

**REGULATORY CRIME:
IDENTIFYING THE SCOPE OF THE PROBLEM**

HEARING
BEFORE THE
OVER-CRIMINALIZATION TASK FORCE OF 2013
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRTEENTH CONGRESS
FIRST SESSION

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OCTOBER 30, 2013
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REGULATORY CRIME: IDENTIFYING THE SCOPE OF THE PROBLEM

WEDNESDAY, OCTOBER 30, 2013

HOUSE OF REPRESENTATIVES
OVER-CRIMINALIZATION TASK FORCE OF 2013
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Task Force met, pursuant to call, at 10:02 a.m., in room 2237, Rayburn Office Building, the Honorable Louie Gohmert, presiding.

Present: Representatives Bachus, Gohmert, Holding, Scott, Conyers, Nadler, Bass, and Jefferies.

Staff present: (Majority) Robert Parmiter, Counsel; Daniel Huff, Counsel; Alicia Church, Clerk; (Minority) Ron LeGrand, Counsel.

Mr. GOHMERT. The meeting will come to order.

Good morning. Welcome to the Over-criminalization Task Force's third hearing.

Thus far, the Task Force has examined over-criminalization issues in Federal statutory law. Chief among them is the absence of a defined *mens rea* or intent requirement from the Federal criminal code. Congressional statutes, though, are merely the tip of the iceberg. Over the last 50 years, there has been enormous growth in Federal regulatory, state and, with it, a shift of power from elected officials to unaccountable bureaucrats at Federal regulatory agencies.

Now the vast majority of laws governing individuals and businesses in the United States are passed not by Congress but are issued as regulations crafted by unelected, unaccountable bureaucrats. There are at least an estimated 4,500 criminal statutes on the books today, up from 165 in 1900, but as many as 300,000 criminally enforceable regulations. In other words, the ratio of regulatory crimes to statutory crimes is 67 to 1.

This hearing is not about the substance of all these regulations. That is a discussion for a different day.

The question before us is solely on the propriety of criminal rather than civil penalties. Criminal sanctions are serious. They carry terms of imprisonment, create stigma, and can have lasting economic consequences such as diminished employability and ineligibility for government benefits, in addition to other life-changing problems as the stroke that we have seen with one of the victims of this over-criminalization. Accordingly, they should only attach to

violations that society generally recognizes as morally blame-worthy.

This hearing is about when, if ever, such onerous criminal sanctions are appropriate punishment for violating agency regulations. If so, how should those crimes be defined, and most important, who should be making those decisions?

It has become a routine practice for Congress to authorize an agency generally to promulgate regulations while providing that violating the yet-to-be-seen regulations will be a criminal offense. This poses a series of fundamental problems beyond the already familiar lack of adequate notice of intent requirements.

First, the bureaucrats who create the regulatory crimes are unaccountable to an electorate. This makes them immune from public opinion which operates as a check when it is, instead, the legislative branch making criminal law.

By contrast, legislators have the broader societal perspective necessary to determine what behavior society deems most blameworthy and therefore the proper subject of criminal sanction.

Similarly, as a result of these broad congressional delegations, the substantive regulatory standards that define regulatory crimes are drafted by agency bureaucrats largely shielded from public debate. Their efforts do not have the benefit of the full open and public scrutiny that helps improve the legislative definition of crimes in Congress. The result is less transparency and deliberation precisely when such procedural protections are most needed because individual liberty is at stake.

Regulations are also much more dynamic than traditional statutory crimes. Requirements that change with evolving science and standards sometimes rest upon assumptions about the efficacy of unproven technology. This complicates notice and compliance, which seems unfair if violations are to bear criminal penalties.

Another factor is that regulatory crimes can be created indirectly when statutes forbidding certain general behaviors such as lying to officials are applied to regulatory infractions that are not otherwise criminal. The result is criminal sanctions for activity that may be far removed from what Congress contemplated when it delegated rulemaking authority to the agency.

Finally, prosecutorial discretion and appeals to the courts may not be sufficiently effective failsafes for unfair results from regulatory crimes. A collection of liberal and conservative groups, including the ACLU and the Heritage Foundation, produced a pamphlet of examples of cases that I believe most Americans would agree should never have been brought.

In the courts, precedents have eroded intent requirements in the context of regulatory offenses while demanding greater deference to agencies' interpretation of the scope of their rulemaking power. Accordingly, agencies are now able to expand their criminal law-making power even to areas that Congress did not specifically commit to the agency. In short, the enormous growth in the regulatory state has been accompanied by an explosion of regulatory crimes. If unaddressed, the growing problem of otherwise law-abiding citizens jailed for violation of ill-defined regulations is a morass of rules of which they cannot possibly be fully aware, and that threat-

ens to undermine the legitimacy of the criminal law and dilute its moral force.

We have an excellent panel of witnesses with us today, and I thank them for being here. I know you are not here because of the pay you get, and for people that may not know, they do not get paid. They are here because they care about what we are doing. And so we are very grateful for your presence. And knowing the story of some of our witnesses, I feel like an apology is due.

But in any event, I look forward to hearing your testimony today, appreciate you all being here.

And people sometimes ask why don't you guys in Congress get along. Well, it depends on what the issue is.

But I now want to recognize a friend, the Ranking Member of the Task Force, the gentleman from Virginia, Mr. Bobby Scott. Together, we have been concerned about this issue and working together for years. And it is an honor to recognize Mr. Scott.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman.

As you pointed out, during the 111th Congress, when you were Chair of the Crime Subcommittee, the Judiciary Committee's Subcommittee held two hearings addressing the problem of over-criminalization of conduct, over-federalization of criminal law, and the resulting over-incarceration, a lot because of regulatory crimes.

Earlier this year, this Task Force examined the problem of over-criminalization in the absence of a *mens rea* requirement in too many laws and regulations that carry criminal sanctions. Through all of these hearings, there has been no dispute that the problem exists and that something has to be done to address and resolve this situation.

As we commence with today's hearing on the issue of regulatory crime, we are challenged to define the problem, and that is, is the conduct in question truly criminal? Are the criminal elements properly defined? Is the penalty appropriate? Does regulatory crime lead to a larger incarceration rate and prison overcrowding? Does regulatory crime stifle job creation and innovation? And who is wrongly affected by these regulations?

Now, the very nature of regulatory crime means that much of it is categorized as *malum prohibitum* crimes, and that is what poses a significant challenge for us. Unlike *malum in se* crimes, in which the society clearly recognizes the behavior as inherently wrong, these regulated activities are not generally viewed as objectionable in principle. Rather, these regulations are intended to protect public health, the environment, public welfare, commerce, finance, and safety. And they serve a purpose, and to that end, they are appropriate.

But having said that, we must ensure that regulations, especially those that impose criminal sanctions, provide fair notice to everyone and punish only the appropriate violators. It is incumbent upon Congress to ensure that Federal agencies have clear and sufficient guidance when Congress delegates to them the authority to issue regulations which carry criminal penalties.

It is true that some individuals have, without notice or intent to violate a law, found themselves arrested, prosecuted, convicted, and even incarcerated for engaging in seemingly harmless behavior which turned out to be a violation of law or regulation. Such occur-

rences have caused us to criticize the lack of prosecutorial discretion, but prosecutorial discretion cannot replace clarity in criminal law.

We obviously need some regulations. They are necessary to help us reduce the incidence of outbreaks of salmonella and e. coli contamination in our food supply or to avoid tragedies such as the explosion of BP's Deepwater Horizon oil rig in the Gulf of Mexico. The home foreclosure crisis, the 2008 financial crisis, and subsequent great recession all stem from the fact that regulators lacked the direction, resources, or authority to confront the highly reckless behavior in the financial services and mortgage industries. So some regulatory offenses should be criminal, but they should include offenses where there is an endangerment of health and safety and where a reasonable person should have known the risk. But to ensure that the criminal statutes are clear and concise and that the penalties are proportional, we need to make sure that any of those criminal statutes involve a process going through the Judiciary Committee so that we can make sure that the language is clear and the penalties are proportional.

I look forward to the testimony of today's witnesses, and thank you for convening the hearing.

Mr. GOHMERT. Thank you, Mr. Scott.

Under the agreement of the Task Force, there were two potential other opening statements, one by the Chairman of the full Judiciary Committee who is not here, but the other was the Ranking Member of the full Committee, the gentleman from Michigan, Mr. Conyers, if he wishes to make an opening statement. It looks by lowering the microphone, he does. So my friend, Mr. Conyers, you are recognized.

Mr. CONYERS. Thank you, Judge. I will be brief and put most of it in the record.

But I wanted to commend everyone that has been sensitized to the fact that over-criminalization is one of the most challenging issues of our criminal justice system. The explosive growth of the Federal criminal code has played an important role in that. We incarcerate more people proportionally than any other country on the planet, and it is a matter of great importance to me in raising some considerations about some principles that should be examined as we go through the distinguished witnesses before us.

What purpose do criminal penalties serve in the regulatory context? Do provisions that impose criminal penalties for regulatory violations provide fair notice of the criminality of the conduct in question? Can we reasonably expect citizens to comply with all such regulations on pain of criminal sanctions?

So I think this is an opportunity to take a long, hard look at the scourge of mandatory minimums. And it is my posture to begin with that eliminating judicial discretion has failed to make our system more fair or just. We have the statistics that I will not go into at this point, but racial disparities are overwhelming. African Americans make up 38 percent of the prison population, 6 times the rate among White Americans. In fact, some inner city communities have an incarceration rate 40 times the international average. The result of all these excessive and ill-conceived criminal statutes is over-incarceration.

And so the Task Force should also focus on the primary criminal laws that lead to convictions. We spend \$51 billion on a so-called “war on drugs,” and we even have 700,000 arrests for marijuana law violations. And so I am here to join with you as we examine what the real contributors to over-criminalization and over-incarceration are.

And I thank the Chairman for allowing me to make these remarks. I will put the rest of my statement in the record.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

Mr. Chairman and Members of the Task Force, when we created this Task Force we did so in order to address the explosive growth of the federal criminal code and the incredible number of federal regulations that carry criminal sanctions—an estimated 300,000! The work of the Task Force is very important, and it’s work that is long overdue.

It’s vitally important that we rein in such explosive growth and ask ourselves whether all of these laws and regulations are truly important. What purpose do they serve? Are they redundant, obsolete or an unnecessary duplication of state laws? We should ask whether these laws and regulations provide fair notice of the criminality of the conduct in question? How can we reasonably expect citizens to comply with all of them? It’s also time we asked whether all of these behaviors truly warrant treating an individual as a criminal or should the remedy be addressed with civil sanctions?

As we proceed with this hearing, I ask our witnesses to consider these questions that I’ve raised, and I also want to raise three points:

First, when good people find themselves confronted with accusations of violating regulations that are vague, address seemingly innocent behavior and lack adequate mens rea, fundamental Constitutional principles of fairness and due process are undermined. I should note that these regulations were promulgated by unelected officials executive branch agencies, and without the benefit of any consideration by this committee or any other Congressional committee.

When crimes are defined by regulation, we run the risk of Americans encountering unpleasant surprises in the form of being confronted with accusations that we violated criminal laws of which we not only have no knowledge, but have no reasonable way of knowing about them. That places all of us at risk of being arrested, prosecuted and incarcerated for questionable reasons.

I believe that it is fair and reasonable to ask whether there should be some mechanism or process for Congressional review of those offenses that would potentially deprive citizens of their freedom and impose a lifetime label of “criminal” on them.

Second, mens rea, the concept of a “guilty mind”, is the very foundation of our criminal justice system. We have established clear standards for what constitutes most criminal conduct. The prohibited conduct is *malum in se*, that is, the act is wrong by its very nature and everyone knows it. We’re talking about offenses such as murder, rape and robbery. That’s not what we’re here to discuss today.

Conduct covered by regulatory offenses is generally not wrong in itself and someone who knowingly engages in the prohibited conduct might not be culpable in the traditional sense. Further consideration is required before assigning criminal liability to the conduct. For example, one might know that he or she is engaging in a particular conduct but have neither the knowledge nor the intent to do wrong. Is that sufficient to arrest, prosecute and convict? In previous hearings on the subject of over-criminalization we’ve heard wrenching testimony from victims who were prosecuted for seemingly innocent conduct, and it is my understanding that we will hear testimony from more witnesses who feel they have been caught in the web of regulatory crime.

I do not doubt that there is reason to review and, where appropriate, rein in the promulgation of regulations that are issued without the benefit of Congressional review.

I want to **caution**, however, against downplaying the benefits of regulation and any exaggeration of its costs. The benefits of regulation can far exceed its costs, whether those benefits are defined in monetary terms or in terms of promoting values like protecting public health and safety and ensuring civil rights and human dignity.

For example, value can be found in the regulations prohibiting lead in gasoline and house paint. It has been clearly documented how the increased I.Q. attainments of our children have benefitted from these regulations.

Regulatory failure, on the other hand can lead to tragedies such as the Massey coal mine explosion in 2010 which took the lives of 29 miners, or the re-emergence of black lung disease among coal miners, an issue that was supposed to have been addressed years ago but continues to plague miners because of lax regulation.

So, I encourage my colleagues to be measured and careful when considering the benefit of regulation. Let's make sure that regulations are fair, provide appropriate notice of criminal sanctions, and let's continue to encourage prosecutorial discretion when deciding whom to pursue criminally versus civilly.

Finally, while it makes sense to review the estimated 300,000 criminal regulations, it's also important to understand that a major result of over-criminalization is over-incarceration. Regulatory crime offenses make up less than 1 percent of the prison population. To the extent that the Task Force is concerned with prison overcrowding and steadily rising incarceration rates, I urge it to look beyond regulatory crime. Let's put drug policy, firearms and immigration offenses on the table for the Task Force's consideration. These are the very real contributors of over-criminalization and over-incarceration in the federal system.

I look forward to hearing the testimony of our witnesses.

Thank you.

Mr. GOHMERT. Thank you, Mr. Chairman.

Without objection, any other Members' opening statements will be made a part of the record.

[The prepared statement of Mr. Goodlatte follows:]

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

Thank you, Chairman Sensenbrenner, for holding this hearing on regulatory crimes.

What struck me most as I reviewed the materials was a sense of how easy it is to become a victim. There are so many federal crimes on the books that the government itself does not have an accurate count. And they do not just cover inherently dangerous activities like murder, sexual assault or robbery. The federal code is riddled with statutes that impose criminal penalties for regulatory conduct. Certain regulations serve the important purpose of public safety and we expect individuals and businesses who engage in potentially dangerous conduct to know the rules. But these rules can too often ensnare innocent citizens. I say innocent because perhaps the most pernicious aspect of these regulatory crimes is weak or even non-existent intent requirements.

Often a criminal conviction requires only that a defendant knowingly take an action; it does not require that he knew the act was prohibited. This construct is appropriate for traditional *malum in se* crimes that society at large has deemed unacceptable.

However, the question before the Task Force is whether this construct is appropriate for *malum prohibitum* crimes—or conduct that is not inherently immoral but is criminalized by statute or regulation.

We are going to hear from two victims today and there are many more. Examples include a 23-year-old man who found a buried skull on a hunting trip in Alaska, and turned it over to the U.S. Forest Service only to be charged with removing an archeological resource from public lands; or the young girl who saved a woodpecker from the family cat, and whose parents were fined for violating the Migratory Bird Act because it is a crime to take or transport a woodpecker. These cases raise the issue of congressional intent. Are they representative of how Congress intended the laws it has passed to be used? If not, it is Congress's duty to do something. As I stated when this Task Force was formed, "Overcriminalization is an issue of liberty." We owe our constituents nothing less than a thorough review of overcriminalization and solutions to reverse this growing trend.

One possible solution the Task Force will evaluate is a default mens rea provision, in large part to ensure that criminal penalties are applied to only those who act with the requisite guilty mind. I hope that today's hearing—coupled with our November hearing on regulatory crimes—will lead to solutions to ensure that our federal laws distinguish between the truly guilty and the merely unlucky.

I thank the witnesses and look forward to their testimony.

Mr. GOHMERT. And without objection, the Chair is authorized to declare a recess during votes on the House floor. I think we should be done before that happens.

At this time, I want to proceed with the introduction for our distinguished panel. First of all, Mr. Reed D. Rubinstein. Mr. Rubinstein is a partner in the Washington, D.C. office of Dinsmore & Shohl, LLP, and has experience in litigation, regulatory, legislative, and appellate advocacy representing publicly traded corporations, small business, individuals, and nongovernmental organizations in matters before the Departments of Justice, Defense, Energy, and Agriculture, the Environmental Protection Agency, the Food and Drug Administration, the U.S. Congress, State agencies, and in the civil and criminal courts. He joined Dinsmore after serving as Senior Counsel for Environment, Technology, and Regulatory Affairs for the U.S. Chamber of Commerce. Prior to joining the U.S. Chamber, he was a shareholder of the Washington, D.C. office of Greenberg Traurig, LLP, where he practiced environmental and administrative law litigation, corporate, and real estate law.

He has regularly published and has spoken around the world on environmental regulatory trends, U.S. Government programs, anti-terrorism strategies, and litigation matters.

He also received his bachelor of arts, master of arts, as well as juris doctorate from the University of Michigan.

And with that, let me mention to all the witnesses you may have more of a written statement that exceeds 5 minutes, and that will be made part of the record, is part of the record. But for purposes of the hearing here, if you would restrict your opening statements to 5 minutes, and you can see the light will go from green to yellow to red, and red is time to complete. So thank you. At this time, we will start with our first witness.

**TESTIMONY OF REED D. RUBINSTEIN, PARTNER,
DINSMORE & SHOHL LLP**

Mr. RUBINSTEIN. Thank you, Mr. Chairman, Ranking Member Scott, Task Force Members and staff.

My name is Reed Rubinstein, as you have heard. I am here testifying today on behalf of the U.S. Chamber Institute for Legal Re-

form. ILR is an affiliate of the U.S. Chamber of Commerce that works to make our Nation's legal system simpler, fairer, and faster for all.

The U.S. Chamber is the world's largest business federation, dedicated to defending America's free enterprise system.

As, Mr. Chairman, you pointed out in your opening remarks, regulatory over-criminalization is a big problem. It is big for the people who are caught up in the system, and it is big from a systemic standpoint. No one knows precisely how many Federal regulations of possible criminal consequences. The best estimates are in the tens of thousands. But what we do know is that this kind of a sprawling code based substantially on regulations is especially likely to contain crimes in which the prohibited conduct and state-of-mind elements are incompletely fleshed out. This kind of a code engenders abuses, especially in agencies unencumbered by the cultural limits that restrain, for the most part, State and Federal prosecutors.

Regulatory over-criminalization is a particularly pernicious phenomenon for at least three reasons.

First, regulations criminalize vast expanses of conduct without notice to the ordinary person that his or her everyday activities may be subject to criminal punishment.

Second, regulatory crimes are the product of bureaucratic not legislative action. Given that the criminal law is the primary system for public communication of societal values, it is unwise and generally improper for crimes to be defined through convoluted agency rulemaking processes.

Third, criminalizing regulatory violations without respect for intent has a chilling effect on small businesses, entrepreneurs, and scientific innovation. ILR supports laws that conserve our environment, guard the quality of our food, and ensure the efficacy of our medicines. But it is simply wrong to give unaccountable Federal agencies functionally limitless discretion first to make the law by rule and then to criminally prosecute citizens for their violations without either predictability or proof of wrongful intent.

The human cost of regulatory over-criminalization has been well documented, and you will hear stories today that ought to cause this Committee's Task Force substantial concern. Reports of armed administrative agency agents breaking into homes, factories, and even animal shelters on the pretext of enforcing arcane Federal and State regulations ought to be unsettling. From a systemic standpoint, however, the chief vice of regulatory over-criminalization is the wholesale abandonment of the basic principle of legality upon which law enforcement in a democratic community must rest. That is, close control over the exercise of the delegated authority to employ official force through the medium of carefully defined laws and judicial and administrative accountability. The paucity of carefully defined laws and the minimal administrative accountability that define our current system inevitably lead to abuses.

Regulatory over-criminalization has very strong secondary and tertiary effects that inhibit economic and personal liberty. Generally speaking, for a company or an individual caught up in this morass, settlement or a plea is almost always the only cost-effective and rational strategy. Public companies facing charges of

criminal violations settle, at least in part, because the risk of insolvency associated with an indictment is so great that contesting a charge amounts to a breach of fiduciary duty in many circumstances. Small businesses lack the resources to effectively contest enforcement actions. Therefore, it is only a very rare few who are capable and willing to stand up and defend themselves and their rights when facing charges.

Furthermore, agency decision-making in this environment is rarely clear, consistent, or predictable. If a law declares a practice to be criminal, but the agency does not or cannot apply its policy with consistency and predictability and fairness, the law's moral effect and public faith in government are necessarily weakened.

Time and again in the course of my practice in many contexts and in various ventures, I have seen large companies, small companies, entrepreneurs, individuals assess the risks and the uncertainty posed by regulatory over-criminalization and then decline to build, to invest, or to grow. I do not know and cannot point you to an empirical study that authoritatively accounts for the jobs lost and the economic activity aborted by regulatory over-criminalization, but the harm is unquestionably pervasive and real.

