Written Statement of

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House Committee on the Judiciary

Over-Criminalization Task Force

Re: Reform of the Federal Criminal Code

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Thank you for the opportunity to share my views on reforming the federal criminal code. I bring you the perspective of a lawyer who has practiced criminal defense in the federal courts for more than twenty-seven years. I have tried criminal cases in federal district courts nationwide. I have argued appeals in many of the federal circuits and, on one memorable occasion, in the United States Supreme Court. From this vantage point, I have observed the practical effect of our bloated federal criminal code.

Congress has revised the federal criminal code a handful of times over the last century and a half, most recently in 1948. It is past time for another comprehensive revision. In my view, that effort should focus on five main points: (1) reducing the number of federal crimes; (2) ensuring that the revised federal criminal code strikes a proper balance between federal and state criminal enforcement; (3) clearly defining the different levels of mens rea and applying those definitions in a fair and rational way to federal offenses; (4) establishing uniform rules of construction; and (5) revising the overly harsh punishment system that has produced an excessive federal prison population.

I. REDUCING THE NUMBER OF FEDERAL CRIMES.

The list of federal criminal crimes has grown from a handful in the Crimes Act of 1790 to thousands today--how many thousands, no one is

quite sure. This growth has occurred in part because the country has become more technologically sophisticated, more complex, and more interconnected--and thus the need for offenses that can address crime that occurs in multiple states and even overseas has expanded. But the number of federal crimes has also increased because every national crisis seems to breed new federal crimes to address the problem. This has often occurred, regrettably, without sufficient inquiry into whether a criminal sanction is necessary at all--as opposed to civil and administrative remedies--and, if so, whether existing federal criminal statutes, many of which are broadly worded, suffice to punish the conduct at issue. This process functions like a ratchet, going only one way: statutes are regularly added to the federal criminal code, but they are almost never removed.

The result of the urge to enact federal criminal legislation in response to each new crisis is a morass of often overlapping statutes. For example, there are more than two dozen different false statement statutes in Chapter 47 of Title 18; there are seven different fraud statutes in Chapter 63 of Title 18; and I count nineteen different obstruction offenses in Chapter 73 of Title 18. Of course, these are just some of the federal offenses addressing these topics; there are other false statement, fraud, and obstruction offenses

scattered here and there throughout Title 18 and still more in other Titles of the federal code.

Federal offenses lurk as well in regulations promulgated by various agencies. These regulatory crimes are especially pernicious because they rarely, if ever, receive careful scrutiny from Congress. They represent a dangerous confluence of power: the Executive Branch that prosecutes crimes also creates and defines them.

This proliferation of federal offenses has two main practical consequences, from my perspective as a defense lawyer. First, the sheer number of crimes creates a notice problem. Justice Holmes declared long ago that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."[1] But with the statutory scheme that now exists, "fair warning" is a fiction. Not even the most sophisticated and experienced criminal practitioner can say, without extensive research, whether certain courses of conduct violate federal law; pity the nonlawyer who must make that determination. If we are to presume that everyone knows the law--a maxim courts repeat with some regularity--it behooves us to make the law knowable.

[1] *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

Second, the existence of multiple federal statutes that address the same conduct encourages federal prosecutors to overcharge. The Antitrust Division, to its credit, typically brings a one-count indictment in criminal price-fixing cases, charging a violation of the Sherman Act. That commendable practice gives the jury a clear choice: guilty or not guilty.

By contrast, many federal prosecutors take advantage of overlapping federal criminal offenses to charge the same course of conduct under two, or three, or more different statutes or regulations. Instead of a one-count indictment charged under a single statute, the jury might have ten or twenty or a hundred counts charged under several different statutes. The result is often jury compromise. Jurors cannot agree unanimously whether the defendant is guilty, so, as a compromise, they convict on some counts and acquit on others.

What jurors are not told--and cannot be told in the federal system--is that for sentencing purposes a conviction on even one count is often the same as conviction on all counts.[2] When jurors compromise, they likely think they are giving each side a partial victory. But they are wrong; in practical terms, a guilty verdict on even one of a hundred counts is the same

[2] This is largely, although not exclusively, a result of the relevant conduct rules under the federal sentencing guidelines. *See, e.g.,* U.S.S.G. § 1B1.3.

as a guilty verdict on all counts.[3] Prosecutors know this and some take advantage of it--unfairly, in my view--by overcharging. Pruning the federal criminal code will reduce this practice and help to ensure fairness for defendants.

