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**BEFORE THE HOUSE SUBCOMMITTEE ON CRIME,
TERRORISM AND HOMELAND SECURITY**

**CRIMINAL CODE MODERNIZATION AND
SIMPLIFICATION ACT OF 2011**

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Chairman Sensenbrenner, Vice-Chairman Gohmert, Ranking Member Scott, and Members of the Committee, I thank you for inviting me to participate in this hearing on H.R. 1823, the “Criminal Code Modernization and Simplification Act of 2011.” Like many lawyers who have worked with the federal criminal code over many years, I welcome the idea of seeing it better organized, simplified and generally made more accessible.

It is a special pleasure to appear as a witness with three others whose work I admire. I had the honor of being Deputy Assistant Attorney General in the Department of Justice Criminal Division under both Attorney General Meese and Attorney General Thornburgh and am delighted to be able to testify along with them. In the past Mr. Lynch and I have testified before the Subcommittee, and I always benefit from hearing his ideas.

I want to begin by complimenting the Chairman on the way the draft bill has been presented. The Chairman has indicated that his desire is to have a discussion on modernization and simplification of the federal criminal code: “Rep. Sensenbrenner is introducing this measure to continue the dialogue and process for rewriting the criminal code, with the hope that other Members, the Senate, the judiciary, the Justice Department, criminal law professors and other interested professionals will provide input and seek to develop a more comprehensive re-write.” Introduction to the Section by Section Analysis of H.R. 23.

Anyone interested in federal criminal law should welcome an opportunity to discuss the code in its present state and how it could be improved. It is refreshing to have

presented a draft for discussion rather than a bill in final form that witnesses must either support or oppose.

I cannot claim to have read the entire draft bill with care or to have familiarity with each section of it. Careful study of the entire bill would be an enormous undertaking, deserving of much more time than I could commit this month at this time. As a result of my being familiar with only some of the bill and not being in a position to comment on many provisions, I am limiting my testimony to some general principles that I support and to observations about some specific aspects of the bill that leaped out at me in my limited review of it.

There are three general principles that the bill seems to embrace that make good sense and should receive widespread support.

1. Moving all federal crimes into title 18 of the United States Code would make it easier for lawyers, judges, legislators and the general public to understand where to find federal crimes, how to count them, and how they are defined.
2. Reorganizing the code so that crimes of a similar character are grouped together complements the placement of them in title 18 and should also make it easier to find federal crimes and see how they relate to one another.
3. When two or more statutes punish exactly the same conduct, combining those statutes into a single crime (with lesser included offenses where appropriate) makes sense because it reduces the possibility that individuals will be convicted of different crimes for doing the same acts simply because of a prosecutor's choice among available statutes.

4. Strengthening and clarifying *mens rea* requirements should receive widespread support, provided that the *mens rea* terminology that is substituted does not actually result in a change in the law or a lessening of the government's burden of proof.
5. Eliminating statutes that are on the books but not actually used by federal prosecutors should reduce some of the clutter in the code, and might be an historic first step in deciding that eliminating crimes from a criminal code might be as much, if not more, in the public interest as adding new crimes.

It appears from my admittedly incomplete review of the draft bill that these general principles are drivers of the draft. If I were confident that the draft advanced these principles without actually making substantive changes in federal criminal law, I would be more comfortable with the draft in its current form. But even my limited review suggests that the draft, consciously or unconsciously, does things that are problematic.

My first concern arises from the proposal to replace “willfully” with “knowingly.” I am not alone in believing that many federal crimes, especially those relating to paperwork and regulatory offenses, now contain *mens rea* elements that are insufficiently demanding. As a general matter, I am opposed to strict liability crimes, and would like to see them eliminated from federal criminal law. It is not surprising, therefore, that I applaud the addition of *mens rea* requirements in section 549.

But, replacement of “willfully” with “knowingly” is arbitrary and is not a neutral move. It actually weakens *mens rea* elements for some crimes and accordingly raises the possibility that people will be convicted who would not be convicted under current law.

It is also doubtful that the replacement will increase clarity given the fact that “knowingly” like “willfully” is subject to varied interpretations.

If one had to choose between the two terms, “willfully” would be the better choice, because it provides more (and appropriate) protection to the accused and avoids conviction of individuals who should be acquitted, because it requires that the prosecution demonstrate that an individual act both knowingly and with a bad purpose. The term “knowingly” standing alone weakens the *mens rea* requirement. This is most troublesome when an offense involves a broad range of conduct that is subject to a number of different interpretations.

As a general proposition it seems like a particularly bad idea to simply assume that everywhere in the criminal code where “willfully” is used, “knowingly” should be substituted. More care is required. It is essential that Congress make a careful, deliberate decision as to which *mens rea* requirement should be attached to which particular conduct in defining a federal crime. This is especially important when the conduct constituting a crime is broadly defined and statutory language may be subject to different interpretations.

