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*CONGRESSIONAL TESTIMONY*

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**Principles For Revising the  
Criminal Code**

**Testimony before  
HOUSE JUDICIARY COMMITTEE,  
SUBCOMMITTEE ON  
CRIME, TERRORISM AND HOMELAND  
SECURITY**

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Mr. Chairman, Vice-Chairman Gohmert, Ranking Member Scott, and Members of the Subcommittee. My name is Edwin Meese. I am the Chairman of the Center for Legal and Judicial Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation. Thank you for the opportunity to present my views concerning the extremely important task of reviewing, revising, and recodifying the federal criminal laws into Title 18 of the United States Code.

I also am pleased to be in such good company here today. I have worked with former Attorney General Dick Thornburg, Tim Lynch of the Cato Institute, and Professor Steve Saltzburg of George Washington University Law School in the past and appreciate the expertise they bring to this task.

My purpose today is to identify some broad principles and themes that I believe should be considered in the revision of Title 18. I also will suggest some solutions to the large-scale problems that exist.<sup>1</sup>

Title 18 has grown into a massive collection of criminal laws, resulting from a series of individual – often disparate – pieces of legislation, introduced

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<sup>1</sup> For a lengthier statement of the position of The Heritage Foundation on the overcriminalization of the law, see Paul Rosenzweig & Brian W. Walsh, eds., *One Nation, Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty* (2010) (hereinafter *One Nation, Under Arrest*), and Brian M. Walsh & Tiffany M. Joslyn, The Heritage Foundation & The National Ass'n of Criminal Defense Lawyers, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (Apr. 2010).

by members of Congress across the political spectrum. Some statutes reflect the popular concerns of the moment, in many cases duplicating criminal laws enacted and vigorously enforced at the state level. Others reflect the objectives of specific interests and organizations, whose views seek to lend importance to their cause by attaching criminal penalties to behavior that would not usually be viewed as crimes.

This subcommittee has a great opportunity to take a fresh approach to the federal criminal law and develop a coordinated set of statutes that reflect the limited authority given to the national government by the Constitution and which recognize division of authority between federal and state governments.<sup>2</sup>

I will make the following four points today highlighting suggestions that would improve the sound enforcement of federal criminal law.

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<sup>2</sup> See Kevin McKenzie, The Commercial Appeal, “Law professor slams expansion of federal crimes”: “[Law professor John S.] Baker blamed Republicans as well as Democrats for the trend, saying that both parties fuel it. One-third of about 4,200 federal crimes on the books have been passed since 1970 and Republican President Richard Nixon’s ‘war on crime,’ he said.” Available at <http://www.commercialappeal.com/news/2011/oct/25/law-professor-slams-expansion-federal-crimes/> (Last viewed Oct. 26, 2011). The problem may be most acute during election years. As my colleague Dick Thornburg has explained: “A significant aspect of this increase in federal crimes over the past ten years, incidentally, is the wholly unsurprising fact that a disproportionate number of these criminal laws were passed in three election years, 1998, 2000, and 2002. The ‘jail-centric’ approach by the Congress, which is fueled by the almost reflexive notion that being ‘tough on crime’ is good fodder on the campaign trail while trolling for votes, has deep societal costs that are especially poignant in the regulatory and business arenas.” Richard Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform – The Dilemma of Artificial Entities and Artificial Crimes*, 44 Am. Crim. L. Rev. 1279, 1282 (2007).

*First:* The federal criminal laws are scattered across the United States Code. This Subcommittee and ultimately the full Committee could improve this situation just by consolidating most federal criminal laws into Title 18. *Second:* The federal criminal code is overly extensive. There are more laws than are needed or could possibly be enforced. There are too many redundant, superfluous, and unnecessary criminal laws. They should be consolidated and/or eliminated. *Third:* The federal criminal code is littered with statutes that empower administrative agencies to issue regulations that subject individuals to criminal penalties. Offense definition should be a task for Congress, not for agency officials. Only officials accountable to the people should have the ability to create any form of positive law that can serve as a basis for a criminal conviction, let alone a term of imprisonment. *Fourth:* In too many cases the federal criminal code does not properly define the *mens rea* or “guilty mind” elements of federal crimes. It is possible today for an honest person, acting in good faith, to commit a felony without any knowledge that he or she is doing so. No one should be convicted – let alone imprisoned – in that circumstance.

