlier than required by the Federal Rules of Criminal Procedure and other applicable law.

"(c) Third party's right to post-restraint hearing.

(1) A person other than the defendant who has a legal interest in property affected by a protective order issued under (a)(1) may move to modify the order on the grounds that —

"(A) the order causes an immediate and irreparable hardship to the moving party; and
"(B) less intrusive means exist to preserve the property for the purpose of restitution.

"If, after considering any rebuttal evidence offered by the Government, the court determines that the moving party has made the required showings, the court must modify the order to mitigate the hardship to the extent that it is possible to do so while preserving the asset for restitution.

"(2) Except as provided in (1) and (3), a person other than a defendant has no right to intervene in the criminal case to object to the entry of any order issued under this section or otherwise to object to an order directing a defendant to pay restitution.

"(3) If, at the conclusion of the criminal case, the court orders the defendant to use particular assets to satisfy an order of restitution, including assets that have been seized or restrained pursuant to this section, the court must give persons other than the defendant the opportunity to object to the order on the ground that the property belonged in whole or in part to the third party and not to the defendant, as provided in Section 413(n) of the Controlled Substances Act (21 U.S.C. § 853(n)).

"(d) Geographic scope of order.

"(1) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of the property subject to the order.

"(2) If the property subject to an order issued under this section is located outside of the United States, the order may be transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement.

"(e) No effect on forfeiture. Nothing in this section shall be construed to preclude the Government from seeking the seizure, restraint or forfeiture of assets under the asset forfeiture laws of the United States.

"(f) Limitation on rights conferred. Nothing in this section shall be construed to create any enforceable right to have the Government seek the seizure or restraint of property for restitution.

"(g) Receivers.

"(1) A court issuing an order under this section may appoint a receiver as provided for in section 1956(b)(4) to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, that have been restrained in accordance with this section.

"(2) The receiver shall have the power to distribute property in its control under subparagraph (1) to each victim identified in an order of restitution at such time, and in such manner, as the court may authorize.

"(b) CONFORMING AMENDMENT.– The section analysis for chapter 232 of title 18, United States Code, is amended by inserting the following after the entry for Section 3664:

'3664A. Preservation of Assets for Restitution.'"

SECTION 203: AMENDMENTS TO THE ANTI-FRAUD INJUNCTION STATUTE

18 U.S.C. § 1345(a) is amended as follows:

1) by adding the following after Section 1345(a)(1)(C):

> "(D) committing or about to commit a Federal offense that may result in an order of restitution;"

2) (a) striking

> (i) "banking law,"
> (ii) "(as defined in section 3322(d) of this title)"; and,
> (iii) "health care"

(b) inserting "identified in subsection (a)(1)" after "offense."

SECTION 204: AMENDMENTS TO THE FEDERAL DEBT COLLECTION PROCEDURES ACT

1) 28 U.S.C. § 3004(b)(2) is amended by adding the following, after "in which the debtor resides.": "However, in a criminal case, the district court for the district in which the defendant was sentenced may deny the request."

2) 28 U.S.C. § 3101(a) is amended by adding the following, after "the filing of a civil action on a claim for a debt" and before "make application under oath to a court to issue any prejudgment remedy.":

> "or in any criminal action where the court may enter an order of restitution"

3) 28 U.S.C. § 3101(d) is amended by adding

a) the following after "The Government wants to make sure [name of debtor] will pay if the court determines that this money is owed.":

> "In a criminal action, use the following opening paragraph: You are hereby notified that this (property) is being taken by the United States Government (the Government), which says that (name of debtor), if convicted, may owe as restitution $ (amount). The Government says it must take this property at this time because [recite the pertinent

ground or grounds from section 3101(b)]. The Government wants to make sure (name of debtor) will pay if the court determines that restitution is owed."

b) the following after "a statement that different property may be so exempted with respect to the State in which the debtor resides.":

"[In a criminal action, the statement summarizing the types of property that may be exempt shall list only those types of property that may be exempt under section 3613 of title 18, United States Code.]"

c) the following after "You must also send a copy of your request to the Government at [address], so the Government will know you want the proceeding to be transferred.":

"If this Notice is issued in conjunction with a criminal case, the district court where the criminal action is pending may deny your request for a transfer of this proceeding."