Again, ILR strongly supports good laws that protect the public welfare and the well-ordered administrative agencies that implement them. But regulatory over-criminalization needlessly conflicts with our constitutionally enshrined commitment to individual freedom and unduly interferes with entrepreneurship, investment, and job growth.

This Task Force and the Congress must take a hard look at a general and clear *mens rea* statute for all Federal crimes, especially those based on regulations. There are simply too many offenses and regulations for Congress to act piecemeal. The reality is that a large solution, a generally applicable statute, is the only practical and effective one.

Also, we call upon this Task Force and the Congress to explore carefully the secondary and tertiary effects of the over-criminalization phenomenon. There ought to be mechanisms for meaningful agency oversight, transparency, and accountability to counteract some of the more egregious secondary and tertiary effects of this phenomenon. These mechanisms should include reasonable limits on agencies' prosecutorial discretion and stronger procedural guarantees to ensure that the targets of agency action are given an independent, fair, and level review of their cases.

Thank you for your attention to this important matter. I am happy to answer any questions that you might have.

[The prepared statement of Mr. Rubinstein follows:]

**BEFORE THE U.S. HOUSE OF
REPRESENTATIVES COMMITTEE ON
JUDICIARY'S TASK FORCE ON OVER-
CRIMINALIZATION**

**“REGULATORY CRIME: DEFINING THE SCOPE OF
THE PROBLEM”**

TESTIMONY OF REED D. RUBINSTEIN, ESQ.
PARTNER, DINSMORE & SHOHL LLP

FOR

THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

October 30, 2013

**BEFORE THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON
JUDICIARY'S TASK FORCE ON OVER-CRIMINALIZATION**

“Regulatory Crime: Defining the Scope of the Problem”

Testimony of Reed D. Rubinstein, Esq.
Partner, Dinsmore & Shohl LLP

for

The U.S. Chamber Institute for Legal Reform

October 30, 2013

My name is Reed D. Rubinstein and I am a partner in the Washington, D.C. office of Dinsmore & Shohl, LLP. I also represent and am Senior Vice President for Litigation of Cause of Action, Inc., a 501(c)(3) non-profit corporation focused on federal agency accountability and transparency.

For over twenty-five years, I have practiced environmental and administrative law, defending individuals and companies in federal civil and criminal enforcement matters. I also have served as the U.S. Chamber of Commerce's Senior Counsel for Environment, Technology and Regulatory Affairs and was for many years an adjunct professor of environmental law at the Western New England School of Law.

I am testifying today on behalf of the U.S. Chamber Institute for Legal Reform (“ILR”) to help define the scope of the regulatory over-criminalization problem. ILR is an affiliate of the U.S. Chamber of Commerce dedicated to making our nation's overall legal system simpler, fairer, and faster for all participants. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region and dedicated to promoting, protecting, and defending America's free enterprise system.

I. SUMMARY

The consensus that “over-criminalization” presents a clear and present danger to American freedom and individual civil liberties is broad and deep.¹ The metastatic growth in the number of federal crimes, the broad scope of modern criminal codes and, most importantly, past Congresses' willingness to provide the Executive Branch with plenary police powers unconstrained by traditional *mens rea* requirements protecting those who did not intend to commit crimes from unwarranted prosecution and conviction, are eroding foundational Anglo-American jurisprudential norms that preserve liberty.²

¹See generally Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538-39 (2012)(citations omitted).

²Baker, HERITAGE FOUND., LEGAL MEMORANDUM NO. 26: REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 5 (2008), cited in Smith, *supra* at fn. 4. According to Baker:

Regulatory over-criminalization is particularly corrosive to our fundamental freedoms. First, regulatory “crimes” nearly always punish conduct that is *malum prohibitum*, or wrongful only because it is prohibited and all too often “consciousness of wrongdoing” is irrelevant.³ Vast expanses of conduct are criminalized without any explicit Congressional sanction or notice to the ordinary person that his or her everyday activities may be subject to criminal punishment.⁴

Second, regulatory crimes are the product of bureaucratic actions, not legislative enactments. Criminal law is the primary system for public communication of societal values, and it is unwise and generally improper for crimes to be defined by unelected, unaccountable bureaucrats through convoluted rulemaking processes.

Third, criminalizing regulatory violations without respect for intent, or *mens rea*, has a chilling effect on small businesses, entrepreneurs, and scientific innovation. ILR supports laws that conserve our environment, guard the quality of our food, and ensure the efficacy of our medicines. But it is simply wrong for unaccountable federal agencies to have functionally limitless discretion to first make the law by promulgating regulations and then to criminally prosecute citizens for their “violations” without prosecutorial consistency, predictability, or proof of wrongful intent.

ILR believes that Congress should enact a general statute that ensures inclusion of appropriate threshold *mens rea* requirements in criminal laws, including laws that criminalize violations of administrative regulations. Such a statute could require all new laws to provide adequate definition of both the *actus reus* (guilty act) and the *mens rea* in specific and unambiguous terms. Any general *mens rea* statute should also provide a default intent standard that would apply in the event that a law, whether new or existing, fails to adequately define an *actus reus* and *mens rea*. Additionally, Congress should consider taking steps to put in place mechanisms for meaningful agency oversight, transparency and accountability in order to counteract some of the more egregious secondary and tertiary effects of regulatory over-criminalization.⁵ These mechanisms ought to include reasonable

The federal government is supposedly a government of limited powers and, therefore, limited jurisdiction. Each new crime expands the jurisdiction of federal law enforcement and federal courts. Regardless of whether a statute is used to indict, it is available to establish the legal basis upon which to show probable cause that a crime has been committed and, therefore, to authorize a search and seizure. . . . Historically, nearly all crimes concerned acts that were *malum in se*, or wrong in themselves, such as murder, battery, and theft. Today, however, new crimes and petty offenses created by statute almost always concern acts that are *malum prohibitum*, or wrong only because it is prohibited.

Baker, *supra* at 6.

³*United States v. Dotterweich*, 320 U.S. 277, 284 (1943). Regulatory offenses differ from the types of crimes punishable at common law, which were deemed *malum in se*, or wrong in and of themselves. *See Morissette v. United States*, 342 U.S. 246, 251–57 (1952) (distinguishing common law and regulatory offenses).

⁴Walsh and Joslyn, HERITAGE FOUND./NACDL, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW, 11 (2010).

⁵*See generally* Walsh & Joslyn, WITHOUT INTENT: HOW CONGRESS IS ERODING THE INTENT REQUIREMENT IN FEDERAL LAW 26 – 31 (2010) available at <http://www.nacdl.org/withoutintent/> (accessed July 8, 2013).

limits on agencies' prosecutorial discretion and stronger procedural guarantees to ensure that the targets of agency action receive an independent, fair, and level review of their cases than current law provides.

II. DISCUSSION.

A. The Scope of "Regulatory Crimes."

Over-criminalization results when Congress expands criminal liability through strict liability offenses that dispense with culpable mental states; imposes vicarious liability without some evidence of personal advertence; inflicts grossly disproportionate penalties that bear no relation to the wrongfulness of the underlying crime, the harmfulness of its commission, or the blameworthiness of the criminal; and broadly delegates criminal enforcement authority and discretion to executive agencies.⁶

The threat posed by over-criminalization to Americans' individual freedom and civil liberties has long been recognized. As Sanford Kadish wrote in 1967:

American criminal law...has extended the criminal sanction well beyond...fundamental offenses to include very different kinds of behavior, kinds which threaten far less serious harms, or else highly intangible ones about which there is no genuine consensus, or even no harms at all. The existence of these crimes and attempts at their eradication raise problems of inestimable importance for the criminal law. Indeed, it is fair to say that until these problems of over-criminalization are systematically examined and effectively dealt with, some of the most besetting problems of criminal-law administration are bound to continue.⁷

For two generations, the over-criminalization problem has grown at a fantastic rate in scope, depth and complexity. According to a widely-cited 1998 American Bar Association report, an incredible 40% of the thousands of federal criminal laws passed since the Civil War were enacted after 1970, many incident to broad economic and environmental regulatory statutes that eviscerate traditional *mens rea* requirements. Estimates are that 4,500 federal laws carry criminal penalties.⁸ "Thus, whether crime rates are rising or falling, the one constant—as predictable as death and taxes—is that scores of new federal criminal statutes are being enacted."⁹ No one knows, precisely,

⁶See Luna, *The Overcriminalization Phenomenon*, 54 AMERICAN UNIV. L. REV. 703, 715 (2005); Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, 7 HERITAGE FOUND. LEGAL MEM. 1, 3-12 (2003) (discussing elimination of *mens rea* requirements and limitations on vicarious liability).

⁷Kadish, *The Crisis of Overcriminalization*, ANNALS AM. ACAD. POL. SCI. 157, 158 (Nov. 1967).

⁸Gary Fields and John R. Emshwiller, "As Criminal Laws Proliferate, More Are Ensnared," *The Wall Street Journal* (July 23, 2011) *available at* <http://online.wsj.com/news/articles/SB10001424052748703749504576172714184601654> (accessed October 28, 2013)(citation omitted).

⁹Smith, *supra* at 538 citing AM. BAR ASS'N, *THE FEDERALIZATION OF CRIMINAL LAW* 7 (1998); Baker, Jr., *Corporations: Measuring the Explosive Growth of Federal Crime Legislation*, ENGAGE: J. FEDERALIST SOC'Y'S PRAC. GROUPS, Oct. 2004, at 23, 27, *available at* http://www.fed-soc.org/doclib/20080313_CorpsBaker.pdf (finding more than a one-third increase in the number of federal crimes since the early 1980s).

how many federal regulations have possible criminal consequences – the best estimates are in the tens of thousands.¹⁰

Our apparently insatiable appetite for broad and indistinct strict liability criminal regulatory schemes¹¹ has weakened the bedrock principles of Anglo-American criminal law. Simply put, these schemes degrade the criminal law and prevent the imposition of just and proportional punishments for offenses. A sprawling criminal code based substantially on agency regulations is especially likely to contain crimes in which the all-important conduct (*actus reus*) and state of mind (*mens rea*) elements are incompletely fleshed out.¹² Such a system engenders prosecutorial abuses, especially by bureaucratic agencies unencumbered by the cultural and prudential limits that restrain state and federal prosecutors.

To begin with:

One of the most elementary requirements of criminal and constitutional law is that the government must offer the public adequate notice of what the law forbids before a person can be held liable for violating a criminal statute....Today, however, the proposition that everyone knows the law is not just a fiction or a “legal cliché”; it is an absurdity. The criminal law no longer merely expresses societal condemnation of inherently nefarious acts that everyone knows are wrong (e.g., murder), so-called *malum in se* offenses. It also regulates the conduct of individuals by making it a crime to commit a variety of acts that are unlawful only because Congress has said so, crimes known as *malum prohibitum* offenses....Given this reality, it is dishonest to presume that anyone, much less everyone, knows everything that the federal penal code outlaws today.¹³

Congress and the Executive Branch, each for their own reasons, have discarded traditional constraints on culpability when ostensibly acting on behalf of the public welfare.¹⁴ In addition, the

¹⁰John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV. 193, 216 (1991).

¹¹See, e.g., Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 289 (1998) (citing over three hundred federal proscriptions against fraud and misrepresentation).

¹²See Smith, 102 J. OF CRIM. L. & CRIMINOLOGY at 540.

¹³Paul J. Larkin, Jr., The Heritage Foundation Senior Legal Research Fellow, *Oversight Hearing On The Lacey Act: Why Should U.S. Citizens Have to Comply with Foreign Laws?* TESTIMONY BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES SUBCOMMITTEE ON FISHERIES, WILDLIFE, OCEANS, AND INSULAR AFFAIRS at 2–4 (July 17, 2013)(citations omitted).

¹⁴According to Kadish:

The plain sense that the criminal law is a highly specialized tool of social control, useful for certain purposes but not for others; that when improperly used it is capable of producing more evil than good; that the decision to criminalize any particular behavior must follow only after an assessment and balancing of gains and losses-this obvious injunction of rationality has been noted widely for over 250 years, from Jeremy Bentham [forward]...And those whose daily business is the administration of the criminal law have, on occasion, exhibited acute awareness of the folly of departing from it. The need for restraint seems to

U.S. Supreme Court long ago acquiesced to federal crimes that lack a *mens rea* requirement and instead impose liability without regard for a guilty mental state.¹⁵ Contemporary regulations often reject historic limitations on vicarious criminal responsibility for the acts of others. And, Congress has delegated the immense power to define prohibited conduct through rulemaking to unaccountable, opaque bureaucracies, and then to prosecute violations with un-cabined enforcement “discretion.”

The criminal prosecution of a well-respected marine biologist, Nancy Black, illustrates the problem.¹⁶ Black’s research has led to important advances in scientific knowledge regarding whale range, behavior, and population structure. Nevertheless, for reasons that cannot be readily ascertained from the record, she was singled out to suffer the full weight of the government’s power, and charged with a variety of crimes including one count of violating 18 U.S.C. § 1519 (alteration of a record with the intent to impede, obstruct, or influence an investigation), one count of violating 18 U.S.C. § 1001(a)(2) (knowingly and willfully making a false statement in a matter), and two misdemeanor counts of violating 16 U.S.C. § 1375(b) and 50 C.F.R. §§ 216.3 and 216.11(b) (knowingly violating a Marine Mammal Protection Act (“MMPA”) regulation that prohibits “feeding” marine mammals in the wild). A forfeiture allegation was also alleged under 16 U.S.C. §§ 1377(d) and 1377(e)(3)(B) and 28 U.S.C. § 2461(c) (seeking forfeiture of a 22-foot dinghy and its gear). Black eventually pled guilty to one count of violating a regulation prohibiting feeding.¹⁷

According to the Department of Justice (“DOJ”), the genesis of the prosecution is that killer whales (orcas) enjoy eating gray whales in the Monterey Bay National Marine Sanctuary. When orcas manage to kill a gray whale, they do not always eat it all at once. Often, portions of the

be recognized by those who deal with the criminal laws, but not by those who make them or by the general public which lives under them.

Kadish, *supra*.

¹⁵See *United States v. Park*, 421 U.S. 658, 663-64, 670-73 (1975) (holding that the Federal Food, Drug, and Cosmetic Act does not require a guilty mental state and affirming CEO’s conviction for unsanitary food storage conditions); *Dotterweich*, 320 U.S. at 285 (1943) (holding a corporate president criminally liable without proof of a culpable mental state because he stood in “responsible relation” to the distribution of mislabeled pharmaceuticals); see also *United States v. Balint*, 258 U.S. 250, 251-52 (1922) (refusing to impose the common law requirement of a culpable mental state when legislative intent was to create strict liability on a class of persons); *United States v. Weitzenhoff*, 35 F.3d 1275, 1283-85 (9th Cir. 1993) (strict liability for Clean Water Act violations without knowledge of the law or illegality of conduct); *United States v. Hanousek*, 176 F.3d 1116, 1120-22 (9th Cir.) *cert. denied* 528 U.S. 1102 (2000) (upholding conviction of a supervisor under the Clean Water Act when a backhoe operator ruptured a pipeline because, *inter alia*, legislation was enacted for the public welfare).

¹⁶Cause of Action, Inc. is part of the team representing Ms. Black.

¹⁷See U.S. Dep’t of Justice, Office of Public Affairs, “*California Woman Pleads Guilty to Feeding Whales in Marine Sanctuary*,” (April 23, 2013), available at <http://www.justice.gov/opa/pr/2013/April/13-enrd-463.html> (accessed October 27, 2013). As part of the plea agreement, the Government agreed to, *inter alia*, dismiss Count One (violation of 18 U.S.C. § 1519) and Count 2 (18 U.S.C. § 1001). At the change of plea hearing, the Government moved to dismiss Counts 1, 2 and 4.

carcass, including strips and chunks of blubber (some over six feet in length and weighing over a hundred pounds), remain floating or semi-submerged after a kill. Orcas and sea birds feed on the leftovers while they are still available in the area.¹⁸

DOJ reports that according to the plea agreement, on or about April 25, 2004, Black was on her boat in the Monterey Bay National Marine Sanctuary, when she and her assistants encountered orcas eating a baby gray whale. She watched the orcas eat pieces of the calf floating in the water. To facilitate her research, she or her crew grabbed a floating bit of the unlucky calf, cut a hole through the corner and inserted a rope through the hole to stop the blubber from floating away from the boat. They returned the piece of blubber to the water and monitored the feeding behavior of the orcas, which ate the blubber off of the rope. Black and her crew repeated the process with the rope and other calf pieces. In court papers, Black admitted that, although she had a valid permit to research orcas, she did not have a permit for this. She also admitted that on or about April 11, 2005, she or her crew did the same thing.

To understand how it could be that this relatively innocuous conduct led Black to spend more than eight years in a very public and immensely burdensome regulatory and criminal morass of investigations, indictments and charges, it is necessary to walk carefully through the relevant statutes and regulations.

First, Congress enacted 16 U.S.C. § 1375(b) as a statute of general application criminalizing prohibited conduct. It provides that “[a]ny person who knowingly violates any provision of this title or of any permit or regulation issued thereunder (except as provided in section 118 [16 U.S.C. § 1387]) shall, upon conviction, be fined not more than \$ 20,000 for each such violation, or imprisoned for not more than one year, or both.” The statute’s *mens rea* requirement (“knowingly,” not “willfully”) is weak. A person need not know that his or her conduct is prohibited by the MMPA to suffer criminal liability, only proof of general intent and knowledge of the facts constituting the offense are needed.

Second, 16 U.S.C. § 1372(a), falls within § 1375(b)’s scope and prohibits the “taking” of a marine mammal. “Taking” is defined at 16 U.S.C. § 1362(13) to mean “harassment.” “Harassment,” in turn, is defined at 16 U.S.C. § 1362(18) to mean anything that could “disturb” marine mammals by “caus[ing] disruption of behavioral patterns ... including ... feeding.”

Third, bureaucratic regulations prohibit (and thus criminalize) any attempt to “feed or attempt to feed” a marine mammal in the wild without a permit. *See* 50 C.F.R. §§ 216.3 (“Take” means to harass ... [and] includes, without limitation, any of the following: ... feeding or attempting to feed a marine mammal in the wild.”), 216.11(b) (taking is unlawful). The anti-feeding regulation was designed to prevent for-profit companies from “baiting” marine mammals to create a “show” for their customers. For-profit companies that have run afoul of NOAA’s anti-feeding regulations have typically been served with notices of violation and paid civil fines.¹⁹ In one case, a forfeiture

¹⁸*Id.*

¹⁹*See, e.g.*, NOAA Office of General Counsel, Enforcement Actions: July 1, 2012, through December 31, 2012, at 17 (Feb. 2013), *available at* http://www.gc.noaa.gov/documents/2013/enforce_Feb_02112013.pdf (accessed July 17, 2013) (“SF1003031, Marine Mammal Protection Act \$5,000 NOV settled for \$5,000, with \$1,000 suspended for eighteen months. Owner and operator were charged for feeding wild dolphins.”); NOAA Settlement Agreement, Marine Mammal Protection Act, Case No. SL0902854MM (Aquatic Adventures Management Group settles \$5,000 NOV violating MMPA regulations prohibiting

action was filed against a company in which the alleged violations were far more extensive and egregious than in the Black case.²⁰ Yet only Black has been prosecuted.²¹

B. The Corrosive Effect of Regulatory Over-criminalization.

The human cost of regulatory over-criminalization has been well documented. Reports of armed administrative agency agents breaking into homes, factories and even animal shelters on the pretext of enforcing arcane federal and state regulations are particularly unsettling.²² But from a systemic standpoint, the chief vice of regulatory over-criminalization is the wholesale abandonment of what Kadish called “the basic principle of legality upon which law enforcement in a democratic community must rest—close control over the exercise of the delegated authority to employ official force through the medium of carefully defined laws and judicial and administrative accountability.”²³ Such abandonment has had a tremendously corrosive effect, and the systemic lack of “carefully

feeding for \$4,000); Notice of Violation and Assessment of Administrative Penalty, Marine Mammal Protection Act, issued to Ben Chancey and Eric Mannino, Case No. SE0903717MM (\$5,000 NOV for alleged violation of MMPA regulation prohibiting feeding of marine mammals in the wild.)

²⁰ Complaint for Forfeiture, *United States v. Manfish*, CV-13-2690-EJD, Dkt. 1 (June 12, 2013).

²¹ Virginia Hennessy, “Cousteau hands over boat to settle whale chumming case: Same footage used in criminal case against marine biologist Nancy Black,” *MONTEREY HERALD* (Oct. 7, 2013), available at http://www.montereyherald.com/news/ci_24260396/cousteau-hands-over-boat-settle-whale-chumming-case (accessed Oct. 28, 2013); Daniel Dew, *Save the Whales NOAA* (September 5, 2012) available at <http://blog.heritage.org/2012/09/05/save-the-whales-noaa/> (accessed October 27, 2013).