Let me turn to my first point, that the collection of federal criminal laws is far larger than necessary.

**1. The Federal Criminal Laws Are Widely Scattered Across The U.S. Code And Should Be Consolidated Into One Title**

One of the problems with the federal criminal code today is that it is so large and so unruly that no one in fact knows just how big it is or what it contains. Title 18 may be the primary body of federal criminal laws, but there are scores of other criminal laws found all over the statute books. For example, Title 15 contains the Sherman Antitrust Act and the securities laws, which have both criminal and civil provisions. Title 21 contains the controlled substances laws. Title 26 contains the tax laws. Title 42 contains (some, but not all, of) the environmental criminal laws. And there are other Titles that also contain criminal statutes.

This Subcommittee could perform a great public service by consolidating all of the federal criminal laws into one coherent title. Bringing all of the federal criminal laws together in one title has the clear benefit of more easily *identifying* those laws. After all, a prerequisite for the legitimacy of the criminal law is that the law should be accessible to every interested person, not just to lawyers. Having a single set of federal criminal laws surely helps in that endeavor.

How, then, can you deal with this problem?

direct the Justice Department to compile a list of all federal criminal statutes; consolidate those laws into Title 18; and then repeal any criminal law not specifically identified in that Title 18 list. That approach has the virtue of forcing the Executive Branch to identify every criminal law that it wishes to remain in “active duty status,” if you will. In that process, the

Justice Department, of course, can draw on the assistance of other Cabinet-level and sub-Cabinet-level agencies to find and list those laws because it has the incentive to find every one or lose the ability to prosecute under it. In the process, it may even be the case that the Justice Department will decide that some of those laws can be “retired” because they are unimportant, they have been used only sporadically, they have been superseded by other newer statutes, or for some other reason.

But in order to encourage the Justice Department to make those decisions, I would require the Department to identify how many prosecutions it has brought under each federal criminal statute in the last 25 years. Some laws – for example, the mail fraud statute – will have been used often and clearly should be part of Title 18. But that is not true in every case. Federal law makes it a crime to engage in unauthorized use of the “Smokey the Bear” image or the slogan “Give a Hoot, Don’t Pollute.”<sup>3</sup> It is difficult to believe that we need to use the federal criminal law for that purpose.

## **2. There Are Too Many Federal Criminal Laws, So Obsolete, Superfluous, And Unnecessary Ones Should be Repealed**

The last time the Congressional Research Service was asked to identify all of the federal criminal laws, including crimes established by regulations,

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<sup>3</sup> Gary Fields & John R. Emshwiller, “As Criminal Laws Proliferate, More Are Ensnared,” *Wall St. J.* (July 23, 2011), available at <http://online.wsj.com/article/SB10001424052748703749504576172714184601654.html> (Last Viewed Nov. 14, 2011). On the provenance of use of the criminal law for the enforcement of small-scale infractions, see Francis Bowles Sayre, *Public Welfare Offenses*, 33 *Colum. L. Rev.* 55 (1933).

it could not do so. A 2008 study authored by Professor John Baker and published by The Heritage Foundation found there to be at least 4,450 statutory federal criminal laws, in addition to thousands of offenses defined in regulations.<sup>4</sup> This says a great deal about the state of federal criminal law: The body of federal criminal law has become obese.

Revision of Title 18 therefore should not be simply a means of giving new names to old statutes or of rearranging the components of Title 18 into an orderly arrangement. No, the criminal law needs to shrink. You should throw out whatever offenses no longer make sense in light of today's needs, whatever crimes should not be enforced through the criminal law, and whatever offenses impose more cost than benefit on America, its criminal justice system, and its people.

