# OVER-FEDERALIZATION

## HEARING

BEFORE THE

OVER-CRIMINALIZATION TASK FORCE OF 2014

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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## OVER-CRIMINALIZATION TASK FORCE OF 2014

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# OVER-FEDERALIZATION

**THURSDAY, MARCH 27, 2014**

HOUSE OF REPRESENTATIVES

OVER-CRIMINALIZATION TASK FORCE OF 2014

COMMITTEE ON THE JUDICIARY

*Washington, DC.*

The Task Force met, pursuant to call, at 9:30 a.m., in room 2237, Rayburn Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Task Force) presiding.

Present: Representatives Sensenbrenner, Bachus, Gohmert, Labrador, Holding, Conyers, Scott, Cohen, Johnson, and Jeffries.

Staff Present: (Majority) Robert Parmiter, Counsel; Alicia Church, Clerk; and (Minority) Ron LeGrand, Counsel.

Mr. SENSENBRENNER. The Task Force will come to order.

Without objection, the Chair will be authorized to declare recesses of today's hearing at any time.

Because we are having votes and Members are going to be departing, I am not going to make an opening statement, and neither is the gentleman from Virginia, Mr. Scott.

I would ask unanimous consent that our opening statements, and other Members' opening statements, be placed in the record at this point.

[The prepared statement of Mr. Sensenbrenner follows:]

**Prepared Statement of the Honorable F. James Sensenbrenner, Jr., a Representative in Congress from the State of Wisconsin, and Chairman, Over-Criminalization Task Force of 2014**

Good morning and welcome to the sixth hearing of the Judiciary Committee's Over-Criminalization Task Force. Over its first 6 months of existence, the Task Force conducted an in-depth evaluation of the over-criminalization problem. One month ago, the Task Force held its first hearing since re-authorization, focusing on Criminal Code Reform—a topic of particular interest to me.

Our work continues today, as the Task Force will consider the issue of the "over-federalization" of criminal law. This issue has been of interest to the over-criminalization movement since at least 1998, when the American Bar Association convened a blue-ribbon panel to examine "over-federalization." However, its origins date back to this country's Founding. The Framers, in their wisdom, created a federal government of limited, enumerated powers, and reserved all powers not expressly conferred on the federal government to the states. Indeed, the Supreme Court has repeatedly articulated that Congress possesses no general police power—and that, in the federal system, the states possess primary authority for defining and enforcing criminal sanctions.

In the criminal justice context, this means that, in practice, the vast majority of criminal prosecutions occur at the state, rather than the federal level. This is borne out by the oft-cited fact that state prosecutors handle approximately 95% of the criminal prosecutions in any given year. Nevertheless, there is no question that, over the past few decades, Congress has created new federal statutes criminalizing conduct that occurs largely intra-state. We know this because, as Members of the Task Force and witnesses before us have repeatedly stated, an estimated 4,500 crimes currently exist in the United States Code—and this number includes a number of "street-level" crimes like carjacking. That statute is one of many that some have argued ought to be the exclusive province of state governments to combat.

We also know that the federal government employs a surprisingly large number of federal agents with firearm and arrest authority, and many have pointed to this as indicative of the "over-federalization" of crime. As far back as September 2008—prior to the Obama Administration—federal agencies employed approximately 120,000 full-time law enforcement officers—that is, the equivalent of 40 officers per 100,000 citizens—all of whom are authorized to make arrests and carry firearms in the United States. These federal agents work for such disparate entities as the Veterans Health Administration, the Fish and Wildlife Service, and the Bureau of Land Management.

We have all heard the anecdote about the Fish and Wildlife Service employing a SWAT team. The IRS has one as well—which should be of great concern to all of us. I am very concerned about these federal regulatory agencies exercising law enforcement authority, because it can only serve to blur the lines between truly criminal and regulatory conduct and weaken the Founding Fathers' intent that the federal government play a limited role in criminal enforcement.

The question, then, is whether and to what extent Congress should act to address this matter. I look forward to hearing from our distinguished panel about the scope of the over-federalization issue, and am very interested in your thoughts about corrective measures Congress might take.

I want to thank the witnesses for appearing today, and look forward to hearing your perspectives on this important issue.

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[The prepared statement of Mr. Scott follows:]

**Prepared Statement of the Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Over-Criminalization Task Force of 2014**

Our government's greatest power, the conduit by which it can deprive a citizen of liberty or even life itself, is criminal law. Aware of this inherent danger, the Framers of our Constitution enshrined significant safeguards in the Bill of Rights to protect citizens from unjust criminal proceedings.

Under the Constitution, states have the "police power" and should have primary jurisdiction over crimes. But for the past several decades, Congress has responded to headlines with knee-jerk federal criminal legislation, without inquiry into whether the federal government should be involved at all. In 1998, the American Bar Association (ABA) Task Force on the Federalization of Criminal Law revealed a startling fact: More than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970, largely in matters previously left to the states. Congress was superimposing federal crimes at record pace on essentially localized conduct that was already criminalized by the states.

Federalizing crimes traditionally handled in states not only taxes an already-strained federal court system, but also shifts prosecutorial priorities, increases selective prosecutions, and undermines state and local anti-crime efforts. It duplicates state enforcement efforts, at high cost to the taxpayer, and floods federal courts with cases that do not belong there, effectively closing federal courthouse doors to deserving litigants. Defendants have often found themselves subject to federal and state prosecution for the same act, undermining the Fifth Amendment protection against

double jeopardy. What the Framers were afraid of is occurring, and overfederalization is largely to blame.

When it comes to criminal law, Congress has abandoned the basic Constitutional principle of restraint. Matters that can be adequately handled by states should be left to states, and only those matters that cannot be so handled should be addressed by the federal government. When we enact criminal legislation, the issue of "need" should be considered. Is a valid purpose served by creating crimes at the federal level, particularly if it duplicates crimes at the state level?

For example, why should carjacking be a Federal offense? State and local law enforcement have been investigating and prosecuting carjacking since long before Congress made it a Federal crime, and they've been doing the job quite well. Wouldn't it be better for the Federal government to provide resources in the form of training, professional development, use of crime labs, consultation regarding best practices in law enforcement, etc. in such a situation? These are the kinds of questions we should be asking before we enact more federal criminal legislation, and we should scrutinize the laws we already have accordingly.

Although many members of Congress remain prone to viewing "tough on crime" as the correct response to highly publicized tragedies and criminal acts, the tide is turning. Bipartisan recognition of the real-world effects of over-federalization in criminal law is growing across the political spectrum, from the Heritage Foundation to the ACLU.

It's past time for Congress to rein in its tendency to federalize criminal law. To that end, let's consider limiting federal criminal jurisdiction to the following types of cases:

- Offenses against the federal government or its inherent interests
- Criminal activity with substantial multi-state or international aspects
- Criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise
- Serious, high-level or widespread state or local government corruption

Congress regularly insists upon restraint from the Executive and the Judicial Branches of government, yet often fails to restrain itself in the area of criminal law. The result has been a waste of tax dollars, a crippling of the federal courts' ability to fairly administer criminal and civil justice for all citizens, and an unwise concentration of law enforcement power in federal agencies.

It's time for us to exercise the same restraint we require in the other branches of government.

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[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. I am very pleased to be here at the second hearing of the Over-Criminalization Task Force, following its reauthorization earlier this year.

As we all heard last year, the U.S. Code currently contains an estimated 4,500 federal crimes, and Congress is adding new crimes at a rapid rate—approximately 500 per decade. The fact that this is only an estimate means that no one knows exactly how many provisions in the federal Code subject American citizens to criminal sanctions.

This is due in large part to what many have termed "legislation by accumulation," which means that Congress has simply accumulated new offenses for more than 200 years by creating new federal laws—often, in response to a national crisis—or expanding existing laws. It has done this with little consideration given to whether the conduct in question should be criminalized at the federal level, or is better left to the states.

This accumulation of offenses has resulted in the "over-federalization" issue this Task Force confronts today. As Chairman of the House Judiciary Committee, the over-federalization of the criminal law is of particular concern to me. It is clear that no one benefits when the federal government indiscriminately criminalizes conduct without regard to prudential and constitutional limitations.

Over-federalization has seeped into every facet of the criminal law—from traditionally "street-level" crime like kidnapping to white collar fraud cases. For example, many scholars in this area have noted that the Department of Justice has employed novel legal theories in prosecuting traditional mail and wire fraud cases, in order to force defendants to settle. Earlier this year, I sent a letter to the Department seeking information on the $8.1 billion—that's billion with a "B"—in civil and criminal fines that they claimed to have recovered in fiscal year 2013. Constantly seeking a "record penalty," which has been the M.O. of this Justice Department, strikes me as a potentially *political* objective. However, political motivations should not drive settlements in criminal cases.

Additionally, I am cognizant of the issues raised by many regarding the concurrent jurisdiction exercised by federal and state law enforcement in many areas, particularly with regard to violent crime. Under my leadership, this Committee is dedicated to ensuring that the legislation we produce addresses conduct that is appropriately handled by federal law enforcement, so the resources of federal courts and agencies can be directed most effectively. The American people deserve no less.