4) 28 U.S.C. § 3202(b) is amended by

a) adding the following after "a statement that different property may be so exempted with respect to the State in which the debtor resides.]":

"[In a criminal action, the statement summarizing the types of property that may be exempt shall list only those types of property that may be exempt under section 3613 of title 18, United States Code.]"

d) adding the following after "You must also send a copy of your request to the Government at [address], so the Government will know you want the proceeding to be transferred.":

"If this Notice is issued in conjunction with a criminal case, the district court where the criminal action is pending may deny your request for a transfer of this proceeding."

SECTION 301: SHORT TITLE

This title may be cited as that "Environmental Crimes Restitution Act of 2006."

SECTION 302: Immediate Availability of Restitution to Victims of Environmental Crimes

Section 3663(a)(1)(A) of title 18, United States Code, is amended to read:

"The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), section 309(c)(2) and (3) of the Federal Water Pollution Control Act (33 U.S.C. 1319(c)(2) and (3)), section 105(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1415(b)), section 9(a) of the Act to Prevent Pollution from Ships (33 U.S.C. 1908(a)), sections 1423 and 1432(a) and (b) of the Safe Drinking Water Act (42 U.S.C. 300h-2(b)(2) and 300i-1(a) and (b)), section 3008(d) and (e) and of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6928(d) and (e)), section 113(c)(1) and (5) of the Clear Air Act (42 U.S.C. 7413(c)(1) and (5)), or section 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.".

Section-by-Section Analysis

Section 102: Amendments to 18 U.S.C. § 3664(f)

This section makes several fundamental changes to 18 U.S.C. § 3664(f), one of the central provisions establishing the procedures for collection of restitution.

Section 3664(f)(1)(C) is identical to language in current 18 U.S.C. § 3612(c)(1)(G) and is relocated only to ensure that all provisions regarding restitution orders are in the same section.

Revised section 3664(f)(2) clarifies that the Attorney General may enforce restitution judgments immediately upon imposition. Although various statutes provide the Attorney General with this authority, some circuit courts of appeal have interpreted one clause within 18 U.S.C. § 3664(f)(2), providing that "the court shall . . . specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid," to require that a mandatory payment schedule be set at the time of sentencing. The current legislative scheme therefore impedes the effective enforcement of criminal monetary penalties, including restitution. The enforcement of restitution would be substantially enhanced if Congress were to amend 18 U.S.C. § 3664(f)(2) to clarify that restitution is due immediately upon the imposition of a restitution order, as is the case with an ordinary civil judgment.

Revised section 3664(f)(3) presents a check-list of what the court must order from the defendant (*e.g.*, a good faith effort to pay restitution and notice of any change in residence or financial circumstances) in order to improve collection procedures.

Proposed section 3664(f)(4) allows Federal prosecutors access to financial information about the defendant. It provides that "[f]or the purposes of enforcing the restitution order, the United States Attorney may receive, without the need for a court order, any financial information concerning the defendant obtained by a grand jury, United States Probation Office, or the Bureau of Prisons. . . ." This provision is necessary because in some districts, financial information is provided only as approved by the judge who sentenced the defendant. In those districts where financial information obtained concerning the defendant is not routinely provided, efforts by prosecutors to identify all collectible criminal debt is impeded. While the court properly should restrict access to information to third parties, *i.e.*, other litigants or private parties, the United States Attorney's Office ("USAO") is not a third party. A statute expressly providing access, to the USAO only, to financial information concerning the defendant obtained by the Probation Office, without the need for a specific court order, would expedite the response process of the Federal judiciary on an issue that is directly related to its mission. Information sought under this new provision would include such items as the affidavit the defendant is required to submit to the court under 18 U.S.C. § 3664(d)(3), the Probation Office's Form 48A (Personal Financial Statement), and the defendant's monthly reports showing employment and income. It would not include the Probation Officer's analysis of the financial information or any of the Probation Officer's recommendations to the court.

