# DEFINING THE PROBLEM AND SCOPE OF OVER-CRIMINALIZATION AND OVER-FEDERALIZATION

## HEARING

BEFORE THE

OVER-CRIMINALIZATION TASK FORCE OF 2013

OF THE

## COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

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## OVER-CRIMINALIZATION TASK FORCE OF 2013

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JUNE 14, 2013

# DEFINING THE PROBLEM AND SCOPE OF OVER-CRIMINALIZATION AND OVER-FEDERALIZATION

**FRIDAY, JUNE 14, 2013**

HOUSE OF REPRESENTATIVES

OVER-CRIMINALIZATION TASK FORCE OF 2013

COMMITTEE ON THE JUDICIARY

*Washington, DC.*

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

Present: Representatives Sensenbrenner, Goodlatte, Bachus, Labrador, Holding, Scott, Conyers, Cohen, Bass, Jeffries, and Jackson Lee.

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

Mr. SENSENBRENNER. I would like to welcome everyone to the first hearing of the Judiciary Committee's Over-Criminalization Task Force. This is the first in a series of hearings the Task Force will hold on the growing problem of over-criminalization and over-federalization. The Crime Subcommittee had hearings in both the 111th and 112th Congresses to resurrect important policy discussions that have been dormant for over 2 decades about the breadth and scope of the Federal criminal law. Our work continues today.

The objective of today's hearing is to define the scope of the over-criminalization problem. That in and of itself is a complex and challenging task. At present, the United States Code contains approximately 4,500 Federal crimes, as well as innumerable regulations and rules, many of which carry severe fines and jail time for violations, and there is no indication that Congress is slowing down.

Indeed, over the past three decades, Congress has created an average of 500 new crimes per decade, and the Administrative Office of the U.S. Courts estimate that over 80,000 defendants are sentenced in Federal courts annually. Many of the crimes on the books are antiquated or redundant, some are poorly drafted, and some have not been used in the last 30 years. Moreover, many of the regulatory crimes in the code lack any *mens rea*, the attempt to commit a crime. That means that an American citizen may not only be

unaware that he is committing a crime, but he may be held strictly liable for his conduct.

In the 109th Congress, 203 bills were proposed containing some 446 nonviolent crimes. It is hard to imagine that there still remain nearly 500 types of legitimate criminal conduct that Congress has failed to properly prohibit. Accordingly, the Task Force will examine the types of conduct Congress has criminalized to assess several important issues. Should the conduct be criminal? If so, to what extent should it be punished? Is the offense properly written to distinguish criminal from lawful conduct?

The need for reform becomes particularly apparent when you read the stories of well-meaning Americans whose lives have been turned upside down when they run afoul of an obscure Federal statute, rule or regulation. In Virginia, a little girl saved a woodpecker from the family cat and was fined $535 because under the Federal Migratory Bird Act it is a crime to take or transport a woodpecker. In Texas, a 66-year-old retiree had his home raided by a SWAT team and spent almost 2 years in prison because he didn't have the proper paperwork for some of his prized orchids, all of which were legally imported. The judge who sentenced him to prison said sometimes life hands us lemons. But the source of the sourness was the government. This Task Force is an overdue effort to address this problem.

We will focus on reforms to streamline our criminal code, reviewing Federal laws in Title 18 to modernize our criminal code and addressing codification of crimes outside of Title 18 that have not gone through the Judiciary Committee. We will examine the extent of the problem and make recommendations to the full Committee on how to effectively address these issues.

I look forward to working with my Task Force colleagues on this bipartisan effort. And it is now my pleasure to recognize for his opening statement the Ranking Member of the Task Force, the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Today's hearing about over-criminalization of conduct and over-federalization of criminal law comes after a series of conversations and hearings that have taken place over the last two Congresses. Members of the Crime Subcommittee have met with a coalition of organizations, some of whose leaders are with us today.

These and other organizations have come to Congress to seek consideration and review of the practice and process of enacting Federal criminal law, and they have come out of a concern for what they and many others view as an explosive rate of growth of the Federal criminal code. They also have questions about the wisdom of continued expansion of the criminal code without first taking time to consider and review the process by which crime legislation is enacted.

Their concern is valid. The U.S. Criminal Code has dramatically increased in size and scope since it was last recodified about 50 years ago. There are an estimated 4,500 Federal crimes in the code today, and according to a study by the Federalist Society, the number of Federal offenses increased by about 30 percent between 1980 and 2004. We are averaging almost one new crime a week over the past few decades.

In the top 4,500 provisions of the Federal criminal code, there are an estimated 300,000 or more Federal regulations that can be enforced with criminal penalties. Far too many of these criminal offenses and regulations lack the adequate criminal intent or *mens rea* requirement to protect the innocent. Some offenses have no intent requirement at all.

A historic and groundbreaking joint study and report released by the National Association of Criminal Defense Lawyers and the 2010 Heritage Foundation report "Without Intent" took a look at the Federal legislative process for non violent criminal offenses introduced in the 109th Congress. That is 2005, 2006.

The study revealed that offenses with inadequate criminal intent requirements were present throughout all stages of the legislative process. Over 57 percent of the offenses introduced and 64 percent of those actually enacted into law contained inadequate criminal intent requirements, putting the innocent at risk of criminal prosecution. The study also commented on poor legislative craftsmanship, citing legislation as being vague, far-reaching, and having inadequate *mens rea* requirements.

The consequence of this will lead to unjust prosecutions, convictions, and punishments, so I look forward to hearing today's witnesses' suggestions regarding methods of improving legislative draftsmanship.

In requirements primarily a matter of State and local law over the past 40 years, Congress has increasingly federalized crimes already covered by State law. Not surprising, this dual Federal/State prosecution authority not only creates tensions between the government entities, but also places an individual in an extremely negative and precarious position of being forced with prosecution either at the Federal or State level. The bottom line is that an individual's fate has often hinged on not the actual offense, but the authority to prosecute them. It will be the challenge of this Task Force to explore and resolve the impact of over-federalization in the area of other crimes, including but not limited to such crimes as carjacking and drug offenses.

An unforeseen consequence of over-criminalization and over-federalization has been over-incarceration, with the explosion in growth in the U.S. prison population. The number of Federal prisoners in 1980 was 25,000, but it is over 200,000 today, and it is this number, when added to those incarcerated in state and local jails and prisons, has resulted in the United States now being the largest incarcerator in terms of both the total number incarcerated and the rate of incarceration.

In the last 30 years, we have gone from an average daily jail and prison incarceration level of about 500,000 to over 2 million, with an average incarceration rate of over 750 per 100,000 residents, a rate about seven times the international average. China, by contrast, with three times as many people, has a total incarceration level of 1.5 million with a rate of about 117 per 100,000. And we look to minorities, it is even worse. The average lockup rate for African Americans is around 2,200; 10 States the rate is almost 4,000.

That is particularly egregious because of a report from the Pew Center on the States. They did research and found that any incar-

ceration rate over 350 per 100,000 gives diminishing returns, and at 500 per 100,000 actually becomes counterproductive, meaning that it actually generates more crime than it stops by messing up so many families, wasting so much money on prisons, having so many people in the area with criminal records.

The work of this Task Force begins today, and it will involve identifying improvements in the Federal criminal code that we can all agree on. This work is extremely important and must be done correctly and effectively. It will require a major commitment of time and attention and must involve participants and input not only from Members of both parties of the House and Senate, but also from a diverse gathering of interested parties, including organizations in the over-criminalization working groups and others.

We will need the help of criminal law researchers, Federal law enforcement community, representatives of the judiciary, including the U.S. Sentencing Commission, and the Administrative Offices of the Courts, and other interested organizations and professionals. So I look forward to working with my colleagues on the Task Force and look forward to our witnesses today, particularly attorney Benjamin, who is one of my constituents.

Thank you very much.

Mr. SENSENBRENNER. Thank you.

The gentleman's time has expired.