I thank our distinguished panel of witnesses, and look forward to their testimony.

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[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**

Today's hearing focuses on the serious problem of over-federalization of crime.

The broad scope of this problem is evidenced by the fact that there are approximately *4,500 federal crimes*—many of which overlap with state law—that are codified in various titles of the United States Code.

Our analysis of this problem should begin where there is the greatest extent of overlap, namely, federal and state drug laws.

Even though the federal government traditionally relies on state and local law enforcement agencies to address illegal drug use under nonfederal law, *more than 100,000* individuals are currently incarcerated in *federal* prisons for violating *federal* drug laws.

This is the result of our Nation's long-term, though largely ineffectual "War on Drugs," which annually costs American taxpayers $51 billion.

It is also important to keep in mind that the vast majority of these individuals have been convicted of low level, non-violent federal drug crimes that are nevertheless subject to mandatory minimum sentences that restrict judicial discretion.

And, these sentences are generally far more severe than anything than would be handed down in a state court.

Additionally, state and federal drug laws are sometimes in conflict. For example, 20 states have legalized the use of marijuana for medical use while Colorado and Washington have now legalized its recreational use. This has caused varying levels of conflict between federal and state enforcement priorities.

Rather than pursue mere possession charges, federal, state, and local law enforcement should better coordinate their efforts to target the high-level distribution of illegal drugs and to ensure that criminal enterprises and cartels do not infiltrate the realm of legalized marijuana use.

**In addition,** we should consider how federal law enforcement can—overall—work with their state and local counterparts to maximize efficiencies in fighting crime.

In the wake of the Great Recession, many state, county, and municipal police forces continue to struggle with tight budgets and reduced resources to combat crime in their communities.

To address that critical need, federal officers should be utilized to support state and local law enforcement agencies.

For example, the FBI could provide its expertise for investigating multi-state crime rings, as discussed at the hearing on human trafficking held earlier this week.

The Fish and Wildlife Service could lend its proficiency in stopping poaching on state and federal land.

And, the EPA could assist in criminal investigations of criminal polluters, such as the recent case in New York where two companies were prosecuted for dumping thousands of tons of asbestos debris directly next to the Mohawk River.

Federal and state law enforcement collaboration would advance common goals of fighting crimes and reducing wasteful duplication of effort.

Finally, we should consider the role Congress itself has played regarding the problem of over-federalization of crimes.

On average, Congress establishes 50 new federal crimes per year.

Unfortunately, these new laws are often considered in a reactionary rather than deliberative milieu.

Thus, before establishing any new federal crime, we should first ask:

- is there a strong national interest warranting action,
- are the states in a better position than the federal government to address the problem; and
- is a new law really needed when the issue may simply involve a matter of better enforcement.

Just yesterday, the Crime Subcommittee held a hearing on the dire problem of domestic minor sex trafficking.

At that hearing, it became very clear that the best way to provide immediate relief would be to enforce *existing* local, state, and federal laws that are already on the books.

Accordingly, I look forward to hearing from our witnesses on these issues.

I also hope we will incorporate what we learn today about over-federalization into the Task Force's upcoming hearings on criminal penalties and the collateral consequences of federal convictions.

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Mr. SENSENBRENNER. I will introduce our witnesses and we can get going right away.

Mr. James Strazzella teaches at Temple University's Beasley School of Law in Philadelphia, where he holds the James G. Schmidt Chair in Law. He teaches in the area of criminal law and procedure, and has been active in a long list of efforts to improve the court system.

He previously served on the faculty of the University of Pennsylvania, where he was also the vice dean of the faculty and served as acting dean at Temple Law School. He has been a visiting professor at Georgetown Law School and has lectured widely abroad.

He previously served as assistant U.S. attorney for the District of Columbia, involved in the trial and appeal of criminal cases. He has also been appointed by the Federal courts to appear in Federal cases and act as amicus as well as a Federal district court master.

For over a decade, he chaired the Pennsylvania Supreme Court committee that promulgated the rules for the criminal procedure covering Pennsylvania courts. He is the author of numerous publications, including several on the growth of Federal criminal law.

He served on and was a reporter for the American Bar Association's Bipartisan Task Force on the Federalization of Criminal Law.

Mr. Joseph Cassilly is the past president of the National District Attorneys Association and is on the NDAA board of directors. He

is an associate member of the American Academy of Forensic Sciences and has held two terms as president of the Maryland State Attorneys Association.

Previously, Mr. Cassilly was an adjunct faculty member at Hartford Community College and an assistant State's attorney.

In 1982, he was elected State's attorney for Hartford County and has been reelected six times

During this time, he helped to establish two narcotics task forces, a domestic violence section, a child advocacy center and the family justice center, three drug courts, a DUI court, and a mental health court.

He earned his bachelor's degree in psychology from the University of Arizona and his juris doctorate from the University of Baltimore Law School.

Without objection, witnesses' opening statements will be entered into the record entirely. I ask the witnesses to summarize their testimony in 5 minutes or less. And to help you stay within the 5 minutes, there is a green, yellow, and red light in front of you, and you know what that means.

Mr. Strazzella?

**TESTIMONY OF JAMES A. STRAZZELLA, PROFESSOR OF LAW/ JAMES G. SCHMIDT CHAIR IN LAW, TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW**

Mr. STRAZZELLA. Thank you, Mr. Chairman. I have met red lights before.

Mr. SENSENBRENNER. Could you please activate your mike? The green light means it is on.

Mr. STRAZZELLA. Thank you, Mr. Chairman. Is it working?

Mr. SENSENBRENNER. No.

Mr. STRAZZELLA. Mr. Chairman, is it working now?

Mr. SENSENBRENNER. No. We have a technical glitch.

Mr. Cassilly, let's try your mike.

Mr. STRAZZELLA. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. Gotcha.

Mr. STRAZZELLA. As always, I am pleased to respond to the Committee's invitation to testify. The dramatic increase in the amount of Federal criminal statutes raises an issue of fundamental and pervasive importance to the Nation and to the American criminal justice system.

I am not representing any group in testifying today, but unsurprisingly, I do draw upon the American Bar Association's Bipartisan Task Force on Federalization of Criminal Law, for which I served as reporter.

My remarks here will be brief. They are confined to one aspect of the issue, and that is the mounting and duplicating patchwork of Federal and State crimes that has grown up with startling speed in the last few decades.

In this area of federalization, the core conduct is often essentially local in nature. And moreover, the conduct usually does not lack for zealous prosecution in State agencies.

Criminal law, Federal criminal law included, has important roles to play in our society, I am sure we all agree. It seeks to protect

our people, but it also brings to bear great societal power upon members of our society.

The law's awesome power and protection needs to be as principled, responsible, and as just as it can be.

Today, there is a continuing crisis in the overlap of Federal and State law, particularly in the areas previously covered only by State law. Much is at stake in this.

It is a mistake to think that criminalization is cost-free. There are significant costs associated with the use of Federal criminal law, costs to our society and governmental structures in general, and to governmental entities involved in the devising, enforcing, and adjudicating these, as well as to individuals who are investigated and charged.

Federal criminal law can best be focused on issues of truly national or international Federal interests, not on areas that appropriately belong with the State offense systems.

Indeed, especially in this era of limited resources, as well as expanding national and international concerns, the resources of Federal criminal law—that is, Federal investigative agencies, Federal courts, Federal prosecutors, and other Federal agencies, including, of course, the critical attention of important Committee such as this—can best be focused on crime that involves a truly Federal interest.

I would like to briefly underscore some of the costs of over-federalization.

Arising from the accumulating patchwork of overlapping Federal and State law about similar local conduct, it is easy to overlook these serious systematic and practical costs involved in the troubling federalization of conduct, formerly left entirely to the States.

To give a short list, one can borrow from the ABA's report and its crystallizing list of these costs. They underscore the fundamental detrimental long-term effects of federalization, where there is no important Federal interest, only a view that the conduct is wrong and should be prosecuted by somebody.

Overall, inappropriate federalization constitutes an unwise allocation of scarce resources, resources that are needed to meet the genuine issues of crime. Some of the particular costs of unwarranted federalization are important systematic effects. It can undermine the delicate balance of Federal and State systems and have a detrimental effect on State judicial, prosecutorial, and investigative personnel, who bear the major responsibility for the enforcement of criminal law.

We all know, I think, that 95-percent-plus of the serious crimes in this country are prosecuted in the State courts and will remain so.

It can dissipate State citizen power and move more decision-making to the Federal level. Other important costs are placed upon Federal judicial and law enforcement institutions. It throws more locally oriented cases into the Federal trial and appellate court system—we know the budget problems the Federal courts are having—jostling for Federal court resources and potentially delaying other cases of a true Federal interest, criminal or noncriminal, to some extent. And to some extent, it adds these cases to the already expensive Federal prison system.

Since criminalizing conduct empowers agencies to investigate the condemned conduct, the more Federal criminal offenses there are both empower Federal investigating agencies and can divert their attention from working on more truly Federal interest crimes.