The process of reducing and making rational the federal criminal code affords the opportunity to address other troublesome areas, beyond the sheer number of federal offenses. Let me mention two such areas, among many. First, the law of conspiracy is long overdue for careful examination. As it stands now, the federal criminal code has a number of conspiracy provisions. Some require an overt act, as well as a criminal agreement.[4] Others do not.[5] None of the conspiracy statutes clearly defines the mens rea necessary for conviction. The offense of conspiracy to defraud the United States is particularly amorphous; that statute has been interpreted to encompass

[3] To cite a recent example, when a New York jury acquitted Mohamed Ghailani on 284 out of 285 counts, many--possibly including the jurors--viewed the outcome as a victory for the defense and a repudiation of the prosecution case. But Ghailani received a life sentence on the single count of conviction--the same sentence, in practical terms, he would have received had he been convicted on all counts.

[4] *E.g.*, 18 U.S.C. § 371.

[5] *E.g.*, 18 U.S.C. § 1956(h); *Whitfield v. United States*, 543 U.S. 209 (2005).

almost any effort to interfere with a function of the federal government through deceit.[6]

Justice Jackson warned many years ago about the "elastic, sprawling, and pervasive" conspiracy offense, which he described as "so vague that it almost defies definition."[7] A revision of the federal code affords an opportunity to rethink conspiracy and ensure that only those truly deserving of criminal punishment are swept up in its net.

As part of the reconsideration of conspiracy law, it is worth examining the so-called *Pinkerton* rule. In *Pinkerton v. United States,*[8] the Supreme Court held that a conspirator is criminally liable for the foreseeable substantive crimes of his co-conspirators in furtherance of the conspiracy, even if the conspirator himself played no part in the substantive offense and did not intend that it occur. *Pinkerton* thus expands the already vast sweep of conspiracy to include substantive offenses as well. The case stands alone in the federal system as a common-law, judge-made theory of criminal liability. If such a basis for conviction is to exist--and I do not think it

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[6] *See, e.g., United States v. Coplan*, 703 F.3d 46, 59-62 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 71 (2013); Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405 (1959).

[7] *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring).

[8] 328 U.S. 640 (1946).

should--it ought to be based on a careful legislative judgment and not on the decree of federal judges.

Second, the principal statute used to prosecute improper disclosures of classified information--18 U.S.C. § 793--has been criticized for decades because of its convoluted language and uncertain scope.[9] That statute has gained heightened prominence of late, with the prosecution of alleged leakers undertaken by the current Department of Justice. Recent judicial decisions have underscored the uncertainty surrounding the mens rea necessary for conviction and the scope of the key phrase "information relating to the national defense."[10] Here too a revision of the federal criminal code affords an opportunity to fix a long-festering problem.

There are many other such troublesome parts of the federal criminal code--the two I have mentioned are merely illustrative. A comprehensive reform of the code affords an opportunity to think through these problems and resolve them in a rational, systematic, and fair way.

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[9] *See, e.g., United States v. Morison*, 844 F.2d 1057, 1085-86 (4th Cir. 1988) (Phillips, J., concurring); *United States v. Rosen*, 445 F.2d 602, 613 & n.7 (E.D. Va. 2006); Harold Edgar and Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 998 (1973).

[10] *E.g., United States v. Kim*, Case No. 1:10-cr-225-CKK, Memorandum Opinion (Docket No. 137) at 6-12 (D.D.C. July 24, 2013).

II. RESTORING THE FEDERAL-STATE BALANCE.

Reform of the code affords another, closely related opportunity: To restore the balance between federal and state law enforcement.

Our federalist system initially contemplated that law enforcement would be primarily a state function. There were only a few federal offenses, and those offenses focused on the protection of clearly federal interests. Although the Supreme Court has recognized the need to exercise caution in altering this traditional federal-state balance in law enforcement,[11] federal criminal jurisdiction has expanded so voraciously that now almost any culpable conduct can be brought within the federal ambit, through a wiring, a mailing, or a potential effect on interstate commerce.[12]

As a result, we see--to cite examples from my own practice--vote-buying in local elections, punishable under state law with a short prison term, being charged as a federal RICO violation, with a potentially massive prison term and forfeiture. We see nondisclosure under state campaign finance laws, punishable as misdemeanor offenses or through civil penalties,

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[11] *See, e.g., Cleveland v. United States*, 531 U.S. 12, 24-25 (2000); *United States v. Bass*, 404 U.S. 336, 349-50 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971).