The Chair recognizes the Chair of the full Committee, gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Chairman Sensenbrenner. I am very happy to be here today at the introductory hearing for this bipartisan Over-Criminalization Task Force. Today's hearing will afford members of the Task Force the opportunity to hear from a distinguished panel of outside experts who have been studying this issue very closely for a number of years.

The number of Federal crimes has exploded in recent decades, bringing the number to approximately 4,500. According to a study by the Federalist Society, the number of Federal criminal offenses grew by 30 percent between 1980 and 2004. Congress added 452 new Federal criminal offenses between just 2000 and 2007 alone, which averages 56.5 new crimes per year. This pace is simply unsustainable.

Perhaps more concerning than the sheer number of offenses is how Congress has written many of these new crimes. The recent growth of the Federal code in all areas of life has brought with it an ever-increasing labyrinth of Federal regulations, many of which also impose criminal penalties without a showing of *mens rea* or criminal intent.

A troubling example of this is what happened to three-time Indy 500 winner Bobby Unser. When snowmobiling near his home, an unexpected snowstorm forced Unser and a friend to seek refuge in a barn. While trying to escape the storm, they unwittingly went into a national forest wilderness area. They spent 2 days and nights in sub-zero weather eating snow to slake their thirst before being rescued.

Following his safe return home, Unser then contacted the Forest Service to help retrieve his snowmobile. For his trouble, he was later convicted of unlawful operation of a snowmobile within a na-

tional forest wilderness area, which carried a maximum penalty of 6 months in prison and a $5,000 fine. I am confident Congress never intended to subject someone in Unser's situation to criminal liability. However, stories like this have become all too typical.

I look forward to hearing from our witnesses today and in the coming months about the scope of over-criminalization and over-federalization and what steps this Task Force and the Judiciary Committee can take to address the issue. Concern for this issue is bipartisan and requires bipartisan perspectives. I commend all of my colleagues here today for your work on the Task Force, and I yield back the balance of my time.

Mr. SENSENBRENNER. The gentleman from Michigan, Mr. Conyers, the Ranking Member of the full Committee, is recognized for his opening statement.

Mr. CONYERS. Mr. Chairman, everybody has said already what I was going to say again, so I will submit my statement for the record and salute the Task Force, congratulate the witnesses for joining us, and yield back the balance of my time.

Mr. SENSENBRENNER. Without objection, the gentleman from Michigan's statement will be included in the report. And without objections, all Members' opening statements will be included in the record at this point.

[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**

Unfortunately, Congress has increasingly resorted to criminalizing actions as the solution to various problems over the past several decades.

There are now about 4,500 federal criminal laws. And, there are about 300,000 federal regulations that impose federal criminal penalties, many of which lack any mens rea requirement.

The breadth and scope of these laws is astounding and definitely in need of repair.

So as the Task Force undertakes its analysis of this problem of over-criminalization, there are several issues it should consider.

To begin with, the Task Force should understand the real consequences of exponentially increasing the number of criminal laws and regulations.

By inadvertently creating a patchwork of confusing, outdated, and duplicative laws, Congress has also created the related problems of overcriminalization and overincarceration.

For example:

- An estimated 65 million Americans have been tarnished with a criminal record, according to one of our witnesses today.
- The number of individuals currently incarcerated in our Nation exceeds 2.3 million, which is roughly 1 out of every 99 adults.
- And, the United States now leads the world in the rate of incarceration. Our incarceration rate is 7 times the international average. Indeed, some inner-city neighborhoods have an incarceration rate that is 40 times the international average.

Another focus of the Task Force should be on identifying creative and effective solutions, such as comprehensive, evidence-based prevention and intervention programs for children and families at risk of coming into the criminal justice system.

Such programs have been proven to not only to brake the cradle-to-prison cycle, but also greatly reduces criminal justice and social welfare costs to taxpayers.

For instance, the Youth PROMISE Act, authored by my colleague Rep. Robert C. "Bobby" Scott, is an excellent step in that direction.

This legislation would mobilize community leaders ranging from law enforcement officials to educators to health and mental health agencies to social service providers.

Another solution would be to revise our criminal laws to limit the severity of punishment for low-level offenses such as possession or use of drugs and to consider alternatives to mandatory minimums.

Research has shown that strong community supervision programs for lower-risk, non-violent offenders can cut recidivism by as much as 30 percent.

Mandatory sentences, long sentences for non-violent first offenses, and laws mandating increased penalties for repeat offenders lead to overincarceration.

One of the most pernicious aspects of mandatory minimums is that it deprives judges, the entities who have the greatest knowledge of the facts and law, of discretion and the ability to assess a particular person's culpability.

Finally, the Task Force should ensure that all of our criminal laws and penalties, be it statutory or regulatory, comply with the U.S. Constitution's due process mandate.

When good people are accused of violating laws that are vague or lack adequate mens rea, however, fundamental constitutional principles of fairness and due process are undermined.

I am particularly concerned that some criminal laws impose strict liability standards and that some regulations lack any mens rea requirements.

Accordingly, I look very much forward to hearing the views of our witnesses today.

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Mr. SENSENBRENNER. The Chair will now introduce the four witnesses.

The first witness is the Honorable George Terwilliger, III. He is a partner in Morgan, Lewis' litigation practice and co-chair of the White Collar Litigation and Government Investigations Practice. In this capacity, Mr. Terwilliger provides counsel in litigation, internal investigations, and enforcement proceedings. He has served as a U.S. presidential appointee in two Administrations. He was appointed U.S. attorney by President Ronald Reagan and served as deputy attorney general and acting attorney general in the George H.W. Bush administration. Most recently, Mr. Terwilliger was a partner in the white-collar practice of another international law firm. He received his bachelor's degree from Seton Hall University and his law degree from the Antioch School of Law.

John Malcolm is the Rule of Law Programs policy director and the Ed Gilbertson and Sherry Lindberg senior legal fellow in the Edwin Meese III Center for Judicial Studies of the Heritage Foundation. In this capacity, he writes and speaks on a variety of law-related topics. Previously, he served as an assistant U.S. attorney in Atlanta, then as an associate independent counsel in Washington, D.C.

Mr. Malcolm then went on to serve as a deputy assistant attorney general in the Criminal Division of the Department of Justice. He was an executive vice president and director of the worldwide anti-piracy operations for the Motion Picture Association of America and went on to serve on the faculty of Pepperdine School of Law as a distinguished practitioner in residence. Mr. Malcolm was most recently the general counsel at the U.S. Commission on International Religious Freedom. He is a graduate of Columbia and Harvard Law School.

William N. Shepherd is testifying in his capacity as a member of the American Bar Association. He is a partner at Holland & Knight. In this capacity, he represents individuals and corporations in the State and Federal Government investigations and grand jury investigations. Previously, he served as a prosecutor in Miami and then as the statewide prosecutor of Florida. He is chair of the American Bar Association's Criminal Justice Section, a member of its Global Anti-Corruption Task Force and a former division director of its White Collar Crime Division. He received both his undergraduate and law degrees from Georgetown.

Steven Benjamin is president of the National Association of Criminal Defense Lawyers, which is a professional bar association founded in 1958. Its members include private criminal defense lawyers, public defenders, Active Duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system. He is in private practice at the Virginia firm of Benjamin—and is it DesPortes or DesPort?

Mr. BENJAMIN. DesPortes.

Mr. SENSENBRENNER. DesPortes. Okay. He served as special counsel to the Virginia Senate Courts of Justice, or Judiciary Committee, and is a member of the Virginia Board of Forensic Science and the Virginia Indigent Defense Commission. He previously served as president of the Virginia Association of Criminal Defense Lawyers.

So we will now proceed under the 5-minute rule. We are facing a very long series of votes this morning and we don't know when it will start, so I will ask each of you to try and wrap it up in 5minutes. And you all know about the green, yellow and red lights. Without objection, all of your full statements will be included in the record at the point with your verbal testimony.

And, Mr. Terwilliger, you are first.