Some of these costs are also real in terms of accused persons—this is an inequality problem, I believe—whose fate and potential sentence, always more severe in the Federal system, will often unequally rest upon a prosecutorial decision to select the same essential conduct for prosecution in either Federal or State court, or, as we know, in both courts.

Of course, there is also an effect on the legislative branch with the accumulation of a larger and larger body of law that requires more and more congressional attention to monitoring agencies.

I can sum up. I have stated these as well in the statement. I can sum up with the time evaporating, by saying that our criminal complex system is valuable and worth constant improvement. It is well-worth remembering that in the important debate about how to curb crime, it is crucial that the American justice system not be harmed in the process. There is a long list of disparities stated in my written statement that tries to itemize what these disparities are.

The Nation has long justifiably relied on a careful distribution of power to the national——

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. STRAZZELLA. Thank you.

[The prepared statement of Mr. Strazzella follows:]

Written statement of

**James A. Strazzella***

to the

JUDICIARY COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES
OVER-CRIMINALIZATION TASK FORCE

hearing on
Over-federalization of Criminal Law
March 27, 2014

* James A. Strazzella
*Professor of Law/James G. Schmidt Chair in Law*
*Temple University Beasley School of Law*
*1719 N. Broad Street; Philadelphia, PA 19122*

I appreciate the Committee's invitation to testify on the important topic of the increasing federalization of substantive criminal law. I will be brief and confine myself here to only part of what might be said about this fundamental issue. These remarks focus on the increasing overlap of federal criminal law with traditionally state law concerning essentially local crime. In this area, serious trouble has arisen and continues to mount with the piece-by-piece accumulation of more and more federal criminal law directed at essentially local conduct.

I am not representing any group or organization in these remarks. My views have obviously been formed over many years, and in many experiences and discussions with others. This includes my work as a prosecutor and work with state court systems. It also includes my efforts with the American Bar Association Task Force on the Federalization of Criminal Law, for which I served as Reporter.[1] Nevertheless, I do not purport to speak for anyone other than myself today.

I acknowledge the importance of federal criminal law and the important sphere of federal law enforcement. Indeed, especially in an era of limited resources, as well as expanding national and international concerns, the resources of federal courts, agencies and other entities (including – if I may respectfully suggest it – the critical attention of important committees such as this) can best be focused on issues of truly national or international federal interest, not ones that appropriately belong with the state offense systems. I want to emphasize why this is so, largely because there are easily overlooked costs involved in the increasingly troubling federalization of conduct formerly left to the states. These often overlooked costs are serious, systematic, and practical. They stretch the basic fabric of our important and complex criminal law system.

The many public servant-oriented people who work in the field of criminal law for the benefit of our citizens deserve great respect, as does the law itself. As do others, I recognize the important role and power of the criminal law in general. It has great importance in maintaining a just society for our citizens and it has, as well, an awesome power that can be brought against the Nation's individuals. Such power needs to be as responsible, as principled, and as just as it can be.[2] Discerning the proper limits of the criminal law is a difficult task compounded by the state-

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[1] REPORT ON THE FEDERALIZATION OF CRIMINAL LAW (ABA 1998) (James Strazzella, Reporter). Unsurprisingly, my remarks at this hearing draw on what was written there (often in greater detail); references to "ABA REPORT" are to that publication.

The 17-member task force was bipartisan in nature. It was initiated by then ABA Criminal Justice Section leader William W. Taylor, III, and chaired by former Attorney General Edwin Meese III. The task force met over many months and was composed of federal and state prosecutors, legislators from both parties, state and federal judges, law enforcement representatives, and others with wide experience in the federal and state criminal law field.

[2] Professor Herbert Wechsler noted this point articulately:

Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which people place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in

federal system of our nation.

In its proper sphere, *federal* criminal law is important and occupies a vital place in our society.[3] In fact, precisely because federal law has such important work to do, it is essential that it not wander into unnecessary or improvident or diverting areas, including into areas that best reside with state law or areas best left to other restraining devices (civil remedies, regulatory systems, moral restraints, etc.).

A governmental system such as ours, one that affords a set of laws sides by side – federal and state – is already a delicate system. It is one that needs to be finely tuned, well-thought-out, and intently guarded. With the growth of federal law demonstratively covering more and more traditionally state-crime areas, a mounting and duplicating patchwork of crimes has grown up in the last few decades. In this area – whatever the theoretical jurisdictional hook on which Congress hangs its constitutional power to enact such legislation – the conduct involved is often, at its core, essentially local in nature (car-jacking or drive-by shootings, already crimes of robbery/assault in all states, are examples); it usually does not want for zealous prosecution by state agencies.

There is a widespread bipartisan belief that in many areas of traditional state crime, the impact of federalization continues to produce a worrisome effect on the American criminal justice system and it undermines its principled future. Beyond matters of principle, the practical effects can be griping and troubling. There has developed a widening, optionally-selected system of parallel legal consequences for essentially the same conduct.

Putting aside those federal crimes that sensibly worry about intrusions on federal functions, sites or agents, today it would be difficult to explain to the average citizen the line between many other federal and state crimes. No one would think it initially wise to set up a governmental system in which the same governmental state or nation was given the power to choose from two offense lists, charging either of two offenses for the same conduct (or indeed compounding/prosecuting both offenses), with the two parallel options providing

penalties of different severity range,
with different imprisonment systems,
tried in different court systems with different procedures and rights,
differently selected judges,

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> jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be: Nowhere in the entire legal field is more at stake for the community or for the individual.

Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

[3] As the *Preface* to the ABA REPORT put it, "It is precisely because federal law enforcement is so necessary in dealing with indisputable federal interests that a legislative instruction to federal prosecutors to utilize their time and resources to prosecute relabeled common law crimes ought to be restrained." ABA REPORT, pp. 3-4.

before differently composed juries,
under different evidentiary rules,
and with other important different consequences

– the choice of option being left to the basically nonreviewable discretion of one side of the case. That, however, is the dual system that is more and more emerging as the federal overlap mounts. The ABA REPORT task force report articulated it this way: In many areas, the expanding federal criminal law "is moving the nation toward two broadly overlapping, parallel, and essentially redundant sets of criminal prohibitions, each filled with differing consequences for the same conduct. Such a system has little to commend it and much to condemn it."[4]

The amount of individual citizen conduct that is now potentially subject to federal criminal control has increased in startling proportions in the last several decades, beyond any understandable interest in dealing with federal programs, truly interstate issues, or international crime. The reasons for this growth have been extensively discussed elsewhere and are undoubtedly familiar to the Committee members. However, it seems safe to say that a major factor in this growth has been the pressure on Congress to "do something" (or appear to be doing something) about the subject of violent or highly visible crime. No one knows such pressures better than the Members of this Committee. Crime legislation certainly seems politically popular. I acknowledge the difficulty and challenge of resisting unwarranted legislation. But a just, rational, and sensible system is essential.

Of course, simply legislating a crime does not mean that it will be prosecuted or otherwise effectively enforced. In fact, limited resources on the investigative, prosecutorial and judicial sides will mandate that only a limited number of federal crimes will be enforced at any given time, in light of the selective prioritization that investigative agencies and federal prosecutors must necessarily employ. There are important down-sides to the increasing accumulation of federal law, so it is important to emphasize the easy-to-overlook reality that the enactment of such overlapping federal and state crime does has serious adverse consequences.

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[4] ABA REPORT, p. 55. (Professor Sara Sun Beale of Duke Law School has noted this phenomenon.) The ABA Report continued (id.):

> The principles of federalism and practical realities provide no justification for the duplication inherent in two criminal justice systems if they perform basically the same function in the same kinds of cases. There are no persuasive reasons why both federal and state police agencies should be authorized to investigate the same kind of offenses, federal and state prosecutors should be directed to prosecute the same kinds of offenses, and federal and state judges should be empowered to try essentially the same kind of criminal conduct. When the consequences of these parallel legal systems can be so different, increases in the scope of federal criminal law and the areas of concurrent jurisdiction over local crime make it increasingly difficult, if not impossible, to treat equally all persons who engaged in the same conduct and these increases multiply the difficulty of adequately regulating the discretion of federal prosecutors. Moreover, it makes little sense to invest scarce resources indiscriminately in a separate system of slender federal prosecutions rather than investing those resources in already existing state systems which bear the major burden in investigating and prosecuting crime.

Despite the tendency to think that enacting a new crime may be "cost-free," this is not the case. Some of the real costs are to our valued American governmental system and the criminal justice system as a whole; some are costs to the federal courts and other agencies; some are human tolls; some are financial.

