Testimony of

The Honorable Patrick Leahy

June 19, 2002

I want to begin by commending Senator Biden for holding this subcommittee hearing. As we both know, the adequacy of the current sentences in white collar prosecutions, especially securities fraud cases, is of particular concern to the American people. That is why I introduced S. 2010, the Corporate and Criminal Fraud Accountability Act of 2002, of which Senator Biden is a cosponsor.

This hearing continues to demonstrate that S. 2010, which contains stiff new criminal penalties for securities fraud and was ordered reported unanimously by the Judiciary Committee on April 25, 2002, merits swift action on the Senate floor.

Our federal criminal sentencing system is all about accountability. In response to an era during which many thought that sentencing was uneven and unfair, we adopted the United States Sentencing Guidelines. But the guidelines did not fix all the problems with uneven federal sentencing - nor were they intended to. One glaring problem that remains is the public perception that well funded, white collar criminals are treated differently than other defendants under the law - that the criminal who puts on a mask and robs a bank of $500 gets twenty years in prison, while the criminal who hires highly paid professional accountants to help juggle the books and defraud investors out of millions receives a much lighter punishment. As the Enron case demonstrates, in order to have true accountability in our federal sentencing system, we must ensure that all those who violate our laws are held accountable. The Enron matter first came to light almost a year ago, and continues to shake the confidence of the investing public in the integrity of our public markets.

Department of Justice Enforcement: Accountability begins with making white collar crime an enforcement priority. I was glad to note that in his planned reorganization of the FBI, Director Mueller made it clear that the investigation of complex financial crime would continue to be a top priority. This is important because as a former prosecutor I know that the FBI and the Department of Justice are uniquely equipped to investigate and prosecute complex financial crime. Unfortunately, data assembled by the Transactional Records Access Clearinghouse at Syracuse University ("TRAC") shows that, in the year 2002, the number of white collar referrals from the FBI to federal prosecutors has significantly decreased, while referrals in cases involving drugs, bank robberies, and less complex bank fraud cases (such as credit card fraud) have remained constant. As the study, which was released last week, states:

During the last five years, bureau referrals for what the department classified as white collar crime have hovered around 33% of the total of all referrals, down from 40% in the mid-90s. During the first six months FY 2002 the proportion of white collar crime matters sent to the prosecutors dropped to 29.6%.

Thus, in FY 2002, the number of white collar referrals dipped below 30% for the first time in 15 years. I ask unanimous consent that the TRAC data be placed in the hearing record, and I hope that these 2002 numbers do not suggest the beginning of a new trend, but merely amount to a blip on the chart due to September 11. The Department of Justice can and must continue to exhibit leadership in the investigation and prosecution of sophisticated fraud schemes such as the Enron case. The American people must be assured that the laws will apply equally to everyone regardless of their economic status.

S. 2010 and the Arthur Andersen Trial: The recently completed criminal trial of Arthur Andersen, LLP ("Andersen") further demonstrates the need for reform. While the hard-working prosecutors at the Department of Justice deserve congratulations for the verdict, the Andersen case demonstrates the importance of quickly passing S. 2010. Prosecutors face significant and unwarranted hurdles in obtaining white-collar convictions, even in cases with apparently obvious criminal infractions. Loopholes in current criminal statutes may be exploited to confuse relatively straightforward issues.

Under current law, the prosecutors were forced to charge Arthur Andersen with "corruptly persuading" others to destroy evidence, rather than simply with the act of the destruction itself. According to press accounts, this legal quirk was used repeatedly by the defense attorneys who attempted to divert attention from Andersen's massive shredding. Making comparisons to the children's game, the defense argued that the government had not identified the "corrupt persuader" and repeatedly asked government witnesses "Where's Waldo?" S. 2010 creates two tough new anti-shredding felonies to close such loopholes. When a corporation destroys thousands of documents in order to obstruct federal regulators, the law should provide clear direction to courts and juries, not prompt jury questions and lengthy deliberations. The current language of these two new anti shredding measures is the result of a bipartisan amendment offered by Senator Hatch and myself in the Judiciary Committee.

When the government brought the Andersen case, many legal commentators observed that it would be the easiest of the cases in the so-called "Enron debacle." They said that shredding documents was a fairly clear cut violation, and they were surprised that Andersen chose to fight the charges against them.

The experts were half right. Under current law, the shredding case against Andersen was among the easiest of the cases facing the government in looking at these complex transactions. Unfortunately, under current law the Andersen prosecution team also faced unnecessary legal hurdles which the defense attorneys hired by Andersen were able to exploit repeatedly in the courtroom. The Leahy-Daschle-Dubin bill closes such loopholes.
In addition, S. 2010 directs the United States Sentencing Commission to review the current sentencing guidelines relating to obstruction of justice and to provide appropriate enhancements in cases where evidence is actually destroyed and to consider appropriate specific offense characteristics for particularly egregious cases.

Enhancing Criminal Penalties for Securities Fraud: The Leahy bill also provides additional tools and tough new criminal penalties for those who defraud investors. Specifically, it creates a new 10 year felony specifically aimed at securities fraud, which is modeled after the bank fraud and health care fraud statutes that already exist. This new crime will free prosecutors from

dependence on the general mail and wire fraud statutes with their five year maximum penalties and eliminate technical requirements in the securities fraud laws. Any "scheme or artifice" to defraud investors in publicly traded companies will be covered under S. 2010. Senator Hatch and I also worked to ensure that S. 2010 would increase the penalties for those who commit the kind of large scale fraud that we saw in the Enron case. The current guidelines simply do not adequately punish those who defraud thousands of people or those whose crimes result in financial devastation.

These changes will hopefully lead to more white collar prosecutions across the nation, which serves as an important deterrent. As the Wall Street Journal reported, the leaders of the SEC recognize that "criminal cases are a much bigger deterrent to white-collar crime than any penalties the SEC can impose" because "[t]here's nothing that speaks as loudly ... [as] the prospect of jail time." S. 2010 both raises criminal penalties and creates a new crime specifically aimed at securities fraud along the lines of the current bank fraud and health care fraud provisions. It will result in more securities fraud prosecutions and longer sentences. We cannot legislate against greed, but we can do our best to make sure that greed does not succeed.

Conclusion: In short, S. 2010 is going to save documents from the shredder and send wrongdoers to jail. As the difficulty in the recent Andersen trial demonstrates, even the most straightforward of these cases can be difficult. We need to remove senseless loopholes from the laws governing fraud. The American people must be assured that there is accountability for all who engage in criminal conduct in our country.

We cannot have one set of rules for a person who steals on the street and another for someone who steals in the corporate boardroom. We cannot punish the person who hides from the police, but not the corporation that hides the truth from regulators by shredding "tons" of documents. S. 2010 addresses those issues as well as other problems in current law. As this hearing shows, the confidence of the American public in our system of justice depends on equality of treatment for those who break the law.

I ask unanimous consent that the TRAC data and the Wall Street Journal article to which I referred by printed in the hearing record.