## TESTIMONY OF THE HONORABLE GEORGE J. TERWILLIGER, III, MORGAN, LEWIS & BOCKIUS LLP

Mr. TERWILLIGER. Thank you, Mr. Chairman and Ranking Member Scott, Chairman Goodlatte and Ranking Member Mr. Conyers, and members of the Task Force, for having me here today and inviting me to join with you in discussing the subject of over-criminalization and over-federalization.

Mr. SENSENBRENNER. Is your mike on, Mr. Terwilliger?

Mr. TERWILLIGER. Yes, sir.

Mr. SENSENBRENNER. Okay.

Mr. TERWILLIGER. I believe that the work of this Task Force has taken on even greater importance than it had when the Task Force was originally initiated. Recent events have vividly brought home to many Americans an understanding that their most fundamental liberties are at risk due to the overpowering and overburdening reach of the Federal Government establishment.

I am not referring to the recently reported NSA counterterrorism programs where I recognize the unfortunate need for these programs due to the significant terrorist threat our people face at home and abroad. Rather, it is something far more insidious and uncontrollable than NSA programs that impinge on Americans' liberties today. The recent events concerning the reprehensible and

possibly thuggish conduct of the IRS is but one stark example of a Federal Government that reaches far too deeply and intrusively into the daily lives and choices of ordinary Americans.

We have lost sight of the fact, in my view, that the purpose of our Constitution is not so much to establish a government as to ensure that the government that we must have is never permitted to take any more of our personal liberties from us than is absolutely necessary. We are on a path that is taking us from a system of ordered liberty through the rule of law to one of liberty that is only as extensive as government fiats allow.

And what freedoms are in peril? They range from the most fundamental of personal choices to others that standing alone may mean less, but considered collectively illustrate that the certain surrendering of personal liberty continues.

Consider: The freedom of each individual to retain the fruits of his or her labor and decide how, when, and for what to use those funds. Instead, we have a system of taxation that takes more and more from a few to distribute to many. That should not be, at least on the present scale, a choice that is made by government.

Liberty is further threatened because one of the results of massive and often wasted runaway Federal spending is that the government is starved for the funds to do the things that are its core functions and responsibilities, most especially those related to national defense and public safety, but also including those needed to foster expansions of economic freedom that produces prosperity.

The Federal leviathan even reaches into our daily life so far as to dictate to us when we awake in the morning, what kind of light bulbs may illuminate our bathroom, and how much water can flow through our showerhead. This would be humorous if not such a sad commentary on what we have allowed to evolve.

Over-criminalization is part of this larger picture. Thus, efforts by Congress to get its arms around these issues, such as through this Task Force, are a most significant step forward. My prepared statement traces the origins and developments of the use of Federal criminal law and addresses how we have strayed from its fundamental purpose. But I believe the fundamental takeaway is this: We have lost sight of the proper use of Federal criminal law as a carefully applied tool to protect the means and instrumentalities of commerce, a goal in harmony with the principles of federalism and the Framer's intent.

I would like to leave you today with one simple idea that I think could be a significant step forward: We could assure ourselves that no person or business is ever convicted of a criminal offense unless a jury has determined that he, she, or it acted with criminal intent, and I believe this could be accomplished by writing an overriding provision of law that requires as an element of any offense where a showing of intent is not expressly required that it be proven beyond a reasonable doubt that the defendant acted with a bad purpose; that is, with the intent to disobey or disregard a requirement of law. This could eliminate any question as to strict criminal liability offenses being actionable and would reintroduce to Federal criminal law the fundamental and venerated principle that a criminal offense must include proof of intent to do a bad act.

Again, I thank the Chair and the Ranking Member of the Task Force for taking on this important work and will be pleased to answer any questions or to discuss these issues with Members or staff anytime.

[The prepared statement of Mr. Terwilliger follows:]

**Prepared Statement of**
**Hon. George J. Terwilliger III**
**Partner, Morgan, Lewis & Bockius LLP**

**Before the**

**House Committee on the Judiciary**
**Over-criminalization Task Force**
**Hearing on**
**Defining the Problem and Scope of Over-Criminalization and Over-Federalization**
**Friday, June 14, 2013**

**Executive Summary**

Mr. Chairman, Ranking Member Scott, and Members of the Task Force, thank you for the opportunity to discuss an issue that has been an important one to me. I applaud the creation of this Task Force and would look forward to further contributing to its work. A brief summary of my prepared statement follows:

- The core purpose of federal criminal law should be to protect the instrumentalities of commerce. This purpose is consistent with principles of federalism, the enumerated powers of Congress, the Founders' intent, as well as early precedents in federal criminal law.
- Over-criminalization, in my view, is defined as the process whereby criminal laws of general application are applied to what is otherwise legitimate activity, but activity that is regulated in its nature, extent and reporting to the federal government.
- Supreme Court precedents imposing criminal liability on corporations and abandoning criminal intent requirements for regulatory offenses created a framework where criminal penalties were used to regulate otherwise legitimate conduct, rather than to protect the integrity of the market.
- As a result of this framework, Congress was freed to create the broad outlines of criminal liability and delegate the creation of criminal punishments to regulatory agencies under their rule-making authority. The result is a morass of highly technical, vague regulations enforced by criminal statutes of general application.
- This framework imposes real burdens on the economy in the form of regulatory compliance costs and a chilling effect on entrepreneurial risk-taking. Additionally, by requiring companies and individuals to comply with opaque regulations under penalty of strict criminal liability, principles of fundamental fairness have been compromised and due respect for the law threatened.
- To address one aspect of this challenge, I suggest omnibus legislation to require minimum criminal intent requirements for all *malum prohibitum* offenses. Specifically, Congress could require that for any criminal violation where the required intent is not expressly stated, the government prove intentional criminal conduct, that is, that the

defendant acted with intent to disobey or disregard the law. Additional reforms to provide clarity to the law are also suggested.

**Introduction**

I will focus my comments today on the role of federal criminal law in protecting our markets and the impact over-criminalization has on our economy. To be certain, there is an appropriate role for federally-enforceable criminal statutes that is wholly consistent with the principles of federalism, our Constitution, and the Framers' intent. Specifically, federal criminal law, including the investigation and prosecution of fraud in commercial markets, is a traditional and powerful tool for protecting the means and instrumentalities of commerce that are necessary to sound economic health. Unfortunately, the increasing reliance on federal criminal sanctions to regulate legitimate business activity can chill the entrepreneurial risk-taking that underlies economic growth and prosperity. By re-dedicating the federal criminal law to its fundamental purpose, it is my belief that we would create an environment that nourishes the commercial heart of America, promotes job creation, and secures prosperity for future generations.

Today, I endeavor to bring to our discussion the benefit of my experience of fifteen years in the Department of Justice, including the privilege of serving as Deputy Attorney General, United States Attorney, and front-line federal prosecutor, as well as experience since in my work as co-chair of the White Collar Litigation and Government Investigations Practice at Morgan, Lewis & Bockius LLP ("Morgan Lewis"), where I advise U.S., foreign, and multinational clients on a variety of enforcement matters. My comments today are wholly my own, and I do not speak on behalf of Morgan Lewis or for any individuals or entities whom I represent.

**The Problem of Over-Criminalization**

Over-criminalization is the rare issue in which all sides can find common ground; indeed there is plenty to be said about the impact of a rapidly expanding federal criminal enforcement apparatus on our civil liberties, the disparate impact of federal criminal drug laws on certain minority groups, and encroachment of federal influence into areas traditionally reserved to the states. However, I address that aspect of over-criminalization whereby criminal laws of general application are applied to what is otherwise legitimate activity, but activity that is regulated in its nature, extent and reporting to the federal government.

Appropriate use of federal criminal law in the commercial context should be to protect and preserve the means and instrumentalities of commerce. A market distorted by fraud and corruption cannot be a free market. Raising concerns of over-criminalization does not mean favoring leniency for fraudsters, hucksters, liars, cheats, and others who would abuse a free market system. Fraud and dishonest practices in the commercial world subvert the market and engender a lack of respect for the rule of law. Such transgressions deserve criminal sanctions.