²² Many federal and state administrative agencies maintain their own armed police forces to enforce regulations. For example, during the infamous Gibson Guitar raid, armed federal agents swarmed an iconic guitar maker, herding its employees at gunpoint based on allegations Gibson was using wood exported in violation of Indian domestic content laws to make musical instruments. Fox News, “Fed Raid Targets Guitars Made From Endangered Trees,” (Aug. 26, 2011) available at <http://www.foxnews.com/politics/2011/08/26/feds-environmental-enforcement-on-guitars-leaves-musicians-in-fear/> (accessed October 27, 2013).

In another case, the Huffington Post reports that thirteen armed state law enforcement agents reportedly raided an animal shelter to capture and then kill a 35-pound orphan baby deer. All shelter employees were corralled near the parking lot while agents went through the property. When a young volunteer took photos of the raid on his phone, officers took his phone and deleted the pictures. The armed agents took the fawn, which was about to be sent to an animal rehabilitation facility in Illinois, stuffed it into a body bag, carried it out of the shelter and killed it. The search warrant for the raid lists a Wisconsin state law forbidding the possession of wildlife without proper permits, and the likelihood that shelter employees might hide the animal, as reasons for the raid. Hunter Stuart, “Baby Deer, ‘Giggles,’ Killed After Raid on St. Francis Society Animal Shelter,” (Aug. 2, 2013) available at http://www.huffingtonpost.com/2013/08/02/baby-deer-killed-raid_n_3691317.html (accessed October 27, 2013).

²³ Kadish, *supra*.

defined laws” and the absence of “administrative accountability” have unquestionably resulted in abuses by federal and state administrative agencies.²⁴

Furthermore, regulatory over-criminalization has very strong secondary and tertiary effects that inhibit economic and personal liberty. The broad authority to “fill in” and define the terms of strict liability crimes and the unlimited prosecutorial discretion given by Congress to unaccountable bureaucratic regulators combine to chill companies and individuals from contesting even civil regulatory abuse. In most cases, targets of agency action must defend themselves in proceedings *run by that very agency*. Some agencies have even effectively done away with the limited due process protection provided by independent administrative law judges. Yet courts generally require targets of agency action to “exhaust” administrative remedies, often at great expense over a period of years, before coming to court for an independent, fair, and level review.

Generally speaking, settlement is almost always the only cost-effective strategy. Public companies facing charges of criminal regulatory violations often settle at least in part because the risk of insolvency associated with a criminal indictment (see Arthur Anderson) is so great that contesting a charge could amount to a breach of fiduciary duty. Small businesses usually lack the resources to effectively contest regulatory enforcement actions and there is no equivalent of the Federal Public Defender’s Office for targets of administrative action. Therefore, only a few rare individuals are capable of standing up and vigorously defending themselves and their rights when facing charges with respect to alleged criminal (and often even alleged civil) regulatory violations.

Also, agency decision-making in an over-criminalized environment is rarely clear, consistent, or predictable.²⁵ Certainly, if a law declares a practice to be criminal, but cannot apply its policy with

²⁴The legal restrictions imposed on the bureaucracy’s power to criminalize and punish are far and few between, “with the only vigorous substantive boundaries set in areas like speech and reproductive freedom.” Generally applicable limitations such as judicially-imposed *mens rea* and actual notice requirements, barriers against shifting evidentiary burdens to the defense, and bans on strict liability status offenses are “derelict[s] on the waters of the law.” This is likely due to a variety of reasons, including hesitance to limit the political branches in their enactment and enforcement of substantive crimes and punishments. Thus:

Every augmentation provides officials a new legal instrument to apply against members of the so-called “criminal class” (many of whom look remarkably similar to the class of “normal” folks). Whether any given instance might be seen as abusive, of course, depends on an individual’s personal predispositions and intellectual commitments, whatever they may be. But in general, “American criminal law’s historical development has borne no relation to any plausible normative theory,” William Stuntz suggests, “unless ‘more’ counts as a normative theory.”

See Erika Luna, *The Overcriminalization Phenomenon*, 54 Am. Univ. L. Rev. 704, 711, 723 (2005) (citations omitted).

²⁵For example, on August 24, 2011, Gibson Guitar factories in Nashville and Memphis were raided by armed agents from the Department of Homeland Security and the U.S. Fish & Wildlife Service for alleged Lacey Act violations. The company was not accused of importing banned wood. Rather, the raid apparently occurred because Gibson ran afoul of a technical Indian regulation governing the export of finished wood products, which was designed to protect Indian woodworkers from foreign competition. *See* Affidavit of Special Agent John M. Rayfield in support of Search Warrant 11-MJ-1067 A, B, C, D at ¶¶ 15-18 (Aug. 18, 2011) *available at*

consistency, its moral effect is necessarily weakened.²⁶ But the agencies' lack of consistency, transparency, and accountability also undermines public faith in the rule of law, impairing innovation and interfering with business investment and job-creation. Time and again in the course of my practice, in various regulatory contexts and in various ventures, I have seen large companies, small companies, and entrepreneurs assess the risks and uncertainty posed by regulatory over-criminalization, and then decline to build, to invest, or to grow. While I know of no empirical study that authoritatively accounts for the jobs lost and/or the economic activity aborted by regulatory over-criminalization, the harm is unquestionably pervasive, palpable, and real.²⁷

<http://www.scribd.com/srcohiba/d/63869457-US-Government-s-Affidavit-in-Support-of-Search-Warrant-at-Gibson-Guitar-Factory> (accessed May 4, 2012). To make matters worse, although the Indian government certified that the wood was properly and legally exported, the regulators substituted their own opinion to support their claims of a Lacey Act violation.

On July 27, 2012, Gibson and the government settled all of their outstanding Lacey Act matters. As to the Indian ebony and rosewood that led to an armed raid:

The Government and Gibson...agree that certain questions and inconsistencies now exist regarding the tariff classification of ebony and rosewood fingerboard blanks...Accordingly, the Government will not undertake enforcement actions related to Gibson's future orders...or imports of ebony and rosewood...from India, unless and until the Government of India provides specific clarification that ebony and rosewood fingerboard blanks are expressly prohibited by laws related to Indian Foreign Trade Policy.

See Letter from Jerry L. Martin to Donald A. Carr dated July 27, 2012 at 3 *available at* <http://www2.gibson.com/News-Lifestyle/Features/en-us/Gibson-Comments-on-Department-of-Justice-Settlement.aspx> (accessed July 14, 2013).

²⁶The bureaucratic impulse to grab discretion in order to punish selectively and for show is deeply rooted. As a World War II Office of Price Violations manual noted, "Criminal prosecution against a corporation is rather ineffective unless one or more of the individuals is also proceeded against." To justify selective enforcement, the Manual stated:

One of the most difficult problems in this field is to combat the attitude, so prevalent in this country, that the criminal laws are made for the criminal classes and do not apply to respectable people. This attitude is clearly incompatible with enforcing general compliance on the part of the consumers. Meeting it calls for the judicious and telling selection of violations by average people in the various economic and social strata of society.

See Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CIII. L. REV. 423, 426, 439 (1962)(citations omitted).

²⁷Brownfield development (or more accurately, the lack thereof) is one manifestation of this phenomenon. "Brownfields" are formerly productive factory or commercial sites that are vacant or underutilized due to the legal risk and uncertainty caused by the federal and state regulations governing responsibility for environmental contamination, lead paint or asbestos insulation. The conduct that led to the environmental contamination, the presence of lead paint or the use of asbestos insulation in the first instance was generally legal and common at the time it occurred. Yet, federal and state regulations promulgated in the 1980s and 1990s shifted the risk of civil and criminal liability for the condition of these properties to new owners. It took years of work by stakeholders, primarily including local governments, developers and community activists, plus the development of

IV. CONCLUSION.

ILR strongly supports measures to protect public health and safety and recognizes the importance of laws that protect the public welfare and of the agencies that implement them. Nonetheless, ILR believes that Congress should take action to address regulatory over-criminalization, which is contrary to our constitutionally-enshrined commitment to individual freedom and discourages entrepreneurship, investment, and job growth. Specifically:

- Congress should take a hard look at the enactment of a general and clear *mens rea* requirement for all federal crimes, including those based on regulations promulgated by administrative agencies. There are simply too many federal offenses and regulations for Congress to act piecemeal. And, even in cases where Congress has included a *mens rea* requirement in an authorizing statute, that language can be so far removed from the language in federal regulations defining specific prohibited conduct that it is difficult to determine what *mens rea* requirement, if any, applies to each given element of the alleged crime. The reality is that the “large solution” (e.g. a generally applicable *mens rea* statute) is the only practical and effective one.²⁸
- Congress, and this Task Force, should more fully explore regulatory over-criminalization’s corrosive secondary and tertiary effects, which must be addressed to preserve the rule of law and protect our system of free enterprise.

Thank you for your attention to this important matter. I am happy to answer any questions you may have regarding my testimony.

advanced remediation techniques and insurance products by the private sector, to mitigate the regulatory risk.

²⁸Arguably, the *mens rea* standard for “crimes” due to regulatory violations should be at least a “willful” violation, meaning that a person does not just intend to achieve a result but that he or she knows that what he or she is doing is prohibited by the regulations before he or she can be held criminally liable. See *Cheek v. United States*, 498 U.S. 192, 199-201 (1991).

Mr. GOHMERT. Thank you very much, Mr. Rubinstein. We appreciate the testimony.

At this time, we will hear from Professor Rachael Barkow. She is the Segal Family Professor of Regulatory Law and Policy and Faculty Director of the Center on the Administration of Criminal Law at NYU. In June of 2013, the Senate confirmed her as a member of the United States Sentencing Commission. Since 2010, she has also been a member of the Manhattan District Attorney's Office Conviction Integrity Policy Advisory Panel. Professor Barkow teaches courses in criminal law, administrative law, and constitutional law.

She has written several articles on sentencing and has explored in numerous articles the role of prosecutors in the criminal justice system. In a series of major articles, she has explored the relationship between separation of powers and the criminal law and the relationship between federalism and the criminal law. Professor Barkow has been invited to present her work in various settings and has testified before Congress.

She previously served as a law clerk to Judge Lawrence Silberman on the District of Columbia Circuit and Justice Antonin Scalia on the U.S. Supreme Court.

Professor Barkow received her bachelor of arts degree from Northwestern University and her juris doctorate from some place called Harvard Law School. [Laughter.]

It is an honor to have you here, Professor, and we look forward to your comments.

TESTIMONY OF RACHEL E. BARKOW, SEGAL FAMILY PROFESSOR OF REGULATORY LAW AND POLICY, NEW YORK SCHOOL OF LAW

Ms. BARKOW. Thank you so much. Thank you, Mr. Chairman, Ranking Member Scott, and Members of the Task Force for inviting me today to talk to you about the problem of over-criminalization as it relates to regulatory crimes.

I want to briefly raise three issues associated with regulatory crimes that I believe are worth further consideration by the Task Force.

First, regulatory crimes are unique among criminal laws in that they often lack *mens rea* requirements that establish that a defendant was blameworthy when he or she acted as he or she did. Now, some of these offenses are strict liability, and to establish criminal liability for these offenses, all the government has to show is that the defendant engaged in conduct and there is no requirement that the government has to demonstrate that the defendant knew that he or she was engaging in the prohibited conduct. Strict liability offenses have long been criticized by criminal law scholars because they lack any culpability requirement that would merit criminal punishment and the stigma of a conviction.

Other regulatory crimes are not pure strict liability but they, nevertheless, criminalize conduct that the defendant may not know is wrongful. The law normally adopts the view that ignorance of the law is no excuse, and for most crimes, it is common knowledge that the act is prohibited. With regulatory crimes, however, this common knowledge may be lacking. Sophisticated players may be

aware of regulations, but people who are not regular industry players may have no reason to know there is a regulatory landscape that requires compliance at the risk of a criminal sanction.

The Supreme Court has dealt with this issue by interpreting some statutes to require an awareness of wrongdoing or illegality, even when the statute is silent about that element. But the Court has not interpreted all regulatory criminal laws this way, and it typically does not do this if it believes that a reasonable person should know that the area is subject to stringent public regulation. So if Congress wishes to tie regulatory crimes to traditional notions of criminal liability, modification of many of these laws may be in order.

The second point I want to make is that regulatory violations have been subject to criminal penalties on the theory that criminalization will make the regulatory scheme more effective. So this is an empirical question, whether criminalization is the optimal strategy for addressing the violation of all regulatory offenses or whether civil enforcement and penalties could achieve the same levels of deterrence and regulatory compliance for some provisions. Sound criminal justice policy, I believe in all areas, not just regulatory offenses, should rest on an assessment of the costs and benefits of criminal punishment to determine whether limited Federal dollars are best spent on prison terms or if less costly options are available and just as effective.

In assessing whether criminalization is necessary for an effective regulatory regime, I believe Congress should evaluate particular regulatory provisions to assess their importance instead of simply making blanket determinations to criminalize an entire regulatory area without attention to detail. And that leads to my final point.

So currently, Congress is typically not aware of the specific regulations that an agency will pass when Congress authorizes criminal punishment for their violation which effectively delegates to agencies the authority to fill in details about what is criminalized. So whatever the usual merits of delegating authority to agencies, I believe criminal law is distinct for at least four reasons.

First, criminal law is about blameworthiness and should reflect society's moral judgments, and Congress has a decided advantage over administrative agencies because Congress represents the broadly held views of the electorate.

Second, constitutional principles of separation of powers have special force in criminal law where government power is at its height.

Third, Congress is more attuned to the problem of the unmanageable expansion of criminal laws.

And fourth, the administrative landscape constantly changes which means that criminal laws tied to regulations will be a moving target. Having Congress take the lead in identifying those situations that merit criminalization would inject more stability and make it easier for actors to keep track of their obligations.

Thank you again for allowing me to testify and share my thoughts, and I would be happy to answer any questions you may have.

[The prepared statement of Ms. Barkow follows:]

**Statement of Rachel E. Barkow
Segal Family Professor of Regulatory Law and Policy
Faculty Director, Center on the Administration of Criminal Law
New York University School of Law**

**Before the House Committee on the Judiciary
Task Force on Over-criminalization
Regulatory Crime: Overview – Defining the Problem
October 30, 2013**

Mr. Chairman and Members of the Task Force: Thank you for inviting me to testify before you regarding the problem of over-criminalization as it relates to regulatory crime. It is an honor to appear before you.

I am testifying today in my personal capacity and not as a member of the United States Sentencing Commission.

It is my understanding that the “regulatory crimes” that are the primary focus of this hearing are those statutes that criminalize the violation of agency regulations. These statutes occur across a wide range of substantive areas but generally share in common a format that “delegate[s] to an agency the power to promulgate regulations, while providing that violations of the yet to be written regulations will be crimes subject to statutory penalties.”¹ A common form is a law that “provides for criminal punishment of anyone ‘who knowingly violates any other [regulatory] requirement set forth in [a specific title] or any regulation issued by the Secretaries to implement this Act, [or] any provision of a permit issued under this Act.’”² An example would be pollution-control statutes, which criminalize the release of pollutants in broad terms but leave agencies to define through regulation “[w]hat constitutes a pollutant, what kind of permitting is required to handle that pollutant, how the pollutant may be stored, and who within an organization may be subject to criminal penalties.”³

Before addressing some specific issues raised by federal regulatory crimes, I would like to situate regulatory crimes more generally within the larger mission of the Task Force to address the problem of “over-criminalization.” Over-criminalization has several connotations. It could refer to a concern that federal criminal laws produce excessive incarceration rates or prison populations.⁴ To the extent the Task Force is concerned with prison overcrowding and rising incarceration rates in the federal system,

¹ Richard E. Myers II, *Complex Times Don't Call for Complex Crimes*, 89 N.C. L. REV. 1849, 1852 (2011).

² Darryl K. Brown, *Criminal Law's Unfortunately Triumph Over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 674 (2011) (quoting H.R. 3968, 109th Cong., § 506(g)(2) (2005)).

³ Myers, *supra* note 1, at 1852.

⁴ See, e.g., Statement of Ranking Member Conyers, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization, available at judiciary.house.gov/news/2013/05082013.html (welcoming the work of the Task Force in analyzing the issue of “[u]nduly expansive criminal provisions in our law unnecessarily driv[ing] up incarceration rates”).

a focus beyond regulatory crime is necessary. Almost half of all federal prisoners are there for drug offenses.⁵ Firearms and immigration offenses make up another large segment of the prison population.⁶ Regulatory crimes are a relatively minuscule part of the federal prison population. Regulatory crimes largely fall within those crimes that the Bureau of Prisons lumps together as “miscellaneous,” and collectively they amount to only 0.8% of the total prison population.⁷ Thus, while it is a laudable goal to improve the treatment of regulatory crimes, doing so will not address the broader problem of over-criminalization in the federal system insofar as the concern is the number and rates of people incarcerated.

Federal over-criminalization could also refer to the problem of federal laws intruding on areas that are adequately addressed by the states.⁸ Regulatory crimes, however, are typically well suited for federal attention. Indeed, they are the paradigmatic example of an area that is appropriate for federal involvement because of their complexity and interstate commercial concerns.⁹

Over-criminalization may also refer to the sheer quantity of criminal laws, particularly when citizens are expected to comply with all of them.¹⁰ Regulatory crimes are a major culprit in this respect, accounting for a huge chunk of the number of criminal laws on the books. By some estimates, there are more than 300,000 federal regulations, administered by as many as 200 agencies, that are punishable by criminal penalties.¹¹

⁵ Federal Bureau of Prisons, *Quick Facts About the Bureau of Prisons*, available at <http://www.bop.gov/news/quick.jsp> (last updated August 24, 2013) (46.8% of federal inmates were sentenced for a drug offense).

⁶ Taken together, these groups account for over a quarter of the prison population, with 16.4% of federal inmates sentenced for weapons, explosives and arson offenses, and 11.7% of federal inmates sentenced for immigration offenses. *Id.*

⁷ *Id.* See also Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 35 (2012).

⁸ See, e.g., Statement of Chairman Goodlatte, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization, available at judiciary.house.gov/news/2013/05082013.html (arguing that the Task Force needs to “take a closer look at our laws and regulations to make sure that they . . . do not duplicate state efforts”); Statement of Crime Subcommittee Chairman Sensenbrenner, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization, available at judiciary.house.gov/news/2013/05082013.html (“Congress must ensure the federal role in criminal prosecutions is properly limited to offenses within federal jurisdiction and within the scope of constitutionally delegated powers”).

⁹ Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 547-48, 570-71 (2011) (documenting that most states give state-level prosecutors instead of local prosecutors the authority to pursue state regulatory crimes and explaining that this allows for the development of expertise in “complex areas whereas local prosecutors may not have a critical mass of these cases or sufficient personnel to develop the specialized knowledge necessary to pursue them effectively,” which holds true of federal regulatory offenses as well).

¹⁰ See, e.g., Statement of Crime Subcommittee Ranking Member Scott, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization, available at judiciary.house.gov/news/2013/05082013.html (referring to the large number of criminal offenses); Paul J. Larkin, Jr., *A Mistake of Law Defense as a Remedy for Overcriminalization*, 29 CRIMINAL JUSTICE 10, 11 (Spring 2013).

¹¹ Myers, *supra* note 1, at 1865.

Finally, over-criminalization may refer to treating behavior as criminal that is either innocent or that is more properly addressed with civil sanctions.¹² This might be called “a divorce between legal guilt and moral blameworthiness.”¹³ The remainder of my testimony will address three key areas related to this aspect of over-criminalization and regulatory crimes.

First, regulatory crimes may lack sufficient mens rea requirements to ensure that defendants charged under those laws are sufficiently blameworthy to merit the stigma and severity of a criminal sentence. A “guilty mind” has long been a bedrock requirement for the blameworthiness of a criminal conviction. It may be absent in some regulatory offenses, however, because the conduct is not wrongful in itself and individuals may lack adequate notice that their conduct has been criminalized.

Second, regulatory violations have been subject to criminal penalties on the theory that criminalization will make the regulatory scheme more effective. But it is an empirical question whether criminalization is the optimal strategy for addressing the violation of all regulatory offenses or whether civil enforcement and penalties could achieve the same levels of deterrence and regulatory compliance for some provisions.

Third, Congress typically is not aware of the specific regulations that the agency will pass when it authorizes criminal punishment for their violation. That delegates to agencies the authority to fill in the details about what is criminalized. This framework raises the question whether Congress should take a greater role in making criminalization determinations because of institutional advantages associated with the legislative process.

I. The Importance of Mens Rea and Notice

Mens rea – the concept of a guilty mind – is a cornerstone of our criminal justice system.¹⁴ The common law respected the notion of “[a]ctus non facit reum nisi mens sit rea – an act does not make one guilty unless his mind is guilty.”¹⁵ This notion “reflects the common sense view of justice that blame and punishment are inappropriate in the absence of choice.”¹⁶ Herbert Wechsler, the legendary criminal law scholar, explains why mens rea is so important to blameworthiness: “Unless the actor realized or should have realized that his behavior threatened such unjustifiable injury; unless he knew or should have known the facts that gave his conduct its offensive quality or tendency, it

¹² See, e.g., Statement of Chairman Goodlatte, *supra* note 8 (observing that “Americans who make innocent mistakes should not be charged with criminal offenses”); Statement of Ranking Member Scott, *supra* note 10 (noting with concern that many criminal provisions do not “requir[e] that criminal intent be shown to establish guilt”).