To give a short list, one can borrow from the ABA REPORT'S crystalized list of these costs (p. 50) in underscoring the detrimental long-term effects of federalization where there is no important federal interest, only a view that the conduct is wrong and should be punished.
-Overall, inappropriate federalization constitutes an unwise allocation of scarce resources that are needed to meet the genuine issues of crime.
-Unwarranted federalization can undermine the delicate balance of federal and state systems and have a detrimental effect on *state* judicial, prosecutorial and investigative personnel, who bear the major responsibility for enforcement of criminal law; it can dissipate citizen power and move more decision-making to the federal level.
-Other important costs are placed upon federal judicial and law enforcement institutions: It throws more locally-oriented cases into the federal trial and appeal courts, jostling for already stretched federal court resources and potentially delaying other cases of a true federal interest (criminal or non-criminal); to some degree it adds these cases to the already expensive federal prison system; criminalizing conduct empowers agencies to investigate that conduct; it will either require more federal agencies or divert an existing agency's attention from working on more truly federal-interest crimes.
-Some of these costs are also real in terms of accused persons, whose fate and potential sentence will often unequally rest on a prosecutorial decision to select the same essential conduct for prosecution in federal or state court, or both.
-Of course, there is also an effect on the Legislative Branch, with the accumulation of a larger and larger body of law that requires more and more Congressional attention to monitoring and considering federal criminal statute amendments and implementation.

Thank you again for your invitation to make a few remarks on this complicated and difficult, but very important, issue. Our complex criminal justice system is valuable and worth constant improvement. It is also worth remembering that "In the important debate about how to curb crime, it is crucial that the American justice system not be harmed in the process" (as the ABA REPORT p. 56 put it). "The nation has long justifiably relied on a careful distribution of powers to the national government and to state governments. In the end, the ultimate safeguard for maintaining this valued constitutional system must be the principled recognition by Congress of the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization."

I would be pleased to answer the Committee members' questions.

JS. March 2014

Mr. SENSENBRENNER. Mr. Cassilly?

**TESTIMONY OF JOSEPH I. CASSILLY, STATE'S ATTORNEY FOR HARFORD COUNTY, MARYLAND, AND PAST PRESIDENT, NATIONAL DISTRICT ATTORNEYS ASSOCIATION**

Mr. CASSILLY. Thank you, Chairman Sensenbrenner, Ranking Member Scott, Members of the Subcommittee. I am testifying today on behalf of the National District Attorneys Association, the oldest and largest organization, representing over 39,000 State and local prosecutors who prosecute 95 percent of criminal cases in the United States.

I have been a prosecutor in Maryland for 37 years. And as a prosecutor, my experience with Federal agencies has been largely one of cooperation. But the following is an example of how over-federalization can be more than just too many laws on the books.

On December 3, 2002, an 8-year-old little girl did not return home from school in Baltimore. City police gathered evidence that pointed to the mother's boyfriend, Abeokuto, as a suspect. The following day, in an effort to divert suspicion from him, Abeokuto mailed an anonymous ransom demand to the mother. A laboratory examination of that letter found the suspect's fingerprints and DNA.

The U.S. attorney for Maryland obtained a warrant for sending a threat through the U.S. mail, a 10-year felony.

The suspect fled from Maryland. On 12 December, the little girl's body was found in a remote wooded area in Hartford County, in my jurisdiction. Her throat had been cut several times, and she had been struck in the head.

Because of the short winter's day, the crime scene was to be secured overnight and processed in the daylight to avoid destroying or overlooking evidence. A State warrant charging the suspect with capital murder, kidnapping, and extortion was issued.

That evening, I received a phone call from the officers guarding the crime scenes. An assistant United States attorney and a team from the FBI had shown up and ordered the State police to turn over the crime scene. I told them the evidence that could be found around the girl's body added nothing to the Federal case, but we would share what we found with the feds.

That didn't dissuade them from wanting to stomp all over my crime scene. I said I would have anyone who crossed the crime scene tape arrested. The feds left.

A week later, the suspect was arrested in Birmingham, Alabama, by the FBI and was returned to Maryland, but the U.S. attorney refused to allow the State to have access to the defendant to pursue our prosecution, and placed the defendant in a holding facility in Maryland as far from my county as possible.

The U.S. attorney never spoke to the victim's family, nor would the U.S. attorney speak with me to explain why it was more important to pursue a 10-year Federal crime than a death sentence for murder. I even wrote to the Attorney General of the United States to intervene.

After 6 months of frustration, I held a press conference in front of the Federal courthouse. I accused the U.S. attorney of publicity-

seeking and subverting real justice in the case of this child and her grieving family.

Two weeks later, the U.S. attorney for Maryland stepped down and custody of the defendant was surrendered to the State.

My written testimony contains a similar, more recent example from New York.

Erasing unused laws from Federal books makes a strong statement of Federal priorities. The FBI investigated a $70,000 theft that occurred on the Aberdeen Proving Ground, a Federal installation beside my county. But because the law did not meet the U.S. attorney's prosecution threshold, the FBI asked me to prosecute.

I have seen cases where criminals drive onto Federal property from a State jurisdiction to deal drugs, because if they were caught, they would not meet Federal prosecution thresholds.

The Attorney General directed U.S. attorneys not to prosecute low-level drug offenses, despite the fact that U.S. attorneys had not prosecuted low-level drug offenses for decades. The Department of Justice has targeted the largest or most publicity-worthy drug offenses, and has left the rest for State and local prosecutors to handle.

When DOJ chooses not to enforce certain Federal laws in States which have legalized marijuana, in some cases not prosecuting dealers who are selling hundreds of pounds a week, but prosecutes those same cases in other States, it sends the message to Americans it is acceptable to break Federal law because the Federal Government inequitably applies the law.

These examples illustrate that if the U.S. attorneys cannot protect Federal interests, it is unlikely that they will act to prosecute most of the laws which cover State interests and concerns.

In reviewing existing or future Federal legislation, the issue of who has the resources to investigate and prosecute a crime should be considered, and whether utilization of those resources will result in neglecting other areas which should be a Federal priority.

Chairman Sensenbrenner, Ranking Member Scott, Members of the Committee, thank you for this opportunity, and I will be glad to answer any questions.

[The prepared statement of Mr. Cassilly follows:]

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**Written Testimony of**

**The Honorable Joseph I. Cassilly**
**State's Attorney for Harford County, Maryland**
**and**
**Past President, National District Attorneys Association**

**Hearing on "Over-Federalization"**

**House Judiciary Committee**
**Subcommittee on Crime, Terrorism, and Homeland Security**
**United States House of Representatives**

**March 27, 2014**

Chairman Sensenbrenner, Ranking Member Scott, members of the Subcommittee, thank you for inviting me to testify today on behalf of the National District Attorneys Association (NDAA), the oldest and largest organization representing over 39,000 district attorneys, State's attorneys, attorneys general and county and city prosecutors with responsibility for prosecuting 95% of criminal violations in every state and territory of the United States.

I am a Past President of the National District Attorney's Association, have been a prosecutor in the State of Maryland for 37 years and am currently the elected State's Attorney for Harford County, Maryland. During my time as a prosecutor my experience with Federal agencies has been largely one of cooperation, but the following is an example of how over-federalization can be more than just too many laws on the books.

On 3 December 2002, an 8 year old little girl did not return home from school in Baltimore. By 6 pm, Baltimore city police homicide and missing persons units were involved in the search. By midnight evidence was pointing to the mother's boyfriend, Abeokuto, as a suspect and his car was then seized for processing.

The following day in an effort to divert suspicion from him Abeokuto mailed an anonymous ransom demand to the mother suggesting that the kidnapping may have been committed by enemies of the girl's father. A few days later, a laboratory examination found the suspect's fingerprints and DNA on the letter.

The U.S. Attorney for Maryland obtained a warrant for sending a threat through the U.S. mail, a ten-year felony. The suspect had fled from Maryland. On 12 December, two boys walking home from school found the little girl's body in a remote wooded area in Harford County, in my jurisdiction. Her throat had been cut several times and she been struck in the head. Because of the short winter's day it was agreed that the crime scene would be secured overnight and processed in the daylight to avoid destroying or overlooking evidence. A warrant charging the suspect with a capital murder, kidnapping, extortion and related counts was issued.

At 9:00pm that evening I received a phone call from the officers at the crime scene. An Assistant U.S. Attorney and a team from the FBI had arrived to process the crime scene and had ordered the state police to turn over the crime scene. I had the officer hand his phone to the Assistant U.S. Attorney so I could ask him how the evidence that could be found around the

girl's body added anything to the Federal Threat by Mail case. That didn't dissuade him. I told him we would share what we found with the Feds. That didn't dissuade him from wanting to stomp all over my crime scene. I told him that I would have him and anyone else who crossed the crime scene tape arrested. After my final threat, the Feds finally left.

A week later the suspect was arrested in Birmingham, Alabama by the FBI. He was returned to Maryland, but the U.S. Attorney refused to allow the State to have access to the defendant to pursue our prosecution and placed the defendant in a holding facility in Maryland as far from my county as possible so that it took his State public defenders and entire day to drive to see him and back.

The U.S. Attorney would not take my phone calls or answer my letters as to why it was more important to create legal issues pursuing a ten year federal crime than a death sentence for murder. I attempted to negotiate with the Department of Justice and I also wrote to the Attorney General of the United States. After six months of frustration, I called every television station in Baltimore and asked them to meet me in front of the Federal courthouse. There I blasted the U.S. Attorney for being a publicity seeking ego-maniac who was subverting real justice in the case of this child and her grieving family. Two weeks later, the U.S. Attorney for Maryland stepped down and the custody of the defendant was surrendered to the State. I was left to wonder why there was no mechanism to have resolved this more quickly without all the wasted time and resources.

