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4 MARKUP OF:

5 RATIFICATION OF SUBCOMMITTEE MEMBERSHIPS;

6 RESOLUTION, REAUTHORIZATION OF THE OVER-CRIMINALIZATION TASK

7 FORCE; AND

8 H.R. 2919, THE OPEN BOOK ON EQUAL ACCESS TO JUSTICE ACT

9 Wednesday, February 5, 2014

10 House of Representatives

11 Committee on the Judiciary

12 Washington, D.C.

13 The committee met, pursuant to call, at 10:13 a.m., in  
14 Room 2141, Rayburn House Office Building, Hon. Bob Goodlatte  
15 [chairman of the committee] presiding.

16 Present: Representatives Goodlatte, Sensenbrenner,

17 Coble, Chabot, King, Franks, Jordan, Marino, Gowdy,  
18 Labrador, Farenthold, Holding, Collins, Smith of Missouri,  
19 Conyers, Nadler, Scott, Lofgren, Cohen, Johnson, DelBene,  
20 and Cicilline.

21 Staff Present: Shelley Husband, Majority Staff  
22 Director; Branden Ritchie, Majority Deputy Staff  
23 Director/Chief Counsel; Allison Halataei, Majority  
24 Parliamentarian; Kelsey Deterding, Clerk; Caroline Lynch,  
25 Majority Counsel; Zach Somers, Majority Counsel; Perry  
26 Apfelbaum, Minority Staff Director; Danielle Brown, Minority  
27 Parliamentarian; Ron LeGrand, Minority Counsel; and Norberto  
28 Salinas, Minority Counsel.  
29

30 Chairman Goodlatte. Good morning. The Judiciary  
31 Committee will come to order.

32 And without objection, the chair is authorized to  
33 declare a recess at any time.

34 Our first order of business is the ratifying of  
35 subcommittee assignments for the remainder of the 113th  
36 Congress. Every Member should have a copy on their desk.

37 The clerk will report the subcommittee assignments.

38 [Pause.]

39 Chairman Goodlatte. More technical difficulties.

40 [Pause.]

41 Chairman Goodlatte. Without objection, the subcommittee  
42 assignments are considered as read.

43 [The information follows:]

44

45 Chairman Goodlatte. And the question is on approving  
46 the appointments and assignments as shown on the roster.

47 All those in favor, respond by saying aye.

48 Those opposed, no.

49 In the opinion of the chair, the ayes have it, and the  
50 assignments are approved.

51 Pursuant to notice, the next item before the committee  
52 today is a resolution to reauthorize the House Committee on  
53 the Judiciary Over-Criminalization Task Force.

54 And the clerk will report the resolution.

55 Ms. Deterding. Resolution. Resolution establishing the

56 --

57 Chairman Goodlatte. Without objection, the resolution  
58 is considered as read.

59 [The information follows:]

60

61 Chairman Goodlatte. And I will begin by recognizing  
62 myself and the ranking member for opening statements.

63 This resolution reauthorizes the committee's Over-  
64 Criminalization Task Force to continue its essential work on  
65 over-criminalization and over-federalization issues. This  
66 bipartisan effort is led by Crime Subcommittee Chairman  
67 Sensenbrenner and Ranking Member Scott. I wanted to commend  
68 both of them for their bipartisan leadership of this unique,  
69 important task force.

70 The Judiciary Committee has jurisdiction over many  
71 divisive hot-button issues. So it is refreshing for me to  
72 see a bipartisan effort at the Member level and the staff  
73 level to address such a complex problem. There is no doubt  
74 that, as I stated when the task force was formed, over-  
75 criminalization is an issue of liberty. It is imperative  
76 that Members on both sides of the aisle find common ground  
77 on this important issue.

78 When the task force was created, Members and staff came  
79 together in a bipartisan fashion and laid out an ambitious  
80 slate of planned hearings for the task force. Over the  
81 first 6 months of its existence, the task force held 4

82 hearings, tackling a variety of issues relevant to over-  
83 criminalization, including the absence of a sufficient mens  
84 rea or, too often, any mens rea requirement in many Federal  
85 criminal offenses and the issues associated with regulatory  
86 crime.

87       However, much more remains to be done. I look forward  
88 to the upcoming task force hearings on such topics as  
89 Federal sentencing policy and over-federalization. Over the  
90 next 6 months, I will be very interested in particular in  
91 the solutions the task force recommends to address the  
92 problems of over-criminalization and over-federalization.