¹³ Larkin, *supra* note 10, at 10.

¹⁴ “The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *Dennis v. United States*, 341 U.S. 494, 500 (1951).

¹⁵ EDWARD COKE, THE THIRD PART OF THE INSTITUTE OF THE LAWS OF ENGLAND 107 (William S. Hein & Co. 1986) (1644).

¹⁶ SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 242 (9th ed. 2012).

was an accident.”¹⁷

For most crimes, the prohibited conduct is *malum in se*, or wrong in itself, such that it is common knowledge that engaging in the conduct is unlawful. Thus, in most cases, criminal offenses need only specify that the defendant has the requisite awareness or knowledge that he or she is engaging in the underlying conduct, without an additional requirement that the government also establish that the defendant was aware that the conduct itself was unlawful, for a defendant to have the traditional culpability that that criminal law requires.

Other crimes, including regulatory offenses, are not wrong in themselves. Thus a defendant who knowingly engages in the conduct that the law prohibits may not be culpable in the traditional sense. But if the defendant knows the conduct is illegal or is aware of the risk that it may be illegal and engages in the conduct in any event, culpability can be supplied by the defendant’s willingness to flout the democratically enacted law.

Mens rea is so foundational to American criminal law that even when a statute is silent as to whether mens rea is required, courts generally presume that its omission was not an intentional one by the legislature and interpret the law to require mens rea.¹⁸ Indeed, an animating principle of the Model Penal Code¹⁹ is that, “unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction may be obtained.”²⁰ The Model Penal Code therefore has a default rule that, in the absence of a stated mens rea requirement, the government must show that a defendant was at least reckless with respect to each offense element.²¹

While the Model Penal Code was hugely influential in the states,²² it had less of an impact at the federal level. The federal code thus lacks a comparable default rule to

¹⁷ Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 524, 527-28 (1955).

¹⁸ *Staples v. United States*, 511 U.S. 600, 619 (1994) (applying the “background rule of the common law favoring mens rea”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2466 (2003) (“[I]n the absence of clear congressional direction to the contrary, textualists read mens rea requirements into otherwise unqualified criminal statutes because established judicial practice calls for interpreting such statutes in light of common law mental state requirements.”).

¹⁹ The Model Penal Code was the product of a law reform effort of the American Law Institute. Herbert Wechsler, with the assistance of distinguished judges, law professors and lawyers, drafted a model code that distilled and organized fundamental principles from the common law into a systematic criminal code. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 322-26 (2007).

²⁰ Model Penal Code § 2.02 cmt. 1 (1985).

²¹ Model Penal Code § 2.02(3). The Model Penal Code includes another default interpretive rule that “[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.” *Id.* §2.02(4).

²² Roughly two-thirds of the states reformed their own codes in light of the Model Penal Code. Ronald L. Gainer, *Remarks on the Introduction of Criminal Law Reform Initiatives*, 7 J. L. ECON. & POL’Y 587, 588 (2011).

the one in the Model Penal Code. To be sure, the federal courts follow the common law presumption that statutes require mens rea even when they do not state the requirement explicitly, but a notable exception in the federal case law applies to public welfare offenses, which include regulatory crimes.²³

Regulatory crimes are unique among criminal laws in that they often lack the kind of mens rea requirements that establish that a defendant was blameworthy in acting as he or she did. Regulatory crimes without traditional mens rea requirements fall into two general categories.

Some regulatory crimes are strict liability. To establish criminal liability for these offenses, the government need only prove that the conduct occurred. There is not even a requirement that the defendant knew he or she was engaging in the prohibited conduct. So, for example, a defendant can be criminally liable for shipping a mislabeled drug, even if he or she was not conscious of the fact that the drug was mislabeled.²⁴

The rationale behind strict liability offenses is that the underlying activity affects “the lives and health of the people which, in the circumstances of modern industrialism, are largely beyond self-protection.”²⁵ So, the argument goes, the risk of any error should fall not on the innocent consumers, but on the people who are opting to engage in the underlying activity of distributing the products. If those individuals engaging in the commercial activity know that they will be strictly liable for any violations of the law and subject to criminal punishment, the theory is that those individuals will take great care in conducting those activities. And because the government will not need to prove even negligence, there is no risk that the manufacturer or distributor will escape liability by claiming he or she exercised reasonable care, even when more could have in fact been done to prevent the harm. This strict liability category of regulatory crimes therefore lacks any culpability requirement and has been widely criticized by criminal law scholars and theorists.²⁶

Other regulatory crimes are not pure strict liability offenses, but they nevertheless criminalize conduct that a defendant may not know is wrongful. These laws require the government to prove that the defendant was aware or intended the prohibited conduct, but there is no additional requirement that the government also prove that the defendant knew that conduct was against the law. Most criminal laws do not require the government to show that the defendant was aware that his or her conduct was unlawful. The absence of this requirement is not problematic in most cases because it is common knowledge that

²³ *Morrisette v. United States*, 342 U.S. 246, 262 (1952). See also *United States v. Balint*, 258 U.S. 250, 252 (1922) (recognizing that legislatures could dispense with mens rea and observing “[m]any instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon the achievement of some social betterment rather than the punishment of the crimes as in the cases of mala in se”).

²⁴ *United States v. Dotterweich*, 320 U.S. 277 (1943).

²⁵ *Id.* at 280.

²⁶ Kadish, *supra* note 16, at 300 (observing that “[t]he great majority of academic writing has opposed absolute liability”). Reflecting these criticisms, the Canadian Supreme Court has concluded that imprisonment on the basis of strict liability is unconstitutional under Canadian law. *Id.* at 299.

the activity is unlawful. It would make little sense to add a requirement to murder statutes that defendants know that killing is unlawful because that is a shared understanding that is pervasive in society.²⁷

In the case of regulatory offenses, a common knowledge of wrongfulness is unlikely to be present. Thus the risk of not including an element that requires the government to show that the defendant knew the activity was unlawful is that innocent individuals may find themselves facing criminal liability. If it is not common knowledge generally or among people engaged in an activity that a certain product needs to be registered or that the activity must be conducted in a particular way, then people without any reason to know of those facts or to investigate the regulatory landscape will become ensnared in the criminal justice system.²⁸ On the other hand, critics have pointed out that requiring the government to prove a defendant's knowledge of the law would be a difficult undertaking.²⁹

For its part, the Supreme Court has interpreted some statutes to require an awareness of wrongdoing or illegality, even when the statute is silent about that element, because of a concern that statutes would otherwise reach innocent conduct.³⁰

The Court has not interpreted all regulatory criminal laws this way. The Court has observed that, in most of the cases where it has not interpreted a regulatory crime to require an awareness of wrongdoing, "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."³¹

The line, then, has been based on the Court's assessment of when Congress would and would not require such proof. That, in turn, depends on whether the Court believes

²⁷ Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 413 (1958) (observing that, when criminal laws align with "community attitudes and needs . . . knowledge of wrongfulness can fairly be assumed" and "any member of the community who does these things without knowledge that they are criminal is blameworthy, as much for his lack of knowledge as for his actual conduct").

²⁸ Arthur Leavens, *Beyond Blame – Mens Rea and Regulatory Crime*, 46 U. LOUISVILLE L. REV. 1, 1 (2007) (explaining how "mens rea serves a notice function" in the context of regulatory crimes).

²⁹ See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 749-752 (2012) (discussing the merits of this view).

³⁰ "Where the conduct covered by the statute is neither inherently wrongful nor dangerous, the Court interprets the statute to require actual knowledge of the law." John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 698-699 (2012). See, e.g., *Liparota v. United States*, 471 U.S. 419, 426 (1985) (interpreting a statute to require the government to show that a defendant knew that the manner in which he or she possessed or acquired food stamps was unlawful and doing so to avoid "criminaliz[ing] a broad range of apparently innocent conduct"); *Cheek v. United States*, 498 U.S. 192, 201 (1991) (interpreting a statute that criminalizes one "who willfully attempts in any manner to evade or defeat any tax" to require the government to show that the defendant knew of the duty established by the law and "voluntarily and intentionally violated that duty"). For a broader summary of cases in which courts have interpreted statutes to require a knowledge of illegality, see Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 343-346 (1998).

³¹ *Liparota*, 471 U.S. at 433.

individuals are reasonably on notice that their conduct may be subject to regulations.³² If an activity is highly regulated and the actors participating in it are typically sophisticated, the Court is more comfortable reading statutory silence with respect to mens rea as intentional. The Court in that instance assumes that Congress prefers to create an incentive for individuals to develop knowledge of the relevant regulatory scheme in order to comply with it.³³

Regulatory offenses thus involve a substantial amount of guess work about what level of liability Congress intends. If Congress wishes to tie regulatory crimes to traditional notions of criminal liability in an effort to check what it views as over-criminalization, modification of many of these laws would be advisable.

II. Is Criminalization Necessary?

A second issue raised by regulatory crimes is whether criminalization is necessary to achieve the public policy goals of the regulatory framework. When the Supreme Court upheld the use of a strict liability criminal regulatory statute in *United States v. Dotterweich*,³⁴ it observed that Congress elected a regime that “dispenses with the conventional requirement for criminal conduct – awareness of some wrongdoing” in order to achieve “the larger good.”³⁵ The assumption was that making individuals who sold food and drugs strictly liable and subject to criminal punishment for adulterated products would make them act more carefully. Or, in the Court’s words, criminal “penalties serve as effective means of regulation.”³⁶

It is a key empirical question whether criminalization is necessary to achieve “the larger good” of a regulation or whether other mechanisms would do so just as effectively.³⁷ Strict liability could still be used in a civil regime, so the inquiry does not center on mens rea options. Rather, the question is what quantum of punishment is necessary to deter violations of the act. A criminal sanction, unlike a civil sanction, can include a term of imprisonment. Criminal sanctions also connote a judgment of blameworthiness that carries a stigma. Convictions carry collateral consequences as well, such as the loss of licenses and ineligibility for certain government programs, depending on the crime. Policymakers could therefore assess whether these additional features of criminal punishment are necessary to achieve the ends of the regulatory scheme.

³² See, e.g., *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (noting in a case involving the shipment of corrosive liquids that “[t]he probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation”).

³³ Susan R. Klein & Ingrid B. Grobey, *Overfederalization of Criminal Law? It’s a Myth*, 28 CRIMINAL JUSTICE 23, 28 (Spring 2013).

³⁴ 320 U.S. 277 (1943).

³⁵ *Id.* at 281.

³⁶ *Id.* at 280-281.

³⁷ In the Sentencing Reform Act, Congress embraced the parsimony principle that punishment should not be greater than necessary to achieve its goals. 18 U.S.C. §3553(a) (instructing courts “sentence sufficient, but not greater than necessary” to achieve the purposes of punishment set out in the statute). While that law addresses sentences in individual cases, the principle should apply at the macro level in setting up sanction regimes in the interest of fiscal responsibility and limited government.

For some would-be individual violators, the prospect of prison and the collateral consequences of a conviction may be necessary. They may view the risk of civil penalties “as a mere cost of doing business” that can be passed along to consumers.³⁸ Even if that is not possible – because the individual does not own a business to pass through fines or the fines are too high – bankruptcy may be an option that allows for a “fresh start.”³⁹ Prison, in contrast, cannot be passed through to someone else, nor does the stigma of a conviction.⁴⁰

Until now, my testimony has focused on individual defendants, but the question of the need for criminal versus civil sanctions is one that should also be asked with respect to corporate defendants. Corporations cannot be imprisoned, of course, so criminal laws do not provide that added disincentive. But criminal actions against companies do produce a greater stigma than civil actions do. The reputational sanction that comes with criminal charges and convictions can in some cases put in jeopardy a firm’s ability to survive.⁴¹ In addition, criminal convictions subject defendant companies in many regulatory areas to “‘debarment,’ meaning that the company is not eligible to enter into a contract with the federal government for a specified time period.”⁴² That is effectively a death sentence for some companies.⁴³

Prosecutors, armed with the leverage that the threat of a criminal prosecution brings, can often extract significant concessions from companies eager to avoid indictment. This leverage typically encourages companies to assist the government in identifying individual law violators within the company. In addition, federal prosecutors are increasingly reaching deferred prosecution agreements (DPAs) and nonprosecution agreements (NPAs) with companies that allow companies to avoid indictment in exchange for agreeing to prosecution demands that may include significant changes to corporate practice and personnel and often the installation of a monitor to oversee the changes. In effect, these DPAs and NPAs give prosecutors additional regulatory power over the company. While DPAs and NPAs can enhance the effectiveness of a regulatory regime, they raise questions about the competency and propriety of prosecutors to impose regulatory conditions.⁴⁴

Regulatory provisions may differ in terms of whether they require the additional disincentives that criminalization provides. And in weighing the benefits that

³⁸ Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 880 (1994).

³⁹ *Id.*

⁴⁰ *Id.* (noting the impact of prison “can be devastating” and “[t]he moral stigma associated with a criminal conviction can, standing alone, irreparably destroy not only existing and future economic relations, but social and familial relations as well”).

⁴¹ Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 87, 90-91 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

⁴² Lazarus, *supra* note 38, at 880.

⁴³ *Id.*; Kadish, *supra* note 16, at 784-785, 802.

⁴⁴ See generally PROSECUTORS IN THE BOARDROOM (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (collecting essays that assess the benefits and costs associated with the increasing use of DPAs and NPAs).

criminalization can bring, it is also important to take into account the added costs of employing a criminal regime to determine if those costs are worth it, or if civil sanctions could achieve the same ends just as effectively and at a lesser cost in some cases.

Sound criminal justice policy – in all areas, not just regulatory offenses – should rest on an assessment of the costs and benefits of criminal punishment to determine whether limited federal dollars are best spent on prison terms or if less costly options are just as effective. Civil regulatory agencies are often underfunded to achieve their regulatory goals, so money that would otherwise go to prison terms may be better spent on more civil personnel to investigate and detect violations. The deterrence literature is clear that would-be offenders care much more about the odds of detection than the amount of punishment should they be caught.⁴⁵ And if deterrence can be achieved just as effectively at a lesser cost, that frees up funds to use on additional public safety measures.

In assessing the question of whether to make incarceration an available option,⁴⁶ it is also important to keep in mind that it may have a negative effect on public safety. While an individual serves his or her sentence, he or she is incapacitated from committing additional crimes. But some individuals may become more prone to committing crimes after being released from prison because of the greater difficulty they will have in maintaining family ties and obtaining employment upon release.⁴⁷ This problem is exacerbated by the collateral consequences that flow from felony convictions and that often stand in the way of an individual's ability to reintegrate into society and live a law-abiding life going forward. Thus, it is necessary to weigh the deterrence benefits of incapacitation against the possible crime-increasing effects of incarceration.

This comparison of the costs and benefits of criminal and civil punishments may vary based on the regulatory context. I lack the data or expertise to make an assessment of whether criminal provisions are required in a given regulatory area, and I take no position here. I do hold the view, however, that it is critical to ask the question of whether criminalization is necessary for an effective regulatory regime. Answering that question will require weighing the costs and benefits described above and a more granular analysis that looks to particular regulatory provisions to assess their importance and subject

⁴⁵ John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 LAW & SOC'Y REV. 7, 8 (1991) (citing studies finding that the certainty of a sanction is a more reliable deterrent than the severity of a sanction); Robert J. MacCoun, *Testing Drugs Versus Testing for Drug Use: Private Risk Management in the Shadow of Criminal Law*, 56 DEPAUL L. REV. 507, 514 (2007) (citing studies finding that "certainty of punishment has a modest but reliable causal impact on offending rates, even for offenses with very low detection probabilities, but the severity of punishment has no reliable impact"); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 183-193 (2004) (citing studies finding high probability of punishment is an effective deterrent but that increasing the duration of a sentence to increase the severity of a punishment does not increase deterrence).

⁴⁶ Congress made clear that "imprisonment is not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. § 3582(a), so rehabilitation is not an independent justification for incarceration. See also *Tapia v. United States*, 131 S.Ct. 2382, 2388-2389 (2011).

⁴⁷ Joanna Shepherd, *The Imprisonment Puzzle, Understanding How Prison Growth Affects Crime*, 5 CRIMINOLOGY AND PUBLIC POLICY 285, 291-292 (2006).

matter, instead of simply making blanket determinations to criminalize without attention to detail.⁴⁸

A cost-benefit analysis need not, however, dictate the outcome. Congress may decide that criminal punishment is necessary or inappropriate for a different reason. One purpose of punishment is “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”⁴⁹ Whether the stigma of a criminal conviction and imprisonment are required to provide a defendant with his or her just deserts may depend on the mens rea of a defendant in committing the regulatory violation and the extent of the harm caused.⁵⁰ Intentional and repeat violations may merit criminal sanctions whereas other violations may not. Thus, the just deserts inquiry will be critically intertwined with the resolution of the issues of mens rea and notice discussed above.

III. Delegating the Question of Criminalization

The last issue I would like to highlight is the question of who is in the best position to make the decision of whether criminalization is appropriate. Under the current framework that dominates the U.S. Code, Congress is not aware of the specific regulations that the agency will pass when it authorizes criminal punishment for their violation. Congress just makes a blanket determination to allow for criminal penalties without attention to the particular character of any regulation and its significance or to the culpability associated with its violation.⁵¹ To be sure, Congress must provide an intelligible principle to guide agencies in promulgating regulations,⁵² but those principles are far more general than the specific rules that are ultimately adopted.

Thus the agency is effectively deciding the specific content of the criminal offenses through its regulatory authority. Once the agency’s regulations take effect and are violated under the terms of the criminalization statute, the criminal penalties can be pursued without any further action by Congress to determine if criminalization makes sense for the specific regulations that are ultimately passed. Rather, it is up to individual prosecutors whether criminal prosecution makes sense or whether an individual should be left to the civil process. The current framework therefore places the criminalization decision with executive branch officials.

Richard Lazarus sums up the current approach with respect to environmental crimes as follows:

⁴⁸ See Lazarus, *supra* note 38, at 881 (observing that, in the environmental context, “Congress made relatively little effort to define thresholds for when a defendant’s conduct justified adding the possibility of criminal sanctions to civil penalties”).

⁴⁹ 18 U.S.C. § 3553(a)(2)(A).

⁵⁰ Lazarus, *supra* note 38, at 888 (“Congress needs to replace the existing indiscriminate broad-brush approach by defining environmental crimes in ways that better establish criminal culpability and better identify the kind of conduct that Congress in fact expects to be prosecuted criminally.”)

⁵¹ Lazarus, *supra* note 38, at 888.

⁵² *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

To date, Congress, however, has made no meaningful or systematic effort to consider criminal sanctions as presenting an issue distinct from that presented by civil sanctions. Congress has not tried to identify those circumstances in which the culpability of conduct warrants taking the next step of imposing criminal sanctions. Congress has not tried to identify those kinds of environmental standards for which criminal sanctions are more appropriate. . . . By criminalizing far more conduct than it would expect to be the subject of criminal enforcement, Congress has, in effect, delegated all of the line-drawing issues to the executive branch without providing any guidance on how that discretion should be exercised.⁵³

The traditional justification for delegation in the civil regulatory sphere rests on the notion that expert agencies are well suited to fill in gaps in the law and to address the resource constraints of having Congress address every issue that may arise. Whatever the merits of that argument in the civil context, there are reasons to view criminal law differently.

First, because criminal law is about blameworthiness, many believe that “criminal law should reflect society’s moral judgments, not the judgments of experts.”⁵⁴ On this view, Congress has a decided advantage over administrative agencies because Congress represents the broadly held views of the electorate. Thus, Congress should make the determination which regulatory violations, if any, are insufficiently deterred through civil sanctions and sufficiently blameworthy that they merit criminal punishment. That means Congress cannot criminalize in advance of knowing what those regulations are and whether civil enforcement works effectively.

Second, constitutional principles of separation of powers have special force in criminal law. “One of the animating features of the Constitution is its preoccupation with the regulation of the government’s criminal powers.”⁵⁵ The Constitution’s text and structure “provide[] ample evidence that the potential growth and abuse of federal criminal power was anticipated by the Framers and that they intended to place limits on it through the separation of powers.”⁵⁶ Bicameralism and presentment allow for careful deliberation before the government can criminalize conduct. But if only the most general decision to allow criminalizing of regulatory violations is made at the legislative level, then the real action is taking place through the administrative process. Thus the key decisions about the content of criminal laws are being made through the less deliberative administrative process, allowing efficiency to trump the greater accountability and consideration that the traditional legislative process provides. But because criminal law involves the greatest threat to individual liberty, it merits the most careful procedures.

⁵³ Lazarus, *supra* note 38, at 883-884.

⁵⁴ Myers, *supra* note 1, at 1864.

⁵⁵ Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012-1020 (2006) (describing the Constitution’s focus on criminal law through prohibitions on bills of attainder and ex post facto laws, limits on the authority to suspend the writ of habeas corpus, a strong judicial check in the form of independent judges and the jury, the President’s pardon power, and many of the provisions in the Bill of Rights).

⁵⁶ *Id.* at 1017.

Mr. GOHMERT. Thank you very much, Professor.

