Written Statement of Gerald H. Goldstein

on behalf of the NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the Judiciary Committee of the United States House of Representatives

Re: H.R. 1678 and *Hubbard v. United States*, 115 S.Ct. 1754 (1995)

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Gerald H. Goldstein is a native of San Antonio, Texas. He graduated from Tulane University in 1965, and then attended the University of Texas School of Law. Since graduating in 1968 from law school, he has devoted his practice to the representation of those accused of having committed a crime. He is admitted to practice law before the state courts of Texas and numerous federal district courts, United States courts of appeal, and the United States Supreme Court. He is certified as a specialist in criminal law by the State Bar of Texas Board of Legal Specialization.

His law firm, Goldstein, Goldstein and Hilley, devotes approximately 15-20 % of its time to *pro bono* work. In addition to his practice, he has served as adjunct professor of advanced criminal law at the University of Texas School of Law since 1982. He lectures frequently on both substantive criminal law and criminal procedure at continuing legal education seminars throughout the United States. He has served as counsel of record for the National Association of Criminal Defense Lawyers as *amicus curiae* in several important controversies before the United States Supreme Court.

Mr. Goldstein serves as the President of the National Association of Criminal Defense Lawyers. He has also served as the President of the Texas Association of Criminal Defense Lawyers, and is a Fellow in the American College of Trial Lawyers.

Mr. Chairman and members of the Committee:

Thank you for providing me this opportunity to testify on behalf of the members of the National Association of Criminal Defense Lawyers (NACDL) in opposition to H.R. 1678.

The almost 9,000 direct, and almost 30,000 state and local affiliated members of the National Association of Criminal Defense Lawyers are private defense lawyers, public defenders and law professors. They have devoted their lives to protecting the many provisions of the Bill of Rights concerned with fairness in the criminal justice system. NACDL's interest in, and special qualifications for understanding H.R. 1678 are keen. I am here today to explain why we stand in firm opposition to H.R. 1678.

I. Where's the Problem?

I think it is important to first ask why H.R. 1678's proposed "remedy" of the Supreme Court's recent *Hubbard* decision is thought warranted.[1] Where is the problem in need of "remedy"?

There is no question that it is unacceptable for attorneys to misrepresent facts or law in court filings. However, under existing rules and procedures, federal judges already have full (and efficient) authority to punish attorneys (from *both* sides) who engage in such unfair practices. A judge who finds attorney misconduct can hold the attorney in contempt of court, and impose a fine or jail term.[2] Or, the judge can suspend the attorney from practicing before the federal courts, or, bar the attorney forever.[3] Finally, the judge can refer the attorney for discipline before the appropriate state board of professional responsibility.[4] Such calls should be made by a *neutral and detached judicial officer*, not one (especially not the already more powerful and monied prosecution) engaged in the adversarial representation of parties in interest. And it is the time-honored trial device of *cross-examination* (overseen by judges according to the rules of procedure) that weeds out in-court falsehoods.

There is no need for H.R. 1678's envisioned expansion of prosecutorial power. This measure would trivialize the federal criminal code and grant prosecutors an unfair advantage over their adversaries. More important, it would do so in a manner divesting a federal judge's power over his or her courtroom and placing an unnecessary weapon in the hands of prosecutors -- so that the latter might invoke unreviewable grand jury proceedings against adversaries, bringing justice-

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[1] Hubbard v. United States, 115 S.Ct. 1754 (1995).

[2] Rule 42, Federal Rule of Criminal Procedure.

[3] Each federal district court has local rules that typically include ethical standards and procedures for sanctioning attorneys who violate the rules, and these rules typically provide for these type sanctions..

[4] *See e.g.*, U.S. v. Lopez, 4 F.3d 1455, 1464 (9th Cir. 1993).

thwarting, and docket-clogging, section 1001 indictments against their adversaries to the exclusion of the much more efficient and fair proceedings conducted by the judiciary. In short, the "potential for mischief"[5] inhering in H.R. 1678 cannot be overstated.

II. H.R. 1678 and "False Statements" in Judicial Proceedings: Silencing the Accused; Over-Aggrandizing the Prosecutor

H.R. 1678 seeks to expand the felony scope of 18 U.S.C. section 1001 in the most unfair manner. Its attempted inclusion of "false statements" made in the course of judicial proceedings within the focus of section 1001 would not simply *chill* speech and the accused's right to zealous representation, it would *freeze* these rights out of the courtroom. H.R. 1678 would make a mockery of our constitutionally-insured adversarial system of criminal justice. It would turn the trials of most importance under our Constitution, criminal trials, into mere "show" trials -- where the prosecutor reigns supreme, judges are disempowered, and the criminal defense lawyer and the criminal defendant are afraid to plead their cause, lest they offend the all-powerful prosecutor.