In another example, William J. Fitzpatrick, District Attorney of Onondaga County, New York and member of NDAA's Board of Directors, informed me of a more recent story of Federal over-reaching. In March of 2013, David Renz abducted a single mother and a 10-year old child in the parking lot of a suburban mall during the evening hours in Onondaga County in Central New York. Renz had a knife and showed what appeared to be a gun, but was later identified as an air pistol. Renz took his two victims and bound the mother to the front passenger seat of her car using plastic twist tie handcuffs. The 10-year old was bound and forced to get in the back seat.

Leaving his own car in a parking spot at the mall, Renz drove them to a remote road just outside of the mall. He ordered the child to disrobe and then ordered her to don pantyhose. He proceeded to cut the pantyhose with his knife and then raped her while Mom sat helpless in the front seat.

After Renz violated the child, the mother managed to partially free herself and open the door. She screamed at her daughter to flee and both managed to get out of the car. Renz proceeded to repeatedly stab the mother while the daughter fled in an opposite direction. Two good Samaritan drivers approaching the scene from opposite directions stopped to render aid - one to the mom, Laurie Bresnehan, and the other to the little girl. The mother expired at the scene but did learn her daughter was safe before she died from her wounds. The little girl suffered severe injuries and tears to her vaginal area which may prevent her from ever conceiving children. She is now back at school and living with one of mom's relatives as the mom was a single parent.

Fitzpatrick's chief Assistant District Attorney received a call from the head of the criminal division of the U.S. Attorney for the Northern District of NY and was told they would be handling the prosecution and asked that we "stand down." The NY Assistant District Attorney advised that the on-call homicide Assistant District Attorney worked the case with the NY State Police all night, the State of New York had already charged the defendant with Murder 1st degree and that Renz was being arraigned as they were speaking. Fitzpatrick contacted the U.S. Attorney and had a conversation with him. The Federal Attorney explained that there was a pending Federal pornography charge against Renz and this alone would mandate that they take the case and more importantly, it's a carjacking giving them jurisdiction.

Fitzpatrick asked how the carjacking theory could possibly apply as the defendant drove to the scene in his own car and obviously had no intent to steal the victim's car. Fitzpatrick ended the conversation by simply saying he would never relinquish the case and was going to call Washington. Hours later, Fitzpatrick received a call saying the US Attorney was going to "stand down." Days later, it became clear that Renz had been on federal pre-trial release from his pornography charge, with the consent of the U.S. Attorney, and had been required to wear an ankle bracelet monitoring his whereabouts. Media comments from the U.S. Attorney after this became public knowledge suggested that Renz was a "computer genius" who had managed to thwart the monitoring capability of the ankle bracelet. In reality, the alarm on his bracelet had gone off over 40 times, including the night of the rape and murder, and the company reported that it was directed to ignore these alarms by the federal probation department. Renz pled guilty to Murder 1st in state court and will be sentenced to life without parole as the State of New York

has no state death penalty. The child's guardians have expressed unequivocally that they have no interest in prolonging this case while the feds ruminate about the death penalty.

Despite that, and despite the specious claim of jurisdiction, the Northern District of New York has never submitted the paperwork to Washington to get the process started to seek death. To Fitzpatrick's knowledge, Attorney General Holder has never sought death in a carjacking case. Admittedly the prospect of death may have prodded Renz to plead guilty in state court, but it's unconscionable to learn that federal authorities haven't even spoken to the victims' family since July, when all the family told the Assistant U.S. Attorney that they are not supporting death for Renz.

Erasing unused laws from the Federal books can also make a strong statement of Federal priorities. I have prosecuted thefts that occurred on the Aberdeen Proving Grounds and were investigated by the FBI because the $70,000 loss did not meet the U. S. Attorney's prosecution threshold. I have seen cases where drug dealers drive onto Federal property from the State jurisdiction to deal drugs because if they were caught they would not be prosecuted because the amounts of drugs they possessed would not meet existing thresholds.

The U.S. Attorney General and Deputy Attorney General recently issued guidance to U.S. Attorneys directing them to not prosecute low-level drug offenses, despite the fact that U.S. Attorneys have chosen not to prosecute low level drug offenses for decades. The Department of Justice has targeted the largest, most publicity-worthy drug offenses and has left the rest of the crimes for State and local prosecutors to handle despite already handling 95% of the criminal

violations in the United States. Also, when the Department of Justice chooses not to enforce certain sections of the Controlled Substances Act in States which have passed State law legalizing marijuana – in some cases, dealers who are selling hundreds of pounds a week in the States of Colorado and Washington - it sends the wrong message to Americans; it is now acceptable behavior for its citizens to break Federal law because the Federal government believes it has the right to pick and choose which priorities it needs to enforce.

I mention these examples because I believe they illustrate that if the U.S. Attorneys cannot act to protect Federal interests it is unlikely that they will act to prosecute most of the laws which cover States' interests and concerns. In reviewing existing or future Federal legislation the issue of who has the resources to investigate and prosecute a crime should be considered and whether utilization of those resources will result in neglecting other areas which should have a higher Federal priority.

Chairman Sensenbrenner, Ranking Member Scott, members of the Subcommittee, I appreciate the opportunity to testify before you on this important topic and will answer any questions which you may have.

Mr. SENSENBRENNER. Thank you very much, Mr. Cassilly. I think you have hit the nail on the head, on what this problem is.

I yield myself 5 minutes. I am not going to use the entire 5 minutes, because, for Members who were not here when the hearing began, I would like to get this done before we have to go to vote, so that the witnesses do not have to sit here for an hour and then most of us won't come back.

That being said, I got into a problem with a well-funded lobby group over the federalization of dogfights. And I ended up losing that battle and we passed a Federal law, criminal law, that makes it a Federal crime to put together a dogfight.

Now, dogfighting is disgusting and a nefarious behavior, but it seemed to me, but not to this group, that the State and local authorities could very easily handle dogfights or other animal fights. And again, we now have a Federal statute on it.

Now this is an example where people think that Congress is not concerned about an issue unless we pass a Federal crime and allow the feds to prosecute obviously nefarious behavior.

Where do we draw the line on that? And I would like to ask for a brief answer from each of you, and then I will go to Mr. Scott.

Mr. STRAZZELLA. It is a hard question, and the hard job falls to Congress, of course, often to say no. It is clear, I think to everybody, that the drive for much of the Federal law is interest groups and the popularity of making a Statement about crime.

I think there are two quick answers. One is, it is useful to insist on an identification of a Federal interest as compared to a State interest and to ask if there is some reason the State is not already prosecuting it, which is seldom the case in many of these instances.

And the second is to think of what systematic ways Congress, much more expert than I am, certainly, can set up to screen these kind of requests and buffer the Members from the political pressure to just enact it.

Sunset laws may do that. Some reports from some administrative agencies that help Congress identify what the costs of this statute would be, what it would divert, what it would really accomplish. As you know, many of these cases are never prosecuted by the feds, or terribly selectively prosecuted, so having some buffer that gives you the information to be able to say to people, "I am against this activity, but I don't think it needs to be a Federal crime," I think is a systematic advantage.

Mr. SENSENBRENNER. Mr. Cassilly?

Mr. CASSILLY. I agree with that, and I think the point really is that there should be a screening requirement, that to even request a Federal law be introduced that there must be a showing that the States are either unable or unwilling to enact laws to deal with the problem. But moreover than that, that there must be some sort of compelling Federal interest in either an interstate crime, which crosses borders and makes State enforcement difficult, or a crime that goes internationally through the Internet or wires or banking systems or some other international chain of commerce that would make State enforcement difficult.

The burden should be, it seems to me, on the people requesting the law. The burden should be on them to have them come in and make that case to Congress before the law can even be introduced.

Mr. SENSENBRENNER. Thank you very much.

I yield back the balance of my time.

The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman.

One of the things we have talked about is carjacking, which is obviously a State crime. States already have laws against robbery. But it is a crime of the day, and we have to have a political response. Obviously, that is one that we have identified that should be left to the States.

How would you analyze things like consumer ID theft that by its nature crosses state lines, although the crime is committed locally? Child trafficking and routine drug cases, in terms of whether they should be federalized or local? ID theft, child trafficking, and routine drug cases?

Mr. CASSILLY. Well, the ID theft tends to be multistate. I mean, once you have somebody's ID, you can order things on the Internet, have them shipped in from everywhere. You can perform financial transactions. So I think that there is a sharing there. There needs to be some cooperation between the State and the Federal authorities.

If there isn't a Federal law, we are not going to get cooperation from the Federal authorities to work some of those cases. So I believe that we do still need that.

We are dealing with interstate commerce. We are dealing with banks, federally regulated banks, when we are dealing with some of that sort of stuff. And you get into the issue of subpoenaing evidence, and acquiring records and transactions.

With respect to the drug issues, again, I think, as my testimony referenced, the feds haven't prosecuted low-level drug offenses, and I have been doing this for 37 years, in my memory.