Congress could consider using the term “purposely” as the *mens rea* requirement for many serious crimes and define it as it is defined in Section 2.02 (2) (a) of the Model Penal Code:

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

- (i) If the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) If the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

Congress could also consider adopting a general provision like 2.02 (3) of the Model Penal Code which would assume a *mens rea* requirement for any statute not explicitly requiring one.

So that I am not misunderstood, I want to be clear that I am not suggesting that “knowingly” is always inappropriate as a *mens rea* requirement. That is not the case. “Knowingly” can be exactly the right *mens rea* provision with respect to a material element of an offense, but it is not necessarily the right *mens rea* provision for all material elements of all offenses. The important thing is that Congress decide for each crime what the right *mens rea* provision is, and that Congress recognize that it is not the same for all crimes.

It cannot be doubted, I think, that substituting “knowingly” for “willfully” will not only increase the probability of convicting people whose conduct should not be criminalized, but it also would change federal law in some instances in significant ways. Consider, for example, the United States Supreme Court decisions in *Ratzlaff v. United States*, 510 U.S. 135 (1994), and *Cheek v. United States*, 498 U.S. 192 (1991). In *Ratzlaff*, the Court addressed alleged violations of the Bank Secrecy Act and held that in order to establish, for purposes of 31 U.S.C. § 5322(a), that an accused “willfully”

violated § 5324(3), the prosecution must prove that the accused acted with knowledge that his conduct was unlawful in part because the willfulness requirement of § 5322(a), when applied to other provisions of the Bank Secrecy Act, consistently had been read to require both knowledge of the reporting requirement and a specific intent to commit the crime. In *Cheek*, the Supreme Court wrote that “[w]illfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.” 498 U.S. at 201. Clearly, the substitution of “knowingly” in the relevant statutes would mark a clear change in the law. That is cause for concern.

My second concern relates to the crime of attempt. Under the current code, there is no general statute proscribing attempts to commit all of the substantive crimes found anywhere in the Code. Instead, attempt is a crime only when Congress has actually made it one in a specific statute. It would be a major change, not a neutral or minor one, to make an attempt to violate any statute a crime. At the moment, attempt is limited to statutes as to which Congress has decided that it is appropriate to punish not only a completed act but also an attempt to do the act. A universal decision to make attempt applicable to all crimes raises special concerns when regulatory crimes are at issue. If federal crimes were narrowly defined, a general provision making attempt applicable to all such crimes might make good sense. But, it seems that Congress has recognized, appropriately, that a criminal code as vast as the federal criminal code requires a more cautious approach to attempt.

It is also questionable that attempt should be punished the same as a completed act. In many states, attempt is punished much less severely (one half the punishment, for example) than a completed offense. Currently, the Federal Sentencing Guidelines recommend significantly decreasing the prison sentence for attempt unless the defendant committed, or would have committed but for interruption, all the acts necessary to complete the substantive offense. See Guidelines Manual §2X1.1(b)(1) (2011 Manual). The Model Penal Code (§ 5.505 (1)) does punish most attempts the same as completed crimes but contains an exception for the most serious crimes. This subject warrants more discussion and analysis.

Another reason to worry about the approach is that it would result in mandatory minimum sentences imposed on offenders who have not completed a crime.

A third concern relates to conspiracy. Just as there is reason to worry about punishing attempts the same as completed offenses, there is reason to worry about changing the penalty structure of the code so that a conviction for conspiracy will make the defendant subject to the same penalties as for the completed offense. This is a major change in the law that will result in increasingly harsh sentences for conspiracy. It is at odds with the judgments made by many states and, along with the approach to attempt, raises serious questions as to whether uncompleted offenses should be punished the same as completed offenses. Here too there is reason to worry that the approach would result in mandatory minimum sentences imposed on offenders who have not completed a crime.

I do applaud the removal of “conspiracy to defraud the United States” as an offense. It eliminates the current possibility where a defendant can be charged under 18 U.S.C. § 371 of a “conspiracy to defraud the United States” without the charge being

connected to any particular crime in the code. This change should promote clarity as to what is a federal crime. This is also true of chapter 3, section 5, which makes clear that an overt act is required to prove conspiracy.

My fourth concern is about probation and fines. If I read the draft bill correctly, sections 3551 and 3561 together would authorize probation for offenses below the class B felony level whether or not probation is specifically mentioned as a sentence option in a statute. I support this approach, recognizing that the federal sentencing guidelines, even though advisory, make probation unlikely for most crimes. Less clear is whether sections 3551 and 3571 make a fine a sentence option for a number of crimes where it is an option now. For example, section 1006 changes the possible penalty for 18 U.S.C. § 219 from fine and/or imprisonment to just imprisonment. This is also true of section 1007 and the change it makes to 18 U.S.C. § 224. Similar changes seem to be made in many places in the draft. Reducing the availability of sentencing options is a major substantive change, not a neutral rewrite.