At this time our next witness is Lawrence R. Lewis, Sr., a licensed class one steam engineer originally from Washington, D.C. In 2007, while working as the Chief Engineer of the Knollwood Military Retirement Residence, Mr. Lewis was arrested for unknowingly violating the Clean Water Act. He pleaded guilty and was sentenced to 1 year of probation in 2008. His story has been featured in the Wall Street Journal and in a video series by the Heritage Foundation. He is a single father with 2 daughters, ages 22 and 17, and resides in Bowie, Maryland.

Mr. Lewis, it is an honor to have you here. We look forward to your testimony.

TESTIMONY OF LAWRENCE LEWIS, BOWIE, MARYLAND

Mr. LEWIS. I just wanted to share with—

Mr. GOHMERT. I am sorry. Would you pull that microphone a little closer? You are an important man and your testimony is important, and we want to make sure everybody hears. Thank you.

Mr. LEWIS. I just wanted to share with everyone the human impact that the new Federal laws have on ordinary citizens like myself.

You know, I was born and raised in the projects and through the grace of God, was able to get through the criminal justice system without being a part of it. In fact, I am proud to say several members of my family, my sister's two daughters, are a part of the D.C. Police Department, police officers.

And after working so hard to make my family, my parents and my children, proud of me, I go to work at an Army military retirement home, a place that meant something special to me, along with other places I have been, because my father was in the military for 20 years, and the kind of care and stuff I expected him to have and wanted him to have—that is what I wanted to provide for the people there.

This particular institution had a history of sewage problems, to my knowledge, at least 28 years prior to when I came there. And we did everything we could to prevent the sewage from affecting the most vulnerable people, which is the people that were in the hospice section of that retirement home, which is on the ground floor. That is the first area that it affected. So the protocol was when flooding started, you get a pump, pump it to the sewage drain while you are trying to unstop the drain. Other than doing it, you are going to flood all these areas. And these areas are not areas that you can just sanitize. I mean, it takes extensive sanitization. And a lot of people were bed-ridden. You just could not move them quickly.

And sometime in March 2007, I think on the 29th, someone there in a nearby park saw a white substance that they thought could be some threat. So law enforcement came about and they traced the substance back to Knollwood. The substance was not sewage. Sewage is not white. The substance was from a new building the contractors were building. They were doing some testing because the blueprints were not adequate to see where did their sewage go where they are trying to.

Law enforcement traced that white substance back to Knollwood, but to the new facility. So they thought since during that same time we were having a spillage, a sewage backup to. So they thought that was actually sewage.

I was home. I came back on site, which I was asked to come back. And I took the men aside and showed them there is nothing white in color in that facility in the sewage system anywhere. We went in and we looked at it, pulled up different sections of the sewage part of the facility and were able to verify there was nothing in there that associated with the white substance.

At that time, I did not know the contractor was doing any testing. I did not find out until the following morning, but I knew it was not sewage.

In any event, the law enforcement force threatened with arresting me, saying I violated some law and they had a pre-written statement they wanted me to sign to implicate my superiors that they had knowledge of it. They were saying some of the military officers had suggested that. And I was telling them I had no personal knowledge of them knowing the effects that the sewage would have on anything. And for that reason, I was threatened with a 5-year prison sentence if I did not provide—really lie on someone, which I was not able to do. I was taught better than that.

So subsequently I had to worry. My immediate effect of it was worrying about where my mother and my kids are going to live. I had a 13-year-old and a 16-year-old then and an 86-year-old mother. Where are they going to live at for 5 years because I cannot pay a mortgage for 5 years from prison. I knew I had enough in my 401 to pay for a year. So I subsequently pleaded guilty to something I really did not do in order to make sure my family had some place to live.

So that is the impact it had on me is I really lost confidence in law enforcement even though I had family law enforcement. I feel like if they are prosecuting me for something I had no knowledge of, I was not aware of—and there was nothing in the records ever saying that it was a violation for this to go on. They looked at all the records where the plumbing companies came for years and years and years. Nothing suggested that this was a violation. This stuff took place regularly.

Also, there had been times when D.C. and Federal inspectors which come several times a year was there when this happened. No one—the fire department, no one—ever said this was improper. They usually seemed to admire the fact that we were doing everything we could to maintain and control it until we could get a contractor in.

So, I would just like to make sure that this Committee understands that there are real lives being affected, normal people, because we do not know. We are not aware of the law. And I would hope that we could send regulations to the facilities to educate the people who work in the facilities and send them to the schools, have it a part of schooling where people would be aware of the new laws that exist because like myself there are many other people who are going to experience the exact same thing.

So I believe I have a little more time. So what I am saying to you is that the best thing that could come from what to me is if

Congress could go back and look at the new laws and the parts that say having knowledge or intent to get prosecuted and/or if a fine could be implemented, in this particular case, it would be appropriate, I would think, that you initially fine the institution and not the individual should be the norm and not prosecuting individuals from a history of a facility functions.

[The prepared statement of Mr. Lewis follows:]

**“REGULATORY CRIME:
IDENTIFYING THE SCOPE OF THE PROBLEM”
TESTIMONY BEFORE THE HOUSE JUDICIARY
COMMITTEE
TASK FORCE ON OVER-CRIMINALIZATION**

OCTOBER 30, 2013

LAWRENCE LEWIS
FORMER CHIEF ENGINEER AT KNOLLWOOD MILITARY
RETIREMENT RESIDENCE

Lawrence Lewis

Thank you for the opportunity to tell you my story. I hope that my story will persuade you to change the law so that other people do not also become victims of over-criminalization.

Like many other people, I had challenges growing up. My family was poor. My mother and my father were separated, and my mom had to raise five children on her own. I had three brothers, and we slept in one room. What was devastating, though, was having all of my brothers murdered before I was 20 years old. Shortly after my third brother died, my father died – I believe of a broken heart. That left me alone to take care of my mother and sister. I took care of my mother until three weeks ago when she passed away. When I became a father, I tried to be a role model for my two daughters, to let them know that you could live well and grow up without becoming a criminal. I have worked hard at many jobs throughout my life to support my family. After high school, I began working at the D.C. Department of Education as a janitor earning \$1.80 an hour. I took night classes and obtained promotions at the Department of Education, and in 2004, I was hired as the chief engineer at Knollwood, a retirement home in D.C. for military veterans and their families. That's when I wound up becoming a "criminal" for trying to help and for doing something that I had no idea was illegal.

At Knollwood, I was in charge of the maintenance staff. This facility had a history of sewage blockages. Many of the residents were elderly, they wore adult diapers, and they flushed them down the toilet because they were embarrassed. We used to find them when we had to clean out a blockage.

The morning of March 29, 2007, we had a particularly bad sewage blockage. The ground floor of that facility is the hospice area, where the most critically ill people live. When we had sewage overflow due to a blockage, this is the area that would flood first. Those people are the most vulnerable people in the whole institution, and my thinking was we can't let anything

Lawrence Lewis

happen to them. So the staff did what they had been doing for years to deal with the blockage. After calling a plumber, they pumped the sewage to a drain in the parking lot to keep it from flooding the area where the critically ill residents were living. I always had assumed that the drain in the parking lot ran into the building's sewage drainage system and the waste wound up at a water treatment facility. I left work at 2:30 p.m. like I normally did. The problem wasn't resolved, but it was under control. Around 4 p.m., I got a lot of phone calls. One of the people on the phone was a federal investigator from the Park Service, and he said he wanted me to return to work immediately. So, I went back to work.

When I arrived in the parking lot, there were 30 or 40 emergency vehicles. Someone must have identified me as the chief and the federal officers took me into the building. They told me, to my surprise, that we had been pumping sewage into Rock Creek. They also told me that unless I gave them a written statement implicating the generals and the captain, who were supervisors, that I was going to jail. I told the officer that I didn't have knowledge of what they knew, and I wasn't able to sign what they wanted because I'd be signing a lie. So I couldn't sign the statement the agents wanted me to.

Because of my own personal integrity, I can't sign something that can destroy or damage someone else's career just because someone else wants me to do that. And that's what I teach my children. You've got to be an independent thinker. You've got to do what's right regardless of whether it's popular or not. And in this case, that's what I did. I refused to sign something that I didn't have any direct knowledge of, that I couldn't say it was 100 percent correct.

I stayed at that building from 4 to 9 p.m., and during that time the agents said they'd decide whether they were going to put me in jail that night or not. So around 9 p.m. they told me that I wasn't going to be arrested that day but I was going to be arrested later, so I shouldn't

Lawrence Lewis

leave the area. As they had threatened, I was later arrested and charged with a felony violation of the Clean Water Act.

I had no idea that what we did to clean up the blockage was a crime. No one gave me any legal training. I took engineering classes at George Washington University, at the University of the District of Columbia, in Northern Virginia, and none of those classes offered me any legal training in my responsibilities.

It turns out to be guilty of the crime, I didn't have to know that the sewage was going into Rock Creek. Instead, I only had to know that I was directing sewage into a drain, which I obviously did. As a result, I wound up pleading guilty to a federal misdemeanor because the prosecutors said that if I pled guilty, they wouldn't oppose probation. As a single dad, I was worried that if I went to prison there would be nobody to raise my children or care for my mother. Even though the government was not "opposing" probation, the judge could have sentenced me to time in prison. When I came to court for sentencing, I had to tell my 16-year-old daughter that she might have to drive the car home by herself because the judge might sentence me to prison and require me to start serving time immediately. Fortunately, the judge didn't send me to prison but rather to one year of probation and six months of community service. I served that six months community service and much longer at the Union Temple Mission Church. But conviction has been a ball and chain upon my life. Two months after the conviction, I resigned from my position at the Army retirement home. I just couldn't bear coming back into there every day, reliving this stuff over and over. It was just too much for me. But finding a new job with a criminal conviction was extremely difficult. I presently work two jobs including a night shift.

Lawrence Lewis

After having children, I dedicated my life to being a good role model. I wanted to show my children that not all African American men need to be part of the criminal justice system. Failing to accomplish that objective has been devastating for me, and it has soured my children on the criminal justice system. They have lost confidence and faith in the judicial system.

Now, I want to prevent somebody else from going through what I went through. I'm done. I got crushed. But for me it isn't fair to go through life and watch it happen to someone else. That's my commitment today – to do everything humanly possible to make sure that what happened to me doesn't happen to anyone else. My commitment is to keeping some other family from going through what we went through.

I would hope the Congress would go through these new laws and take out the ones that are unfair or that no one knows about. There are enough real criminals in our society to keep the government busy. Why destroy good families for reasons that they don't understand? Right now, no one is safe from being unfairly prosecuted.

Thank you for your time.

Mr. GOHMERT. Thank you, Mr. Lewis. I imagine we will be exploring those thoughts further during our questions. And thank you for the testimony.

At this time, we will hear from Ms. Cornelia Joyce Kinder of Grand Rivers, Kentucky. She is the former owner, along with her husband Steven, of two Kentucky caviar businesses. Their business involved collecting paddlefish eggs in the Ohio River and exporting them. They had all of the appropriate licenses, reported all of their catches in the State of Kentucky. However, the Ohio River forms the Ohio-Kentucky border. The Kinders would connect one side of their net to land in Kentucky and the other to land in Ohio. Therefore, some of the caviar was actually harvested from Ohio waters.

Federal investigators charged the Kinders with violating the Lacey Act, which makes it a felony to import flora or fauna in violation of another State's or Nation's laws. The Kinders faced up to \$250,000 in fines and 5 years in prison because of the possible steep penalties. The Kinders pleaded guilty and were sentenced to 3 years probation and a \$5,000 fine, and they were forced to forfeit their fishing boat and a work truck.

Ms. Kinder, I look forward to your testimony. Thank you. And, yes, go ahead and pull that close to you as well and speak right into the microphone.

**TESTIMONY OF MR. AND MRS. STEVEN KINDER,
GRAND RIVERS, KY**

Ms. KINDER. I have had an asthma attack this morning.

Mr. GOHMERT. Well, let's get it right up close to your mouth so you don't have to try too hard.

Ms. KINDER. Can you hear me now?

Thank you for having me here today to tell my story. My name is Joyce Kinder.

My husband Steve and I just wanted to run a caviar business. We did not hurt anybody. We did not deliberately violate any law. But in 2011, we were convicted of Lacey Act violations because we unknowingly fished on the wrong side of that Ohio River. We have lost everything.

I am here because I want the over-criminalization caused by the Lacey Act and other laws to stop.

My husband and I live and work in Owenton, Kentucky. We own Kinder Caviar and Black Star Caviar Company. We use nets to collect the paddlefish eggs. We harvest them into caviar and we export them to foreign countries. Ever since we started, we fished in the Ohio River. We never connected anything that was not to be done. We, in fact, connected one end of our nets to the land in Kentucky and the other end to the branches out in the water of the Ohio River on the Ohio side.

We did not come from a wealthy family, but we did work hard and we loved our work. We were the first established caviar company in Kentucky, and we were the first to export Kentucky caviar. This was our American dream. We never took chances with the law. We were fully licensed and permitted to fish in Kentucky waters. We always have reported all of our catches. We knew that paddlefish are a protected species. We never deliberately fished in Ohio's portion of the water. We knew that the Lacey Act makes it

a felony to export fish in violation of another State's laws. That is why we hired two law enforcement officers and an ex-fish and game officer to work for us. We thought we were obeying the law.

But on May the 5th, 2007, my husband was confronted with Federal agents from the U.S. Fish and Wildlife Service. The agents told him that he was fishing in Ohio because his nets extended past the Ohio-Kentucky boundary out in that river.

On March 14th, 2011, my husband and I were charged in Federal court in a four-count indictment with illegally harvesting the paddlefish in Ohio waters and falsely reporting that we caught the fish in Kentucky waters.

How were we supposed to know where the boundary line was? There is no buoy. There is no sign, and there is no markings of any kind on the river to identify the border. Even Kentucky and Ohio officials were confused where the boundary was. We fished in the clear light of day and no official ever told us to move our nets.

We felt then and we still feel now that we did nothing wrong. But on January 17th, 2012, we made the painful and humiliating decision to plead guilty. We were facing prison time. We could not suffer the emotional and financial trauma of a trial. We did not want to risk losing our freedom, as well as our property.

Today we are in poverty, and during our probation, we are prohibited from fishing and from applying for or receiving an export permit that would allow us to engage in international business. We cannot pay our fishermen. We have lost our customers. My husband and I are not physically able to work anymore. We cannot make ends meet. Our conviction has devastated us psychologically as well. We feel humiliated, utterly helpless. We do not feel as if the law protects us anymore right here in our own country.

The only thing that got me through this community service that I was to serve was the hope that I could come and tell my story so that what happened to us would not happen to anyone else. The Government should go after people who have done things that we all know are wrong. We still think this is the best Government and the best country in the world. In fact, I had hoped, after my retirement, to go into public service. But we are living proof that it is becoming impossible for decent, honest people to work without fear of unknowingly breaking a criminal law and end up in prison. If this can happen to us, as it did, it can happen to anyone.

I beg you make it stop.

I thank you for your time, and I will be happy to answer any questions that you might have.

[The prepared statement of Ms. Kinder follows:]

**Prepared Statement of Mr. and Mrs. Steven Kinder,
Grand Rivers, Kentucky**

Thank you for inviting me here to tell my story.

My name is Joyce Kinder. My husband and I have been convicted of a federal crime because we followed commercial fishing guidelines as we understood them. We didn't hurt anybody, steal from anybody, or damage anybody's property. We didn't deliberately violate any law. But, in 2011 my husband Steve and I were sentenced by a federal judge to three years of probation, fined \$5,000 dollars, and had our boat and work truck taken from us. We ended up on the wrong side of the law because we unknowingly fished on the wrong side of the Ohio River. Because we did something that we had no reason to think was illegal, our lives were ruined. I'm here to tell our story because I don't want anyone else to fall victim to a weapon called the Lacey Act; an Act that has become the weapon of choice by wildlife agents. I'm here because I want overcriminalization caused by this Lacey Act and similar acts to stop.

My husband and I live and work in Owenton, Kentucky, where we own Kinder Caviar and Black Star Caviar Company. We collect paddlefish eggs, harvest them into caviar, and export them to customers in other countries. To catch the paddlefish, we use gill nets. Ever since we started our business, we've fished in the Ohio River. We connected one side of our nets to land in Kentucky and the other to branches out in the water on the Ohio side of the river.

We don't come from a wealthy family, but we did learn to work hard and we loved this work. We had big plans to grow the caviar business. We were the first established caviar company in Kentucky. We were the first to take caviar made in Kentucky into international markets around the world. Although small, we had in fact built an industry. We provided for our family, created jobs, and brought new business to Kentucky. We are proud of our business and what we have achieved as a family. We were so proud to have earned the confidence and the

trust of our government, which allowed us to engage in international trade and all that it entails. We never took chances that we knew would jeopardize our business, credibility or the reputation that we worked so hard to earn. This was our American Dream!

We were very careful about whom we hired. The fishermen that fished for us weren't strangers. Most of them belonged to the same family. They included an active sheriff with 30 years of service, a police officer, a construction worker, a Kentucky disabled fish & wildlife officer, and a congressman's aid's son-in-law.

We've never tried to hide anything that we've done from anyone. The state of Kentucky has recognized our success and applauded it. In 2008, I was appointed to the state's Aquaculture Task Force, where I represented wholesalers of aquaculture products. I testified before my state legislature about laws that harshly punished commercial fishermen for accidentally breaching water boundaries. I testified that the boundaries were inaccurate because of GPS positioning lying somewhere on the bottom of the Ohio river. There were three (3) established boundary lines out in that river. Not even the law enforcement of either state, Kentucky or Ohio, knew where either line was positioned, nor did they know which was the true line.

That same year, our company was featured on the Kentucky Department of Agriculture's website. Here's what the Department of Agriculture said about our business:

“Caspian Sea style caviar made right here in the Bluegrass! American caviar now comparable to the caviars of the Caspian Sea!

[A]s the catch and quotas of Caspian Sea caviar continue to decline, prices will steadily increase. Kinder Caviar is fast becoming the choice for the caviar savvy consumer...”

We've always done our best to obey the state laws. In *Ohio v. Kentucky* (1980), the Supreme Court stated that Ohio River is "not the usual river boundary between states" because the "northerly edge" of the river, rather than the river itself, forms the border between Ohio and Kentucky. The Court also found that, historically, the Ohio River has been controlled by Kentucky.

We were fully licensed and permitted to commercial fish in Kentucky waters, therefore, as long as we stayed in the water, we were in Kentucky, or so we thought. In September of 2012, three months after the conviction, we applied for and received harvesting permits that cost \$500, which was specifically designed for harvesting paddlefish and sturgeon and was effective for the entire fishing season, which was through May of 2013. Four months after this condition, Kentucky Fish and Wildlife made a law that said that if any fisherman was convicted of a Lacey Act violation, he could not even work as a helper to any commercial fisherman in any manner. According to the Kentucky legislative research commission compiler, this law would not be effective until January of 2013. However, the fact remained that it was imposed upon us in December of 2012. Six months after this conviction, Kentucky Fish & Wildlife revoked all of our licenses and permits that allowed us to engage in the commercial fishing industry in any capacity. These bullying tactics continue today.

We've always reported every one of our catches to the Kentucky Fish and Wildlife Department, as usual, with the added instruction from the Department of the Interior to list the boat ramp we used as well as the body of water where we fished. No other fisherman was requested to do this. We knew that paddlefish are a threatened and protected species worldwide, not just under Ohio law. We also knew that Ohio law prohibits commercial fishing for paddlefish, as well as the possession or use of gill nets. We interpreted this to mean inland bodies

of water. We worked the same locations and the same water holes in the Ohio River for seven years, almost every day of the season, in the light of the day, before being charged with fishing in Ohio's portion of the river. We never deliberately fished in Ohio's waters.

We've also always done our best to obey federal law. We knew that the Lacey Act makes it a felony to export plants or animals in violation of another state's laws. We took the Lacey Act seriously. That's part of the reason we hired two law enforcement officers and an ex-fish and game officer to help catch the fish we needed for export.

We thought we knew the law, and we thought we were obeying the law. But we didn't know that, according to the GPS coordinates setting the boundary between Ohio and Kentucky sides of the Ohio River, we were actually fishing in Ohio waters as well as Kentucky waters. How could we? This GPS boundary line was not established or made known to have been established to law enforcement officers of either state, Kentucky or Ohio, or to Kentucky commercial fishermen, until late in the year 2008, one and a half years after the incident. The regulation setting the GPS boundary line didn't even come into effect until late in the year 2008. Yet, that fact wound up making us into criminals, even though we always wanted to, and we always tried to, and we always thought we did comply with the law.

On May 5, 2007, my husband was tending our nets when he was confronted by federal agents from the United States Fish and Wildlife Service. The agents told my husband they "had to hold" him for a compliance check and questioned him for hours. He told the agents what he was doing. He explained that, as far as he knew, he was fishing in Kentucky waters, but "they had a job to do." He knew then that he was a target. The agents informed him that he was actually fishing in Ohio because his nets extended past the Ohio/Kentucky boundary. The agents

told him that what he was doing was a federal crime—that even removing two fish (blue cat fish) from nets in Ohio’s portion of the river and throwing them back into Kentucky’s portion of the river was a Lacey Act violation. And so, on March 14, 2011, my husband and I were charged in federal court in a four-count indictment with illegally harvesting paddlefish from Ohio waters and falsely reporting to the Kentucky Department of Fish and Wildlife Resources that we caught the fish in Kentucky’s water.