Proposed section 3664(f)(5) provides, *inter alia*, that the court may "at any time prior to the termination of the restitution obligation under section 3613 of this title, impose or modify special payment directions upon the defendant." This change is necessary to clarify the powers of the district court. A district court clearly has the statutory power to enforce the other non-supervisory terms of its sentence, including terms imposing a fine or restitution, notwithstanding the fact that a term of probation or supervised release has expired. For example, current 18 U.S.C. § 3664(k) (permitting an adjustment in payment schedules when there is a change in a defendant's economic circumstances), 18 U.S.C. § 3613A (permitting an adjustment in payment schedules when the defendant is in default), and 28 U.S.C. § 3204 (permitting an installment payment order when a defendant receives income not subject to garnishment, or is diverting or concealing earnings) are not limited to the period of probation or supervised release, except for those relatively few cases where restitution is imposed solely as a condition of probation of supervised release.

Proposed subparagraph 3664(f)(6) is drawn from current subparagraphs 3664(f)(2) and (n), with some important modifications. Current 18 U.S.C. § 3664(f)(2) has undermined the efforts of the United States to enforce restitution because it provides that "the court shall . . . specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid . . ." Courts of appeal have interpreted this provision as requiring the imposition, at every sentencing, of an exclusive court-imposed payment plan that limits the ability of the United States to enforce restitution using other available civil and administrative enforcement methods. As a result, district courts generally impose minimal payment plans upon the defendant that thereafter cannot be changed except by the court and upon a showing of a substantial change in the defendant's economic circumstances. Therefore, proposed subparagraph 3664(f)(6) deletes from the statute the requirement that the district court "shall...specify in the restitution order...the schedule according to which, the restitution is to be paid..."

Nevertheless, district courts have an inherent responsibility to ensure that their own judgments are enforced, especially in criminal cases. Thus, proposed 18 U.S.C. § 3664(f)(6) permits – but does not require – district courts to enter payment directions. The term "payment directions" is used instead of "the schedule" to make it more clear that the courts' orders with regard to payments are merely a supplemental tool that may be used to assist in the enforcement of the restitution judgment. The term "the schedule" suggests exclusiveness; it is that suggestion of exclusiveness that has deprived the Attorney General of the ability to enforce restitution using otherwise available and reasonable means.

Proposed 18 U.S.C. § 3664(f)(6) also substitutes the word "may" for "shall" before the criteria to be considered in imposing payment directions. Numerous courts of appeal have remanded for resentencing payment schedules where, in the view of the court, the district court failed to establish with sufficient detail that the defendant could actually meet the payment schedule. However, requiring district judges to make express written findings inevitably results in payment schedules for minimal amounts or no payment directions at all. Before a district court imposes a payment direction, the court should consider the economic circumstances of the

defendant, but there is no need to require specific fact finding before imposing reasonable payment directions upon a defendant who has already been convicted of a Federal offense and ordered to pay restitution.

Finally, language from current 18 U.S.C. § 3664(n) is moved into proposed 18 U.S.C. § 3664(f)(6). Current subsection 3664(n) relates to defendants who receive substantial resources from any source, such as an inheritance or settlement. It requires that such a person "shall be required to apply the value of such resources to any restitution or fine still owed." However, it is limited to defendants who are incarcerated. The proposed revision, in the last sentence of proposed 18 U.S.C. § 3664(f)(6), is applicable to all defendants who have an outstanding restitution obligation, regardless of whether they are incarcerated or on supervised release, and even if their period of supervised release has expired.

Proposed 18 U.S.C. § 3664(f)(7) is a revision of current 18 U.S.C. § 3664(f)(3)(B). The Department understands congressional intent to be that every defendant should pay full restitution immediately or, if that is not possible, as soon as reasonably possible. Even if a defendant cannot make reasonable payments towards his restitution obligation, then Congress expects the courts to require the defendant to make at least nominal, periodic payments toward his restitution obligation. However, the current statute is unclear. According to the statute, the court may "direct the defendant to make nominal payments . . . if the economic circumstances of the defendant do not allow the payment of any amount . . ." As stated in *United States v. Kemp*, 938 F.Supp. 1554 (N.D.Ala. 1996), "If the criminal is unable to make any payment, how can he make a nominal payment?" Because of the unclear language of the statute, courts rarely order nominal payments. This proposal will ensure that the statute implements Congressional intent.

Proposed section 3664(f)(8) states that the ability of the Attorney General to maintain an Inmate Financial Responsibility Program ("IFRP") through the Bureau of Prisons ("BOP") is not limited. Some appeals courts have held, as a result of current subparagraph 3664(f)(2) described above, that district courts have the exclusive power to require payment. This effectively prohibits the BOP from enforcing final restitution orders through its long-established IFRPs, on the theory that an IFRP trespasses upon the district court's sole power to enforce restitution obligations.