[12] In a handful of cases, the Supreme Court and the courts of appeals have attempted to place limits on the vast sweep of federal criminal power. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Waucaush v. United States*, 380 F.3d 251, 256-57 (6th Cir. 2004). But these cases mark only brief interludes in the steady expansion of federal criminal jurisdiction. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 23-33 (2005) (reading *Morrison* and *Lopez* narrowly).

being charged as a federal wire or mail fraud offense, felonies that carry a loss of civil rights, in addition to draconian punishment. And we see violation of state and local anti-patronage laws, with relatively modest potential punishments, being charged as federal honest services fraud, again with a lengthy prison term, stiff financial penalties, and the disabilities of a federal conviction. And of course there are drug laws, where the gap between state and federal law enforcement grows steadily wider.

Some may argue--though I would disagree--that federal interests justify treating these essentially local matters as federal crimes. Regardless of where Congress ultimately strikes the federal-state balance in law enforcement, the issue deserves careful, systematic consideration. Reform of the federal criminal code affords that opportunity.

III. REFORMING MENS REA.

I know that the Task Force has heard a great deal about the need to reform the federal mens rea standards. Please let me add my voice to those who urge thoughtful change in this area. A comprehensive reform of the federal criminal code affords an ideal opportunity to establish uniform

terminology for different levels of mens rea and to assign to each offense in the revised federal criminal code an appropriate level of mens rea.[13]

This is not the hearing for a comprehensive critique of the current mens rea morass. But I would like to address two issues, among many, worthy of attention as part of a reform of the federal criminal code.

First, it is important to determine when the government must prove that the defendant knew his conduct was illegal, and with what degree of specificity. Federal courts routinely recite the old maxim that ignorance of the law is no excuse, and no federal criminal statute of which I am aware expressly requires proof that the defendant knew his conduct was illegal. But given the extraordinary complexity of federal crimes and the constitutional imperative of fair notice, courts have interpreted the mens rea element of certain federal offenses to require knowledge of illegality. These cases do not typically require proof that the defendant knew the precise statute he was violating, or even that his conduct violated a criminal statute--but they do require proof that he knew what he was doing was unlawful.[14]

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[13] Sections 2.02 through 2.05 of the Model Penal Code represent an effort to establish and define a hierarchy of mens rea requirements. The MPC mens rea provisions may work well for a typical state criminal code, but they are inadequate for the more complex offenses that appear in the federal code. Among other deficiencies, the MPC does not adequately address the need for proof of knowledge of illegality in the context of broadly worded federal offenses.

[14] *See, e.g., Bryan v. United States*, 524 U.S. 184, 196 (1998); *United States v. Bishop*, 740 F.3d 927, 2014 U.S. App. LEXIS 1697, at *13-*19 (4th Cir. Jan. 28, 2014).

Courts generally find the requirement of knowledge of illegality in the statutory term "willfully."[15] But, as the Supreme Court has observed, "willfully" is a word of many meanings, ranging from mere intentional conduct to an intentional violation of a known legal duty.[16] Because "willfully" has no clear definition, and because there is rarely legislative history illuminating its meaning in specific statutes, courts are left to decide for themselves what the term means in any given context.

This comes close to the common-law crime creation that the Supreme Court long ago forbade,[17] and it creates serious notice problems as well. Reform of the federal criminal code affords the opportunity to decide, in a reasoned and systematic way, when knowledge of illegality should be required and how specific that knowledge must be.

A second area that deserves comprehensive reform is the judge-created doctrine of willful blindness--also known as deliberate ignorance or conscious avoidance. According to this doctrine, when Congress requires the government to prove that the defendant acted with knowledge of a particular fact, the government can satisfy that burden by showing that,

[15] *E.g., Ratzlaf v. United States*, 510 U.S. 135, 143-49 (1994); *Cheek v. United States*, 498 U.S. 192, 198-99 (1991).

[16] *E.g., Ratzlaf v. United States*, 510 U.S. 135, 141 (1994); *Spies v. United States*, 317 U.S. 492, 497 (1943).

[17] *See United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816); *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

although the defendant did not have the required knowledge, he was aware of a high probability that the fact existed and took deliberate actions to avoid learning the truth.[18]

This judicially-created substitute for knowledge was originally used in drug cases--where, for example, mules caught driving cars with drugs hidden in secret compartments would deny knowing that the drugs were there.[19] Courts insisted that the doctrine was to be rarely used.[20] But as the years passed the courts threw caution to the wind.[21] Now federal district courts routinely give a willful blindness instruction in almost any case where the defendant does not expressly concede knowledge, and courts even let the government argue actual knowledge and willful blindness in the alternative.[22]

The widespread use of willful blindness instructions creates grave danger for defendants. In many--perhaps most--federal criminal cases, mens rea is the only element that is seriously disputed. Any instruction that waters

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[18] *E.g., Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011).

[19] *See, e.g., United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc).

