

Testimony of

# **The Honorable Patrick Leahy**

April 25, 2002

The collapse of Enron has become a symbol of a corporate culture where greed has been inflated and accountability devalued. Joined by Arthur Andersen, Global Crossings, and now Xerox, Enron's apparent actions have shaken confidence in our financial markets. If we do nothing to learn and apply the lessons of Enron's fall, we will only compound the problem.

Innocent consumers, investors and employees depend on stock investments for their children's college funds, for their retirement nest eggs and for their savings. Nearly one in every two Americans invest in our financial markets, and they are watching what we do here. They deserve action. We must act now to restore confidence in the integrity of our markets and to hold those who defraud investors accountable for their crimes.

This bill, the Corporate and Criminal Fraud Accountability Act of 2002, is all about accountability and transparency - two bedrocks of our markets. Transparency instills confidence, and accountability helps enforce transparency and forthright financial decisions. As I have said before, we cannot stop greed, but we can stop greed from succeeding.

The bill, S.2010, has three prongs to restore accountability:

- (1) Punishing and preventing fraud,
- (2) Preserving the evidence of fraud, and
- (3) Protecting victims of fraud.

In short, this bill is going to send wrongdoers to jail and save documents from the shredder, and that sends a powerful and clear message to potential wrongdoers - "don't do it."

This bill enjoys wide support from both state securities regulators and state attorneys general, as well as numerous whistleblower groups and consumer protection advocates. I have letters of support from these groups, which I ask unanimous consent to have included in the record, in addition to my complete statement and other supporting materials. I also wish to briefly highlight a few areas of S. 2010.

**New Securities Fraud Crime:** This bill will create a tough new federal felony for "securities fraud" with a 10 year maximum penalty.

As a former prosecutor, I was surprised to learn that unlike bank fraud, health care fraud, and bankruptcy fraud, there is no specific federal crime of 'securities fraud' to protect victims of fraud related to publicly traded companies.

**Protecting Corporate Whistleblowers:** S. 2010 also provides long overdue protections for corporate insiders who try to report fraud at publicly traded companies.

When sophisticated corporations set up complex fraud schemes, often times corporate insiders are the key to protecting victims of fraud. As the Enron case shows, the corporate insiders are often the only ones who can say 'who knew what, and when they knew it.'

This bill is supported by groups such as the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud, who have written a letter calling this bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."

**New Anti-Shredding Criminal Provisions:** This bill also creates two new anti-shredding felonies which set clear requirements for preserving financial audit documents and close loopholes in current anti shredding laws.

**Lengthens the Statute of Limitation in Securities Fraud Cases:** S. 2010 would protect securities fraud victims by extending the statute of limitations from 1 year from discovery or 3 years at the most to 3 and 5 years respectively.

In securities fraud cases, the perpetrators often take extensive steps to conceal their fraudulent actions. The current short statute of limitations encourages and rewards precisely that type of behavior and punishes innocent victims.

Experts from both parties, including Arthur Levitt and Richard Breeden, the last Republican and Democratic heads of the SEC, both agree that this short statute of limitations must be lengthened.

As Attorney General Gregoire testified at our recent hearing, in the Enron state pension fund litigation led by the States of Washington, Georgia and Ohio, the current short statute of limitations has forced some states to forgo claims against Enron based on securities fraud in 1997 and 1998. In Washington state alone, the short statute of limitations may cost hard working state employees, firefighters and police officers nearly \$50 million - lost Enron investments which they can never recover under current law.

**Makes debts from securities law violations non-dischargeable in bankruptcy:** S. 2010 would also protect fraud victims by amending the Bankruptcy Code to make judgments and settlements based upon securities law violations non-dischargeable. State securities regulators have indicated their strong support for this change in the bankruptcy law, and I have received letters supporting the passage of this bill from the North American Securities Administrators Association.

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STATEMENT OF SENATOR PATRICK LEAHY,  
CHAIRMAN, SENATE JUDICIARY COMMITTEE  
MARKUP OF S. 1974, THE FBI REFORM ACT OF 2002  
April 25, 2002

I am pleased to join my good friend Senator Grassley in urging the Judiciary Committee to approve the FBI Reform Act of 2002 with a Leahy-Grassley substitute amendment. This is a

good bill, a constructive bill and helpful bill for the FBI. I thank Senator Grassley for his leadership and sustained attention to making the FBI the best law enforcement agency that it can be. I also thank all the Members of the Judiciary Committee for their constructive participation in the oversight hearings the Committee has held since I became Chairman last summer.