Proposed 18 U.S.C. § 3664(f)(9) requires that if the court imposes some limitation on the ability of the United States to enforce a judgment, such as a stay of enforcement when the defendant pursues an appeal, it must do so expressly, for good cause stated on the record. Absent exceptional circumstances, as determined by the court, the court must require a deposit with the clerk's registry, the posting of a bond, or "impose some additional restraints upon the defendant to prevent the defendant from dissipating assets."

This provision would only be applicable in a very limited number of circumstances, such as when the defendant appeals a restitution judgment and the court imposes a stay upon the ability of the United States to enforce the restitution judgment. It parallels current 18 U.S.C. § 3572(g), which provides:

If a sentence imposing a fine is stayed, the court shall, absent exceptional circumstances (as determined by the court) –

(1) require the defendant to deposit, in the registry of the district court, any amount of the fine that is due;

(2) require the defendant to provide a bond or other security to ensure the payment of the fine; or

(3) restrain the defendant from transferring or dissipating assets.

The proposal ("impose additional restraints upon the defendant to prevent the defendant from transferring or dissipating assets") varies slightly from current 18 U.S.C. § 3572(g)(3) ("restrains the defendant from transferring or dissipating assets") because proposed 18 U.S.C. § 3664(f)(3) already contains a provision requiring the court, at sentencing, to direct the defendant to refrain "from taking any action which conceals or dissipates the defendant's assets or income."

Congress has already determined that a final restitution judgment should be enforceable immediately, not withstanding the possibility of an eventual resentencing or successful appeal. *See* 18 U.S.C. § 3664(o). Congress recognizes that in some cases the court may, nevertheless, stay enforcement. *See* 18 U.S.C. § 3572(g). Congress permits, that in "some exceptional circumstances (as determined by the court)," when the defendant appeals a judgment imposing a fine or restitution obligation, the court may stay enforcement, but then Congress requires something more than in the ordinary case to balance the risk that the defendant may use an appeal as simply additional time to hide his assets. *See* 18 U.S.C. § 3572(d).

Section 103: Amendments to 18 U.S.C. § 3572(d)

This section would amend 18 U.S.C. § 3572(d) with respect to criminal fines and payment directions for these fines in a manner similar to the changes we make to 18 U.S.C. § 3664(f)(2) regarding restitution. Under current law, some enforcement provisions respecting fines are in the restitution statute, and some enforcement provisions respecting restitution are in the fines statute. The proposed statutes are de-conflicted, so that subsection 3572(d) addresses only fines and special assessments and subsection 3664(f) addresses only restitution obligations.

Section 104: Amendments to 18 U.S.C. § 3612(b)

Minor changes to 18 U.S.C. § 3612(b), primarily deletions, are proposed to conform to proposed 18 U.S.C. §§ 3572(d) and 3664(f). Specifically, subsections (f) and (g) are struck, and subsection (d) cross-references both section 3572 and section 3664.

Section 105: Amendments to 18 U.S.C. §§ 3663(b) and 3663A(b)

This section of the bill clarifies that defendants may be ordered to pay restitution to victims for the victims' reasonable attorneys fees incurred as a result of the offense.

New Sections 3663(b)(1)(B) and 3663A(b)(1)(B) of Title 18 would provide that restitution orders include attorneys' fees reasonably incurred in attempts to recover damaged, lost or destroyed property. The federal courts of appeals have interpreted the existing provisions of Section 3663 not to permit inclusion of such attorneys' fees in restitution awards. For example, in *U.S. v. Mitchell*, the Fifth Circuit held that a restitution order could not include attorneys' fees expended by a victim to recover from his insurance company for a truck stolen by the defendant. 876 F2d 1178 (5th Cir.1989). Similarly, in *U.S. v. Mullins*, the Fourth Circuit held that a restitution order could not include attorneys' fees expended by the victim to repossess property fraudulently obtained by the defendant (prior to discovery of the fraud), because the fees were consequential damages. 971 F2d 1138 (4th Cir.1992). Finally, in *Government of the Virgin Islands v. Davis*, the Third Circuit held that a restitution order could not include attorneys' fees expended by a victim to recover funds in a bank account frozen because of defendant's fraud. The court stated that, "absent specific statutory authority for an award of attorneys' fees, the amount of restitution ordered under the VWPA may not included compensation for legal expenses unless such costs are sustained as a direct result of the conduct underlying the offense of conviction." 43 F.3d 41, 46 (3rd Cir.1993). This new subsection will provide statutory authority for inclusion of attorneys' fees for return of property by clarifying that such fees are in fact direct or at least foreseeable results of the offense.