On the other hand, the last five wires that my local county task force has run, the last fire five wiretaps on drug cases, have led us to suppliers in New York, New Jersey, Atlanta, Georgia, Florida, Arizona. So there is an area where, at some level, there continues to be the need for Federal drug legislation to assist the States. And I think that that should be the emphasis, as where do we need to assist the States without intruding on areas that the States can already cover.

And I am sorry I forgot your last one?

Mr. SCOTT. Child trafficking.

Mr. CASSILLY. I think that there you run into, in some instances, immigration issues, so again, I think that there is a role there for the Federal agencies to play, because when you have children, it is often difficult to identify them or trace back where they are coming from. I mean, we are talking sometimes 13- and 14-year-olds.

Mr. SCOTT. In terms of some of the cases in which you were involved, could the Federal Government be more helpful, not with the criminal law prosecution itself, but with coordination and things like use of laboratories and other expertise?

Mr. CASSILLY. Certainly, with identity theft. It would be very helpful with identity theft, if there were certain repositories where we can go to, to find out who else is having the problem, where is our victim's identity being used, shut down the use of certain Social Security numbers. So we can get some help that way, where we

know somebody's Social Security number has been stolen and has been replicated. It is often very difficult to get cooperation from the Social Security folks and other folks to kind of shut that down, to stop the additional commission of crimes.

So yes, I agree.

Mr. SCOTT. Mr. Strazzella, can you talk about the double jeopardy implications of having dual prosecutions?

Mr. STRAZZELLA. I can, briefly, not necessarily wholly accurately.

As we know, the Supreme Court has insisted that because there are different sovereigns involved—the United States, on one hand, and an individual State—that the Double Jeopardy Clause provision that you can't be put twice in jeopardy for "the same offense" does not cover that.

And so bank robbery, for example, which was made a crime in a period of new bank robbery activity, is basically a Federal crime, as I understand it, because the bank is federally insured. That is what makes it a Federal crime. It is also local crime. It is like any other robbery at a grocery store, in that sense.

As I recall the case, the Supreme Court has said they are two separate sovereigns, two separate crimes. They can both be prosecuted. You can be convicted of both, acquitted of one and then convicted.

There are, to the credit I think of both some State statutes and the Department of Justice, there are some internal administrative regulations, I believe, in the United States attorney manual about when it would be appropriate to prosecute a crime after any crime has been prosecuted in the State court, whether the feds would pick it up, or vice versa.

So there is some protection of that. But it is not constitutional protection.

It is a serious matter, I think. And I think one of the concerns in the background of my mind is the inequality of the feds picking up these cases. Carjacking is a perfect example. The ones they pick up are not because the car was taken in D.C. and found in Michigan, traveled over state lines. The statute is premised on any part of the car having moved in interstate commerce, which is the jurisdictional hook.

And what happens is the cars are made in Baltimore and shipped to D.C. They may be here 20 years before they are hijacked. And that gives them a jurisdictional hook. But it may be robbed at one corner and found three corners away.

My concern is that that inequality, which the courts have basically said is a matter for prosecutorial discretion, and the double jeopardy law, both may get expanded as Federal jurisdiction becomes more and more wide, so that we have a patchwork that is almost one on top of the other.

It would make no sense to have——

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Idaho, Mr. Labrador?

Mr. LABRADOR. Thank you, Mr. Chairman.

I want to follow up on your comments, Mr. Strazzella and Mr. Cassilly. I like where he was going.

The text of the Tenth Amendment says, "The powers not delegated to the United States by the Constitution, nor prohibited by

it to the States, are reserved to the States respectively, or to the people."

Do you believe that one of the major contributing factors to over-federalization of criminal law is a long-standing and bipartisan marginalization of the Tenth Amendment?

Or in other words, it seems like we, as Members of Congress from both parties, have forgotten what the Tenth Amendment is about, which is about letting the locals decide the local issues.

Mr. Cassilly, and then Mr. Strazzella.

Mr. CASSILLY. I think basically the problem with over-federalization is largely due to reacting to the crime of the month, so that Mr. Scott's example of carjacking, when carjacking was sort of the crime of the month, or certain other crimes that become—Michael Vick goes and gets involved with dogfighting, becomes the crime du jour, and everybody runs out to pass those sort of things.

So I really think that this is a political issue. There is pressure on Members of Congress to respond to this, to say this is bad, this is wrong. They don't want to say this isn't bad. They don't want to be perceived as saying, "We don't care about this," so a law gets passed.

Mr. LABRADOR. But if we understood, as Members of Congress, that yes, it is bad, but the local jurisdiction can handle bad things, that we are not the only ones who can handle bad things, do you think, Mr. Strazzella, that maybe we need to spend more time talking about that?

Mr. STRAZZELLA. The answer is yes. I don't want to pretend any expertise on the amendment that you mentioned, but I do think, in line with what we both said earlier, that some presentation to Congress about whether this is being handled at the State level, in any particular State where comes up, the carjacking cases were terrific pieces in the paper of people being dragged down the street, if those presentations were made and the case was made the State is already handling this well, it would give Members of Congress, I think, a buffer to say there is no reason for us to get into this.

If I can just add to the question that was asked, as well, I think one of the driving forces is the country is incredibly mobile.

I see this with my students. They all think it is one big country. If you tell them there is Maryland and Pennsylvania, they hardly remember. And the Internet has pushed that forward. The mobility going over state lines is such, the international feel of things, the email, has minimized, to some degree, their view, the young people's view, I think, and many people's view, of the fact that these States have different independent, historical significance that is important.

Mr. LABRADOR. Thank you.

Mr. STRAZZELLA. And I think that really plays into it more than a lot of legality.

Mr. LABRADOR. Mr. Cassilly, as a prosecutor, what are your thoughts about mandatory minimums?

Mr. CASSILLY. I think in some instances, especially with repeat offenders where we know that these particular people are responsible for a high percentage of crimes, and getting them off the street prevents future crime, yes, I would agree with mandatory minimums.

But I think often judges should have the discretion, because you do treat the facts of each case. And the facts surrounding the background of the defendant are all different. And a judge should have a certain amount of discretion to take that into account and respond to that.

On the other hand, if the defendant has proven himself from previous conduct not to be a good risk to be on the street, then, I would say, that mandatory minimums are appropriate.

Mr. LABRADOR. Do you think mandatory minimums should be used to force low-level defendants to give up the people up the chain, for example, in drug convictions?

Mr. CASSILLY. I don't have a problem with that, as a prosecutor.

Mr. LABRADOR. All right, thank you. I have no further questions.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Michigan, Mr. Conyers?

Mr. CONYERS. Thank you, Mr. Chairman.

I applaud this Task Force for examining over-criminalization and particularly over-federalizing so many crimes.

I want to emphasize the problem with drugs and the criminal law. And before I do that, I wanted to remind the Committee that there are 4,500, approximately, Federal crimes, many overlapping State law, and that we hand down from Congress, we ourselves are responsible for establishing about 50 new Federal crimes every year.

So we are in a tough situation. And when you talk about drug laws, we have an extremely difficult situation in which the so-called war on drugs, although largely ineffectual, costs $51 billion every year. And many of them are low-level, nonviolent Federal drug crimes, unfortunately, and they are subject, of course, to the mandatory minimum sentencing strategy, which I vigorously resist and think is counterproductive.

And so what I wanted to do is go over with you exactly what the Federal criminal code ought to contain, or how do we divide the Federal and State crime situation?

And I just had delivered this morning a letter from the Judicial Conference of the United States, which I received a copy from the secretary of that conference on the stationery of the Chief Justice of the United States.

The conference specifically identified five types of criminal offenses deemed appropriate for Federal jurisdiction: offenses against the Federal Government, or its inherent interests; criminal activity with substantial multistate or international aspects; criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using Federal resources or expertise; serious high-level or widespread State or local government corruption; and fifth, criminal cases raising highly sensitive local issues.

Now, I assume this is accurate, and if you do, too, I would like you to comment on that.

This makes our task that we are examining here this morning extremely difficult, because there are so many levels of activity that are interchangeable.

And so it may be that the most important thing that comes out of this hearing is the fact that there are a growing number of Mem-

bers of Congress who realize that over-criminalization is partly our responsibility because we are adding to the pile every year.

Do you agree with me that this is an extremely complex and challenging problem?

Mr. SENSENBRENNER. The gentleman's time has expired.

Can the witnesses answer the question briefly, because we are running up against the bell ringing, and others wish to ask questions?

Mr. CASSILLY. I mean, I think that has been the nature of our testimony up until now, that we do believe it is a problem.

I agree, Mr. Conyers, what the issue is is where does the State's ability to handle some of these problems start and end, and where can the Federal Government assist the States by moving into the areas that you have just spoken about.

Mr. SENSENBRENNER. The gentleman from North Carolina, Mr. Holding?

Mr. HOLDING. Thank you, Mr. Chairman.

Mr. Cassilly, I recall the incident that you spoke about, regarding one of the former U.S. attorneys in Maryland. I would point out that it was that incident, and a few other things, that precipitated his resignation prior to the end of his term.

Of course, I would also say that the benefit of that is the next U.S. attorney that you got in Maryland is probably one of the more competent and professional U.S. attorneys in the country that we have had in some time.