This bill stems from the lessons learned during the series of Committee hearings on oversight of the FBI that I chaired beginning last June, including hearings this year on the Webster Commission review of FBI security in the wake of the Hanssen espionage case and the Justice Department Inspector General's report on the belated FBI disclosure of documents in the Oklahoma City bombing case. The important changes which are being made under the FBI's new leadership, after the September 11 attacks, and to implement the new powers granted the FBI by the USA PATRIOT Act, have made FBI reform a matter of pressing national importance.

Since the attacks of September 11, and the anthrax attacks last fall, we have relied on the FBI to detect and prevent acts of catastrophic terrorism that endanger the lives of the American people and the institutions of our country. The men and women of the FBI are performing this task with great professionalism at home and abroad. Americans have felt safer as a result of the full mobilization of the FBI's dedicated Special Agents, its expert support personnel, and its exceptional technical capabilities. We owe the men and women of the FBI our thanks. We also owe them our support, through efforts such as this bill.

For decades the FBI has been an outstanding law enforcement agency and a vital member of the United States intelligence community. As our hearings and recent events have shown, however, there is room for improvement at the FBI. We must face the mistakes of the past, and make the changes needed to ensure that they are not repeated. In meeting the international terrorist challenge, the Congress has an opportunity and an obligation to strengthen the institutional fibre of the FBI based on lessons learned from recent problems the Bureau has experienced.

This view is not mine alone. When Director Bob Mueller testified at his confirmation hearings last July, he forthrightly acknowledged "that the Bureau's remarkable legacy of service and accomplishment has been tarnished by some serious and highly publicized problems in recent years. Waco, Ruby Ridge, the FBI lab, Wen Ho Lee, Robert Hanssen and the McVeigh documents-these familiar names and events remind us all that the FBI is far from perfect and that the next director faces significant management and administrative challenges." Since then, the Judiciary Committee has forged a constructive partnership with Director Mueller to get the FBI back on track.

Congress sometimes has followed a hands-off approach about the FBI. But with the FBI's new increased powers, with our increased reliance on them to stop terrorism, and with the increased funding requested in the President's budget, will come increased scrutiny. Until the Bureau's problems are resolved and new challenges overcome, we have to take a hands-on approach.

Indeed our hearings and other oversight activities have highlighted tangible steps the Congress should take in an FBI reform bill as part of this new hands-on approach. Last year's hearings demonstrated the need to improve FBI internal accountability, extend whistleblower protection, end the double-standard for discipline of senior FBI executives, enhance the FBI's internal security program to protect against espionage as occurred in the Hanssen case, and modernize

the FBI's information technology systems. After last year's oversight hearings, the Committee explored additional management issues that are reflected in the FBI Reform Act. Senator Grassley called attention to concerns about the practices of the FBI and other federal criminal investigative agencies in reporting and using statistics on their investigations. In addition, FBI officials responsible for protecting its facilities informed us of difficulties in retaining the most qualified people on the FBI's own police force to protect some of our nation's most important and, unfortunately, most targeted facilities.

When Director Mueller announced the first stage of his FBI reorganization last December, he stressed the importance of taking a comprehensive look at the FBI's missions for the future, and Deputy Attorney General Thompson's office has told us that the Attorney General's management review of the FBI is considering this matter. Director Mueller has observed that the second phase of FBI reorganization will be part of a "comprehensive plan to address not only the new challenges of terrorism, but to modernize and streamline the Bureau's more traditional functions...." Thus, through our hearings, our other oversight efforts, and the statements and efforts of the new management team at the FBI, an initial list of challenges facing the FBI was developed to serve as the basis for S. 1974, as introduced.

Following introduction in February, the need for this legislation was strongly confirmed at the Committee's hearings in March and April on the Webster Commission review of FBI security and the Justice Department Inspector General's report on belated FBI document production in the Oklahoma City case. At the end of my remarks is a summary of the statements by witnesses at the Committee's hearings in support of provisions in the FBI Reform bill. Based on testimony at these hearings and other information, Senator Grassley and I have made revisions in the bill as introduced and propose a substitute for adoption by the Committee.

The provisions in the FBI Reform Act address each of these challenges.