93       I think there is a wide bipartisan agreement that the  
94 Judiciary Committee should consider enacting a default mens  
95 rea standard for the Federal Code. However, there are many  
96 more areas to explore and solutions to consider.

97       For example, I am interested in evaluating proposals to  
98 apply a mens rea requirement to every element of a Federal  
99 crime and considering whether stiff civil penalties, rather  
100 than criminal sanctions, are appropriate for malum  
101 prohibitum offenses that society does not consider  
102 inherently wrong.

103           It is my hope that the task force will once again  
104 proceed in a bipartisan fashion to address these and other  
105 important issues, and I commend all members of the task  
106 force for their hard work and dedication to this endeavor.  
107 And I urge my colleagues to support the resolution and now  
108 recognize the ranking member, Mr. Conyers, for his remarks.

109           Mr. Conyers. Thank you, Chairman Goodlatte.

110           Members of the committee, when this first bipartisan  
111 task force was established last year, I was a strong and  
112 enthusiastic advocate of its mission because of the fact  
113 that our Nation's criminal justice system is broken. For  
114 example, there are more than 200,000 individuals in Federal  
115 prison and 1.8 million in State and local prisons and jails.

116           Our Nation has, unfortunately, the highest incarceration  
117 rate in the world, with more than 700 out of every 100,000  
118 Americans behind bars, or roughly 5 times the national  
119 average. Racial disparities are overwhelmingly composed of  
120 African Americans making up 37 percent of the prison inmate  
121 population, even though they comprise only 11 percent of the  
122 overall U.S. population.

123           Our course of the task force tenure testimony -- or

124 during the course of the tenure, the testimony was received  
125 about various problematic aspects of over-criminalization.  
126 To begin with, certain criminal laws have inadequate or  
127 utterly lack any mens rea intent standards. This is an  
128 affront to undermine fundamental principles of fairness and  
129 due process.

130 Another problematic aspect of over-criminalization is  
131 the scourge of mandatory minimums. While there is no doubt  
132 that some of these inmates are where they deserve to be,  
133 many others should be able to become productive members of  
134 our society. But mandatory minimums, which limit judicial  
135 discretion, prevents this from happening, and they have not  
136 made our Nation any safer.

137 And finally, the so-called war on drugs has mostly been  
138 a matter of having gone out of style and has largely been a  
139 failure. For instance, more than half of those in Federal  
140 prison were convicted of committing drug-related crimes,  
141 many of which are nonviolent offenses.

142 The past 40 years have shown that locking up people and  
143 throwing away the key for minor drug offenses has in no way  
144 solved the Nation's drug problems. Not only has the war on

145 drugs resulted in ruining the lives of millions of  
146 Americans, it costs taxpayers billions of dollars.

147 On average, United States spends \$51 billion annually to  
148 pay for this so-called war. And in 2011, 1.5 million people  
149 were incarcerated in Federal, State, and local prisons and  
150 jails for committing nonviolent drug crime charges. In the  
151 same year, more than 750,000 people were arrested for  
152 marijuana violations.

153 These, now that we look at it, ill-conceived laws also  
154 have a disproportionate impact on minorities. Two-thirds of  
155 those incarcerated for a drug offense in State prisons are  
156 either African American or Hispanic, even though whites use  
157 drugs at the same rate as these groups.

158 And so, in closing, I commend the chairman of the  
159 committee and feel that it is imperative that the task force  
160 examine these and other pressing issues on a bicameral  
161 basis, and I accordingly support the authorization and urge  
162 my colleagues to do the same.

163 I yield back.

164 Chairman Goodlatte. Thank you, Mr. Conyers.

165 And I now recognize the chairman of the Over-

166 Criminalization Task Force, Mr. Sensenbrenner of Wisconsin.

167 Mr. Sensenbrenner. Thank you very much, Mr. Chairman.

168 You have made most of the points that I was going to  
169 make in your opening statement. So I ask unanimous consent  
170 that my statement appear in the record and yield back the  
171 balance of my time.

172 Chairman Goodlatte. Without objection, the efficiency  
173 in guiding the Over-Criminalization Task Force is very  
174 welcome.

175 [The information follows:]

176

177 Chairman Goodlatte. I now recognize the ranking member  
178 of the task force, the gentleman from Virginia, Mr. Scott.

179 Mr. Scott. Thank you, Mr. Chairman.

180 The previous statement puts a lot of pressure on me, and  
181 I will follow the precedent. I have a great statement, for  
182 those that are interested, that it be placed in the record.  
183 And I yield back.