Take fraud as an example. Fraud is both unlawful and illegal conduct – unlawful under the civil law, and illegal under the criminal law. Parties injured by fraud can seek relief under the common law of torts, contracts, and restitution,<sup>5</sup> as well as under state consumer protection statutes. Those private actions have benefits for the injured parties and have a deterrent

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<sup>4</sup> See John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum (June 16, 2008). See also, Dick Thornburgh, The Heritage Foundation, Heritage Lectures, *Overcriminalization: Sacrificing the Rule of Law in Pursuit of "Justice"* 3 (Mar. 1, 2011); *One Nation, Under Arrest* 131.

<sup>5</sup> See *Restatement (Second) of Torts* §§ 526-28, 530, 538 (1976); *Restatement (Second) of Contracts* §§ 159-62 (1979); *Restatement (Second) of Restitution* § 8 (1937).

effect that helps the public, too.<sup>6</sup> As far as the criminal law goes, fraud has been a crime at common law in some form or another for more than 300 years<sup>7</sup>. The states make fraud a crime<sup>8</sup> and numerous statutes make fraud a federal offense. In fact, two of the most widely-used federal criminal laws – the mail fraud and wire fraud acts<sup>9</sup> – deal specifically with this offense. But so, too, do numerous other federal laws.<sup>10</sup> We therefore are entitled to ask these questions: Why are there so many acts of Congress on this subject?

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<sup>6</sup> *Hudson v. United States*, 522 U.S. 93, 102 (1997) (“all civil penalties have some deterrent effect.”).

<sup>7</sup> John Kaplan, et al., *Criminal Law: Cases and Materials* 861-66 (5<sup>th</sup> ed. 2004). Fraud originated in the doctrines of “cheats” (i.e., using a false token or weights and measures), obtaining property by false pretenses, and larceny by trick. See, e.g., Sanford H. Kadish, et al., *Criminal Law and Its Processes: Cases and Materials* 956 (8<sup>th</sup> ed. 2007).

<sup>8</sup> *Id.*

<sup>9</sup> 18 U.S.C. § 1341 (mail fraud) and § 1343 (wire fraud). For an explanation of the growth of those two statutes, see Anne S. Dudley & Daniel F. Schubert, *Mail and Wire Fraud*, 38 Am. Crim. L. Rev. 1025 (2001).

<sup>10</sup> Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* 152 (2006) (“Under American law, for example, there are now dozens of statutory provisions that criminalize offenses such as mail fraud, wire fraud, bank fraud, health care fraud, tax fraud, computer fraud, securities fraud, bankruptcy fraud, accounting fraud, and conspiracy to defraud the government.”) (footnote omitted); *id.* at 152 n.23 (citing 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud), § 1344 (bank fraud), § 1347 (health care fraud), 26 U.S.C. §7201 (tax fraud), 18 U.S.C. § 1030 (computer fraud), 15 U.S.C. §§ 77x, 78ff (securities fraud), 18 U.S.C. § 157 (bankruptcy fraud), § 371 (conspiracy to commit fraud against the United States); Ellen S. Podgor, *Criminal Fraud*, 48 Am. U. L. Rev. 729, 730-31 (1999) (“Although fraud is not a crime in itself, fraud is an integral aspect of several criminal statutes. For example, one finds generic statutes such as mail fraud and conspiracy to defraud being applied to an ever-increasing spectrum of fraudulent conduct. In contrast, other fraud statutes, such as computer fraud and bank fraud, present limited applications that permit their use only with specified conduct. In recent years, criminal fraud statutes have multiplied, offering new laws that often match legislative or executive priorities.”) (footnotes omitted); *id.* at 740 (“The terms ‘fraud,’ ‘fraudulent,’ ‘fraudulently,’ or ‘defraud’ appear within the text of a total of ninety-two substantive statutes in title 18 of the United States Code.”).

What is the reason for more than one anti-fraud law? Are there so many varieties of fraud that we need a separate law for each one? Is it necessary for every regulatory scheme to have its own fraud statute? Will we, as a society, not be taken seriously about fighting fraud unless we double, triple, and quadruple the number of iterations of this crime? We should define the range of conduct that can constitute fraud, make a judgment about the seriousness of this crime, set a lower and upper limit to the penalty that can be imposed, and give the Sentencing Commission the task of identifying aggravating and mitigating factors for a judge to consider.