But regulating legitimate activity through criminal prosecution, particularly where in use of their broad discretion, prosecutors set regulatory parameters, is ill-advised. This results from Congress increasingly creating the broad outlines of criminal liability, and then regulators, using their rule-making authority to fill in the details, create a morass of dense regulations. Prosecutors then, interpreting the minutiae of highly technical, vague standards, can bring

prosecutions for crimes of general application, such as fraud and false statements, for transgressions of regulatory standards they establish. It is estimated by a number of sources that there are currently more than 4,000 criminal statutes on the books today, up from 165 in 1900, and as many as 300,000 criminally-enforceable federal regulations, though nobody knows the exact number.[1]

This proliferation of federal regulations has had an appreciable impact on the national economy. The Competitive Enterprise Institute ("CEI") recently released the 20th edition of its survey of the federal regulatory environment, entitled *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*. CEI estimates that the total cost to Americans to comply with federal regulations reached $1.806 trillion in 2012, equivalent to over half of federal spending and larger than the GDP of either Mexico or Canada.[2] This figure amounts to $14,678 per family, or 23 percent of the average household income.[3] A recent Small Business Administration survey of the overall federal regulatory environment estimated annual regulatory compliance costs of $1.752 trillion in 2008.[4]

In my experience in private practice, my practice group colleagues and I advise companies on a variety of criminal enforcement matters, such as enforcement of and compliance with the Foreign Corrupt Practices Act ("FCPA"), in the context of contemplated and ongoing business transactions and projects. This experience allows me to confidently convey to the Task Force that complicated and criminally-enforceable regulations create uncertainties that have a significant adverse effect on business. When confronted with opaque regulatory requirements that may give rise to strict criminal liability, companies too often forego opportunities, or at the very least expend valuable resources and delay ventures in order to address the legal risks that underlie entrepreneurial decision-making. It is not that the businesses and the people making decisions are overly risk-averse, it is that they cannot properly assess risk because regulatory and enforcement lines are too fuzzy.

Examples of the trend toward regulation by criminalization abound. Environmental laws for instance, incorporate steep criminal penalties for failing to meet regulatory standards in conducting otherwise legitimate commercial activity. Polluting is legal in the United States; the government issues permits to allow it. Polluting too much, however, can be a felony. Some acts of pollution may indeed be criminal because they involve volitional and intentional acts that can result in foreseeable and significant harm—dumping highly toxic materials in an open field or waterway, for example. The federal government has a legitimate regulatory interest in such activity, which is appropriately enforced using criminal penalties. But the more common subject matter of environmental "crimes" involves the line between permitted and prohibited discharges,

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[1] *See, e.g., Priority Issues: Overcriminalization*, RIGHTONCRIME.COM, http://www.rightoncrime.com/priority-issues/overcriminalization/ (last visited June 10, 2013); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507(2001).

[2] Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State* 2 (2013 20th Ann. ed.)

[3] *Id.*

[4] *Id.*

which can be razor thin, often expressed in parts per million, and the stuff of great debate between experts and scientists.[5]

Similar pitfalls await those providing goods and services under government health insurance programs such as Medicare and Medicaid, and those working to extract oil and natural gas from federal lands, among other fields. The result is notorious examples in which complex regulations underlie prosecutions for crimes of far-reaching scope, frequently resulting in absurd outcomes.

While the literature on over-criminalization includes reference to a number of these cases, several of which are familiar to those of us who have studied this issue, such as *United States v. McNab*,[6] the so-called "Honduran Lobsterman" case, and the repeated raids on Gibson Guitars' Nashville factory for alleged violations of the Lacey Act, I will only focus on a couple today. One example is the 1982 case of *United States v. Hartley*, in which the Eleventh Circuit upheld the conviction of a corporation and two of its employees for selling the military breaded shrimp that failed to meet certain specifications, including the amount of breading on each piece of shrimp.[7] The defendants in that case had committed some serious criminal acts, including defrauding the government by altering inspection standards and changing the weights used to determine how much shrimp the government bought.[8] To be sure, these transgressions may well deserve criminal sanction because they involve the type of deception and dishonesty that traditionally characterizes criminal intent. But one must question whether the under-breading of shrimp—the fundamental aspect of the case—justified thirty-three counts of conspiracy, mail fraud, violations of the National Stolen Property Act, and the Racketeer-Influenced Corruption Organizations Act ("RICO").[9]

Similarly, in *United States v. Whiteside*, the Eleventh Circuit rejected the overbroad application of a general criminal statute to ordinary commercial conduct.[10] The government accused the individual defendants of making false statements under 18 U.S.C. § 1001 in Medicare/Medicaid and CHAMPUS reimbursement reports, and of conspiracy to defraud the United States, among other offenses.[11] The case turned on whether the defendants knowingly and willfully made a false statement when they filed a single report (required by regulation) classifying debt interest in terms of "how the debt was being used at the time of filing of the cost report rather than how the funds were used at the time of a loan origination."[12] However, the

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[5] *See, e.g., Gen. Elec. Co. v. E.P.A.*, 53 F.3d 1324, 1326 (D.C. Cir. 1995) (discussing the Toxic Substances Control Act, which was concerned with the level of polychlorinated biphenyls inside decommissioned electric transformers in parts per million).

[6] 331 F.3d 1228 (11th Cir. 2003).

[7] *United States v. Hartley*, 678 F.2d 961, 965-66 (11th Cir. 1982).

[8] *Id.* at 966.

[9] *Id. Hartley* was later abrogated regarding the applicability of the RICO statute, in that it involved the only appellate court to hold that a person and enterprise identified by the RICO statute could each be the same corporation. *United States v. Goldin Indus., Inc.*, 219 F.3d 1268, 1270-71 (11th Cir. 2000).

[10] *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002).

[11] *Id.* at 1350.

[12] *Id.* at 1351.

court found no legal authority clearly supporting the government's interpretation of the regulations at issue. Instead, it noted that the experts disagreed as to the proper interpretation thereof, and accordingly found that the government failed to establish that the defendants' interpretation of the regulations was not reasonable.[13]

*Whiteside* has a happy ending because the court of appeals let common sense prevail. By recognizing that the government's theory of the case was significantly flawed, the *Whiteside* court's holding implicitly identified and embraced important principles of fundamental fairness and due process. As the Supreme Court has recognized, "a penal statute must define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[14]

As the *Whiteside* prosecution and other cases demonstrate, however, the current state of play has more than economic costs. Criminal sanctions for violations of opaque regulatory standards offend due process principles and can engender lack of respect for the rule of law. While many regulatory goals enjoy widespread support and are legitimate subject matter for some government regulation, that alone is not a sufficient justification for resorting to criminal sanction to achieve them. As criminal enforcement proliferates, the impact of criminal sanctions is diluted; penal statutes become predominated by *malum prohibitum* laws and the moral force—and moral legitimacy—of the criminal code is undermined. Moreover, due to the practical reality of the new framework in which Congress merely lays the borders, the drafting of criminally-enforceable rules are delegated to unelected regulators and bureaucrats, raising concerns under separation of powers principles where the legislature defines criminal acts.

**How Did We Get Here?**

Before offering recommendations on how, in my view, some of these issues may be addressed, let me provide some context on how I believe we reached this point. A reminder of the evolution of the use of federal criminal law, particularly as related to commercial activity, is essential to appreciate and place in context the criminal regulatory regimes that face businesses today.

The federal government, of course, does have a legitimate interest in regulating conduct which threatens to undermine the commercial health of the country. Indeed, among the driving forces behind the constitutional convention was the desire to buttress the strength of the nation through prosperity in economic union:

> There are appearances to authorize a supposition that the adventurous spirit, which distinguishes the commercial character of America, has already excited uneasy sensations in several of the maritime powers of Europe. . . . Impressions of

[13] *Id.* at 1352-53.