How were we supposed to know where the boundaries were? The GPS coordinates have changed over the years. No one ever sent us updates. The boundary is not marked in any fashion, even today there are not any boundary signs or indicators. No state or federal official ever told us to move our nets, or said we were anywhere near any boundary line, not even during seasonal boat inspections by Ohio game wardens, Kentucky game wardens or the coast guard. Everyone knew about our business. All it would have taken was a simple warning. We’d have stopped what we were doing immediately. There are state laws in place for these types of incidents that are purposed for decency between two states. But instead, the Lacey Act was the weapon of choice for the agents and officers involved. What we experienced at the hands of those officers was 5 years of pure abuse, bullying, harassment, and intimidation tactics, to the extent of destroying a large international caviar contract in 2007. The Lacey Act made this possible.

We weren’t the only ones confused about the boundary line. On August 8, 2008, Chief David Graham of the Ohio Department of Natural Resources’ Division of Wildlife wrote a letter to Deputy Commissioner Benjy Kinman of the Kentucky Department of Fish and Wildlife. Chief Graham recommended that both states take measures to help “clarify issues concerning Kentucky commercial fishers in the Ohio River experiencing problems or confusion with Ohio laws” and expressed hope that those measures would “aid in clarifying the boundary issue

between the two states.” He acknowledged that “there is some error associated with [the] downloadable track line” used to indicate the boundaries between the two states and emphasized the need to “use the same state boundary information,” as well as make the same “GPS coordinates... available to commercial fishers as well as officers of both states.” In 2010, our fellow fisherman, with 30 years of service and still an active sheriff, John Dunn, testified before a grand jury that he wasn’t sure where the boundary was. He also told the grand jury that the GPS coordinates had recently caused confusion for police when they were trying to figure out which department had jurisdiction over a drowning incident near a boundary.

We felt then, and we still feel now, that we did nothing wrong. But, on January 17, 2012, we made the painful and humiliating decision to plead guilty because we didn’t think we had a choice. We were facing a maximum penalty of up to five years in prison, a \$250,000 fine, or both, on each of four counts. Our companies could have been fined up to \$500,000 per count. We couldn’t suffer the emotional and financial trauma of a trial, and we didn’t want to risk losing our freedom as well as our property. We have three grandchildren and are very involved in their lives. Going to prison was not an option, but a threat. Being a felon was not an option, but a threat. We were concerned that we wouldn’t get a fair trial before an Ohio jury, given that Ohio and Kentucky have been fighting over the water rights in the Ohio River for 200 years. Also, we were told that even if we happened to win at the federal court level, we would have had to go into the court for crimes against animals. We were told that there was no way for us to win. So, our companies each pleaded guilty to one felony labeling violation. This means that we reported (labeled) our catch as being in Kentucky water when Ohio says it was actually from their portion of the water. This is considered false labeling of where the fish came from. My husband and I each pleaded guilty to one count that we “should have known” that we were

fishing in Ohio's portion of the river, a misdemeanor trafficking violation. This means that we took the fish out of Ohio's portion of the river and brought them into Kentucky's portion of the river (thus, trafficking). Many business owners in our position have made similar decisions when threatened with prison time.

Today, we're in poverty. During our probation, we've been prohibited from fishing anywhere in the Ohio River where that river forms the border between Ohio and Kentucky, as well as prohibited from applying for or receiving an export permit. We told our fishermen to go, we could no longer pay them. Our customers left us – guilt by association, a couple of them used the situation to not pay an existing huge invoice. I am not physically able to work anymore. My husband can't even get back in a commercial fishing boat. Our entire way of life has been destroyed. They have us in a hole and they won't let us out. We have completed one year and four months of probation and fulfilled every condition. We have filed a motion for early release from probation, but the prosecutor denied our request on grounds that we have not been punished enough, and it was upheld. Every means of working has been stripped from us. The Food Safety Branch of the Kentucky Department of Public Health refused to renew our permit to operate a business based on a phone call from "somebody up north" and a letter that Kentucky Fish & Wildlife sent directly to the Kentucky DPH. And, based on that letter from Kentucky Fish & Wildlife, the Kentucky DPH told us that they (DPH) would not allow us to process any roe bearing fish, including paddlefish, and that they would be monitoring our facility to ensure that we were not processing paddlefish. We had to close the facility because paddlefish is the only business we do. The main purpose of Kentucky DPH is to make sure that companies are permitted in order to operate a business. Now, they are claiming the authority to monitor my business in order to ensure that I am not producing caviar. By the time the Kentucky DPH

realized they did not have authority to deny us a permit to operate a business, it was too late to start up. We don't have a way of working, not even to make ends meet. The power that the Lacey Acts gives government agents to use at their discretion against the people of the United States is unconstitutional at best. No matter what we do to start working again, we can't fish for ourselves, we can't afford to pay fishermen to fish for us now, buyers will only buy at cut-throat rates – all of which will not sustain life. Enduring this every day for five years, one finally succumbs. Stop. We never wanted to fight them, and we can't win. They took every means away for us to work, I don't want to live like this anymore. Life has become so painfully worthless. The Lacey Act has enabled the government agents to steal and destroy our lives.

Our conviction has devastated us psychologically as well. You can't imagine what it's like for me to know that, in the eyes of the law, my government, my country, I am a criminal. We feel ashamed for what our family has had to endure, humiliated, demeaned in every way, utterly helpless. We don't feel as if the law protects us anymore – we have been victimized by it. All that we have endured at their hands because we established a caviar/commercial fishing business.

One of the conditions of our probation was that we complete 100 hours of community service. The only thing that got me through those 100 hours was the possibility that I could one day tell my story and draw attention to the devastation and destruction caused by Overcriminalization. There are far too many laws out there like the Lacey Act, that agents use as tools to punish people for doing things that aren't morally wrong and which ordinary people have no reason to think would be illegal. Innocent mistakes shouldn't get you threatened with prison time and drive you into poverty levels beyond anyone's imagination, as well as disgrace. Criminal law shouldn't be used to punish people who are morally blameless. Police, agents and

prosecutors should spend their time and the taxpayer's money going after people who have done things that we all know and recognize are wrong. *We have been told that the government spent "upwards of five million dollars" prosecuting our case.*

In spite of all that my husband and I have endured, we don't hate the government. I've always hoped to go into public service, and I still have hope that I'll be able to do so in the future. We still think this is the best country in the world, with the best government in the world. But we also want decent, honest people to be able to live, work and prosper here in the United States of America, peacefully without fear of unknowingly breaking a criminal law and ending up in prison. We are living proof that it's becoming impossible to do that anymore. We didn't ask to be martyrs, but we're here in the hopes that a lot of good will come of our pain and suffering. If this can happen to us, it can happen to anyone. We have, sadly, come to know that it happens more often than most people think. I beg you: help make it stop.

Thank you for your time. I will be happy to answer any questions you may have.

Mr. GOHMERT. Thank you very much, Ms. Kinder.

At this time, we will begin questioning. Each of us will have 5 minutes, and I will recognize myself for 5 minutes.

Mr. Lewis, Ms. Kinder, as a judge, I have looked into the eyes of many hardened criminals and sent them to prison. I have looked into the eyes of a couple of people and ordered they be taken and put to death. But I look in your eyes and my heart breaks for what you have been through. And I am very sorry for your travails that was brought on by a system that does not seem to have worked as it should. So thank you for being here to hopefully help us get our system corrected.

Professor, you clerked for Antonin Scalia. I was with a group that he was speaking to, a small group. When he said what questions you got, one of them said would you say our country is the freest in history because we have the best Bill of Rights. And you know Justice Scalia. He is very abrupt, and he said, oh, gosh, no. He said the Soviet Union had a better bill of rights than we do. And I had forgotten. I did a paper on the Bill of Rights in college, and they did. They had more enumerated rights than we do. That was not the key, and Justice Scalia pointed out we are the freest Nation in history because the Founders did not trust government. And so they made it as difficult as they possibly could to create laws.

I see the case of Mr. Lewis and Ms. Kinder, so many others that Mr. Scott and I have listened to over the years and read about. And it looks like one of the biggest problems is when none of those safeguards are utilized and agencies, bureaucrats, totally unaccountable, make the rules, make criminal laws.

Mr. Lewis, you mentioned a civil penalty. Obviously, this whole thing was embarrassing, take the criminal violation alleged out. Do you think you would have ever been a part of sewage moving as it did if you had been fined or had your pay docked and some civil penalty like a fine without ever going through the criminal court? Do you think you ever would have done that again?

Mr. LEWIS. Absolutely not. In fact, everywhere I have been since then, I made everybody around me aware, look, it's out there you may not be aware of, and there are certain things that I see, if I see some concerns with it, some possibilities with it, I share that with the people around, the employer and my coworkers. No, if I had any idea, there is no way I would risk my family being in a shelter somewhere to stop water for anyone. I would have never done that knowing that would result in me going to a prison. I would have never.

Mr. GOHMERT. Ms. Kinder, do you think given the embarrassment just from having Government agents come and talk to you—do you think if you had been civilly fined without ever having to go through the criminal justice system, that you would have ever violated such a regulation again?

Ms. KINDER. Of course, not, Your Honor. I would like to say a little bit more about that.

Mr. GOHMERT. Okay.

Ms. KINDER. We operated in the day of light. Our nets were—you could see them for a long distance away. We had big buoys that floated on top of the water. We fished that river in those same

holes for 7 years. No one ever told us that we were doing anything wrong. No one ever told us to move our nets. No one ever said anything that we were doing wrong. Even the Ohio and Kentucky officials—they did not know that there was a boundary. I guess they figured there was a boundary out there, but no one knew how to identify it. So in 7 years, we were never told anything that we were doing anything wrong by Ohio, Kentucky, or the Coast Guard.

Mr. GOHMERT. Thank you.

Mr. Rubinstein and Professor Barkow, just one last question before my time runs out. And our lights have been really messed up here.

But do you think that we can solve the biggest part of our problem by adding an intent, a *mens rea* requirement to statutes such as what captured Mr. Lewis and Ms. Kinder?

Mr. RUBINSTEIN. Just before I answer, in answering the questions, these are my opinions, not necessarily those of ILR. Yes.

Mr. GOHMERT. Well, it is you that is testifying, so it is your opinion. I am not asking anybody else's.

Mr. RUBINSTEIN. My opinion, yes. The lack of an intent requirement, particularly when you are imposing criminal penalties, is tremendously problematic, at a human level, as you heard, and at a systemic level. It undermines, you know, the basic bedrock propositions of our entire polity. It has to be fixed.

Ms. BARKOW. I agree with that. The only thing I would add is it is complicated to draft that in a way that is not going to raise some of the same issues because the Federal criminal code does not have any default rules about how you apply *mens rea* to different elements. So unlike lots of States that follow the model penal code where you just assume if Congress puts a *mens rea* term in there, it applies to everything. But there is no default standard for congressional statutes. So even if you plopped in the word "knowingly" or "willfully," there would still be an interpretive question for the courts of what it applies to. So if you did do that, you would want to make clear or pass a default rule that says it applies to all the elements of this provision.

Mr. GOHMERT. Okay, thank you. We would welcome your submission of anything in writing you think would do that trick.

My time has expired, and at this time, it is my pleasure to recognize Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

I want to thank all of our witnesses for their testimony. This has been very helpful.

Professor Barkow, one of the questions that we had is the effect of regulatory crime on over-incarceration. I think in your written statement you had a comment on that. Could you comment on the effect on over-incarceration?

Ms. BARKOW. Yes. It actually does not make up a large proportion of the number of people who are incarcerated in Federal prisons. So the number of people in the Bureau of Prisons who are there for regulatory crimes is not actually categorized separately. It would fall under the category that BOP calls "miscellaneous." So it is going to include things other than regulatory crimes as well. So at most it would be .8 percent of the total prison population and

something south of that because “miscellaneous” includes other things.

Mr. SCOTT. That is .8 of the Federal system, and the Federal system is a small portion of the overall national incarceration.

Ms. BARKOW. That is correct.

Mr. SCOTT. You mentioned also that there are some crimes—there appears to be a *mens rea* requirement, intent implied. How can we ensure that health and safety regulations may qualify for criminal prosecution when you have actually endangered people’s lives?

Ms. BARKOW. So I think there are a lot of statutes and regulations out there. So you would want to identify which ones, if any, that you wanted to have *mens rea* requirements to, and obviously, Congress has the power to decide that it wants to have different mental state requirements depending upon the regulatory scheme. But you could certainly distinguish those regulations that are designed to protect health and safety and go to the core of those issues and then decide what you thought the appropriate mental state would be that you would want to have.

Mr. SCOTT. So it should be one at a time, individualized?

Ms. BARKOW. Well, right now what Congress does typically is it just passes a general provision that basically says any regulations that are going to be passed under this statute—they are all subject to this criminal fine. And so what it essentially does is it puts it in the hands of Federal prosecutors to decide who will be charged and who will not.

What you could do instead would be to identify, after regulations are passed, which regulations you believe should, in fact, be subject to criminal penalties. So you could identify those that really go to the core of these health and safety concerns, and if you wanted to, you know, you certainly have the power to make those strict liability or you could have a negligence standard, whatever you saw fit, whereas you could have more paperwork type regulations, things that you do not view as serious, as not being subject to criminal penalties.

Mr. SCOTT. Thank you.

Now, Mr. Rubinstein, one of the problems we have with this is that the regulators may not have the expertise in criminal law to make them precise and have proportional penalties. But we also have the problem that Congress may not have the expertise to figure out which regulations in the nuclear plant ought to be subject to criminal sanctions. Can you help us with how we would actually write laws in areas where we may not have the expertise?

Mr. RUBINSTEIN. Well, I think it goes back to something that Professor Barkow just said, which is that there needs to be some communication with respect to the core health and safety issues that are of concern. The fact of the matter is in a large number of Federal statutes, differentiations are made between conduct that is theoretically going to lead to criminal penalties and conduct that is not. The problem is, though, as the professor pointed out, that in many cases Congress will enact a general statute that effectively criminalizes a whole set of behavior and then leave it to the agencies to fill in afterwards.

So what you have, practically speaking, are cases in which there is a statutory standard but then there is an incorporation of these regulations, and by the time you work your way through the chain, you have situations, for example, of that of a marine biologist named Nancy Black who just is in the middle of a criminal matter in California as the result of feeding orcas, killer whales, or alleged feeding. The conduct that she was charged with was prohibited by a regulation, but legally walking up the chain, eventually you ended up with a much more stringent prohibition of behavior that the regulation was really never meant to reach. And so there is a disconnect between what Congress said in the first instance and what the regulators ultimately did.

It is a very knotty question, I agree, but at some point, as I said in my testimony and wrote in some detail in the written submission, the big solution here may be the only one that is practical, which is creating a default *mens rea* provision perhaps with a carve-out for certain kinds of core health and safety violations that are just so egregious that per se they are wrong. But the way the system is working now, you end up with these terrible abuses. You end up with stories like we heard this morning, and it needs to be fixed.

Mr. GOHMERT. Thank you, Mr. Scott.

At this time, we recognize the distinguished gentleman from Alabama, Mr. Spencer Bachus.

Mr. BACHUS. Thank you.

First of all, I want to commend each of you for, I think, your pursuit of justice, which is what I think this is all about.

Most of us had heard anecdotal evidence, stories like the two of you shared, but I do not think any of us—and I am an attorney who has tried many cases, including criminal cases, murder cases early in my career. But I never imagined that this was out there. And it is almost like an iceberg in that it is invisible to the general public and to most of us until someone hits it and, obviously, people hit it every day. And the result is not a benefit to society—cost/benefit. But it also violates, I think, our sense of justice and of democracy. It is inconsistent—and, Professor, you said this—with our democratic values.

In some respects, I think the Constitution as our forefathers drafted it—they would have never imagined this. It certainly violates, I think, our traditions and our values.

I think for most of us or all of us—we are, as the sitting Chairman said—in a bipartisan way, the bigger problem that I was focused on was criminalization of drug cases and that sector and that we are, by a multiple of many times, incarcerating more people. And I was actually shocked that sentences are now longer than they ever have been in the history of our country, which was a shock, I think, to me.

But the question now is not whether this problem exists. It is how do we address it.

And my first question was, is there anyone making up, say, a database catalog of these offenses?

Mr. RUBINSTEIN. Not that I am aware of. There have been a couple of studies that are published in the literature, and some of these are older. The American Bar Association did a very widely

cited study in the late 1990's. The numbers, though—they are estimates. I think it is about 4,500 Federal crimes, so to speak. And then, as I said, it is pretty much anybody's guess about the number of regulations. One professor estimated it, I think, at about 300,000, and that seems to be the study that is out there most significantly.

As I suggested, the problem is that the way the law is written and the discretion that the agencies have and then that the prosecutors have allows them to take laws that Congress wrote, never intending to reach the conduct that the regulations prohibit, and back into a criminal violation. And then what you end up with, as you heard, are situations where people who are thinking they are doing nothing wrong are put in a position where they have to make a cost/benefit analysis between standing up and fighting or watching their lives be destroyed even more. So the obvious, rational thing to do is to do exactly what they did, to do what most people do.

Mr. BACHUS. And you would think discretion will be used with good judgment, but obviously it is being used to make bad judgments or people that do not have, I think, the legal background.

Let me ask you this. You know, we could come at it by saying, okay, here are all of them, and it would be almost impossible, if you are talking about 300,000. You testified that the actus reus of prohibited conduct is not always spelled out in the regulations. And, of course, I think that is a start, that we just require that. And I would like maybe to get from you later some examples of that.

Should Congress consider codifying a mistake or an ignorance of the law defense for regulatory offenses? I will ask anyone. First, I am going to ask the legal experts because your stories speak for themselves.

Ms. BARKOW. So I guess I will give you the pros and the cons. Right? So the benefits of doing that would be that it would make a defense available to people who could say that they were unaware of the law. The con against it—

Mr. BACHUS. Of course, they would have to prove that.

Ms. BARKOW. Well, now I am getting to the con part, which is that the Government, I think if you had a government witness here, would tell you that it may be difficult to demonstrate. And so if that is a requirement of a statute, it is going to make it harder for the Government to bring prosecutions.

Mr. BACHUS. It ought to be hard if we are talking criminal.

Ms. BARKOW. That is your decision, obviously.

Mr. BACHUS. Not in civil, but if we are talking criminal.

Let me ask one more question, if I can. Under a "knowingly" standard, a person can be convicted of a crime for knowingly engaging in the conduct without knowing that the conduct is illegal. And I think that was in your testimony. And that is the essence of it.

Ms. BARKOW. Yes. Some statutes have been interpreted that the "knowing" just refers to that you knowingly engaged in the conduct, but you do not have to have the additional knowledge that the conduct was against the law. So you could either cure that by doing what you said, which is to have a mistake of law defense, or

you could make it clear that “knowing” actually applies to the knowledge that there are regulations that you violated.

Mr. BACHUS. I would think we need a default *mens rea* standard, and I would invite you all to give us your thoughts and elaborate at some point in time.

And I appreciate the Chairman’s indulgence.

Mr. GOHMERT. Thank you.

At this time, I will recognize the distinguished gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

Underlying this important hearing is the concern that has not been cleared up for me about whether or not *mens rea* should apply in which cases. And, Professor Barkow, I wanted to engage you in this discussion because regulatory crime violations—sentencing is less than 1 percent, while all these other offenses, particularly drug offenses, weapons, explosives, immigration, robbery, all constitute the rest. Can you point out to the Committee the circumstances under which *mens rea* is determined to be a requirement or not?

Ms. BARKOW. So if I understand the question correctly, you know, I think it is a very difficult question to answer—

Mr. CONYERS. It is.

Ms. BARKOW [continuing]. Because I think it is really a congressional policy call. I do not feel like I have the expertise to give you the answer of what conduct you view as sufficiently morally blameworthy that you want to have criminal sanctions attached to it. I mean, I can tell you that I think if we are talking about 300,000 regulations, that not all of them are probably going to go to the core of health and safety protection that I think you would want to use this very powerful hammer on. I think if you say, well, maybe we need criminal law in order to deter because the consequences of violations are so great that we want to stop these things from happening, I think it just requires careful attention to what those consequences are that you think justify lowering the traditional notions of *mens rea* and culpability.

So when all this started when Congress initially started doing this sort of thing, you know, it was basically industrialization and lots of products going out there and drugs and harmful food that could kill hundreds of thousands of people, and the idea was we have to make sure that does not happen. So we will just pass strict liability offenses, and now we know that these big industrial players will know that if they make a mistake, they are going to face heavy sanctions. And I think the question for Congress is when do you feel that those circumstances are analogous that you want to continue to maintain criminal penalties.