Changes to Sections 3663(b)(4) and 3663A(b)(4) make clear that a court may (or, under section 3663A, must) order restitution of attorneys' fees reasonably incurred by a victim for participation in investigation and prosecution of the case, such as when the victim secures counsel to protect her rights during the course of the investigation and prosecution.

New Sections 3663(b)(6) and 3663A(b)(5) make clear that restitution orders may include reasonably incurred attorneys' fees that are not incurred as part of the investigation or prosecution of the offense (which would be available under § 3663(b)(4) and § 3663A(b)(4) as revised by this bill), but that are a foreseeable result of the offense. Under this language, a court still could determine that such litigation was not a foreseeable result of the crime, but victims would be able to recover fees where such litigation was foreseeable.

The fees covered by this section would be those at issue in, for example, *U.S. v. Cummings*, an appeal from a restitution order entered against a father convicted of kidnapping his children to Germany, in which the Ninth Circuit upheld inclusion of attorneys' fees that the children's mother had incurred in civil and international litigation to secure the children's return. The court stated that the fees "were a direct and foreseeable result of Cummings' improper removal and retention of [the children]. There would have been no need to engage in civil proceedings to recover the children if Cummings had not unlawfully taken them to Germany." 281 F.3d 1046, 1052 (9th Cir.2002). Although the court included the fees at issue under § 3663A(b)(4), it is more appropriate to include such expenses in this new section, since they were

incurred in litigation caused by the crime rather than the investigation and prosecution of the crime itself.

These new provisions would resolve a circuit split regarding the extent to which such attorneys' fees can be recovered under the existing statute. *Compare United States v. Diamond*, 969 F.2d 961, 968 (10th Cir.1992) (restitution order could not include attorneys' fees incurred by the Small Business Administration in liquidating the assets of a company whose owner had fraudulently obtained SBA debentures because "[e]xpenses generated in recovering a victim's losses...generally are too far removed from the underlying conduct to form the basis of a restitution order"); *United States v. Barany*, 884 F.2d 1255 (9th Cir.1989) (restitution order may not include insurance company's attorneys' fees expended in litigating claims by defendant that proved to be fraudulent); *United States v. Onyeigo*, 286 F3d 249 (5th Cir.2002) (restitution order may not include attorneys' fees expended by victim travel agencies to defend against lawsuits by airlines as a result of defendants' theft of airline tickets) *with United States v. Blackburn*, 9 F.3d 353 (5th Cir. 1993) (allowing inclusion of attorneys' fees expended by victim bank to defend against lawsuit filed by defendant as part of his attempt to defraud bank); *United States v. Mikolajczyk,* 137 F.3d 237 (5th Cir.1998) (Ford Motor Co. could recover attorneys' fees for defending lawsuit by defendant in his scheme to defraud Ford); *United States v. Akbani*, 151 F.3d 774 (8th Cir.1998) (permitting inclusion of attorneys' fees expended by victim bank to secure collateral posted by defendant for loans serviced by defendant's check kiting scheme); *United States v. Corey*, 77 Fed. Appx. 7 (1st Cir. 2003) (permitting inclusion of attorneys' fees by victim bank in foreclosure on collateral on loan fraudulently obtained by defendant).

Section 202: New Section 3664A in the Mandatory Victims Restitution Act

This new section provides the authority to restrain assets specifically to satisfy a restitution order similar to the authority that already exists in asset forfeiture cases. At the same time, it provides appropriate safeguards for criminal defendants who have not yet been convicted of a crime by permitting defendants to challenge the restraint.