[14] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Raley v. Ohio*, 360 U.S. 423, 438 (1959) ("[a] state may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them.").

> this kind will naturally indicate the policy of fostering divisions among us, and of depriving us, as far as possible, of an Active Commerce in our own bottoms.[15]

Encouraging economic prosperity was recognized by 20th century theorist Michael Novak to be the significant contribution of the Anglo-American system, when he stated that "[t]he invention of the market economy in Great Britain and the United States more profoundly revolutionized the world between 1800 and the present than any other single force."

It follows then that a core function of the federal government is to promote commerce, and thus a critical function of federal criminal law is to protect its means and instrumentalities. It is well accepted at this point that Congress has near-plenary authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[16] Article I, Section 8 also provides the means for Congress to promote commerce by, for example, providing the authority to make uniform bankruptcy laws, to establish post offices and post roads, and to promote science and protect inventions.[17]

Congress also has the enumerated power to define and *punish* specific crimes, including treason, counterfeiting, piracy, felonies committed on the high seas (i.e., affecting international trade and shipping), and offense against the laws of nations.[18] In other words, Congress' enumerated power to pass criminal laws serves a fundamental purpose: to protect the country, including its channels of commerce, and to preserve the integrity of the functions of government. The first Congress acted on this power and enacted laws which tracked closely its enumerated authority by punishing treason, misprision of treason, perjury in federal court, bribery of federal judges, forgery of federal certificates and securities, and murder robbery, larceny and receipt of stolen property on federal property or on the high seas.[19]

Early criminal laws up until the early part of the 20th century followed this pattern of lawmaking by which the sanction of criminal laws safeguarded commerce and cleansed it if corruption developed. Laws enacted during this period include the False Claims Act,[20] which was passed during the Civil War to prevent fraud by wartime profiteers and also to punish frauds in federal procurement; the Interstate Commerce Act;[21] and the Sherman Antitrust Act,[22] which

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[15] The Federalist No. 11 (Alexander Hamilton); *see also* The Federalist No. 12 (Alexander Hamilton) ("The prosperity of commerce is now perceived and acknowledged, by all enlightened statesmen, to be the most useful as well as the most productive source of national wealth; and has accordingly become a primary object of their political cares. By multiplying the means of gratification . . . it serves to vivify and invigorate the channels of industry, and to make them flow with greater activity and copiousness.").

[16] U.S. Const. art. I, § 8.

[17] *Id.*

[18] *Id.*

[19] *See generally* An Act for the Punishment of Certain Crimes Against the United States, ch. 9.

[20] An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 696 (1863) (current version at 18 U.S.C. § 287 and 31 U.S.C. §§ 3729-3733).

[21] Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

[22] Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890).

sought to provide protection to the free market by aiming to free interstate commerce from anticompetitive forces.

Similar principles undergird federal bank fraud and robbery statutes, New Deal securities regulations, and financial reporting laws designed to preserve market integrity and promote investor confidence. Even RICO has a fundamental purpose of cleansing commercial markets of the insidious effect of organized crime. This pattern of using federal criminal statutes for specific purposes to protect the means and instrumentalities of commerce was thus consistent with the Founders' concern that the federal government be enabled to create and preserve infrastructures that would promote commerce and encourage it to flourish.

This paradigm began to shift in the first half of the 20th century with Progressive- and New Deal-era reliance on the federal criminal law to regulate otherwise lawful corporate conduct. The opening salvo came, of all places, from the Supreme Court when it decided in 1909 that corporations could be prosecuted for crimes by extending "a step further" to criminal liability principles of *respondeat superior* developed in tort.[23] In *New York Central Hudson River Railroad Co. v. United States*, the defendant corporation challenged the Elkins Act, which prohibited railroad companies from paying rebates to favored customers and expressly prohibited corporations from engaging in practices that would constitute criminal violations of the Act, if done by a natural person.[24] Recognizing that the Elkins Act was part of a growing class of *malum prohibitum* offenses, the Court concluded there was "no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them . . . . If it were not so, many offenses might go unpunished."[25]

It seems not an obvious choice to extend criminal liability to corporations. Civil remedies were available to right corporate wrongs, while the keystone criminal remedy—loss of liberty—is not applicable to corporations.[26] Instead, the Court made a policy decision that regulatory violations by corporations should be criminally punished. The Court did not address, and therefore offered no persuasive rationale for, its abandonment of traditional notions of the basis for criminal responsibility in reaching the conclusion that a criminal proceeding should lie against an entity that is a legal fiction, incapable of forming intent or otherwise acting except through the conduct of real persons.

From here things progressed quickly. In *United States v. Union Supply Co.*[27] the Court upheld an indictment of a corporation for violating a statute that applied to "persons" and lacked a clause explicitly applying criminal penalties to corporations, such as was present in the Elkins Act.[28] Justice Holmes, writing for a unanimous Court, readily dismissed the defendant's

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[23] *New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909).

[24] *See* 49 U.S.C. § 11907.

[25] *New York Central & Hudson*, 212 U.S. at 494-495.

[26] *Id.* at 495-496 (discussing the fact that corporations can only be fined).

[27] 215 U.S. 50 (1909).

[28] *Id.* at 54-55.

argument that the statute's mandatory minimum prison term meant the provision could not be applied to corporate defendants. Justice Holmes wrote, "if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean on that account to let the defendant escape."[29] Such expansive jurisprudence hastens the criminalization of otherwise legitimate corporate conduct that falls short of regulatory dictates.

With the precedent in place, the doctrine of strict criminal liability was expanded to individuals, contributing further to the widespread use of criminal law as a means of regulation. In *United States v. Balint*, the Court upheld the convictions of multiple defendants under the Narcotics Act of 1914, which made it a crime to sell certain controlled drugs without permission from the Commissioner of Revenue, regardless of whether one knew the drugs were controlled.[30] Recognizing the statute was a departure from the traditional requirement that *scienter* be proven as an element of every crime, the Court stated, "[m]any instances of this are found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*."[31]

Similarly in *United States v. Dotterweich*, the Court upheld the conviction of the president and general manager of the Buffalo Pharmacal Company for criminal violations of the Food, Drug, and Cosmetic Act for misbranding and adulterating drugs shipped in interstate commerce.[32] The corporation was also charged, but had been acquitted by the jury at trial. Although the Second Circuit had reversed Dotterweich's conviction, the Court disagreed with the Second Circuit's reading of the statute's definition of "person" to include only the corporate entity.[33] The Supreme Court, on the other hand, concluded that the statute should be read more broadly and treated as a "working instrument of government and not merely as a collection of English words."[34] The Court further stated that the statute at issue was part of a "familiar type of legislation *whereby penalties serve as effective means of regulation*."[35] Acknowledging a remarkable willingness to overlook basic and fundamental notions of criminal responsibility for legislation that "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing" when the actor is "standing in responsible relation to a public danger,"[36]

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[29] *Id.* at 55.

[30] *United States v. Balint*, 258 U.S. 250, 251, 253-54 (1922).

[31] *Id.* at 252.

[32] *United States v. Dotterweich*, 320 U.S. 277, 278 (1943).

[33] *United States v. Buffalo Pharmacal Co.*, 131 F.2d 500, 503 (2d Cir. 1942).

[34] *Dotterweich*, 320 U.S. at 280.

[35] *Id.* at 280-281 (emphasis added).

[36] *Id.*

the Court held it is "natural enough" to impose strict criminal liability on those who ship drugs in commerce.[37]

Now being duly unburdened by traditional common law and constitutional principles relevant to use of criminal law, Congress has followed the courts' lead and has increasingly relied on federal criminal law as a regulatory tool. In so doing, however, Congress has largely abandoned its traditional role in defining by statute what is a crime, instead enacting general enforcement provisions in regulatory schemes and allowing agencies to define the crimes by virtue of their exercise of rule making authority. Individuals and corporations must decipher these regulations to determine what constitutes a crime. Additionally, these regulations usually require regulated entities to provide information to the government, the reporting and certification of which can become fodder for prosecutors considering whether to bring charges for making false statements or concealing material information from the government.

