Written Testimony
United States House of Representatives Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security
"Reining In Overcriminalization: Assessing the Problems, Proposing Solutions."
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Mr. Andrew Weissmann
Partner, Jenner & Block LLP

Good morning Chairman Conyers, subcommittee Chairman Scott, ranking member Gohmert, and members of the Committee and staff. I am Andrew Weissmann, a partner at the law firm of Jenner & Block in New York. I served for 15 years as an Assistant United States Attorney in the Eastern District of New York, including as Chief of the Criminal Division of that office. I had the privilege to represent the United States as the Director of the Department of Justice's Enron Task Force and Special Counsel to the Director of the FBI. I also am an adjunct Professor of Law at Fordham Law School, where I teach Criminal Procedure. I am testifying today on my own behalf.

The proposal outlined by both The Heritage Foundation and the National Association of Criminal Defense Counsel ("NACDL"), in their report entitled *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, is a win-win. It would bring much needed clarity and certainty to an area of the law where such attributes are critical. The fact that two groups which at times have such divergent views and constituencies are together strongly advocating this reform should be of particular note. It is to me, as it signals that this reform is one that would advance responsible government to the advantage of all citizens.

The perspective I would like to share with you is that of a former member of law enforcement. You have heard how the proposals would benefit the public, and not just putative defendants. Anyone who could be the subject of a criminal investigation or an overzealous prosecutor will benefit from these reforms. That encompasses all of us, individuals and corporations, the mighty and the disenfranchised. Although clear *mens rea* rules will benefit most those investigated or charged with a crime that is *malum prohibitum*, rather than *malum in se*, such rules will inure to the benefit of all citizens. A question can arise as to what the potential downsides are of these proposed reforms to the public or to law enforcement. As a dedicated federal prosecutor for years, these proposals would have no drawbacks for law enforcement. Indeed, as I will discuss, they would serve to benefit meaningfully law enforcement and consequently the public. Given my background, I focus my remarks on the implications for so-called white collar investigations, although the points I make are applicable to all *malum prohibitum* crimes.

First, the proposals would require criminal bills to state clearly the *mens rea* requirement for each element of the crime. Such a reform would only serve to assist prosecutors in guiding their decisions as to who to investigate and who to seek to charge. By also spelling out clearly what needs to be established beyond a reasonable doubt at trial, our federal judges too will benefit from not having to guess at Congressional intent. If their determination is later found to

be wrong by an appellate court, they and the parties have to hold retrials that are costly to the judicial system, strained law enforcement resources, and the public.

One notable example is the prosecution of international accounting firm Arthur Andersen, in which I served as a lead attorney for the government. The learned federal district court judge was faced with a statute -- the obstruction statute then in existence -- that required the defendant to act intentionally and "corruptly." The definition of the latter, however, was not spelled out in the statute and thus she followed precedent that the Supreme Court only years later determined to be erroneous.[1] The Supreme Court itself grappled with what the term "corruptly" meant in the context of that statute, and did not itself clarify if Congress meant the defendant had to know her conduct was illegal or merely "wrong."

The "federal criminalization reporting statement" advocated by The Heritage Foundation and NACDL could have led to a more just outcome, which mitigated or avoided entirely the problems created by an unclear statute. Instead of a company facing indictment for a crime whose elements were not in retrospect crystal clear, the government and grand jury would have been able to determine prior to indictment whether the conduct violated the clear terms of the obstruction statute. Further, if the grand jury went forward and voted an indictment, the company would have been able to defend itself at the trial based on the clear requirements of the criminal statute, and not have to await two levels of appeal, which in a corporate setting can render any relief pyrrhic. Indeed, by the time the Supreme Court ruled in the *Andersen* case, the organization was basically defunct and the government was in the unenviable position of deciding whether to expend addition scarce resources to re-prosecute a company that was no longer extant. And the company (and public), on the other hand, were left wondering if Andersen would have been prosecuted and convicted under the statute as clarified by the Supreme Court.

Thus, in answering whether the proposed reforms we address here today are wise, I submit one need only imagine the answers of the prosecution, the defense, and the court in the *Andersen* case to the question of whether they would have preferred that Congress specify clearly the intent standard in the obstruction statute. In short, lack of clarity in the criminal law can have real and dire consequences, which are antithetical to the goals of the justice system.

I would like to address a second way in which the proposed reforms would be beneficial. The rush to enact a new criminal statute to "address" perceived criminal problems can be illusory; the issue is often not the absence of criminal statutes on the books, but of detection, investigation, and enforcement. Often the conduct at issue already runs afoul of existing criminal law. In such situations, enacting a new criminal statute is not only redundant, it can be counterproductive since it focuses our time and attention on a measure that actually will not serve to reduce the risk of recidivism.

For instance, in the immediate aftermath of high-profile national crises that are perceived to be able to be ameliorated through criminal law enforcement -- from corporate scandals to illegal immigration, -- there is a natural desire to take action that will reduce the risk of

[1] 544 U.S. ___ , 125 S. Ct. 2129 (May 31, 2005).

recurrence. Such actions often include the passage of additional criminal statutes. Such statutes can often be useful and well-crafted, but in the heat of the moment they can also be ill advised, redundant, and vague.

As one example in the white-collar context, the hearings last year in the Senate on a bill that would have simultaneously created a uniform fiduciary duty on all financial institutions to their clients -- under all circumstances-- and criminalized breaches of that duty. While I don't question the good intentions of its proponents, the bill itself is a good illustration of the problems the current reforms would serve to ameliorate. Let me explain how.