One of the goals of the Sentencing Reform Act was to make fines a true alternative to incarceration, something that seems almost forgotten in the current era of mass incarceration. Consider this language, for example, from the Senate Report:

Current law is not particularly flexible in providing the sentencing judge with a range of options from which to fashion an appropriate sentence. The result is that a term of imprisonment may be imposed in some cases in which it would not be imposed if better alternatives were available. In other cases, a judge might impose a longer term than would ordinarily be appropriate simply because there were no available alternatives that served the purposes he sought to achieve with a

long sentence. For example, maximum fines in current law are generally too small to provide punishment and deterrence to major offenders. Frequently, a fine does not come close to the amount the defendant has gained by committing the offense. . . .

S. Rep. No. 98-255, at 50 (footnote omitted). The draft bill appears to remove the flexibility that the Sentencing Reform Act intended to be part of a sentencing scheme.

A fifth concern is about changes to the controlled substance laws. Chapter 17 uses the term “imprisoned” instead of “sentenced to a term of imprisonment” when, for example, stating mandatory minimum terms. This may affect the calculation of good time credits. For example, section 403(a) which roughly corresponds to 21 U.S.C. §960(b) and sets out the basic punishment structure, states that if an offense involved a “large quantity of drugs” (elsewhere defined), “the offender shall be imprisoned not less than ten years,” rather than “shall be sentenced to a term of imprisonment of not less than ten years.”

The draft defines a “career offender” as “a person who is convicted under this chapter after two or more prior convictions for a felony drug offense” and imposes a sentence of life in prison for such career offenders. It does not require that the prior convictions “have become final” as current law does before triggering a life sentence for defendants who commit a drug offense with two priors.

Where current law mandates a 20 year minimum when “death or serious bodily injury results from the use of [an illegal] substance,” the chapter would require the same mandatory minimums should death or serious bodily injury result “to any person from the

offense.” For example, see section 403(a)(1), which addresses §960(b). This would appear to broaden the reach of the death results provision currently in the law.

A sixth concern is about substantive changes to sex offenses that are found in chapter 13. The chapter would make the death penalty available to less serious, more broadly defined, crimes than under current law. Currently, § 2245(a) mandates that a person who “murders” an individual in the course of an offense under chapter 109A or sections 1591, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425 shall be punished by death or imprisoned for any terms of years or life. The proposed bill replaces that with section 204, which reads: “Whoever, in the course of an offense under this subchapter, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.”

Chapter 13 does reduce or eliminate some mandatory minimum sentences -- which is something Congress almost never does. Just as eliminating some federal crimes makes good sense, reducing or eliminating mandatory minimum punishments that appear unnecessarily harsh also makes sense. An example of a reduction is found in section 212, which lowers a mandatory minimum penalty originally set at 10 years in §2422(b) (enticing a minor to engage in prostitution, etc.) to 5 years. A similar example is found in section 213, which lowers the mandatory minimum in §2423(a) (transportation of a minor with intent to engage in criminal sexual activity) from “not less than 10 years or for life” to “not less than 5 years and not more than 30 years.” Section 221(e) completely eliminates a mandatory minimum for engaging in conduct outlined in the section “that results in the death of a person.” The proposed new punishment is “death or imprisoned

for any term of years or for life.” The current punishment identified in §2251(e) is “death or imprisoned for not less than 30 years or for life.”

Finally, I question whether it makes sense to reform the code without examining the penalty structure currently in place. The federal prison population has grown appreciably as sentences are at historical highs. All reputable studies of penal policy show that longer sentences have no more deterrent impact than shorter sentences for many crimes. There are some offenders who should be locked away for substantial periods, even life, because they are a danger to society and will remain a danger. But, there is reason to believe that many sentences are higher than they need be. An inquiry into appropriate penalties would require an examination of mandatory minimum statutes, particularly those applicable in drug and gun cases, and how these statutes may have the effect of ratcheting up sentences for other crimes to a level that is higher than necessary and that results in incarcerating individuals longer than necessary. The fact that the proposed bill reduces mandatory minimum sentences for some sex crimes supports an examination of the ways in which these sentences have driven criminal sentences generally in an upward direction.

In conclusion, I support the effort to bring clarity and simplicity to the federal criminal code. I would go even further, however. I suggest it is time to take a hard look at the criminal justice system as a whole, including our corrections system. It is true that it is more than 50 years since an attempt was made to revise the criminal code. It is also true that as many years have passed since a serious effort to examine the criminal justice system more generally. An effort to reform the criminal code could be part of a more comprehensive look at criminal justice. The National Criminal Justice Commission Act

of 2011, co-sponsored by Senators of both political parties, would provide a vehicle for taking that look. I very much hope that the spirit of entering into a discussion about code reform could be extended to a discussion of all of the major criminal justice issues that have been neglected for many years.