Proposed 18 U.S.C. § 3664A(a)(1) provides that upon a finding of probable cause that a defendant, if convicted, would have to satisfy an order of restitution, a district court shall "enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action necessary to preserve the availability of" any property traceable to the commission of the offense(s) charged. The quoted language is drawn from Section 413(e) of the Controlled Substances Act, 21 U.S.C. § 853(e)(1), which provides that a court in a criminal case may restrain property prior to trial to ensure that it is available for forfeiture to the United States in the event the defendant is convicted. Subsection (a)(1) makes explicit, as the courts have correctly held in construing section 853(e)(1), that such orders may be entered by the court *ex parte*, and that entry of such orders as to traceable assets upon proper application by the Government is intended by Congress to be mandatory. *See United States v. Monsanto*, 491 U.S. 600, 612-13 (1989). In addition, subsection (a)(1) provides that the court, if it determines that it is in the interests of justice to do so, must issue any order necessary to preserve any assets that

may be used to satisfy such restitution order even if those assets are not traceable to the offenses charged.

Proposed 18 U.S.C. § 3664A(a)(2) applies to Section 3664A(a)(1) the asset forfeiture pretrial restraint procedures in Section 853(e).

Proposed 18 U.S.C. § 3664A(a)(3) provides that instead of issuing a restraining order, a court may authorize the United States to seize monetary instruments or other property.

Proposed 18 U.S.C. § 3664A(b) codifies the protections for defendants required by *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998), and *United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001). A defendant has a right to a post-restraint hearing if he (a) establishes by a preponderance of the evidence that there are no assets, other than the restrained property, available to him to retain counsel or to provide for a reasonable living allowance and (b) makes a prima facie showing that there is bona fide reason to believe that the court's *ex parte* finding of probable cause to restrain the property was in error. At all stages of this post-restraint hearing process, the government has the right to rebut the defendant's evidence and to cross-examine any witness.

If the court determines that the defendant has established that he has no other assets available to retain counsel or provide for reasonable living expenses and that there is a prima facie reason to doubt the court's *ex parte* finding of probable cause, the court may hold a hearing to reexamine whether there is probable cause. If the court again finds probable cause, the protective order must remain in effect. If the court finds that no probable cause exists as to some or all of the property, or determines that more property has been seized and restrained than may be needed to satisfy a restitution order, it must modify the protective order to the extent necessary to release the property that should not have been restrained.

While providing these protections for defendants, the subsection also ensures that these hearings cannot be used to undermine the government's case. First, the court may not entertain challenges to the grand jury's finding of probable cause regarding the criminal offense giving rise to a potential restitution order. Second, the court must also take whatever steps may be necessary to prevent the use of such hearings to obtain disclosure of evidence or the identities of witnesses earlier than required by the Federal Rules of Criminal Procedure and other applicable law.

Proposed 18 U.S.C. § 3664A(c) provides that a third party who has a legal interest in the restrained property may move to modify or vacate the restraining order on the grounds that the order causes a substantial hardship to the party and less intrusive means exist to preserve property for restitution. In such a case, the court must modify the order, to the extent that it is possible to do so while still preserving the asset.

Proposed 18 U.S.C. § 3664A(d) provides that district courts have jurisdiction to enter orders for preservation of assets for restitution without regard to the location of any property that

may be subject to restitution under this section. This proposed subsection is drawn from Section 853(l) and is necessary to ensure that the court has the power to effectuate its orders

Proposed 18 U.S.C. § 3664A(e) provides that nothing in the section shall be construed to preclude the government from seeking the restraint, seizure, or forfeiture of property, real or personal. This proposed subsection is necessary to ensure that the addition of this new restraint provision for restitution has no effect at all upon the government's ability to seek the forfeiture of property, and to restrain and seize property alleged to be forfeitable, as permitted by law

Proposed 18 U.S.C. § 3664A(f) provides that nothing in this new section of the U.S. Code creates an enforceable right of a party to force the government to seek seizure or restraint of property for restitution. This subsection makes clear that prosecutors retain discretion to seek the preservation of assets for restitution only in those cases where they determine that it is appropriate to do so.

Proposed 18 U.S.C. § 3664A(g) authorizes a court to appoint a receiver to locate, take custody of, and, after entry of a restitution order, distribute assets of the defendant. In some cases, such as those involving offenses with exceedingly numerous victims or defendants with numerous or especially difficult assets to manage and liquidate, specialized assistance may be needed to administer restitution.