In his concurrence in *Hubbard v. United States*, 115 S.Ct. 1754, 1765 (1995), Justice Scalia (joined by Justice Kennedy) anticipated quite well precisely what is wrong with the concepts reflected in H.R. 1678:

> There [exists] a serious concern that the *threat* of criminal prosecution under the capricious provisions of section 1001 will deter vigorous representation of opposing interests in adversarial litigation, particularly representation of criminal defendants, whose adversaries control the machinery of section 1001 prosecution.

(Emphasis in original).

And the criminal defense bar knows first hand about such threat posed by all-powerful prosecutors.

Even without the statutory power of H.R. 1678, prosecutors frequently abuse their authority in ways that imply an effort to intimidate their adversaries and eliminate all "opposition" to conviction. H. R. 1678 would open the proverbial floodgates to more of these practices:

> ➤ Federal prosecutors in Reno, Nevada recently released a major drug smuggler from jail, allowing him to continue using $10 million in forfeitable drug profits, and promised him leniency at his sentencing, to induce him to testify that his defense attorney, Patrick Hallinan, had joined in his drug conspiracy. There was no evidence to corroborate the testimony purchased against Hallinan, a highly respected attorney and zealous advocate who had handed federal prosecutors several high-profile defeats. Finally, on March 7, 1995, having endured a lengthy investigation and a grueling six week trial, the 60 year

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[5] Hubbard v. U.S., 115 S.Ct. at 1765 (Scalia, J., concurring).

old Hallinan was quickly acquitted by a (similarly abused) jury.[6]

➤ Federal prosecutors in Milwaukee, Wisconsin recently initiated a criminal investigation of respected attorney (indeed, former prosecutor) Stephen Kravit, on nothing more than his routine and appropriate representation of a business client suspected of fraud. According to the United States Court of Appeals reviewing the case: "On meager grounds the U.S. Attorney's office launched a sting operation against the lawyer for an individual under criminal investigation by the same office. Although the investigation produced zero evidence or leads to evidence of illegal conduct, it dragged on for two years."[7] In the meantime, the defense attorney was forced to abandon the representation of his client to defend himself.

➤ Kent Schaffer, a prominent criminal defense attorney from Houston, Texas, and a member of the NACDL Board of Directors, was recently sued on a trumped up libel charge by an Assistant United States Attorney who was offended by the fact that Mr. Schaffer has been so impertinent as to report the prosecutor's unethical behavior, by confidential letter, to the Department of Justice's Office of Professional Responsibility. Fellow NACDL members were called upon to represent Mr. Schaffer, and the case was summarily dismissed.[8]

Under H.R. 1678, defense lawyers and their clients would be placed in a Kafkaesque criminal justice system, under the thumb of the prosecution, threatened with indictment should they be deemed to be "making trouble" for the prosecution through the zealous advocacy that has historically and traditionally typified our justice system, especially our criminal justice system. The mere existence of the expanded section 1001 would thwart vigorous representation of citizens accused, even in circumstances where the particular prosecutor has not threatened his or her adversary and does not intend to use any such overt threat.

It is important to view the bill's proposed expansion of prosecutorial power in the context of the ethical "opt-out" rights now claimed by federal prosecutors. Since at least 1989, the Justice Department (under both Republican and Democratic Administrations) has consistently claimed *its attorneys* are above the ethics laws applicable to all other attorneys.[9] In the 1989 memorandum of then-Attorney General Richard Thornburgh, the Department of Justice claimed

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[6] *See* Rob Hasseler, Jury Acquits Hallinan of All Charges: Prominent S.F. Attorney Cleared Quickly in Drug Case, S.F. Chron., Mar. 8, 1995, at A1.

[7] United States v. Van Engel, 15 F.3d 623, 629 (7th Cir. 1993).

[8] *See* Eva M. Rodriguez, Prosecutor Fights Fire with Fire: Accused of Misconduct, AUSA Sues Defense Lawyer for Libel, Legal Times, Apr. 10, 1995, at 1.