### **3. The Federal Criminal Law Includes Offense-Defining Regulations That Should Be Adopted By Congress, Rather Than Promulgated By Administrative Agencies**

Let me now turn to my third point: The federal criminal law is littered with regulations that define the elements of a crime. In my view, that is a job for the Congress, not for administrative agencies.

As you know, federal criminal law is not defined only by acts of Congress. We live in an administrative state, and there are numerous agencies with the power to issue rules, regulations, and informal opinions that can have the same enforcement effect as an act of Congress. It is common for Congress to authorize a federal agency to promulgate regulations that define the meaning of statutory terms or that fill in the blanks of a regulatory scheme. If you count federal regulations that define the content of federal offenses, the number of potential federal offenses increases

logarithmically. Some have estimated that the addition of regulations into this mix increases the number of potentially relevant criminal provisions in excess of 300,000.<sup>11</sup>

Consider that number: more than 300,000 potentially relevant regulations that could result in a prison sentence. The late Harvard Law Professor William Stuntz once noted that American criminal law “covers far more conduct than any jurisdiction could possibly punish.”<sup>12</sup> Professor Stuntz could have had regulatory crimes in mind when he reached that conclusion. The staggering number of regulations that can be used in federal prosecutions seems to be a perfect example of the overcriminalization of American law.

The number of potential federal crimes also puts the lie to the proposition that every person is presumed to know the law. At one time that presumption was a sensible one. The common law outlawed conduct that was inherently blameworthy, so no one would have been surprised to be charged with an offense. Because of that, the common law also did not require the government to prove that a person acted with the conscious purpose of

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<sup>11</sup> *One Nation, Under Arrest* xv-xvi, 218; cf. Gary Fields & John R. Emshwiller, “As Criminal Laws Proliferate, More Are Ensnared,” *Wall St. J.* (July 23, 2011), available at <http://online.wsj.com/article/SB10001424052748703749504576172714184601654.html> (Last Viewed Nov. 14, 2011) (“Since its inception in 1970, the Environmental Protection Agency has grown to enforce some 25,000 pages of federal regulations, equivalent to about 15% of the entire body of federal rules. Many of the EPA rules carry potential criminal penalties.”).

<sup>12</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505, 507 (2001).

breaking the law. No longer can we assume that criminal defendants are willful lawbreakers. It is possible today to be charged with felonies as defined by regulatory schemes that do not involve blameworthy conduct. Thus, the axiom that every person is presumed to know the law cannot be reconciled with a just society. Indeed, today – with more than 4,000 federal criminal statutes and hundreds of thousands of potential federal offense-defining regulations on the books, it is difficult to defend the presumption that every person knows the law.

How do we deal with this problem? There are several options. You could adopt a statute providing that no regulation alone can be used as the basis for a criminal conviction and that crimes must be defined in a statute enacted by Congress. That would be the easiest and cleanest way to deal with this problem, but may be difficult to achieve for practical or political reasons. Exactly 100 years ago the Supreme Court held that Congress can authorize a federal agency to promulgate regulations whose violation can be prosecuted as a crime.<sup>13</sup> The Supreme Court has reaffirmed that decision since then,<sup>14</sup> and Congress has delegated to a host of federal agencies the power to define by regulation the elements of a broad range of different

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<sup>13</sup> See *United States v. Grimaud*, 220 U.S. 506 (1911).

<sup>14</sup> See, e.g., *Yakus v. United States*, 321 U.S. 414 (1944) (upholding statute making it a crime to violate the Price Administrator's regulations); cf., e.g., *United States v. Sharpnack*, 355 U.S. 286 (1958) (upholding the constitutionality of the Assimilative Crimes Act, 18 U.S.C. 13, which incorporates for federal enclaves state-law offenses and their sentences).

criminal laws. As the result, it may be too difficult to walk back from where we find ourselves now.