184 [The information follows:]

185

186 Chairman Goodlatte. Thank you, Mr. Scott.

187 [Pause.]

188 Chairman Goodlatte. All right. Is there any further  
189 discussion of the resolution?

190 [No response.]

191 Chairman Goodlatte. If not, the question is on adopting  
192 the resolution.

193 Those in favor will say aye.

194 Those opposed, no.

195 The ayes have it, and the resolution is adopted.

196 Pursuant to notice, I now call up H.R. 2919 for purposes  
197 of markup and move that the committee report the bill  
198 favorably to the House.

199 The clerk will report the bill.

200 Ms. Deterding. H.R. 2919, to amend Titles 5 and 28,  
201 United States Code, to require annual reports to Congress on  
202 and the maintenance of databases on awards of fees and other  
203 expenses --

204 Chairman Goodlatte. Without objection, the bill is  
205 considered as read and open for amendment at any point.

206 [The information follows:]

207

208 Chairman Goodlatte. And I will begin by recognizing  
209 myself for an opening statement.

210 I would like to thank Representatives Cynthia Lummis and  
211 Constitution Subcommittee Ranking Member Steve Cohen for  
212 introducing this important Government transparency  
213 legislation. Every year, pursuant to the Equal Access to  
214 Justice Act, the Federal Government through settlement or  
215 court order pays millions of dollars in legal fees and costs  
216 to parties to lawsuits and administrative adjudications that  
217 involve the Federal Government.

218 However, despite the large amount of taxpayer dollars  
219 paid out each year through the act, the Federal Government  
220 no longer comprehensively keeps track of the amounts of fees  
221 and other expenses awarded, why these fees and expenses were  
222 awarded, and to whom these costs were awarded.

223 This is because in 1995, Congress repealed the  
224 Department of Justice's reporting requirements and defunded  
225 the Administrative Conference of the United States and other  
226 agencies charged with reporting this basic information to  
227 Congress. The Administrative Conference was reestablished  
228 in 2010, but the requirements to report on fee and cost

229 payments have not been reenacted.

230       Accordingly, there has been no official Government-wide  
231 accounting of this information since fiscal year 1994,  
232 almost 20 years ago. This lack of transparency is  
233 troubling, given that the Equal Access to Justice Act is  
234 considered by many to be the most important Federal fee-  
235 shifting statute.

236       Fundamentally, the act recognizes that there is an  
237 enormous disparity of resources between the Federal  
238 Government and individuals and small businesses who seek to  
239 challenge Federal actions. Congress enacted the Equal  
240 Access to Justice Act to provide individuals, small  
241 businesses, and small nonprofit groups with financial  
242 assistance to bring suit against the Federal Government or  
243 defend themselves from lawsuits brought by the Federal  
244 Government.

245       As the Supreme Court has noted, the act was adopted with  
246 the specific purpose of eliminating for the average person  
247 the financial disincentive to challenge unreasonable  
248 governmental actions. But how can we know if the act is  
249 working well toward this end if we have no data on awards?

250 Without the data the bill requires the Administrative  
251 Conference to compile and report, we have nothing more than  
252 anecdotal evidence as to whether the act is providing some  
253 measure of relief to the financial disincentive to seeking  
254 judicial and administrative redress against the Federal  
255 Government. The legislation we are considering today will  
256 end this lack of transparency and restore the reporting  
257 requirements that were repealed in 1995.

258 I want to once again thank Representatives Lummis and  
259 Cohen for introducing this bill and urge my colleagues to  
260 support its passage.

261 I now recognize the ranking member, Mr. Conyers of  
262 Michigan, for his opening statement.

263 Mr. Conyers. Thank you, Chairman.

264 Members of the committee, I support H.R. 2919. It  
265 strengthens the Equal Access to Justice Act, an important  
266 law that has helped senior citizens, veterans, the disabled,  
267 and nonprofit organizations vindicate their rights against  
268 unreasonable Government action by providing for fee shifting  
269 when they are victorious against the Federal Government.

270 I want to commend my colleague from Tennessee, Steve

271 Cohen, for his incredible diligence in helping to craft this  
272 bipartisan legislation, and I am going to yield to him in  
273 just a moment.

274 This bipartisan legislation requires annual reports on  
275 the amount of fees paid under the act to prevailing  
276 litigants against the Government. And although this  
277 reporting requirement existed in the past, it lapsed in  
278 1995. And by increasing transparency, we will enable the  
279 Congress, as well as all Americans, to better identify any  
280 efficiency among the Federal agencies that are incurring  
281 these fee awards.