[9] *See* Gerald H. Goldstein, Government Lawyers: Above the Law?, Op-Ed., Wash. Post, May 2, 1995.

that the extent to which federal prosecutors are bound by the ethical rules of the states licensing the lawyers is strictly up to the Department to decide, as a matter of federal executive branch policy. In August 1994, Attorney General Janet Reno codified this view, through a federal regulation. The Reno regulation, like the Thornburgh memorandum before it, asserts that irrespective of the state bar ethics rules supposedly applicable to all lawyers, federal prosecutors can contact and communicate *directly* with opposing parties they know to be represented by counsel. This regulation also allows federal prosecutors to "interview" employees of corporate targets, outside the presence of the corporation's counsel.[10] Yet, this is the group that H.R. 1678 would allow to "police" its adversaries through felony indictments for making "false statements" during litigation.

III. H.R. 1678 and the Star Chamber

About the only precedent in our centuries of legal tradition for the system of criminal "justice" that is envisioned by H.R. 1678 is the spine-chilling "Star Chamber" that was determined to be so offensive to the Founders and the Framers of our Constitution. This notorious and secret tribunal of 16th and 17th century England was used to dispatch the Crown's enemies without any semblance of due process.[11] It was precisely this sort of unfair and totalitarian power in the hands of prosecuting authorities referenced by Justice Scalia in *Hubbard* that the Star Chamber wielded at the expense of the people, and which the Founders sought to prevent from recurring on these shores. Yet H.R. 1678 does not even make the claim of the Star Chamber, that "high state policy" justifies such an inquisitorial criminal law regime.[12]

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[10] The "supremacy" "logic" of the Department's state ethics opt-out claim has been rejected by federal courts considering it, and unanimously condemned (as offensive to the fundamental concept of Federalism) by the 50-state Conference of State Court Chief Justices in a Resolution promulgated earlier this year.

[11] The Star Chamber:

> [t]hat curious institution, which flourished in the late 16th and 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying "political" defenses, the Star Chamber has for centuries symbolized disregard of basic individual rights.

Faretta v. California, 422 U.S. 806, 821 (1975). *See also* Professor Lawrence Freedman, A History of American Law 23 (1973):

> The court of star chamber was an efficient, somewhat arbitrary arm of royal power. It was at the height of its career in the days of the Tudor and Stuart kings. Star chamber stood for swiftness and power; it was not a competitor of the common law so much as a limitation on it -- a reminder that high state policy could not safely be entrusted to a system so chancy as English law . . . .

See generally also 5 W. Holdsworth, A History of English Law 155-214 (1927).

[12] *See id.*

One unfortunate target of the Star Chamber's inquiries was a Presbyterian named William Prynne. He was accused of publishing seditious pamphlets. Given the Star Chamber's "false pleadings" ban, no lawyer would dare sign pleadings in Prynne's defense. As a result, Prynne found himself standing at the pillory with both his ears cut off and his cheeks branded with the letters "S.L." (for "seditious libeler") -- *before beginning his sentence of life imprisonment.*[13]

IV. Conclusion

An outstanding analysis on the subject just published by the CATO Institute aptly observes:

> As a federal judge recently noted, "[O]ne of the lawyer's most noble responsibilities is to protect the individual against Government excesses"; in a free society, "[t]he lawyer must stand independently and resolutely when he or she believes the government is wrong. And on occasion it takes great courage." It is one thing to hope lawyers will be courageous; it is quite another to ask them to fight zealously for the rights of their clients in a system where their own reputations, livelihoods, and freedom would hinge on the discretion of their government adversaries. Who will challenge the government then?[14]

H.R. 1678 is deeply misguided and utterly incompatible with our adversarial system of justice and the most fundamental principles of fairness for which our American democracy stands. To again borrow from, and paraphrase the *Hubbard* concurrence penned by Justice Scalia, NACDL urges the Committee to reject outright H.R. 1678 and all that it represents -- to immediately "uproot this weed."[15]

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[13] Jarett B. Decker, The 1995 Crime Bills: Is the GOP the Party of Liberty and Limited Government?, Policy Analysis No. 229, at 13 (CATO Inst. Jun. 1, 1995) [hereinafter Decker, Policy Analysis], citing Faretta v. California, 422 U.S. 806, 823 n.18 (1975) (which quotes J. Stephen, A History of the Criminal Law of England (1883)).

[14] Decker, Policy Analysis, *id.* at 14 (quoting Matter of Doe, 801 F. Supp. 478, 488 (D.N.M. 1992)).

[15] 115 S.Ct. at 1766.

NACDL is a specialized bar association representing the nation's criminal defense lawyers. Its 8,700 direct members and 70 state and local affiliates include private criminal defense lawyers, public defenders, and law professors. The 36-year old association is devoted to ensuring justice and due process for persons accused of crime; fostering the integrity, independence, and expertise of the criminal defense profession; and promoting the proper and fair administration of criminal justice.

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