But there are at least two other options. You could adopt a statute requiring the federal government to give a party notice that he or she has violated a regulation and an opportunity to remedy the matter before criminal charges could be brought. Or you could adopt regulations into statute law by using a legislative procedure similar to the one that is used in connection with Congressional approval of trade agreements. Congress could require an agency to submit its regulations to Congress for an up-or-down vote on each of them in order to define a crime enacted in accordance with the Constitution. That would involve Congress in the lawmaking process without needing to use a legislative veto.<sup>15</sup>

#### **4. Congress Should Ensure That Every Federal Criminal Statute Requires Proof Of A Mens Rea Element Of The Offense, Ensuring That Only Blameworthy Persons Are Convicted**

That brings me to my final subject. The common law followed the rule that a crime required the union of act and intent,<sup>16</sup> and common law crimes were limited to morally blameworthy conduct. Murder, rape, robbery, burglary, theft – at common law all were crimes against God and man, so there was no risk that someone would not know that his conduct was both immoral and unlawful. But that is not the case today.

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<sup>15</sup> See *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>16</sup> 4 William Blackstone, *Commentaries* \* 358; *Morissette v. United States*, 342 U.S. 246, 251 (1952). The Latin phrase is “*Actus non facit reum nisi mens sit rea.*”

Federal criminal law is not limited to crimes that mirror any readily recognizable moral code.<sup>17</sup> Beginning in the last century, we have seen the development of what have been called “public welfare offenses.”<sup>18</sup> Public welfare offenses are not the felonies of common law. These offenses dealt principally with a violation of a traffic, housing, safety, or health and welfare code. Public welfare offenses are often “strict liability” crimes. No proof of a guilty mind was necessary. But a conviction for such an offense did not carry with it any moral condemnation and could not result in imprisonment. The penalty imposed was only a fine.

But that is no longer true. Today, a person can be found guilty of violating a commercial, regulatory, or environmental law without proof of either of the following elements: (1) that he had a purpose of breaking the law or (2) that his conduct clearly was blameworthy. Both of those elements have been critical to the ability of the law to limit criminal punishments to those persons who deserve it. Common law crimes, such as murder,

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<sup>17</sup> Richard Thornburgh, 44 Am. Crim. L. Rev. at 1281; *One Nation, Under Arrest* xviii.

<sup>18</sup> See Graham Hughes, *Criminal Omissions*, 67 Yale L.J. 590, 595 (1958) (“For it was in the latter half of the nineteenth century that the great chain of regulatory statutes was initiated in England, which inaugurated a new era in the administration of the criminal law. Among them are the Food and Drugs Acts, the Licensing Acts, the Merchandise Marks Acts, the Weights and Measures Acts, the Public Health Acts and the Road Traffic Acts. With these statutes came a judicial readiness to abandon traditional concepts of *mens rea* and to base criminal liability on the doing of an act, or even upon the vicarious responsibility for another's act, in the absence of intent, recklessness or even negligence.”) (footnotes omitted); Francis Bowles Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 63-69 (1933).

effectively had an element of blameworthiness built into the definition of the offense. Because everyone knew that murder was immoral, the common law did not require the prosecution independently to prove that a person knew that his conduct was unlawful and that he acted with the purpose of breaking the law. That built-in blameworthiness element of the criminal law was an enormously valuable feature. It helped keep morally blameless persons from being convicted or punished.

But today's criminal law lacks that protection. Regulatory offenses are crimes only because the Congress or a regulatory agency has outlawed the conduct at issue, not because that conduct is inherently wrongful. To use the terms of the common law, regulatory crimes are "*malum prohibitum* offenses," and common law crimes are "*malum in se* offenses." Regulatory crimes, such as commercial or environmental offenses, pose a substantial risk of convicting the innocent. To avoid that outcome, Congress should require proof that a person acted with the purpose of breaking the law whenever Congress adopts a criminal offense in a regulatory field.