And then the second would be whether you need them because the other thing I would add is that it may be that a civil sanction regime where companies could lose their license, for example, if they engage in certain conduct, that that may be sufficient in some contexts. So you just want to know when do you need the threat of criminal punishment because the way it plays out in practice is exactly as we heard, which is it is a way to get pleas and it is a way to get offenders to agree to terms. It is something that Government prosecutors like very much because it enables them to threat-

en something quite severe in order to get the sanction that they think is appropriate.

Mr. CONYERS. Well, that is a good start. We are confronted here on this end with some incredible questions that have not been raised before. This is a separation of the Subcommittee on Crime, and you are on the commission. And I am wondering—this could be the beginning of a huge inquiry into where *mens rea* is required and when it is not.

What about the mandatory minimums that are found so much in the drug offenses? Has your commission—have you inquired into that very deeply?

Ms. BARKOW. So I am testifying today in my personal capacity and not as a member of the Sentencing Commission. So it would not be appropriate for me to comment at this time on the matters that are relevant to the work of the commission at this hearing. I myself have written, before I joined the commission, about the topic of mandatory minimums and would be happy to talk about that in another context. But today I am just here in my personal capacity and not as a member of the commission.

Mr. CONYERS. So we can get your testimony after you give it today.

Ms. BARKOW. My longer written statement?

Mr. CONYERS. No. The one that you are going up for this afternoon.

Ms. BARKOW. I am not testifying about mandatory—in my academic capacity, I have written quite a bit about mandatory minimums.

Mr. CONYERS. Oh, I see.

Ms. BARKOW. That is separate from what the commission's work is.

Mr. CONYERS. Well, can you talk about mandatory minimums in an individual capacity like you are here for today?

Ms. BARKOW. Well, I am here today actually to talk about the regulatory crimes and not questions about sentencing. So I do not think it would be appropriate for me to comment now as a member of the Sentencing Commission because there is a spectrum of views on the commission as they relate to mandatory minimums.

Mr. CONYERS. All right. I will accept that. I do not know if the gentleman from New York is going to let you off the hook as easily as I do.

But at any rate, what is the bottom line that Chairman Gohmert and us are struggling with here? And this has sort of crept up over the years. My time is also out. This is my last question to you then.

Is there any organized way we could go about this? Maybe Ranking Member Scott and Chairman Gohmert could have Committee staff go through all of the laws and recommend to us what is *mens rea* and where it is not. And I say that, Chairman Gohmert, because we have just had one of the biggest financial collapses on Wall Street, and they are just beginning to bring people into court charged with crimes. And it seems that there is a stark reminder of the privilege that many white-collar defendants enjoy when they violate regulations. Well, I guess maybe they do not have a *mens rea* element. Oh, they do. Okay.

Can you help close this out with a few ideas on this subject?

Ms. BARKOW. The one thing I will say is that the Federal system decided not to follow the model penal code, which was a model code to try to help States put their criminal laws in order and avoid some of the things that we have seen happen in the Federal system. In the 1970's, Federal code reform was considered and ultimately was abandoned. But if Congress were serious about these issues and wanted to do something like that again, I do think that it is possible to think of some sort of body that could think systemically and broadly about Federal code reform and maybe do something similar to the model penal code project.

Mr. CONYERS. Well, thank you very much.

Mr. Chairman, could I put the Public Citizen comments on this subject that were sent to the Over-criminalization Task Force in the record?

Mr. GOHMERT. Without objection, so ordered.

[The information referred to follows:]



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The Honorable Jim Sensenbrenner
Chairman
House of Representatives Committee on the Judiciary
Over-Criminalization Task Force
Washington, DC 20515

The Honorable Bobby Scott
Ranking Member
House of Representatives Committee on the Judiciary
Over-Criminalization Task Force
Washington, DC 20515

RE: Hearing on "Regulatory Crimes: Identifying the Scope of the Problem"

Public Citizen urges members of the House Judiciary Over-Criminalization Task Force to distinguish carefully between egregious regulatory offenses and minor offenses in its consideration of over-criminalization of regulatory crimes. Rather than numerous examples of over-criminalization, we believe that under-criminalization is the current norm when it comes to enforcing major and egregious violations of federal regulatory standards.

For example, those who claim over-criminalization of regulatory offenses bemoan the growth in the raw number of offenses subject to criminal liability. Yet, this number is meaningless when taken out of context and ignores the real world of criminal justice enforcement. Although the number of such offenses has grown, federal prosecutors have invoked new criminal authority only in exceptionally rare instances.¹ Rather, federal prosecutors continue to rely on older "tried and true" criminal statutes in a few discrete areas that represent the overwhelming majority of federal criminal prosecutions. Specifically, in 2011, 30% of all federal criminal defendants were charged with drug offenses while 29% were charged with immigration violations. Regulatory offenses, on the other hand, comprised only 2% of all federal defendants in criminal cases in 2011 which is actually down from 7% in 1980.² Given that criminal prosecutions of regulatory violations are actually *decreasing*, it appears that solving the issue of over-criminalization of regulatory crimes is very much a solution in search of a problem.

Indeed, the lack of any significant criminal prosecutions of reckless activity conducted by financial firms on Wall Street and high-ranking officials within those firms leading up to the 2008 financial collapse³ is telling evidence of our government's inability to hold deep-pocketed defendants accountable and a stark reminder of the privilege white collar defendants enjoy in the criminal justice system when they violate regulations. Legal experts have pointed to the *mens rea* element which requires proving intent to defraud as one of the primary explanations for the lack of prosecutions, the failure of most to meet that high bar is a key factor to consider as the Task Force considers increasing *mens rea* requirements.⁴ More recently, the size of

¹ See Susan R. Klein, Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 Emory L. J. 1 (2012)

² *Id.*

³ http://www.huffingtonpost.com/2013/09/13/wall-street-prosecution_n_3919792.html

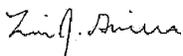
⁴ See Peter J. Henning, *Making Sure "The Buck Stops Here": Barring Executives for Corporate Violations*, 2012 U. Chi. Legal F. available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2151553

financial institutions appears to be playing a role in prosecutors' decisions to enter into deferred or non-prosecution agreements with the financial institutions rather than criminally indicting them. The deferred prosecution agreement the Department of Justice reached with HSBC, Europe's largest bank, even after HSBC admitted to laundering \$881 million dollars of drug cartel money, has left the public wondering how much money a bank has to launder before being subject to criminal sanctions, or whether a financial institution is so large that it has blanket immunity from criminal liability.

In fact, a focus on issues regarding enforcement of major and egregious regulatory violations reveals problems that do need solutions. In many areas of regulatory violations, genuine enforcement of those violations is hobbled by criminal penalties that are too low to incentivize federal prosecutors to hold criminal actors accountable. Approximately 4,693 U.S. workers were killed on the job in 2011,⁵ yet penalties for worker safety violations remain exceedingly small and criminal prosecutions are all but non-existent. This is because the Occupational Safety and Health Act only authorizes criminal penalties resulting in a maximum of six months in jail for "willful" workplace safety violations that results in a worker's death, thereby ignoring cases of serious bodily injury.

In many other instances, civil enforcement of major regulatory violations has resulted in fines for large corporations that are significantly reduced in practical terms once the favorable tax treatment of those fines is taken into account. For example, British Petroleum (BP) has claimed over \$10 billion in tax deductions for the costs of cleaning up the Deepwater Horizon oil spill in the Gulf of Mexico,⁶ meaning that taxpayers have been left to subsidize BP's irresponsible behavior. Lawmakers should be looking for ways to ensure that settlement agreements that already offer corporate defendants the advantage of not having to admit guilt don't also offer the added benefit of a tax deduction on top of it. Compliance with regulatory standards should be the goal of enforcement regimes, rather than an expectation that noncompliance will only result in fines that are considered nothing more than the cost of doing business.

Justifying broad claims of over-criminalization of regulatory crimes by primarily referencing minor regulatory offenses ignores the prevailing under-criminalization of major regulatory offenses by large and sophisticated corporations which recklessly endanger the public's health, safety, and financial security. Recent egregious regulatory offenses have resulted in little accountability in the form of criminal penalties despite strong evidence of corporate wrongdoing at the highest levels. In the interest of appropriate accountability for past violations of regulatory standards and effective deterrence of future violations, the House Judiciary Committee Task Force should be looking for ways to strengthen criminal enforcement of major regulatory crimes, not weaken it.



Lisa Gilbert, Director
Public Citizen's Congress Watch



Amit Narang, Regulatory Policy Advocate
Public Citizen's Congress Watch

⁵ BUREAU OF LABOR STATISTICS available at <http://www.bls.gov/opus/btn/volume-2/death-on-the-job-fatal-work-injuries-in-2011.htm>

⁶ <http://www.uspirg.org/blogs/blog/usp/four-reasons-lawmakers-are-scrutinizing-how-companies-turn-settlements-wrongdoing-tax>

Mr. CONYERS. Thank you.

Mr. GOHMERT. Thank you, Mr. Conyers.

At this time, we recognize the distinguished gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

Professor Barkow, I cannot resist this. Without compromising your status as a member of the Sentencing Commission, without testifying perhaps about your current opinions, could you tell us in a couple sentences the thrust of the conclusions of your prior academic writing on mandatory minimums?

Ms. BARKOW. I will say this, and I will try this approach instead. And I am going to apologize in advance that I said in advance I was going to leave early. It is not because of this line of questioning.

Mr. NADLER. This is my last question in that line.

Ms. BARKOW. I will say that the commission as a body recently submitted to the Senate its views on some of the proposed mandatory minimum reform legislation that is pending in the Senate. And so as a body, there is a statement that reflects the commission's views on possible reforms to improve those things.

Mr. NADLER. We could get from NYU, I assume, your prior academic—

Ms. BARKOW. You could get that from your Senate—you could get it. It is a public document.

Mr. NADLER. Thank you.

Let me just switch topics now. Obviously, the question of *mens rea* and the question of intent and the question of knowledge is a very serious question, and it is not as simple as it might appear at first glance.

Secondly, the obvious question of very few big-time bankers being prosecuted, if any, for causing the catastrophe that happened when the—obviously, many crimes were committed and people getting away without criminal prosecutions and the blow-up of the British Petroleum rig in the Gulf years ago shows one extreme of not prosecuting people who perhaps should be, but maybe they are too powerful or whatever. And here we have two witnesses who, assuming the truthfulness of their testimony—and I have no reason to doubt it—were obviously victims of very bad prosecutorial decisions and perhaps badly drafted laws and regulations.

My question is this because certainly Mrs. Kinder's testimony raises a different problem for me. Let me ask you this, Mrs. Kinder. Your testimony is that—first of all, I am not familiar with the Lacey Act, but I assume from your testimony that the Lacey Act is a Federal law which makes it a crime to do something with fishing in the wrong State?

Ms. KINDER. Actually the State of Ohio claims that their portion of water—the paddlefish is threatened or endangered in. Kentucky it is not.

Mr. NADLER. Okay. So the Lacey Act makes it a crime to take endangered fish which would only be endangered in Ohio in this case?

Ms. KINDER. Right, in that body of water.

Mr. NADLER. Okay. It would certainly be an element of the alleged crime that you were, in fact, taking fish in Ohio. If you were doing it in Kentucky, it would not have been a problem.

Ms. KINDER. That is true.

Mr. NADLER. And your testimony is that there is no way to tell the boundary, that the GPS was confused and no one knew anything about this and so forth. Given that, it would seem to me that the real problem here—although that may be one problem, but the other problem here is that the Federal Government comes down, threatens a prosecution which you could have, had you had the money and the time and the funds and the lawyers, defeated because based on what you are saying, you would not have met the—you did not commit any crime even unknowingly because there was no delineation of the boundary between the two States and so forth. One real problem here is the way the Federal Government comes down on people who end up feeling compelled to plead guilty to a lesser included offense to avoid a risky, expensive trial. And I suspect that that is a bigger problem, that a lot of people plead guilty to things they are not guilty of simply because they cannot fight the might of the Federal Government in court. Do you agree with that?

Ms. KINDER. Thank you, sir. Thank you so much. Yes.

Mr. NADLER. And that to me is not the question of over-regulation, although there may be over-regulation here too. I do not know. But it is a larger problem that I think this Committee ought to deal with, where people feel compelled to plead guilty simply because they do not have the resources that you need to fight the Federal Government in court. It is something I think this Committee has to deal with quite separately from whatever we do in the area of over-regulation or non-over-regulation.

In coming back to over-regulation, let me just say that the mandate of this Subcommittee is really not just regulatory crimes. It is over-incarceration, et cetera. The regulatory problem is a problem, but it results in less than .8 of 1 percent of the people in jail. That is not say we should not deal with it because one person being a victim of injustice is one person too many. But we also have to deal with 30 percent of drug crimes. 30 percent of the people in Federal jail are there for drug crimes, most of which in my opinion should not be crimes at all.

So it seems to me we have three different problems here: the alleged over-regulation, the whole function of *mens rea* and state of mind being one very serious problem which leads to witnesses and the testimony of the two academic witnesses illustrate. Second, the problem is, of course, the whole drug problem. The third problem is the problem of how do you deal with people who may be coerced into plea bargains because of the power of the Federal Government.

You look like you wanted to say something, Mr. Rubinstein.

Mr. RUBINSTEIN. Just briefly with respect to the Lacey Act, the Congress has been considering amendments because it does apply without respect to knowledge, and it criminalizes not only all United States laws but all foreign laws.

Mr. NADLER. How does it do that?

Mr. RUBINSTEIN. Because that is what Congress said. It says specifically that any law that deals with fish or game or plants, so

forth—a violation of that can lead to criminal sanctions. And you may remember a case involving Gibson Guitar, the guitar company, where agents came in in the middle of the day, herded all the employees into the offices at gunpoint and so forth because of allegations with respect to the illegal importation of Indian wood. The law that was violated in that case was an Indian domestic content regulation. And so the United States Government in its wisdom in this particular case decided that that warranted an armed raid on Gibson's factories.

The Lacey Act has some significant issues. I mean, obviously, it serves a very salutary purpose and you do not want to throw the baby out with the bath water, but that is actually a pretty good paradigm for the issue that we are talking about today with respect to regulatory over-criminalization.

Mr. NADLER. Because it violates any foreign act too, any foreign law?

Mr. RUBINSTEIN. Absolutely.

Mr. NADLER. So if Russia passed a law that said Americans who fish in this area, but nobody else, are guilty, that would make that an American claim too?

Mr. RUBINSTEIN. That is correct. Or if you are failing, if somebody fails to pay taxes to the local czar of whatever the province is or so forth, yes. In that respect Lacey is unique, but as I said, as a paradigm it works really well because essentially what the statute says and the way that it has been interpreted and enforced, if you violate a foreign law, even if you did not know about it, you can go to an American prison.

Mr. NADLER. The question of regulatory relief—it sounds like we ought to take a look at the Lacey Act too.

Thank you. I have exceeded my time. I yield back.

Mr. GOHMERT. Thank you.

Ms. Bass, the Chair recognizes the gentlelady for 5 minutes.

Ms. BASS. Thank you. I actually wanted to follow up on my colleague's question and wanted to ask you if maybe you could give a little more history about the Lacey law, when it was passed, why. Are there parts of it that you think are positive?

Mr. RUBINSTEIN. Last question first. There are certainly parts of it that are positive. The reason it was passed—and that is actually the first of the Federal environmental laws. It was passed really at the beginning of the last century to prevent poaching and to prevent killing of what we today call endangered species.

But what has happened, as typically does, over time the expanse of the statute has grown. There was a determination made that in order to stop the international trade in things like elephants and rhinoceroses and so forth, that it was important to add this extra criminalization component. Several years ago, Congress expanded Lacey to include plants and plant products. And so the way it is written and as the world has become more—economies become more integrated, the way it is written, it charges pretty much Americans with the obligation to know foreign laws.

The Department of Justice and the various agencies charged with enforcing it have said they are not able to provide a database. That is one of the suggestions that stakeholders have made. Give us a place we can go to find the laws. And the answer is that we

are not going to do that. You are charged with knowledge. And if it is a tax law, if it is a law about domestic content in India, if the foreign government itself you are not in violation of the law, it does not matter. Lacey needs some work.

Ms. BASS. Well, I think it was Professor Barkow was mentioning about what should be done prospectively about the law, and I wanted to know your opinions about what should be done with the laws that are already on the book, the regulations.

And I also want to associate myself with Congressman Nadler's comments in regard to both of the witnesses, Lewis and Kinder, because as I listened to your testimony, you know, I thought of just numerous times where there were other offenses that were not regulatory but where people really wind up pleading to crimes they did not commit because they really did not have the resources, you know, to defend themselves. And that is certainly a problem here, but it is a general problem within our system. Maybe you could respond to that.

Mr. RUBINSTEIN. Certainly. And one of the issues with the over-criminalization discussion generally is that to some extent over-criminalization is in the eye of the beholder, and there is a lot of good writing about this. Depending on sort of where you sit, you see different aspects of the problem. So it is important to take a step back, as the Task Force is doing, in a bipartisan way and really get back to first principles. And the first principles, the way the system is supposed to work, the way we assume the criminal law works is that the criminal law is supposed to reflect deeply held societal values about what is or is not right and wrong, and that individuals are able to exercise, through their own reason, the ability to identify what is and is not right and wrong in a given situation within limits. And obviously there are exceptions, but generally, that is the way it is supposed to work.

The problem with the regulatory state, for want of a better word, is that you have many moving parts. It is very arcane. The law is very convoluted. And if you are very wealthy, you can hire a whole raft of lawyers, people like me, to sit down and try and tease this all out. If you are like these people, that is just not an option. And so there is a reason that we have laws to protect clean water, and there is a reason that we have laws to protect the fish. But there has to be some balance and there has to be some transparency and there has to be some accountability. And right now, particularly with respect to regulatory crimes, there just is not.

Ms. BASS. Let me ask you a question. It is a little bit off topic, but your answer kind of raises it with me and that is our drug laws, which several people have referenced. But you talk about something that is changing in our society, and that is certainly one area of law that is changing depending on what State you live in. So we have on our books now, if you are a student applying for financial aid and you want Federal financial aid, there is a box that you have to check as to if you have had a drug conviction. But we have States now that have legalized the use of marijuana. So what is your thought on that. I mean, I have legislation to try to address that, but I would like to know your thoughts on that.

Mr. RUBINSTEIN. It is a very complex topic. Obviously, this is a big country and we have very different attitudes toward all sorts

of things in many of the States, and frankly, that is reflected in many cases in the exercise of prosecutorial discretion. Years ago, I was working in Michigan and drug offenses in the northern part of the State would be prosecuted very aggressively but drunk driving would not. But if you were in the southern part of the State, you would have the exact opposite. Drunk driving would be prosecuted very aggressively, but drug offenses would not. And that was reflective of local norms and mores. And that is just in one State. That is not all over the country. So it is a very difficult topic.

Part of the problem again is just sort of a proliferation of laws. By one count, there are over 300 Federal statutes that deal with fraud, going to the banking question earlier. There are plenty of laws on the books and it comes down to the exercise of prosecutorial discretion.

The space that I know best is the regulatory one, and here again the issue is framed in a very specific way. The solution is, frankly, to go back to first principles, things like *mens rea*, things like making it clear what the prohibited actions are, and then perhaps letting localities, the States work it out in the exercise of prosecutorial discretion.

Federal agencies are a different beast, and that is part of a longer discussion frankly.

Ms. BASS. Thank you.

Mr. GOHMERT. We thank the gentlelady from California.

At this time, we recognize Mr. Jeffries, the gentleman from New York.

Mr. JEFFRIES. Thank you, Mr. Chair.

And let me thank the witnesses for your testimony here today and certainly Mr. Lewis and Mrs. Kinder for your presence, for your willingness to relive what I think we all understand would be a difficult moment, unnecessarily difficult moment in your lives, but also to take the opportunity to share that moment with us in the hopes that Congress will act and that we can prevent others from going through the similar trauma that you have gone through. And certainly I think the power of the narratives that you have both communicated are compelling in that regard.

Let me ask Mr. Lewis first. It is my understanding that initially you were charged with a Federal felony offense. Is that correct?

Mr. LEWIS. Yes, sir.

Mr. JEFFRIES. And then ultimately you pled to a misdemeanor.

From the moment of the initial charge to the ultimate plea, what was the time period.

Mr. LEWIS. I believe 10-11 months, 12 months, something like that.

Mr. JEFFRIES. And during that time period, did you retain counsel or was counsel appointed?

Mr. LEWIS. The company that I worked for obtained counsel that represented me, yes.

Mr. JEFFRIES. And, Mrs. Kinder, initially you were charged with a felony and ultimately pled guilty to a felony. Is that right?

Ms. KINDER. Yes.

Mr. JEFFRIES. And what was the sort of duration of the legal process from initial charge to plea?

Ms. KINDER. All together, we went through about 5 years. I cannot remember the date today. We went through about 5 years of wondering day to day.

Mr. JEFFRIES. And are you still under Federal supervision, probation?

Ms. KINDER. We are on probation. Even though I have satisfied all of the requirements, they still hold us on probation. They will not let us go.

Mr. JEFFRIES. And as a consequence of the felony conviction—I am not as familiar with Kentucky law in terms of disenfranchisement, but have you lost your ability to vote?

Ms. KINDER. I am sorry. Would you ask me that again?