282 And I yield now to the gentleman from Tennessee, Mr.  
283 Cohen.

284 Mr. Cohen. Thank you, Mr. Conyers. I appreciate your  
285 comments and your yielding to me to make the statement.

286 To the chairman, I rise in strong support of the Open  
287 Book on Equal Access to Justice Act, and I appreciate your  
288 moving this bill forward here today.

289 This bipartisan legislation is a modest, but important  
290 step towards transparency, and I am proud to work with the  
291 bill's sponsor, the gentlewoman from Wyoming, Ms. Lummis,

292 and to have her share with me on the work on this bill.

293       The Equal Access to Justice Act, also known as EAJA, was  
294 enacted in 1980 and provides certain parties who prevail  
295 against the United States with attorneys fees and court  
296 costs. This enables ordinary citizens like veterans,  
297 seniors with attorneys fees when they are successful, and  
298 also advocates for clean air and clean water to fight unfair  
299 or illegal Government actions without fear of court costs  
300 involved. It has been a great success.

301       But since '95, when certain reporting requirements were  
302 eliminated, we have had no reliable data on how much money  
303 has been awarded by the Government in these proceedings.  
304 The public has a right to know how taxpayer funds are used,  
305 and Congress ought to be able to assess the impact and the  
306 effectiveness of the Equal Access to Justice Act.

307       This bill will address the lack of transparency in EAJA  
308 cases by requiring the Administrative Conference of the  
309 United States, known as ACUS, to deliver an annual report to  
310 Congress on the fees and costs awarded in these cases. The  
311 reports would also include the number and nature of the  
312 claims involved.

313 In addition, ACUS would be required to establish a  
314 publicly accessible, searchable database with this  
315 information, as well as the case name, the agency involved,  
316 the name of the party awarded cost, and the basis for the  
317 award.

318 I am pleased that we have been able to come together on  
319 a bipartisan basis and address this important issue. This  
320 is a good bill that will bring transparency to our  
321 Government and gather valuable data that will help Congress  
322 do its job in a better way.

323 I urge my colleagues to support this legislation. I  
324 thank the chairman and Ms. Lummis, and I yield back the  
325 balance of my time.

326 Chairman Goodlatte. The chair thanks the gentleman.

327 Are there any further opening statements?

328 [No response.]

329 Chairman Goodlatte. Are there any amendments?

330 [No response.]

331 Chairman Goodlatte. The chair would advise the  
332 committee that we are one Member short of a reporting  
333 quorum. Any Member will do. I think we need one more

334 beyond Mr. Gowdy.

335 So the committee will --

336 Mr. Collins. Mr. Chairman? While we are waiting --

337 move to strike the last word.

338 Chairman Goodlatte. For what purpose does the gentleman

339 seek recognition?

340 Mr. Collins. Move to strike the last word.

341 Chairman Goodlatte. The gentleman is recognized.

342 Mr. Collins. Mr. Chairman, I appreciate it, and I

343 appreciate also being a cosponsor of this.

344 I believe any time that we can deal with transparency,

345 we deal with it in an open process like this, and I

346 appreciate Representatives Cohen and Lummis and being proud

347 to be a part of this bill. And I think it just moves

348 forward.

349 This is a way, I think, that we can work forward on

350 things that do matter to the American public. When they

351 look at our taxpayer funding, they look at how we do that.

352 Then we can continue to move forward in a way that the

353 American public understands that we are looking out for them

354 first.

355           So I do appreciate the ranking member on the committee  
356 and also Representative Lummis for her work on this. And  
357 Mr. Chairman, with that, I yield back.

358           Chairman Goodlatte. The chair thanks the gentleman for  
359 vamping until ready, and we now have that additional member  
360 of the committee.

361           And the question occurs on the bill.

362           A reporting quorum being present, the question is on the  
363 motion to report the bill H.R. 2919 favorably to the House.

364           Those in favor will say aye.

365           Those opposed, no.

366           The ayes have it. The bill, as amended, is ordered  
367 reported favorably. Members will have 2 days to submit  
368 views.

369           Without objection, the bill will be reported as -- no,  
370 we don't need that.

371           And that concludes our business for today. So I thank  
372 all of you for your participation and patience, and we thank  
373 you all for attending.

374           The meeting is adjourned.

375           [Whereupon, at 10:31 a.m., the committee was adjourned.]