**Recommendations for Reform**

Over-criminalization is a broad and diffuse issue, and accordingly there are a number of ways to attack the problem. As a general matter, in my view a concerted effort should be made to re-dedicate the federal criminal law to traditional principles underlying its purpose and fundamental fairness. To that end, requiring knowing and intentional conduct before criminal penalties can be imposed would be a major first step towards placing an emphasis back on protecting the means and instrumentalities of commerce rather than using criminal law to regulate, and punish, ordinary commercial activity governed by regulation. I propose three specific recommendations that would further this goal.

First, we could assure ourselves that no person is ever convicted of a criminal offense unless a jury has determined that he or she, or it, acted with criminal intent. I believe this could be accomplished by writing an overriding provision of law that requires, as an element of any offense where a showing of intent is not expressly required, it be proven beyond a reasonable doubt that the defendant acted with the intent to disobey or disregard the law.[38] This could eliminate any question as to strict liability criminal offenses being actionable and would reintroduce to all federal criminal law the fundamental and venerated principle that a criminal offence must include proof of *mens rea*.

Second, Congress should consider long-overdue reforms to the FCPA. Although this law is only one of several thousand imposing criminal penalties, it presents a significant impediment to businesses and uncertainty in FCPA enforcement standards represents a ready example of the adverse affect on businesses of poorly formed statutes. Specifically, because the FCPA is largely enforced exclusively by the Department of Justice and Securities Exchange Commission, beyond the scrutiny of judicial oversight, enforcement is dependent largely on prosecutorial discretion

[37] *Id.* at 281 (quoting *United States v. Johnson*, 221 U.S. 488, 497-98 (1911) (holding that Narcotics Act, while covering factual statements as to the contents of drugs, did not apply to opinion or "mistaken praise")).

[38] *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (citation omitted); *United States v. Bryant*, 420 F.2d 1327, 1333 n.9 (D.C. Cir. 1969).

and internal agency guidance.[39] In order to provide greater clarity to the FCPA, Congress should consider some of the following reforms:

- **Affirmative Defense for Adequate Procedures:** Like the UK Bribery Act, the FCPA should include a presumption against criminal prosecution upon a showing by a defendant corporation that it has in place an effective compliance program, structured around specified standards. Such a reform would permit companies to concentrate resources into structuring effective compliance programs (which in turn would help assist in furthering the deterrent effect of the law), knowing that the efforts could help insure them against unforeseeable corruption risks, thus helping to spur investment in overseas operations and ventures.
- **Repose of Post-Acquisition Due Diligence:** Congress should consider an amendment to the FCPA that would provide that if in a defined period after an acquisition closes, a company conducts a detailed compliance assessment of the acquired company's operations, promptly discloses to the government and remediates any non-compliant conduct discovered, the acquiring company would be immune from penalty for FCPA violations occurring in the acquired entity's operations during or prior to that period. Because the realities of pre-acquisition due diligence do not always allow full and complete access to the target company's operations records, this would incentivize and allow an acquiring company the opportunity to uncover issues not identified during pre-acquisition due diligence and to quickly and fully integrate the acquired entity into its compliance program.
- **Additional Reforms:** Additionally, in order to promote greater clarity, Congress should consider amendments to the FCPA that would clarify specific ambiguous terms that have been the subject of much spilled ink in the academia, the FCPA bar, and before this very Committee. Specifically, greater clarity should be provided to the meaning of "foreign official" and the degree of control required of foreign governments before a state-owned enterprise or other foreign entity is considered an "instrumentality" of a foreign government.

  Greater clarity can also be provided to the meaning of "facilitation payment." Due in part to the government's expansive definition of liability, the facilitation payment exception to the FCPA exists in theory, but not in practice. Many companies that discover what appear to be benign facilitating payments can be left paralyzed with uncertainty as to whether the practice violates the law.

Finally, the Task Force should consider drafting a set of principles to which all new or proposed criminal sanctions are required to conform before being voted out of Committee. For example, these principles could express a sense that the fundamental purpose of federal criminal is to protect the means and instrumentalities of commerce and/or to protect the integrity of government operations; if a nexus to either of these requirements cannot be clearly identified, the proposal should be tabled.

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[39] *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "Guidance"), released jointly by the Department of Justice and Securities Exchange Commission in November 2012, consolidates the governments' interpretation of the FCPA and its enforcement expectations and is a helpful reference. However, the Guidance does not do enough to significantly reduce enforcement uncertainty.

**Conclusion**

In the interest of both the fair administration of justice, and in fostering an environment in which commercial prosperity—and its attendant blessings for all Americans—may flourish, Congress should consider taking affirmative steps to address the problem of over-criminalization. This Task Force is a very positive step forward in that process. The rapid expansion of the federal regulatory environment over the last half century has imposed real and significant costs on all Americans. That many of these regulations are criminally enforceable yet lack any required showing of criminal intent chills entrepreneurial risk-taking and violates traditional notions of fundamental fairness and due process. To be sure, criminal conduct should be subject to vigorous criminal enforcement, but the emphasis should be placed on protecting the means and instrumentalities of commerce rather than using criminal law to punish transgressions of regulations governing legitimate commercial activity. Entrepreneurial risk-taking—the heart of American commerce—can only thrive so long as it is nourished; regulation through criminalization undermines, rather than promotes, that commercial heart.

Again, I thank the Chairman and Members of this Task Force and I look forward to answering any questions from the dais.

Mr. SENSENBRENNER. Thank you, Mr. Terwilliger.
Mr. Shepherd.

**TESTIMONY OF WILLIAM N. SHEPHERD, AMERICAN BAR ASSOCIATION (ABA)**

Mr. SHEPHERD. Thank you very much, sir. Mr. Chairman, Ranking Member, it is a pleasure to be here on behalf of the American Bar Association. I serve as chair of the American Bar Association's 20,000-member Criminal Justice Section, a group that is made up of both prosecutors and defense lawyers, judges and academics, who, like you in this bipartisan setting, often find themselves——

Mr. SENSENBRENNER. Is the light on?

Mr. SHEPHERD. I believe it is on. Oh, there we go. Thank you very much, sir.

Who find ourselves, as you do, addressing these issues in a bipartisan fashion. We, from our diverse professional backgrounds, come to the same conclusions that you do: There are too many criminal laws, the enforcement of many of these laws becomes confused, and because of the overburdening number of laws and the strain that puts on our system, priorities, which we might all agree on, oftentime get sidetracked because of fiscal realities.

My own practice background is that I spent 12 years as a State court prosecutor trying cases in courthouses in Miami and throughout the State of Florida. For the last 4 years of that service I had the opportunity to serve as Florida's statewide prosecutor and at which point I spent a fair amount of time in our legislative processes in our State legislatures. One of the issues that became apparent to us as a security threat was the growing problem of gangs in the State of Florida. We worked with legislative leaders to address some of the issues and craft new laws that would help give law enforcement tools they might better use to protect the citizens of our State.

As that debate went on, one of the main issues became, well, Mr. Shepherd, if we pass some of these, it will have a significant prison bed impact. Well, yes, that was the goal, to have a prison bed impact as it related to serious gang violence and gang offenders. But, Mr. Shepherd, you don't understand, we have a large influx of new inmates who are traffic offenders, not trafficking, traffic, driving offenses. And I am not trying to minimize the importance of those, but I think it illustrated the point that as new penalties get added on to new statutes, perhaps without thinking about the long-term impact, some of those decisions have an impact on what we would prioritize.

If we are going to build prisons, certainly we would build them to protect our communities from violent gang offenders, and if our own fiscal realities have been dictated by something else, I think that is a prime example, on a broader spectrum, of some of the same issues that States are facing as you are trying to discuss these issues today.