First, it was not at all clear that new criminal penalties were needed. It is still not clear that all -- or even the core -- of the conduct that we find most troubling on Wall Street at this juncture is properly considered criminal. While it is tempting to think that we have not learned the lessons from Enron, we have yet to see the kind of systemic fraud that occurred in that institution.

Second, to the extent that there is misconduct at play -- and inevitably there will be some, since Wall Street is not immune from crime -- there are strong and abundant tools already at the government's disposal, if it were to choose to use them. Thus, even if the prescription for the current crisis is in part to impose jail time for certain Wall Street misconduct, that goal does not necessitate creating additional federal crimes. In my view neither Enron nor the current Wall Street conduct that causes us concern and even outrage were preventable but for the supposed dearth of federal criminal laws.

Much has been written about the sheer number of federal criminal statutes on the books, and without repeating those compendiums, it suffices to note the enormous growth of federal crimes, including so-called white collar crimes.[2] Most relevant here is the breadth of some existing federal criminal statutes that apply to financial fraud, specifically the mail and wire fraud statutes.[3]

For example, Chapter 63 of Title 18 of the United States Code contains eleven different provisions criminalizing different forms of mail and wire fraud. To win a conviction under the broadest of these sections, a prosecutor needs only to show (beyond a reasonable doubt, of course) that the defendant used the mails or the wires as part of a scheme to defraud. In our technological and bureaucratic age, almost every action taken by someone at a financial institution satisfies this jurisdictional hook -- any email or SEC filing can suffice. The simplicity and breadth of these statutes is widely recognized; prosecutors of financial fraud almost always bring charges under one of these provisions along with whatever other statutes are more narrowly tailored to the particular crime at issue. One anecdote is illustrative: when I switched from prosecuting organized crime bosses in New York City to going after financial fraud on Wall Street and sought advice on the workings of the intricate securities fraud criminal statutes, a

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[2] *See, e.g.,* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514-15 (2001); Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 825-26 (2000); Am. Bar Ass'n, Criminal Justice Section, Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 7, 51 (1998).

[3] *See* Stuntz, *supra* note 1, at 516-17.

senior white-collar prosecutor told me that the mail and wire fraud statutes were the only ones I would ever really need to know; everything else I might charge was gravy.

Given the breadth of the federal criminal statutes currently available to prosecutors of white-collar crime, it is unclear what conduct that we would think should be a crime does not already come within the current statutory regime. Where a material misstatement or omission regarding an investment is intentionally made, criminal liability is already provided under the mail and wire fraud statutes, as well as the federal laws criminalizing securities fraud. *See* 18 U.S.C. sections 1341, 1343 and 1348 and 15 U.S.C. section 78. Consequently enacting a new criminal law may serve to create the false impression of taking action to thwart a problem, when in fact it would be better to pay greater attention to any gaps in detection, investigation, and enforcement that could have addressed the problem.

Third, prior to creating a new fiduciary duty and criminalizing its breach, a wiser course would be to consider whether a new fiduciary duty with civil rather than criminal sanctions would adequately address the perceived harm. I am by no means suggesting it would or would not. But before Congress goes from 0 to 60, it is useful to consider whether lesser remedies could solve the problem. Such civil steps can serve to also identify unanticipated or unintended vagueness in the application of the statute, and can do so when only civil and not criminal sanctions are at issue. Even if it does not succeed, the experience of applying any new obligation in the civil context will give shape and content to the duty, thus lessening the fairness and notice concerns if the breach is ultimately criminalized.

For instance, even in the civil context, the definition of the scope of fiduciary duties can prove a challenge. Even after centuries of cases analyzing the duties of fiduciaries in different contexts, the inquiry into the exact nature of a fiduciary's obligation in a particular case is often highly fact-specific.[4] The poorly defined nature of whether and when there is a fiduciary duty would have particular resonance in the criminal context, where issues of vagueness and notice take on constitutional dimension.[5] For instance, issues left unaddressed in the proposed bill criminalizing breaches of fiduciary duty include whether every breach of duty of care would be a federal crime, such that a broker's intentional or reckless failure to read diligently all prospectuses or to call a client with updated financial prognoses every day could subject her to criminal sanction? A "federal criminalization reporting statement" would serve to lessen the risk of harm engendered by such vagaries.

In conclusion, I would note that the line separating criminal conduct from all other is society's starkest boundary between right and wrong. It has been reserved, and should continue to be reserved, for the most egregious misconduct, i.e. actions taken intentionally, as opposed to

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[4] *See, e.g., DeKwiatkowski v. Bear, Stearns, & Co.*, 306 F.3d 1293, 1306 (2d Cir. 2002) (collecting instances in which existence of fiduciary duty between broker and investor depended on facts distinguishing situation from the "ordinary case"); *In re Daisy Systems Corp*., 97 F.3d 1171, 1178 (9th Cir. 1996) (rejecting conclusion that relation between investment banker and client is not a fiduciary one, as "existence of a fiduciary relation is a question of fact which properly should be resolved by looking to the particular facts and circumstances of the relationship at issue").

[5] *See Bouie v. City of Columbia*, 378 U.S. 347, 350, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (stating that it is a "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime").

by accident, through negligence, or even recklessly. The goal of reserving the criminal law to those truly deserving of the highest punishment our society can impose would be greatly served by acting on the proposals put forward today.

Thank you.