**Oversight and Accountability:** Titles I, II, and VII of the FBI Reform Act strengthen the system for uncovering and reviewing FBI misconduct and imposing appropriate discipline, so that there is appropriate accountability. Title I creates statutory jurisdiction for the DOJ Inspector General over allegations of misconduct in the FBI. It brings the statutory authorities of the Justice Department's Inspector General into line with the administrative regulations adopted by the Attorney General on July 11, 2001, ensuring that there will be no return to a system in which the FBI enjoyed unique exemption for scrutiny by an independent Inspector General. Title II strengthens whistleblower protection for FBI employees and protects them from retaliation for reporting wrongdoing. Title VII eliminates statutory disparities in disciplinary penalties for Senior Executive Service and non-SES personnel.

The Committee received testimony in our oversight hearings showing that, too often, the independence that is part of the FBI's culture crossed the line into arrogance. Senator Danforth expressed concern to the Committee about entrenched executives at the FBI who had created a closed and insular culture resistant to disclosure of mistakes and to reforms. His concern was echoed in testimony the Committee heard from experienced FBI Special Agents, including a unit chief in the FBI's own Office of Professional Responsibility, who told us of a "club" mentality among some Bureau executives who viewed any criticism or change as a threat to their careers.

If there was one common message from these witnesses, it was that FBI executives needed to be more willing to admit their mistakes. Too often their response was to shield the Bureau from embarrassment by sacrificing accountability and needed reform. For example, Senator Danforth testified that the FBI helped fan the flames of conspiracy theories at Waco by covering up evidence that it used pyrotechnic rounds, even though they had nothing to do with starting the fire. The FBI culture demanded covering up rather than admitting a mistake. Of course, as the FBI painfully discovered, the price for circling the wagons in this way can be the loss of public confidence.

The Justice Department Inspector General is in a position to conduct independent investigations that enable the Attorney General and the FBI Director to hold FBI personnel accountable and learn the necessary lessons from mistakes. When Director Mueller was asked at his confirmation hearing about a separate FBI Inspector General, he replied, "If I were the Attorney General I might have some concern about a separate Inspector General feeding the perception that the FBI was a separate institution accountable only to itself. And I'm not certain in my own mind whether or not what the accountability you seek cannot be discharged by an Inspector General with appropriate personnel in the Department of Justice, as opposed to establishing another Inspector General in the FBI." Attorney General Ashcroft decided to follow this route, and Title I of the FBI Reform Act codifies his action.

The Committee also heard disturbing testimony about retaliation against FBI Agents who are tasked to investigate their colleagues or who discuss issues with the Congress, either directly or through cooperation with the General Accounting Office, which assists in Congressional oversight. Therefore, Title II is important to ensure that the federal whistleblower protection laws protect FBI personnel to the greatest extent possible. Senator Grassley deserves great credit for stressing the need for this provision and developing the language in the bill. The bill extends whistleblower protections to employees who report wrongdoing to their supervisors or to Congress, and ensures that whistle blowers will enjoy basic procedural protections, including the normal procedures and judicial review provided under the Administrative Procedure Act, if they are subjected to retaliation. It also ensures that those who report wrongdoing to the Office of the Special Counsel have access to the normal Merit System Protection Board rights if retaliated against.

Title VII addresses the issue of a double standard for discipline of senior executives. Internal investigations must lead to fair and just discipline. A troubling internal FBI study that was released at the Committee's July hearing documented a double standard at work, with senior FBI executives receiving a slap on the wrist for the same kind of conduct that would result in serious discipline for lower level employees. At his confirmation hearing, Director Mueller said it is "very important that there be no double standards in accountability. I know there have been allegations that senior FBI officials are sometimes treated more leniently than more junior employees. Any such double standard would be fundamentally unfair and enormously destructive to employee morale." Title VII embodies that principle by eliminating the disparity in authorized punishments between Senior Executive Service members and other federal employees and requiring, for the first five years, that the annual report of the FBI's Office of Professional Responsibility address the double-standard issue.

Security Measures: The Hanssen espionage case was a tremendous shock to the nation and to the FBI.. A trusted and experienced FBI Supervisory Special Agent was found to have sold many of the nation's most sensitive national security secrets to the Soviet Union and to Russia. Just as the Ames case forced the CIA to revamp its security program after 1994, the Hanssen case requires major changes in FBI security. Former FBI and CIA Director William Webster chaired a commission that reviewed lessons learned from the Hanssen case for the Attorney General and the FBI Director. Judge Webster appeared before the Judiciary Committee on April 9, 2002, to present his unclassified findings and recommendations. He testified that the security provisions of the FBI Reform Act "offer promise for greater security and greater attention to security and greater understanding and training of security within the FBI." The FBI Reform Act incorporates the Webster Commission's recommendations and reforms in several key areas.