The American Bar Association has long been in favor of policies that would bring sensible reforms to some of the legislative issues, one that I will talk about as it relates to an individual case that I was involved in recently. In drafting an amicus brief on behalf of my colleague here at the National Association of Criminal De-

fense Lawyers, involved a commercial fisherman in Tampa who was prosecuted under a crime drafted by this Congress, but my guess would be that Congress had no idea that a post-Enron anti-document-shredding statute would be used to convict a man of destroying three red grouper.

A 4-day Federal court trial resulted in his conviction for the destruction of this evidence that he had been sent by the Fish and Game Commission to take to the port. When they came back to the port 3 days later to reinspect the fish, the original count of 72 reflected there were now only 69 fish on the port. That case is now before the Court of Appeals in the 11th Circuit.

And I am not here to argue the case, but what I am here to say is that the laws that you draft get applied by real people and impact real lives in ways that you may have no idea would be the ultimate goal and the ultimate use as it impacts those individual people. If laws are important enough such that individual men should spend time in Federal prison, those laws should be drafted by you, the people in this Congress, instead of delegated to career people who work in agencies, who are not elected officials like yourself, people who have a narrow focus and perhaps don't have a broader perspective that you carry with you when you come from your constituents.

So, in concluding, I would just say that if it is important enough to send a man to Federal prison, it is important enough for this Congress to vote on it, and I think that that is an overarching issue that you can all address in this, and I compliment you for your work in this area. Thank you.

[The prepared statement of Mr. Shepherd follows:]


Testimony of

WILLIAM N. SHEPHERD

on behalf of the

AMERICAN BAR ASSOCIATION

for the hearing on

DEFINING THE PROBLEM OF OVER-CRIMINALIZATION AND OVER-FEDERALIZATION

before the

Committee on the Judiciary
Task Force on Over-Criminalization

of the

UNITED STATES HOUSE OF REPRESENTATIVES

June 14, 2013

www.americanbar.org

Co- Chairman Sensenbrenner, Co-Chairman Scott, and Members of the Task Force:

I am William Shepherd, Chair of the American Bar Association (ABA) Criminal Justice Section. I am pleased and honored to appear today on behalf of the ABA at the first hearing held by the Task Force on "Defining the Problem of Over-Criminalization and Over-Federalization."

The ABA, with nearly 400,000 members, commends the Task Force for holding this hearing. We also applaud the leadership of the Judiciary Committee, its Chairman Bob Goodlatte and Ranking Member John Conyers, Jr. as well as the Task Force Co-Chairs, for fostering the creation of this Task Force and for doing so on a bipartisan basis. I also want to acknowledge the leadership of our colleague organizations. The NACDL, the Heritage Foundation and the Federalist Society have worked tirelessly and increasingly together with us in recent years to bring about a broader focus on issues that the Task Force will examine over the next few months.

The need for comprehensive review of the state of federal criminal law by the Task Force is clear. At every stage of the criminal justice process today – from the events preceding arrest to the challenges facing those re-entering the community after incarceration – serious problems undermine basic tenets of fairness and equity, as well as the public's expectations for safety. The result is an overburdened, expensive, and often ineffective criminal justice system.

Both over-criminalization and over-federalization lessen the value of existing important legislation by flooding the landscape with duplicative and overlapping statutes, making it impossible for the lay person to understand what is criminal and what is not. Punishment, the centerpiece of American criminal law, can lose its deterrent, educative, rehabilitative, and even retributive qualities, under the barrage of overly broad, superfluous statutes.

***Over-federalization***

While only a small fraction of our nation's prosecutions are handled in federal court, the overwhelming number of regulations and statutes that carry criminal penalties are found on the federal side of the ledger. Many of these criminal violations were never passed by Congress and are not found in Title 18, but instead are created through the regulatory framework housed in federal agencies.

The ABA has long called for more careful scrutiny and steps to reform the unchecked growth of federal criminal law and the attendant expansion of the federal criminal justice system. We share this concern for over-federalization with a wide range of organizations.

In 1998, the American Bar Association (ABA) Task Force on the Federalization of Criminal Law, chaired by former Attorney General Edwin Meese, issued a report entitled "The Federalization of Criminal Law." It noted that for much of our national history, the deeply rooted principle that the general police power resides in the states – and that federal law enforcement should be narrowly limited – was recognized in practice as well as in principle. At least until recently, the constitutional vision that the federal government should play a narrowly circumscribed role in defining and investigating criminal conduct was reflected in cautious limitation on the types of behavior that federal lawmakers addressed through criminal law. The ABA Task Force reached the clear conclusion that there had been significant growth (much of it

recent) and that a sizeable portion of new federal crime legislation dealt with localized matters earlier left to the states. A complex layer is being added to the overall criminal justice scheme, dramatically superimposing federal crimes on essentially localized conduct already criminalized by the states.

The Task Force's research revealed a startling fact about the explosive growth of federal criminal law: More than 40% of the federal provisions enacted since the Civil War have been enacted since 1970. It concluded that the federalization trend presents a troubling picture with far-reaching consequences. It reflects a phenomenon capable of altering and undermining the careful decentralization of criminal law authority that has worked well for all of our constitutional history. It also raises questions about what kind of American criminal justice system will evolve if this trend continues.

The 1998 Report noted that as the federal courts were increasingly burdened with cases traditionally handled in state courts the federal criminal justice system had grown in unprecedented scale, size and cost to fulfill new its duties. Greatly increased federal criminal jurisdiction led to a greatly larger federal criminal justice infrastructure in all respects. A direct consequence of much concern today in a period of intense fiscal scrutiny of federal spending is that the greatly increased numbers of federal convictions resulting from an unprecedented expansion of federal criminal law has led inevitably to commensurate increases in the federal prison population, burdening the federal system with all the attendant consequences of such expansion. There is a growing consensus that the costs for maintaining the projected growth of the federal Bureau of Prisons budget cannot be sustained and that reform of federal criminal laws, particularly those governing sentencing and release from terms of imprisonment must be reexamined.

Inappropriately federalized crimes cause serious problems in the administration of justice in this country. Even when prosecuted only occasionally, inappropriately federalized crimes threaten fundamental allocation of responsibility between state and federal authorities. While a single unsuitable proposal, intended as a well-meaning antidote for criminal ills, may be thought to do little damage, it is important to keep in mind the detrimental long-term effects of unwarranted federal intrusion.

- It general undermines the stat-federal fabric and disrupts the important constitutional balance of federal and state systems.
- It can have a detrimental impact on the state courts, state prosecutors, attorneys, and state investigating agents who bear the overwhelming share of responsibility for criminal law enforcement.
- It has the potential to relegate the less glamorous prosecutions to the state system, undermine citizen perception, dissipate citizen power, and diminish citizen confidence in both state and local law enforcement mechanisms.
- It creates an unhealthy concentration of policing power at the federal level.
- It can cause an adverse impact on the federal judicial system.
- It creates inappropriately disparate results for similarly situated defendants, depending on whether their essentially similar conduct is selected for federal or state prosecution.
- It increases unreviewable federal prosecutorial discretion.

- It contributes, to some degree, to costly and unneeded consequences for the federal prison system.
- It accumulates a large body of law that requires continually increasing and unprofitable Congressional attention in monitoring federal crimes and agencies.
- It diverts Congressional attention from a needed focus on that criminal activity which, in practice, only federal prosecutions can address.
- Overall, it represents an unwise allocation of scarce resources needed to meet the genuine issues of crime.

Because inappropriate federalization produces insubstantial gains at the expense of important values, it is important to legislate, investigate and prosecute federal crimes only in circumstances where limited legislative time and law enforcement efforts can most realistically deal with the most serious problems and do so without intruding on long-standing values. Congress should not bring into play the federal government's investigative power, prosecutorial discretion, judicial authority, and sentencing sanctions unless there is a strong reason for making wrongful conduct a federal crime – unless there is a distinct federal interest involved.
Other observers have reported that since the 1998 report the pace of new federal criminal law has continued unabated. After decades of expansive federal action, experts estimate that there are now more than 4,500 separate federal criminal statutes that are scattered throughout the federal code without any coherent organization. There is also widespread recognition that the result of decades of expansion of federal crime has resulted in the criminalization of behavior that often lacks criminal intent (*mens rea*) and would better be managed by civil fines or other non-criminal sanctions.