It also matters greatly exactly what scienter element a statute contains. Let me give you an example of the importance that the proper definition of *mens rea* can play in the law. Consider the difference between the terms "willfully" and "intentionally" or "knowingly." The term "willful" often is used today to describe a state of mind characterized by an intentional

violation of a known legal duty.<sup>19</sup> Said differently, a person acts willfully when he consciously and purposefully breaks the law. Congress has often used this term in criminal provisions under the federal tax laws due to their complexity, and the Supreme Court has explained that use of the term willfully generally means that Congress sought to outlaw only purposeful illegality. Otherwise, the Supreme Court has explained, an innocent person can violate the criminal law without any purpose of doing so, even if he or she makes an innocent, good faith mistake when interpreting a complex area of law.<sup>20</sup>

By contrast, the terms “intentionally” and “knowingly” do not require proof that someone purposefully broke the law. Rather, the terms “intentionally” and “knowingly” require the government to prove only that a person intended to perform certain conduct (or to achieve a certain result) or that the individual knew that he or she was engaged in the conduct, the *actus reus*, constituting the offense. The terms “intentionally” and “knowingly” include a far larger range of conduct than the term “willfully,” and using the terms “intentionally” and “knowingly” in a regulatory field are dangerous. Perhaps, a person who was sleepwalking or unconscious could establish his or

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<sup>19</sup> See, e.g., *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973).

<sup>20</sup> See, e.g., *Bryan v. United States*, 524 U.S. 184, 191 (1998); *Ratzlaf v. United States*, 510 U.S. 135, 138 (1994); *Cheek v. United States*, 498 U.S. 192, 200 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973); see generally *Ratzlaf*, 510 U.S. at 138 (Blackmun, J., dissenting) (discussing the meaning of the term “willful” in modern-day federal criminal statutes).

her innocence under a knowledge standard. But a person could act “intentionally” or “knowingly” even if he or she lacked any knowledge of what the law prohibited, or even if he or she did not know that there was a law dealing with the conduct at issue. The only proof necessary is evidence showing knowledge of the facts constituting the offense, not the additional proof of knowledge that those acts are unlawful.<sup>21</sup>

There is a straightforward way to deal with this problem. In *malum prohibitum* offenses, Congress should require that a conviction must be based on proof that a person purposefully intended to break the law. A person should not be at risk of conviction and imprisonment for engaging in actions that are not inherently blameworthy unless he or she knew that the act involved was illegal. Proof of willfulness, therefore, should be required for all regulatory crimes. It should be noted that civil penalties or administrative sanctions are available for those who violate a regulation but do not meet the requirement for a criminal conviction.

Let me add one final point in this regard. The government often argues that we should not fear that the criminal law could be overbroad because, even if it is, we should trust government officials to make only reasonable decisions about what cases to prosecute. As a factual matter, that argument is unpersuasive. The Heritage Foundation has identified

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<sup>21</sup> See, e.g., *Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005); *Bryan v. United States*, 524 U.S. at 191; *Rodgers v. United States*, 522 U.S. 252, 254-55 (1998) (plurality opinion); *Staples v. United States*, 511 U.S. 600, 602 (1994); *United States v. Bailey*, 444 U.S. 394, 408 (1980).

numerous cases in which the federal government acted unreasonably in bringing criminal charges against someone.<sup>22</sup> In any event, a “trust us” argument is mistaken as a matter of law. Our legal system is based on the proposition that ours is “a government of laws, and not of men.”<sup>23</sup> No one should be obliged to rely on prosecutorial discretion to avoid being charged with a crime.

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Let me end where I began. I am honored to have been invited to speak at today’s hearing. I see four areas of greatest need for your attention. *First:* The federal criminal laws should be consolidated into a single Title of the U.S. Code. *Second:* The federal criminal code needs to be shorn of redundant, superfluous, and unnecessary criminal laws. *Third:* Offense definition should be a task for the Congress, not for agency officials, because only Congress is accountable to the people. *And fourth:* The federal criminal code should be revised to ensure that the *mens rea* or “guilty mind” elements of federal crimes capture only blameworthy conduct.

Thank you once again for the opportunity to speak with you about this important subject today. I am happy to entertain any questions that you may have about my testimony

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<sup>22</sup> Those cases are discussed in *One Nation, Under Arrest*.

<sup>23</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

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