Mr. CASSILLY. Rod Rosenstein and I get along very well. He goes out of his way to reach out to the States to work with us.

Mr. HOLDING. Right. So competent that your senators in Maryland kept over from the prior Administration, thinking that they couldn't do any better than him as their U.S. attorney.

I want to explore two different things. One is, in your work prosecuting State crimes, do you ever find it beneficial for the potentiality of a Federal prosecution to be up there? So you have a defendant before you, and the fear out there that he could be prosecuted federally leads him to swiftly plead to your charges and help clear out your docket a little bit faster than otherwise?

Mr. CASSILLY. That does happen, especially in areas of child pornography in Maryland, often the fear of Federal prosecution for child pornography, some drug offenses.

And it was mentioned in terms of robberies or bank robberies, sometimes that happens, although I have to say that often with some violent crimes, especially in the East Coast where States are so close, we often find some people who are doing a pattern of robberies go from Virginia to D.C. to Maryland, that is helpful to have Federal jurisdiction to deal with that, because not only can they bring all that evidence together, but they can present all the evidence to the sentencing judge for a stricter Federal sentence than we might present to a State judge.

Mr. HOLDING. Secondly, are there any areas of Federal law where you have evidence of a crime and you know that the U.S. attorney would be better able to obtain a much longer sentence? You actually reach out to the U.S. attorney and say, "Would you please prosecute this case? I know you can get a higher sentence." You mentioned child pornography.

Mr. CASSILLY. We do that with our drug cases often, too. Not only do they get, in some instances, better sentences, but by putting the defendant in a Federal institution, away from the State of Maryland, they prevent the defendant from continuing to run his criminal enterprise from a State institution by getting him out of the way. So there is an advantage to that.

Mr. HOLDING. That is interesting.

Mr. Chairman, I yield back.

Mr. SENSENBRENNER. Thank you.

The gentleman from New York, Mr. Jeffries?

Mr. JEFFRIES. Thank you, Mr. Chairman. And I thank the witnesses for their presence here today.

Mr. Cassilly, I believe you made reference in your testimony, and also in the written submission, that there were some instances where the Federal Government was not prosecuting drug crimes at a low level. Is that correct?

Mr. CASSILLY. Yes.

Mr. JEFFRIES. Not for purposes of clarity, is it that you were referring to instances where Federal prosecutors were declining to pursue marijuana prosecution?

Mr. CASSILLY. No, generally, other types of drugs as well.

For example, the complex wiretaps that my county officers conduct, generally, we turn over the top of those organizations, which are often multistate—getting their supplies from out-of-state or supplying out-of-state—we turn those folks over to Federal prosecutors.

And we work very well with the Federal prosecutors. I mean, we sit down, look through the cases with them, discuss which ones they are going to work better on and which ones we will work better on. But generally, we take all of the lower level pretty much in-state defendants and take care of them. They take the upper-level folks.

So it is not just marijuana. It is everything across the board.

Mr. JEFFRIES. Okay, right now the Federal system, 8 percent of the individuals in the Federal system have been convicted of a violent crime, but about 50 percent of the individuals are actual nonviolent, low-level drug dealers. So that is why am curious as to your observation, because what the numbers suggest is that, for decades, a disproportionate number of the individuals who are actually being prosecuted, convicted, sentenced, and put behind bars in the Federal penitentiary are actually low-level drug offenders.

Mr. CASSILLY. That doesn't go along with my experience. I mean, I would have to ask what is the definition of a low-level drug dealer, for one thing. I mean, we may have a definitional issue.

The other problem, too, that comes up with some of these is that there is an offer to plea down. So you may have a drug dealer who is actually liable for a more serious crime, who works out a plea to a lesser crime. It benefits the drug dealer, but it also moves the case through the system.

Perhaps if you are dealing with uncooperative witnesses or other issues, evidentiary issues, the prosecutor deals the crime down from a more serious level to a less serious level, but the crime was the same in terms of the nature of the crime, but it is reflected as a lower seriousness crime.

Mr. JEFFRIES. Thank you. I appreciate the explanation there.

Professor Strazzella, you reference the general notion that there is an increasing overlap between Federal crimes and State crimes, consistent with what has been mentioned by my colleagues here. I think that is, certainly, troubling for me, for a wide variety of reasons.

In your experience, the wire fraud statute that currently exists in law and is often robustly used by Federal prosecutors to prosecute what otherwise may be a State offense but where, for instance, a fax machine may have been used consistent with a fraudulent representation, even if the fax is transmitted from one locality to the next not crossing state lines, then invokes Federal jurisdiction. Do you think the wire fraud statute is an area we might be able to look at in terms of whether it is being abused?

Mr. STRAZZELLA. I thank you for the question. I think the question goes along with some of the early ones in some ways.

I keep trying to sort in my mind what is valid Federal jurisdiction, and, certainly, interstate commerce is the basis for a lot of it. It was the basis I mentioned for the carjacking statute. The wire fraud statutes were that. They were originally telephone wires, and built on the mail that went across the lines. And the mail was actually premised that it was a government function.

And the trouble I am having, as I think about what you said, is there are cases of wire fraud that are clearly interstate. And has he said, you really need the resources of the feds across state lines to deal with those. There other ones that are just from one local bank to two guys two blocks away, and it will still fall under it. And that is a prosecutorial decision.

I wouldn't preclude those kind of wire fraud statutes, certainly. But I think the discretion for the D.A. and the U.S. attorney to say this is really a local matter is probably where the rubber hits the road in that kind of situation.

Mr. JEFFRIES. Thank you.

Thank you, Mr. Chair.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Alabama, Mr. Bachus?

Mr. BACHUS. Mr. Cassilly, your story about the little girl, many times as Members of Congress, we have seen instances where there would be an interstate crime ring, or even an international crime ring, headquartered in a different State. And the FBI is approached by local businesses that are victims, and they are told they don't have the resources.

And then we pick up the paper and see where they are involved in a case of bullying in a high school. It was high visibility, a lot of publicity.

Is there some way, I mean, one way may be to allow the State or local authorities to opt to prosecute or decline to prosecute. And at that time, the U.S. attorney would take a role. Or where the State or local law enforcement agencies go to the Federal agencies and say we lack the resources.

Mr. CASSILLY. We do do that now. As Mr. Holding pointed out, we have a very good U.S. attorney in Maryland right now, Rod Rosenstein. If I need something from Rod, I have his direct dial phone number. I can pick that up and call him and say, "I need

some help here. Can you assign some people? Can we have a meeting? Can we talk about some cooperation?"

Sometimes they don't have the resources. I mean, the answer for me sometimes is, we just don't have anybody to work on that, or that is not going to pass our threshold.

But sometimes the feds are coming to me and asking us to do things. I mean, we do a lot of prosecutions for Federal agencies, FBI, ATF, because U.S. Attorney's Office, even though they have worked on the case and done the investigation, the U.S. Attorney's Office won't prosecute, and so the State prosecutor ends up taking the investigation from the Federal investigators and pursuing it in State courts.

Mr. BACHUS. I would say, 90 percent of the U.S. attorneys are doing exactly that. I mean, they have a great relationship with the local. And I think, presently, that is the case in the area I represent.

Are there any guidelines that would, say, prevent that U.S. attorney from coming in and taking that murder case over?

Mr. CASSILLY. Well, I, certainly, didn't get any help when I wanted to get them to back off of their mail threat case and turn the defendant over to us quickly. I mean, it eventually happened, but we wasted a lot of time at the State court level. I had State court deadlines running where we were supposed to have done arraignments and those types of things, and those didn't happen. I had to go to the State judges and request extensions of time for different things to happen.

Mr. BACHUS. I wonder if the National D.A. Association or someone could suggest to us some language to help, maybe guidance.

Mr. CASSILLY. We would be happy to work on that.

Mr. BACHUS. I noticed the Judicial Conference, the letter has been referred to, actually among the cases that they say are Federal Government were criminal cases raising highly sensitive local issues. That, to me, kind of expands it maybe into cases that are just getting a lot of publicity, which I think is not a reason for Federal involvement. So

I think that one is a pretty big loophole to go through.

But if you could suggest at least some guidelines or guidance that we can get to prevent the type of thing that happened to you.

Mr. CASSILLY. We will be back with you.

Mr. BACHUS. Thank you.

Mr. SENSENBRENNER. I don't think the letter that was referred to by the gentleman from Alabama and earlier, the gentleman from Michigan, has been inserted into the record. It should be. So, without objection, the letter will be put in the record at this point.*

The gentleman from Georgia, Mr. Johnson?

Mr. JOHNSON. Thank you, Mr. Chairman.

This hearing of the Over-Criminalization Task Force is to discuss the fact that the Federal Government's role in investigating and prosecuting crime has grown exponentially.

And you gentlemen are here to shed light on this phenomenon.

*The material referred to was not available at the time this hearing record was finalized and submitted for printing on August 14, 2014.

And I could not agree with you more, Mr. Cassilly, when in the last paragraph of your statement, the last sentence, you say that in reviewing existing or future Federal legislation, the issue of who has the resources to investigate and prosecute a crime should be considered and whether utilization of those resources will result in neglecting other areas, which should have a higher Federal priority.