Consistent with the Commission's report, Title III of the FBI Reform Act would establish a Career Security Program in the FBI and Title IV would establish an FBI Counterintelligence Polygraph Program for screening personnel in exceptionally sensitive positions with specific safeguards. In addition, as a result of concerns about terrorist attacks against FBI targets, Title V would authorize an FBI police force as part of comprehensive security enhancements. Based on specific Commission concerns, Title VIII has been added to provide for enhancing the security of the Department of Justice and the handling of Foreign Intelligence Surveillance Act information.

The FBI Career Security Program would bring the FBI into line with other U.S. intelligence agencies that have strong career security professional cadres whose skills and leadership are dedicated to the protection of agency information, personnel, and facilities. The challenges of espionage, information technology vulnerability, and the FBI's high profile as a target of terrorist attack require that the FBI match or exceed the best security programs in the intelligence and national security community. This can only be achieved by a fundamental change that reverses the tendency, found too often in civilian agencies, to treat security as a secondary mission and security assignments as obstacles to career advancement. Before the Hanssen case, an FBI Special Agent experienced as a criminal investigator might be assigned for a few years to a security position and then move on without building continuity of security expertise. Turnover in FBI security work was high, and the top rank was Headquarters Section Chief.

Director Mueller has changed direction by creating an Assistant Director position to head a new Security Division and supporting the principle of a Security Career Program. I support this change. Title III of the FBI Reform Act provides the statutory mandate and tools to achieve this goal based on the experience of the Defense Department in reforming its acquisition career program. The key requirements are leadership and accountability in a Security Director, creation of security career program boards, designation of security positions, identification of security career paths requiring appropriate training and experience, and development of education programs for security professionals. To help ensure that security professionals gain stature comparable to Special Agents, the program would limit the preference for Special Agents in considering persons for security positions. FBI security managers would complete a security management course accredited by the Joint Security Training Consortium recently formed by the Intelligence Community and the Department of Defense.

The FBI Counterintelligence Polygraph Program that would be established under Title III of the Act also addresses the security issue. Title III recognizes the security value of polygraph screening, but provides specific safeguards for those who may be subject to adverse action based on polygraph exams. Screening procedures must address the problem of "false positive" responses, limit adverse actions taken solely by reason of physiological reactions in an examination, ensure quality assurance and control, and allow subjects to have prompt access to unclassified reports on examinations that relate to adverse actions against them. Title III is based upon the simple conviction that increased security and protection of employee rights can and must coexist at the FBI.

Title IV of the Act provides long-overdue statutory authorization for a permanent FBI Police force, to protect critical FBI facilities. It would provide the men and women who currently guard the highest-risk targets with the same pay and benefits as members of the Uniformed Division of the United States Secret Service. Today the FBI police force operating under delegated authority from the General Services Administration has been unable to retain skilled personnel at a rate commensurate with the threat and the need for experienced leadership. The FBI Reform Act would bring the FBI police force generally into line not only with the Uniformed Division of the Secret Service, but also with the Capitol Police and the Supreme Court police. It is intended to be consistent with the current Memorandum of Agreement between the FBI and the Metropolitan Police Force of the District of Columbia with respect to FBI buildings and grounds covered in Washington, D.C.

Title VIII responds to the Webster Commission's statement that the Security and Emergency Planning Staff of the Justice Department "seems to suffer from many of the structural weaknesses that led us to recommend creation of an Office of Security in the Bureau, weaknesses such as inadequate resources and insufficient stature within the Department's structure." The Commission also discussed the Department's Office of Intelligence Policy and Review ("OIPR") which handles matters under the Foreign Intelligence Surveillance Act ("FISA") and specifically noted that "the absence of secure computer links between the FBI and OIPR requires that classified FISA documents be carried by hand between DOJ and Headquarters, creating risks to the physical security of the documents." Title VIII requires a report from the Attorney General on plans to enhance Justice Department security and authorized additional funds for the security staff and OIPR. The OIPR authorization is a follow-on to comparable legislation that I introduced in 2000 and that was reported by the Judiciary Committee and included, in modified form, in the Intelligence Authorization Act for FY 2001.