Section 203: Amendments to the Anti-Fraud Injunction Statute

18 U.S.C. § 1345(a)(1)(D) would be added to the current statute in order to permit the Attorney General to commence a civil action to enjoin a person who is "committing or about to commit a Federal offense that may result in an order of restitution." Additionally, 18 U.S.C. § 1345(a)(2) would be amended to permit the court to restrain the dissipation of assets in any case where it has the power to enjoin the commission of an offense, not just, as current law authorizes, in banking or health care fraud offenses.

Section 204: Amendments to the Federal Debt Collection Procedures Act

28 U.S.C. § 3101(a)(1), the Federal Debt Collection Procedures Act provision which permits the issuance of prejudgment remedies in civil cases, would be amended to allow the United States to use the same procedures in criminal cases that are available to it in ordinary civil cases, where it is necessary to preserve a defendant's assets for restitution.

In addition, 28 U.S.C. §§ 3101(d)(1) and 3202(b) contain the notice provisions that must be issued by the Clerk of Court when the United States seeks a prejudgment remedy. Technical amendments are made to make the notices applicable to criminal cases.

Section 302: Immediate Availability of Restitution to Victims of Environmental Crimes

Many environmental crimes involve knowing releases of dangerous substances into the environment. When individuals are exposed to these dangerous substances, the results can be tragic. Some victims have died; others have suffered severe permanent bodily injury.

Immediately enforceable restitution orders currently authorized under 18 U.S.C. §§ 3663 and 3663A are limited to Title 18 offenses, a scattering of crimes under Titles 21 and 49, and defined "crimes of violence." Such orders may not be imposed for a variety of federal offenses, including environmental felonies that may well result in pecuniary loss, bodily injury, and even death. The only way a victim of any of the crimes not covered by sections 3663 and 3663A may secure restitution is as a discretionary condition of probation under 18 U.S.C. § 3563(b)(2) or as a condition of probation or supervised release after the defendant is released from prison. Thus, victims of environmental felonies may be forced to wait years before being compensated for their physical and economic injuries, if they are compensated at all. This is inequitable as victims of environmental crimes are no less deserving of immediate restitution for their injuries than are victims of the crimes listed in 18 U.S.C. § 3663(a)(1)(A).

This inequity is best illustrated by *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001) (as amended), *cert. denied*, 537 U.S. 812 (2002), *appeal after remand*, 111 Fed. Appx. 943 (9th Cir. 2004). Elias sent two young men he employed into a large tank containing cyanide waste to clean it out. Despite their complaints of respiratory problems, the two men were not provided with any protective gear. One of the young men, Scott Dominguez, was overcome by cyanide fumes and, before he could be rescued, sustained permanent brain damage. Beyond knowingly sending the young men into the tank, Elias, who was present during the rescue operation, failed to reveal to emergency response personnel the nature of the tank's contents, thereby delaying efforts to provide treatment to his unconscious employee.

Elias was convicted by a jury of violating a knowing endangerment provision of the Resource Conservation and Recovery Act (RCRA), the principal hazardous waste statute, 42 U.S.C. § 6928(e), and of other crimes, and was sentenced to 17 years in prison. The trial court also sought to impose an immediately enforceable restitution order upon Elias to cover the medical expenses that Scott Dominguez would incur for the rest of his life. However, because Elias was convicted of crimes not among those listed in 18 U.S.C. §§ 3663(a)(1)(A) and 3663A, the restitution order was reversed by the court of appeals, which lamented the fact that knowingly exposing workers to hazardous waste is "one of the few [offenses] for which Congress has not sanctioned the imposition of restitution. Perhaps this case will change that. At present, however, we conclude that the law does not sanction the imposition of restitution. . . ." 269 F.3d at 1022.