I think that is extremely reasonable and a good guideline for us to take as we think about imposing more Federal criminal statutes, some of which are passed only to show that we are being tough on crime.

So I recognize that, and I respect that.

But then with your testimony and your statement, you also point to some specific incidents that illustrate prosecutorial overreach, in your opinion. And then you even go so far as to name, among all of the unnamed U.S. attorneys, you name our current U.S. Attorney General, you cite him by name for issuing an edict not to enforce low-level marijuana prosecutions, and use that as support for your assertion that if they won't prosecute Federal laws, then we need to get rid of the laws.

But at the same time, you enjoy the fact that the Federal lever of a harsher sentence, in some cases, helps you to exact a favorable plea deal on State charges. And also that when a drug case is prosecuted by the feds, it is advantageous to you because it can help remove the defendant from your State, so that they can no longer run their drug operation.

So it just seems to me that your gripe is more about the interplay between Federal and State prosecutors in the use of prosecutorial discretion, as opposed to over-criminalization in general. Is that correct?

Mr. CASSILLY. I don't think so. I mean, I would say, for example, the examples of carjacking, the examples of animal cruelty laws, and probably a lot of other laws that I can find that have been passed and I would be amazed if they had ever been prosecuted, are sort of meaningless, but they raise public expectation that something is being done or a problem is being solved at the Federal level, when in fact it isn't and hasn't been solved, just because the law has been passed.

And the focus needs to be that these people need to work at the State level to get this issue solved, or those issues prosecuted.

And yes, I did make reference to the Attorney General's statement about low-level drug offenses. I don't remember if it was specifically low-level marijuana offenses, but at the time that was made, basically, most State and local prosecutors I know were kind of amazed that any Federal authorities were prosecuting low-level drug offenses.

Again, that may be a function of how you define low-level drug prosecutions. But certainly, in the cases that I work with my U.S. attorney, they take very, very serious cases, kilo dealers, large-scale interstate dealers. They are not trying to take the stuff that States are prosecuting.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Tennessee, Mr. Cohen?

Mr. COHEN. Thank you, Mr. Chairman.

Mr. Conyers mentioned some categories maybe crimes can fit in, that are of a Federal nature. And while he did, in a fifth category, it mentioned crimes that are of a particular local—not a local nature, but have local import. That might cover it, but I was concerned about civil rights crimes and crimes that sometimes may not be prosecuted in parts of the country, because the local prosecutors aren't as responsive or concerned or sensitive to certain offenses.

Do you not think that there is a special niche for there to be Federal jurisdiction and Federal crimes that cover what would otherwise be State crimes where there would be a civil rights involvement or nexus?

Both of you, but Mr. Strazzella, I guess, first.

Mr. STRAZZELLA. The last category, which you mentioned, I was intrigued by. I read it actually differently than the sensational murder kind of case.

The category of Federal crimes that I think is the most problematic in terms of constitutional basis, but I think everybody ends up agreeing should be on the Federal list, are political corruption crimes. That kind of political sensitivity, where there is an inherent conflict often in the local authorities in terms of prosecuting local officials.

And I was intrigued that is on there. The ABA report actually has something about that as well.

In terms of civil rights, I think it would fall under that category. In my list, it is often one of the things not prosecuted by the local people. And, therefore, you have a statute that gives you a clear basis, and there are a lot of reasons to step in and those kinds of instances.

Mr. COHEN. Thank you Professor Strazzella.

Mr. CASSILLY. I think the question should be what are we defining as a civil right. Is it a voting right? Is it some other right with a Federal nexus? Are we simply talking about defining a special protection, or a protection for an ethnic or otherwise defined group of people on a crime that already exists.

And I use, for an example, in Maryland, we have passed special laws based on if there was an assault committed on someone because of a specific motivation because of their gender or——

Mr. COHEN. A hate crime.

Mr. CASSILLY. A hate crime. Those are often difficult to prove because it is often difficult to prove why someone was assaulted. Was it just a street robbery? Was it just a bar fight? Was there something else going on? And often, there are already existing laws and crimes that cover the behavior, not necessarily the motivation.

So those are issues, but I guess when you are asking me about a violation of a civil right, is it a Federal civil right or is it a State right that would be better covered in State court?

Mr. COHEN. Who was the Justice that said he didn't necessarily know how to define pornography, but he knew it when he saw it?

Mr. STRAZZELLA. Justice Stewart.

Mr. COHEN. Well, I think Justice Stewart would have the same thing. I am not sure always what a civil right is, but I know it when I see it, and I think U.S. attorneys can see it better than district attorneys, in general.

I think in Texas, I am pretty sure that that gay person who was dragged behind the car, Matthew Shepard——

Mr. GOHMERT. It was an African-American, and the two most responsible got the death penalty.

Mr. COHEN. Federal or State?

Mr. GOHMERT. Through the State. The Federal didn't have death penalty.

Mr. COHEN. Reclaiming my time, I thank you for the help from Texas.

Tennessee helped Texas a lot, so it is nice of you to reciprocate.

Are there other Federal crimes that you think are uniquely of a Federal nature that didn't come within those five categories, classes? No?

Mr. STRAZZELLA. Not offhand, but I do want to say, as I heard Representative Conyers read this, what was interesting to me was what was not on there. A lot of the Federal crimes that are in the books today are not on that list.

And I think it makes the point that I mentioned. The Federal courts feel overwhelmed by a lot of these local crimes. I used to be a Federal prosecutor, and there is often the view this ought to be somewhere else.

Mr. COHEN. Our time is over, but before I am told my time is over, it was Matthew Shepard.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Texas, Mr. Gohmert?

Mr. GOHMERT. Thank you, Mr. Chairman.

I heard my friend from Tennessee mention from drug behind a car, and so that was in Jasper, Texas, and it was an African-American.

And it actually fits in well with the discussion we are having, because as Federal legislators, we feel a need when we hear about something that outrageous, that just shocks the conscience, I would like to have a law that allows a victim's family to drag the perpetrators behind their vehicle of choice.

But under Texas law, we had the death penalty. Three perpetrators in that egregious, horrible crime, and the two most culpable got the death penalty, and the other got life in prison.

But we didn't want to stand idly by. So we rush in to create a Federal crime that doesn't even have the death penalty, that couldn't be nearly as severe as the State itself had. And yet we want to federalize that offense as well.

And I believe in the Matthew Shepard case, a horrible incident, but I believe there may have been two life sentences under State law. So again, the Federal law really wouldn't have made any difference. But once again, we rush in to try to say we have a bigger, better idea since we are the Federal legislators, and we will get the Federal officials involved.

We have seen times when civil rights were violated and people did not receive—may have been acquitted of a State crime—but a civil rights violation was an appropriate charge, and people were held to account in that manner.

My problem is when we actually legislate and say what really amounts to a police power prosecution is now going to be a Federal prosecution. And it does overwhelm our Federal courts.

I have seen that personally, as an attorney. As a State court judge, I was amazed at how many State actions actually could have been charged in Federal court and the Federal prosecutors were saying our plates are filled, we don't know why Congress keeps trying to usurp State police authority.

But that is how we end up with thousands of Federal crimes that really do seem like they need to be consolidated into—I mean we have the 18 U.S. Code where they ought to be consolidated, and yet they are throughout.

So I applaud the Chair and the Ranking Member and others that see the need to cut this down so that we, for one thing, don't allow regulators, unaccountable bureaucrats, to make laws for which there are criminal penalties.

Do either of you see any time when you think it might be appropriate for Congress to pass a law saying it will be a crime to violate this section and any violation of any regulation set by the bureaucrats is appropriate for a crime? Or do you, as most of us think, we shouldn't have a crime unless Congress passes it?

Mr. CASSILLY. My comment earlier was that I think that there should be a showing predicate to the introduction of any law that, one, the States are either unable or unwilling to act in a certain instance; and, moreover, that there is a compelling Federal interest to act in that area, that somehow there is interstate action or regulation of federally regulated organizations, such as banks or the Internet or something else like that. That should be a predicate showing before the law is even——

Mr. GOHMERT. But once, if that predicate is met, do you think it is appropriate to have Congress just pass a general criminal statute and the specifics will be filled in by agency personnel?

Mr. CASSILLY. I have always felt that that is sort of unconstitutional. Our courts have said that criminal statutes should be narrowly construed. How can you narrowly construe a statute when it is sort of subject to grow and be modified at the whim of whoever is out there.

Mr. GOHMERT. A great point. Thank you.

Mr. SENSENBRENNER. The gentleman's time has expired.

This has been a very interesting and meaningful hearing. I would like to thank both of the witnesses for giving us a lot of insight into the problems that we face on the over-federalization.

I think if we try to cut back on some of the Federal crimes, people who have persuaded Congress or the bureaucrats to put something on the statutes are going to be screaming quite loudly.

But there are some crimes that I think are better prosecuted at the State level and using State resources, and we don't need to send the FBI out on everything that really can be better handled by local police and local prosecutors.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And without objection, this hearing is adjourned.

[Whereupon, at 10:37 a.m., the Task Force was adjourned.]

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