[20] *E.g., United States v. Hilliard*, 31 F.3d 1509, 1514 (10th Cir. 1994); *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992).

[21] *E.g., United States v. Heredia*, 483 F.3d 913, 924 n.16 (9th Cir. 2007) (en banc) (overruling prior decisions stating that the willful blindness instruction is "rarely appropriate" and "should be used sparingly").

[22] *See, e.g., United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007).

down the required mens rea has the inevitable effect of tilting the playing field in the prosecution's favor. Willful blindness instructions are especially pernicious because, despite cautionary language, they may cause lay jurors to blur the line between negligence or recklessness, which typically are not criminal, and knowledge, which can be.[23]

The decision to permit conviction based on something less than actual knowledge is a quintessentially legislative one; in our federal system, where common law crimes are anathema, that decision should not be made by judges. Congress has on occasion chosen to include willful blindness provisions in criminal statutes--in the Foreign Corrupt Practices Act, for example.[24] But the question of when, if ever, a conviction can rest on a deliberate lack of knowledge, rather than on knowledge itself, should be resolved comprehensively and systematically as part of an overall reform effort.

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[23] *E.g., United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) (Posner, J.). *See generally* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191 (1990) (discussing legal and philosophical flaws in use of conscious avoidance as a substitute for actual knowledge); *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2072-73 (2011) (Kennedy, J., dissenting) (criticizing conscious avoidance doctrine); *United States v. Heredia*, 483 F.3d 913, 930-33 (9th Cir. 2007) (en banc) (Graber, J., dissenting) (same).

[24] 15 U.S.C. § 78dd-2(h)(3)(B).

IV. ESTABLISHING UNIFORM RULES OF CONSTRUCTION.

Courts have adopted certain rules of construction to interpret criminal statutes, the most prominent of which is the rule of lenity. Because these rules are judge-made, however, their application can seem random. And they may conflict with other rules of construction, such as the admonition in the RICO statute that its terms are to be liberally construed to effect its remedial purposes.[25] Reform of the federal criminal code affords an opportunity to establish uniform rules that courts can apply in construing federal criminal statutes.

Two such rules are worth highlighting. First, the rule of lenity--that doubts about the scope of a criminal statute should be resolved in the defendant's favor--should be codified and made applicable to all federal crimes. The rule of lenity, especially in conjunction with a strong mens rea requirement, gives meaning to the basic constitutional requirement of "fair warning."

Second, courts often struggle to determine the reach of a criminal statute's mens rea element. Does the requirement that the defendant act "knowingly," for example, extend to all aspects of the conduct that makes up the offense? Does it extend to jurisdictional elements, such as the use of

[25] *See, e.g., United States v. Turkette*, 452 U.S. 576, 587 & n.10 (1981); *United States v. Banks*, 514 F.3d 959, 967-68 (9th Cir. 2008).

interstate commerce? Does it extend to circumstances that make the conduct criminal, such as the age of a victim of sexual misconduct? Does it extend to elements that affect punishment, such as the quantity of drugs involved?[26] Many of these difficult questions of interpretation can be resolved with a simple, generally applicable rule that the specified mens rea applies to all elements of the offense unless the statute creating the offense specifically provides otherwise.

These and possibly other straightforward rules of construction will increase uniformity--and thus fairness--in the interpretation of federal criminal statutes. They will also conserve judicial resources that are now devoted to interpreting federal criminal statutes on a case-by-case, ad hoc basis.

V. ESTABLISHING A RATIONAL SYSTEM OF PUNISHMENT.

Finally, revision of the federal criminal code affords an opportunity to rethink punishment. Most significantly, the use of mandatory minimum sentences should be carefully reviewed and, in my view, abandoned or greatly restricted. Mandatory minimum sentences are a harsh, blunt tool that

[26] For examples of the Supreme Court struggling with this interpretive task, see *Fowler v. United States*, 131 S. Ct. 2045 (2011) (analyzing intent element of federal witness tampering statute); *Staples v. United States*, 511 U.S. 600 (1994) (analyzing mens rea for 26 U.S.C. § 5861(d)).

leads to the prolonged incarceration of many men and women who could be punished and returned to society through less draconian means.

It is worth considering as well other means of reducing the bloated federal prison population without diminishing deterrence or jeopardizing public safety. Among the possible reforms worth considering are the re-institution of federal parole, expanding the amount of "good time" a federal prisoner can earn, and increasing the power of federal judges to reduce or alter the conditions of federal prison terms in light of certain hardships. Through these means or others, federal prisoners who have received just punishment and present no danger can return to their families and become productive members of society, rather than a burden on taxpayers.