The district court, upon resentencing Elias, imposed restitution as a term of supervised release. Unfortunately for Scott Dominguez and his family, supervised release will not begin until Elias gets out of prison – 17 years after his sentencing. Thus, for the duration of his imprisonment, Elias is immune from paying restitution for the permanent injury he caused to

Scott Dominguez. Moreover, since Elias was sentenced at age 62, it is entirely possible that he will die in prison, thus forever depriving his victim of any restitution.[1]

The legislative history of 18 U.S.C. § 3663(a)(1)(A) indicates that Congress intended to authorize restitution for victims of crimes which caused injury or death, or loss, damage or destruction of property. S. REP. NO. 97-532 at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2537.[2] Yet Congress specifically declined to extend restitution coverage to crimes arising under the antitrust laws, the securities laws and certain other regulatory statutes because such statutes "involve complex issues which are outside the intended scope of Section [3663] such as standing, reliance and causation" and "have historically contained their own methods of restituting victims – such as the authorization of treble damages – a system of sanctions and reparations the Committee believes should remain integral parts of the regulatory statutes themselves." S. Rep. No. 97-532 at 33, 1982 U.S.C.C.A.N. at 2539.

With passage of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, Congress amended the restitution provisions of 18 U.S.C. § 3663. The Senate Report that accompanied the bill states:

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

S.Rep. No. 104-179 at 19, 1986 U.S.C.C.A.N. 924, at 932.

While a superficial review of the legislative history of 18 U.S.C. § 3663(a)(1)(A) would seem to suggest Congress's unwillingness to make restitution available to victims of environmental crimes, further analysis shows this to be incorrect. The original version of the Senate bill (S. 2420) ultimately enacted as the Victim and Witness Protection Act of 1982 enumerated each of the federal offenses for which a court could not order restitution.[3] No environmental offense is listed.[4]

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[1] The *Elias* case and its effect upon Scott Dominguez are the subjects of the recently released book The Cyanide Canary by Joseph Hilldorfer and Robert Dugoni (Free Press, 2004).

[2] The restitution sections of the Victim Witness Protection Act of 1982 were originally codified at 18 U.S.C. §§ 3579-3580, but were later renumbered by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, as 18 U.S.C. §§ 3663-3664.

[3] *See* section 3579(d) of S. 2420, set forth in S. Rep. 97-532 at 7, *United States Congressional Serial Set Serial Number 13453*. The federal offenses listed under section 3579(d) of S. 2420 are:

(1) section 24 of the Securities Act of 1933;

Further, Congress's rationale for refusing to extend the availability of restitution to regulatory or other statutes governing criminal conduct does not apply to the environmental statutes that contain criminal provisions. First, environmental offenses, which are components of regulatory statutes, do not raise issues such as standing, reliance or causation as do the antitrust and securities laws. Second, the environmental statutes do not contain their own methods of providing restitution or reparation to victims.[5] Thus, there should be little doubt that the rationale Congress articulated in 1982 for refusing to extend restitution to certain regulatory statutes, and which it reiterated in 1996, does not apply to environmental crimes.

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(2) section 325 of the Trust Indenture Act of 1939;
(3) section 32(a) of the Securities Exchange Act of 1934;
(4) section 29 of the Public Utility Holding Company Act;
(5) section 49 of the Investment Company Act of 1940;
(6) section 217 of the Investment Advisers Act of 1940;
(7) section 11911 of subtitle IV of title 49;
(8) section 127 of chapter 2 of title 1 of the Act of October 26, 1970;
(9) section 210 of the currency and Foreign Transactions Reporting Act;
(10) sections 9(b), (d) and (e) of the Commodity Exchange Act;
(11) the eleventh paragraph of section 25(a) of the Act of December 23, 1913; and
(12) sections 1, 2, and 3 of the Sherman Act.

[4] In 1982, Congress might not have been aware of criminal enforcement of the environmental statutes. The Clean Air Act criminal enforcement provisions had been enacted only 12 years previously and the statute had rarely been enforced criminally. The Clean Water Act of 1972 contained criminal provisions that were used only slightly more frequently. Effective enforcement provisions covering hazardous waste crimes were not enacted until 1980. When Congress passed the Victim and Witness Protection Act of 1982, the criminal enforcement programs at the U.S. Environmental Protection Agency and other federal agencies were in their infancy. *See* Cooney, Starr, Block, et al., "Criminal Enforcement of Environmental Laws" 5-8, in ELR'S ENVIRONMENTAL CRIMES DESKBOOK (Environmental Law Institute, 1996).

[5] As stated, no environmental statute authorizes a crime victim to seek restitution or reparation for the harm he or she has suffered. We nevertheless note that the Oil Pollution Act of 1990 creates a cause of action by private parties to recover damages they suffer as the result of an oil spill. *See* 33 U.S.C. § 2702(b)(2)(B)-(E).