Mr. JEFFRIES. Have you lost your ability to vote as a result of the conviction?

Ms. KINDER. Not that I know of to vote.

Mr. JEFFRIES. Okay. Well, I appreciate the testimony of both of you. Obviously, under certain State laws, one gets a felony conviction and they are prohibited from participating in the electoral process in some instances temporarily, in some instances permanently.

Ms. KINDER. May I elaborate on that?

Mr. JEFFRIES. Sure.

Ms. KINDER. They offered us a \$25 fine and a misdemeanor. So we had to weigh that. Did we want to go to trial where we could not afford a trial to start with at that point in time and take chances on going to prison? So we could not refuse.

Mr. JEFFRIES. Well, I think that both of the stories that you have told illustrate the point that several of my colleagues have mentioned. In facing the power of the Federal Government and possibly in the absence of the inability to bring to bear an equivalent level of legal representation, folks are put in an untenable situation in terms of ultimately having to plead guilty. And in the continuum of justice, which moves from congressional action to administrative rulemaking to prosecutorial discretion and judicial review, obviously there is a breakdown, at least I believe respectfully, in that prosecutorial discretion phase that requires some measure of corrective action.

Mr. Rubinstein, if you can comment on sort of the notion of one of the things that have been explored is the possibility of default *mens rea*. Another possibility, maybe additive, is the notion of applying the rule of levity to some degree which, as I understand it, would require construing the defendant's behavior in the best possible light as it relates to criminality. Can you make an observation on that possibility in addition to—

Mr. RUBINSTEIN. That is certainly one of the tools in the toolbox. There are a variety of options available to you to try and solve the problem, particularly in dealing with it from the regulatory standpoint. And part of it could be related to a regulatory reform issue to open up the process to make sure that there is, as I said, some transparency in terms of how agencies make rules so that there is more notice and that people have the ability to understand what the law is.

There are potential limits on prosecutorial discretion. For example, the way the Department of Justice now handles RICO viola-

tions or RICO prosecutions. There is this kind of centralized process that might be appropriate with respect to these kinds of regulatory decisions to take them away from the people who are making the laws, so to speak, writing the regulations, and giving those functions to an independent body to make determinations about enforcement because, again, regulatory agencies are kind of unique beasts. In many cases, they act as—they write the laws, they enforce the laws, and then they prosecute the violations. More often than not, those are civil, than criminal instances obviously, but the problem obtains in both realms.

So I think there are certainly solutions, and the one you suggest absolutely ought to be part of the mix. It is not a simple problem, but it is one that you need to fix and there are fixes.

Mr. JEFFRIES. Thank you. I yield back.

Mr. GOHMERT. I thank the gentleman.

At this time, we have finished the questioning. However, it is important to note that all Members will have 5 legislative days to submit additional written questions for the witnesses, and the witnesses may have 5 additional days, if you think of something else you would like to have submitted for the record in this hearing.

But that at this time concludes today's hearing. Thank you to the witnesses very much for your assistance, as we pursue this problem. This hearing is adjourned.

[Whereupon, at 11:36 a.m., the Task Force was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

November 27, 2013

VIA FEDERAL EXPRESS

The Honorable Jim Sensenbrenner, Jr.
Chairman, Over-Criminalization Task Force
House of Representatives Committee on the Judiciary
2449 Russell House Office Building
Washington, DC, 20515

The Honorable Bobby C. Scott
Ranking Member, Over-Criminalization Task Force
House of Representatives Committee on the Judiciary
1201 Longworth House Office Building
Washington, DC, 20515

Re: *Mens Rea Requirements for Regulatory Crimes/Follow Up to the Over-Criminalization Task Force Hearing on "Regulatory Crime: Identifying the Scope of the Problem"*

Dear Chairman Sensenbrenner and Ranking Member Scott:

We write to follow-up on an issue that was raised at the October 30, 2013 hearing of the House of Representatives Committee on the Judiciary's Over-Criminalization Task Force titled "Regulatory Crime: Identifying the Scope of the Problem." Some Members expressed an interest in addressing the absence of mens rea requirements for many regulatory crimes, and, in particular, identifying specific strategies for doing so to stop prosecutorial over-reach and to ensure criminal enforcement of federal regulatory violations is consistent with our core notions of due process.

While this is a complex issue that Congress may wish to address in different ways depending on the substantive area, one option is to adopt default rules of interpretation. The drafters of the Model Penal Code followed this path, and we thought it might be helpful for the Task Force to have the benefit of seeing what that approach entails.

Criminal offenses are comprised of elements that the government must prove beyond a reasonable doubt. These elements may include conduct, results, or attendant circumstances. Sometimes statutes list elements without specifying what mens rea a defendant must have with respect to those elements. For example, a statute may prohibit the emission of a chemical, without specifying whether the defendant has to know he or she was engaged in such emission or whether the defendant knew what the chemical was. If a court concludes that statutory silence means that no mens rea is required, these become strict liability offenses, where the government

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need only prove the prohibited conduct, without also having to show that the defendant had a particular degree of knowledge or awareness of what was happening.

The Model Penal Code contains a default rule so that statutory silence is not interpreted as creating a strict liability offense. For statutes that fail to mention a mens rea term at all, the Model Penal Code states that “such element is established if a person acts purposely, knowingly or recklessly with respect thereto.”¹ Of those three mental states, recklessness is the easiest for the government to establish. The Model Penal Code notes that “a person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”² Thus, in the above example, the government would have to at least demonstrate the defendant consciously disregarded a substantial and unjustifiable risk that he or she was emitting the chemical. Congress could adopt a similar rule and eliminate all strict liability crimes.

A second mens rea issue that comes up with regulatory crimes is whether a mens rea term in a statute applies to all the elements or just some of them. The Model Penal Code addresses this issue with another default rule. It states that “[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.”³ Thus, if a law makes the “knowing emission of chemical X” or the violation of a regulation a crime, this default rule would mean that the government would have to prove both that the defendant knew he or she was emitting a substance and that the defendant had knowledge of what the substance was.

These default rules would fill many of the mens rea gaps that exist in federal law currently, but they would not address situations where individuals knew exactly what they were doing but had no awareness that the behavior constituted a crime. While typically this kind of mistake of law is not a defense to a charge, Congress may wish to create an exception for regulatory crimes as a group or some subset of those crimes because of a concern that non-sophisticated participants in a field may be unaware of their obligations.

Often, a statute may authorize an agency to promulgate rules and establish that the violation of those rules can be subject to criminal enforcement, but without specifying whether, or under what circumstances, a defendant’s mens rea affects potential criminal jeopardy. Thus,

¹ MODEL PENAL CODE § 2.02(3).

² MODEL PENAL CODE § 2.02(2)(c).

³ MODEL PENAL CODE § 2.02(4).

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criminal enforcement could apply to even the most minor or arcane regulatory violations. Without specifying a mens rea requirement related to knowledge of the law, Congress in these instances therefore delegates to agencies broad powers to define prohibited conduct by administrative rule and to decide which rules to enforce with criminal sanctions.

There are at least two avenues for Congress to address this issue should it wish to make awareness of the law a prerequisite to criminal liability. One approach would be for Congress to make knowledge of a regulatory requirement itself an element of an offense. Simply stating that a defendant must "willfully" violate a law or regulation would not be sufficient to make this clear, however, as courts have often concluded that this term does not require knowledge of the regulation itself.⁴ If Congress wanted courts to interpret willfully in a statute to require knowledge of a specific statute or regulation, it would have to specify that is what the term means.

Another approach would be for Congress to adopt a general mistake of law defense. An example of a law that takes this latter approach is a New Jersey statute that provides a defense when an actor "otherwise diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances in which a law-abiding and prudent person would also so conclude."⁵

Congress could address the mens rea issues raised by regulatory crimes in a general fashion through default rules. It could also apply different standards to different substantive areas. However, this letter has the modest goal of offering some examples that we hope are helpful to Congress should it make the policy decision that default rules are the best approach for dealing with the many laws that raise these issues.⁶

* * * * *

⁴ See, e.g., *United States v. Overholt*, 307 F.3d 1231 (10th Cir. 2002).

⁵ N.J. STAT. ANN. §2C:2-4(c)(3).

⁶ Mr. Rubinstein's written testimony for the October 30, 2013 hearing reflects the U.S. Chamber Institute for Legal Reform's official position regarding regulatory over-criminalization. This letter reflects solely the personal views of Prof. Barkow and Mr. Rubinstein and not those of ILR or any other person or entity.

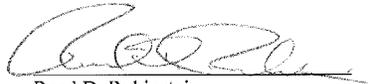
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Thank you for your attention to this matter. Please feel free to contact us if you have any questions or if we can be of additional assistance.

Sincerely yours,



Rachel E. Barkow
Segal Family Professor of Regulatory Law and Policy
Faculty Director, Center on the Administration of Criminal Law
New York University School of Law



Reed D. Rubinstein
Partner, Dinsmore & Shohl LLP

cc: Robert B. Parmiter, Esq., Counsel to the Subcommittee on Crime, Terrorism, Homeland Security and Investigations, U.S. House of Representatives Committee on the Judiciary

Ron Legrand, Esq., Democratic Counsel to the Subcommittee on Crime, Terrorism, Homeland Security and Investigations, U.S. House of Representatives Committee on the Judiciary





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January 31, 2014

VIA ELECTRONIC MAIL

Alicia Church
c/o Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20615

RE: "Regulatory Crime: Identifying the Scope of the Problem"/Questions for the Record

Dear Ms. Church:

This responds to the letter dated January 9, 2014 from Chairman Goodlatte providing questions for the record from Representative Spencer Bachus with respect to the Judiciary Over-Criminalization Task Force hearing titled "Regulatory Crime: Identifying the Scope of the Problem" held on Wednesday, October 30, 2013.

Question one: In your testimony, you stated that "a sprawling criminal code based substantially on agency regulations is especially likely to contain crimes in which the all-important conduct (actus reus) and state of mind (mens rea) elements are incompletely fleshed out." Would you please provide examples of cases where individuals have been prosecuted for crimes in which the actus reus is incompletely fleshed out? Would you please provide examples of cases where individuals have been prosecuted for crimes in which the mens rea is incompletely fleshed out?

Answer: The case studies presented at the hearing are quite typical of the kinds of situations in which citizens find themselves at risk of incarceration for "crimes" that lack meaningful actus reus and mens rea elements, at least in my experience. The data base of case studies found on the Heritage Foundation's Over-criminalization page has been cited as a useful source of information on such cases. See Stephen Smith, "Overcoming Over-criminalization," 102 J. OF CRIM. L & CRIMINOLOGY 537, 542 fn. 16 (2012) citing <http://www.heritage.org/issues/legal/overcriminalization> (accessed January 31, 2014). Also, both the scholarly literature and the media, dating back to the early 1960s at least, is replete with examples of citizens who suffer criminal penalties for conduct that is simply not appropriately subject to the government's criminal authorities. A December 17, 2011 Wall Street Journal article is reasonable typical. See Radnofsky, et al, "Federal

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Police Ranks Swell to Enforce a Widening Array of Criminal Laws," *The Wall Street Journal* (Dec. 17, 2011) available at http://online.wsj.com/news/articles/SB10001424052970203518404577094861497383678?mod=ITP_pageone_0&mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052970203518404577094861497383678.html%3Fmod%3DITP_pageone_0 (accessed January 31, 2014).

I am unaware of any statistical studies quantifying the cases in which individuals have been prosecuted from crimes in which the actus reus and mens rea have been incompletely fleshed out.

Question two: Could you elaborate further on your views regarding a default mens rea standard?

Answer: Please see the attached joint letter from Prof. Rachel Barkow and Reed D. Rubinstein, Esq. regarding a default mens rea standard.

Question three: Please submit any relevant studies or information that would shed light on the number of criminally enforceable regulations.

Answer: A leading study is by James A. Strazzella, and is titled *The Federalization of Criminal Law*, Criminal Justice Section, American Bar Association (1998) available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_sectionnewsletter/crimiust_pubs_catalog_fedcrimlaw1.authcheckdam.pdf (accessed January 31, 2014). This study concludes that it was virtually impossible to get an accurate count of all of the federal crimes because the statutes are complex, there are so many, their location in the United States Code and Code of Federal Regulations is so scattered, and there are nearly 10,000 regulations that are nearly impossible to categorize because they mention some sort of criminal or criminal-type sanction. *Id.* at 10.

Another leading study is by John S. Baker, Jr., and titled *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memo. No. 26, June 16, 2008 available at http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes#_ftn20 (accessed January 31, 2014). Professor Baker, while acknowledging many of the same difficulties encountered by the ABA Task Force in trying to accurately count the total number of federal criminal laws, concluded that by the end of 2007 the United States Code contained at least 4,450 federal criminal laws. He cites estimates of up to 300,000 regulations that may have criminal consequences. *Id.* at fn. 20.

Another leading study is by Marie Gryphon, and titled *It's a Crime?: Flaws in Federal Statutes That Punish Standard Business Practice*, Manhattan Institute for Policy Research (Dec. 2009) available at http://www.manhattan-institute.org/html/cjr_12.htm (accessed January 31, 2014). This study concludes: "Today, the regulatory state so

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thoroughly encompasses the range of commercial activity that businesses and businesspeople trying to reduce their costs, better their products, best their rivals—do all of the things, in short, on which survival in a market economy depends—run an ever-present risk of becoming ensnared in the criminal law. In many instances, the laws in question are so voluminous and loosely drafted that even a student of the legislation would not have fair notice of what conduct was prohibited and what was not.”

Please feel free to contact me if I can provide additional information.

Best regards,

DINSMORE & SHOHL LLP



Reed D. Rubinstein

RDR:alm
Enclosure





TOURISM, ARTS AND HERITAGE CABINET
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November 5, 2013

The Honorable Jim Sensenbrenner, Jr.
Crime, Terrorism, Homeland Security, and Investigations Subcommittee Chairman
2449 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

Dear Representative Sensenbrenner:

For over 100 years the Lacey Act has been an important interstate mechanism for the protection of wildlife. Originally enacted to address problems with the introduction of non-native, or exotic species of wildlife into native ecosystems, it now also serves as an important federal bridge for protecting state fish and wildlife laws already in existence. The Act protects fish, wildlife, and plants by creating civil and criminal penalties for a wide range of violations involving trade in wildlife, fish, and plants that have been illegally taken, possessed, transported or sold. The Act is also one of the broadest and most comprehensive tools in the federal arsenal to combat wildlife crime. With increasing activity in international and domestic wildlife trafficking, the Act has evolved to become an important weapon to protect these resources domestically and abroad.

A recent hearing conducted by the House Committee on the Judiciary Over-Criminalization Task Force addressed the prosecution of two Kentuckians and their caviar companies who had pleaded guilty to trafficking and falsely labeling illegally harvested paddlefish. Steve and Cornelia Joyce Kinder owned and operated Kinder Caviar Inc. and Black Star Caviar Company, companies in the business of exporting paddlefish eggs as caviar to customers in foreign countries.

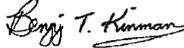
It is critical for the Kentucky Department of Fish and Wildlife Resources (Department) to address this issue, as the illegal trade of paddlefish eggs continues to be a growing problem in Kentucky and other surrounding states. Regulations have been established to protect a declining paddlefish population while maintaining a sustainable commercial fishery, and to hopefully preclude the need to list the species under Endangered Species Act. If not properly regulated and enforced, the illegal trafficking of paddlefish eggs will continue to endanger the future sustainability of this important species.

It is also important to address and clarify several points in Ms. Kinder's testimony where the Department maintains she misstated some facts regarding the revocation of her commercial fishing and buyers licenses in Kentucky.

- Ms. Kinder purchased and received the necessary commercial permits in September 2012; however, these licenses were revoked in December 2012 following the receipt of her Lacey Act conviction. Pursuant to our regulations the Department shall revoke a license if a person is convicted of a federal commercial fishing violation.
- It is true that the Department revised the commercial fishing regulations in January 2013. The intent of these updates was to prevent commercial anglers from hiring helpers that were convicted of federal commercial fishing violations because there was a regulatory loophole that allowed these individuals to continue in the industry during their license revocation period.
- Ms. Kinder was also involved in establishing a new regulatory framework for the paddlefish industry in Kentucky in 2008. She worked with the Department and state representatives to establish penalties that would address the violators in this industry. Included in this new framework was a list of provisions that would require automatic revocation of commercial fishing licenses. Ms. Kinder was in agreement with these provisions.
- Ms. Kinder repeatedly testified regarding the boundary line of the closed fishing area along the Ohio River in the state of Ohio. While a boundary line is difficult to mark on an open river system, KDFWR did collectively agree with Ohio, Indiana, and Illinois on a set of GPS points to delineate this boundary. These points were established after the conviction of the Kinders. Prior to this time Mr. Kinder was officially told by Department officials on multiple occasions to avoid the Ohio bank side of the Ohio River since commercial fishing was prohibited in that state. Our Department subsequently learned that commercial fishing gear was tied to trees on the Ohio shoreline; in fact old commercial gear tags registered to Mr. Kinder were located on these trees.
- Ms. Kinder testified they had to close their fish processing business since the Kentucky Department of Public Health would not issue them a permit due to their paddlefish conviction. Our records indicate they received 2013 permits for both Kinder and Black Star Caviar. Health officials claimed they could not restrict their processing of paddlefish from other sources provided they were not collected by Steve or Joyce Kinder.

This was a case where the Lacey Act was effective for the continued protection of a fish species that has been subject to numerous illegal trade incidents. We appreciate the opportunity to clarify these issues and would welcome the opportunity to provide any additional information that might be helpful in your Committee's findings.

Sincerely,



Benjy Kinman
Deputy Commissioner

House Committee on Judiciary Over-Criminalization Task Force

Regulatory Crime: Identifying the Scope of the Problem

Hearing on October 30, 2013

STATEMENT FOR THE RECORD

SUBMITTED BY THE

ASSOCIATION OF FISH AND WILDLIFE AGENCIES

Tuesday, November 5, 2013

The Association of Fish and Wildlife Agencies (Association) is a bipartisan organization, representing the state fish and wildlife agencies of all 50 states, and supports and advocates for state, territorial and provincial authority for fish and wildlife conservation and assists those agencies in promoting science-based resource management in collaboration with public and private partners.

For over 100 years the Lacey Act has been an important interstate mechanism for the protection of fish and wildlife. Originally enacted to address problems with the introduction of non-native, or exotic species of fish and wildlife into native ecosystems, it now also serves as an important federal bridge for protecting state fish and wildlife laws already in existence. The Act protects fish, wildlife, and plants by creating civil and criminal penalties for a wide range of violations involving trade in wildlife, fish, and plants that have been illegally taken, possessed, transported or sold. The Act is also one of the broadest and most comprehensive tools in the federal toolbox to combat wildlife crime. Activity in international and domestic wildlife trafficking continues to increase, and the Act has evolved to become an important tool to protect these wild resources domestically and abroad from over-exploitation. The Lacey Act is considered a vital tool to helping state fish and wildlife agencies protect the fish and wildlife that they manage as public trust resources in every state across the country.

The Association supports the rights of state fish and wildlife agencies to manage and restrict harvest of species within their borders and fully supports the states' authority and right to make and enforce their fish and wildlife laws. States' decisions to set harvest regulations, seasons, bag limits and the like are based on sound science and through processes that involve the public. These harvest regulations and restrictions are established to ensure fish and wildlife populations continue to thrive while allowing for sustainable harvest. Over-harvesting and deviation from these regulations leads to population declines and ultimately listings of species under state and federal endangered species laws.

The paddlefish is listed as a threatened species in the state of Ohio and the population is actively monitored for progress. Because it is listed as a state threatened species, it is illegal to harvest paddlefish in Ohio. Kentucky allows the commercial harvest of paddlefish by permit only, and

harvest is closely regulated and monitored since the roe is a high-valued product sold internationally and, therefore, must also conform to international trade laws.

International demand for paddlefish roe from the United States continues to increase, especially since the Caspian Sea caviar market has collapsed from overfishing. Increasing consumer demand for a declining yet highly sought-after product often stimulates the illegal harvest and trafficking of fish and wildlife products. The situation is exacerbated in the example of paddlefish because the roe is in limited supply, and it is a high-priced product with increasing consumer demand, both of which can contribute to over-exploitation of the species.

The illegal and black market trafficking of paddlefish eggs is a growing problem, and states like Ohio that prohibit harvest do so to protect their declining paddlefish population and to hopefully preclude the need to list the species under the federal Endangered Species Act. States like Kentucky that allowed for commercial harvest under strict regulatory conditions do so with close monitoring so to protect the fishery from over-harvest and preserve the long-term viability of the species.

Illegal harvesting and other activities contribute to the decline of paddlefish, and undermine state fish and wildlife agencies' conservation efforts and their ability to restore the species' population to healthy, more sustainable levels. We fully support the states' rights to regulate the harvest of paddlefish and to enforce all associated fish and wildlife laws to protect their public trust resources as well as the use of the Lacey Act as a means of enforcement.

If you have any questions, please contact the Association's Government Affairs Director, Mrs. Jen Mock Schaeffer, at jenmock@fishwildlife.org.