Preparing the FBI for the 21st Century: The Attorney General has directed Deputy Attorney General Thompson to lead a management review of the FBI, while Director Mueller has already begun reorganizing the Bureau. Congress must participate in reviewing the FBI's structure and identifying its future priorities. The FBI is being called on today to protect the national security from terrorist and intelligence threats mounted from abroad. FBI investigations now extend overseas far more often because of our government's decision to use law enforcement as an instrument of national security along with diplomacy, military deployments, and intelligence operations. At the same time, it must continue with other uniquely federal areas of enforcement. Title VI requires a set of reports that would enable Congress to engage the Executive Branch in a constructive dialogue about how best to build a more effective FBI for the future.

To help Congress participate in charting the FBI's course, Title VI directs the Attorney General to submit a comprehensive report on the legal authorities for FBI programs and activities. In the late 1970s the Judiciary Committee considered enactment of a legislative charter for the FBI that would spell out its authorities and responsibilities. That proposal was set aside in 1980 despite determined efforts by then-Judiciary Committee Chairman Kennedy, Judge Webster and Attorney General Civiletti to reach agreement. The time is ripe to revive consideration of this effort.

In addition to a comprehensive charter, Congress should consider whether the FBI should continue to have responsibility for the broad range of investigations that it is currently expected to conduct. Critics from across the political spectrum have observed the over-federalization of criminal law enforcement and urged that certain responsibilities, which are not uniquely federal, should be transferred back to the states. In addition, even within the federal law enforcement family, numerous agencies perform redundant functions. The Attorney General's report would recommend whether the FBI should continue to have all its current investigative responsibilities, whether existing legal authority for any FBI program or activity should be modified or repealed, and whether the FBI must or should have express statutory authority for new or existing programs or activities.

Title VI also recognizes that the task of modernizing FBI's information technology and management is as important as setting the FBI's future missions. This need was clearly demonstrated by the Webster Commission report and the report of the Justice Department Inspector General on the belated production of FBI documents in the Oklahoma City bombing case, as presented to the Committee at a hearing on March 21, 2002. Judiciary Committee oversight hearings have documented, and Director Mueller has acknowledged, that the FBI must overcome years of neglect in this regard. Congress is providing the funds, especially in the FY 2002 Counterterrorism Supplemental, for technology assistance. We must ensure, however, that the FBI can and does use these funds effectively. There is concern that the FBI may need greater flexibility than is allowed under current law to procure new technologies. Title VI directs the Attorney General to address these concerns in a comprehensive report on a ten-point plan for FBI information management and technology.

Finally, Title VI requires the Comptroller General to investigate and complete a report on how statistics are reported and used by Federal law enforcement agencies, including the FBI. Senator Grassley has focused attention on the question whether the FBI and other agencies may be double-counting criminal investigations and arrests in the reporting of accomplishments. We also need to ascertain whether the FBI and other agencies properly use the statistics which they compile in making management decisions. It is important to get the facts and recommendations that put the FBI into the context of the full spectrum of Federal law enforcement agencies. Title VI ensures that the GAO can complete this important task by requiring agencies to comply with its requests for the information that is necessary to assist in preparing this report.

The legislation which Senator Grassley and I have sponsored is just one part of a bipartisan, hands-on approach to FBI reform. Our oversight hearings considered other significant issues arising from the Justice Department Inspector General's report on the belated production of documents in the Oklahoma City bombing case and the report of Judge Webster's Commission



on the security lessons of the Robert Hanssen espionage case. The Committee also intends to hear from Director Mueller and Deputy Attorney General Thompson on their actions and goals in reorganizing the FBI and charting its management course for the future.

At the same time, we are focusing oversight attention on key aspects of FBI and law enforcement performance in connection with the September 11 terrorist attacks and the lessons learned for developing an effective counterterrorism and homeland security program. As contemplated by the sunset provisions in the USA PATRIOT Act, we must monitor the implementation of new surveillance and investigative powers provided to strengthen counterterrorism efforts and, in some provisions, law enforcement and counterintelligence generally.

The FBI Reform Act is designed to strengthen the FBI as an institution that has a unique role as both a law enforcement agency and a member of the intelligence community. As the Judiciary Committee continues its oversight work and more is learned about recent FBI performance, additional legislation may prove necessary. Especially important will be the lessons from the attacks of September 11, the anthrax attacks, and implementation of the USA PATRIOT Act and other counterterrorism measures. Strengthening the FBI cannot be accomplished overnight, but today, with the Committee's approval of the FBI Reform Act, we will take an important step into the future.

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