At the ABA Criminal Justice Section 2012 Fall Conference, former Attorney General Edwin Meese noted that the immense number of laws are traps to the unwary, and threaten people who would never consider breaking the law. The sheer size of the federal criminal law is so great that no one has even been able to find and provide a definitive count of the thousands of statutory criminal offenses. In addition to the issue of size, the statutes are scattered across the United States Code and are near impossible to find.

***Over-criminalization***
Criminal penalties represent the ultimate intrusion on individual liberty and constitute "community condemnation" which justifies their imposition. This infuses a criminal penalty with a significance not attached to a civil penalty. The seriousness of its use with regard to any individual has traditionally demanded that it be utilized only when certain mental states and behaviors are proven.

The effect of a *mens rea* requirement or guilty mind element provides an offense with its normative appeal: the degree of liability and punishment will be proportionate to culpability and limited by it. It is a fundamental principle of criminal law that, before criminal punishment can be imposed, the government must prove both a guilty act (*actus reus*) and a guilty mind (*mens rea*).

Increasingly and in too many instances, federal and state criminal statutes do not properly define the *mens rea* or guilty mind elements of the crime. Too often, the use of a criminal sanction or

sanctions is applied to behavior that was formerly addressed by the civil law, through regulation. There are manifold examples of federal regulatory crimes that impose a criminal penalty, including jail or imprisonment, without a requirement of a finding of criminal intent.

Individuals who make honest mistakes or engage in conduct that that under traditional standards is not sufficiently wrongful to give them notice of possible criminal responsibility are increasingly not protected from criminal prosecution by a prerequisite legal requirement of meaningful *mens rea*.

The ABA Criminal Justice Section recently developed draft policy that urges governments to re-examine strict liability offenses to determine whether the absence of a *mens rea* element results in imposition of unwarranted punishment on defendants who lacked any culpable state of mind in performing acts that were not *malum in se*, to prescribe specific *mens rea* elements for all crimes other than strict liability offenses, and to assure that no strict liability crimes permit a convicted individual to be incarcerated. This draft policy will be voted on by the House of Delegates during the 2013 ABA Annual Meeting in August.

More broadly, the problem of over-criminalization adds to the human and societal costs of an overburdened criminal justice and corrections system. Over-reliance on incarceration and long sentences is expensive, unsafe for inmates and corrections employees alike, and unlikely to achieve the goal of rehabilitation. Numerous social and economic disadvantages characterize the vast majority of individuals who are released from prison, including poor educational attainment and employment histories, poor physical and mental health, and alcohol and other drug misuse. There are inadequate community resources for the drug addicted and those suffering from mental illness. Despite unprecedented numbers of people incarcerated, there are also unprecedented numbers of ex-offenders who are released without job skills or without treatment for substance abuse, who face collateral consequences of conviction that have been greatly expanded in a similar fashion to the federal criminal laws. It is not surprising that recidivism rates are so high.

At year end 2011 there were 6.98 million offenders under supervision in the United States' adult correctional system; 4.9 million of these individuals are on probation and parole and 2.2 million are incarcerated in prisons or jail. Nearly half of the prisoners in the United States have been incarcerated for nonviolent offenses. While these numbers reflect a 1.4% decline in the correctional population and a 0.9% decline in the state and federal prison population, California's decline of 15,493 prisoners through the Public Safety Realignment plan accounted for more than half of the 0.9% prison population decrease. Moreover, the United States continues to maintain the highest rate of incarceration in the world with extreme and entrenched racial disparity. If current trends continue, one of every three African American males born today can expect to go to prison in his lifetime, as can one of every six Latino males, compared to one in seventeen white males.

Mass incarceration has come at great cost to taxpayers. State prisons hold the vast majority of prisoners, about 86.5% of United States prisoners. The average cost of incarcerating an individual in state prison for one year is $31,116. On average, states spend roughly two and a half times more per prisoner than per public school pupil. In fiscal year 2012, total state spending on corrections, including prisons as well as probation and parole, is estimated to total

$53.3 billion. At the federal level, DOJ's Bureau of Prisons had a fiscal year 2012 operating budget of about $6.6 billion—the second largest budget within DOJ. Aside from the substantial financial burdens, there is also the damage done to the lives of those incarcerated and their families. Incarceration has been proven to have a negative impact on future income, employment prospect, and family involvement. Reducing over-criminalization saves taxpayer money and improves the lives of all citizens.

I appreciate the opportunity to share the views of the American Bar Association on these pressing issues. We look forward to working with the Task Force as it moves forward to combat the issues of over-criminalization and over-federalization.

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For additional information on these issues, please contact Thomas Susman (202-626-3920; Thomas.Susman@americanbar.org),
Director of the ABA's Governmental Affairs Office (GAO), or Bruce Nicholson (202-662-1769; Bruce.Nicholson@americanbar.org), Senior Counsel, ABA GAO.

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Mr. SENSENBRENNER. Thank you very much.
Mr. Malcolm.

**TESTIMONY OF JOHN G. MALCOLM,**
**THE HERITAGE FOUNDATION**

Mr. MALCOLM. Mr. Chairman, Members of Congress, thank you for providing me the opportunity to speak to you about over-criminalization, a term used to describe the overuse and misuse of criminal law in today's society. In my capacity as the Rule of Law Programs policy director at the Heritage Foundation, I host regular meetings of an Overcriminalization Working Group consisting of several organizations from across the political spectrum. These organizations don't agree on very many issues but they do agree on this: Over-criminalization is a serious and growing problem and needs to be remedied.

I have also spent much of my career as a prosecutor and a criminal defense attorney, so I speak to you as someone as experience on both sides of the courtroom. For most of our Nation's history, all of the crimes, and there weren't very many of them, were malum in se offenses; that is, they prohibited conduct that was widely recognized as morally blameworthy. Today, however, buried within the 51 titles of the United States Code and the far more voluminous Code of Federal Regulations, there are approximately 4,500 criminal statutes and another 300,000 or more criminal regulations, and scores more are created every year.

Many of these laws, unfortunately, contribute to the over-criminalization problem. Many Federal criminal laws duplicate other existing Federal and State criminal laws. Some Federal laws increase the penalties for certain crimes without any demonstrated need, adding to the taxpayer's burden. Most of these new laws, usually in the form of regulations, are malum prohibitum offenses, which are crimes only because Congress or some regulator has said that they are, not because they are inherently blameworthy. Unlike malum in se offenses which prohibit morally indefensible conduct, regulations actually allow conduct, but they circumscribe when, where, how, how often, and by whom certain conduct can be done, often in ways that are very hard for the nonexperts to understand.

When criminal penalties are attached to violations of obscure regulations, over-criminalization problems often ensue. But there is an even bigger problem. Today, many criminal laws lack an adequate or any *mens rea* requirement, meaning that a prosecutor doesn't even have to prove that the accused knew that he was violating the law in order to convict him. Many of these so-called offenses are so arcane or incomprehensible that a reasonable person wouldn't have any idea that what he was doing was a crime.

And there are other problems, too. If somebody wanted to find out whether his proposed conduct was illegal, there is no convenient, easily accessible place that he could go to in order to find a complete list of Federal crimes. Moreover, the criminal code today is so vast and complex that the judges and lawyers have a lot of trouble discerning what is legal and what is illegal. What hope do ordinary citizens have?

It is inevitable that many morally blameless individuals will end up committing acts that turn out to be crimes and some of them

will end up in prison. The Heritage Foundation just came out with a booklet entitled "USA vs You" that provides the stories of just a few unfortunate people who got cauht up in the web of over-criminalization, and there are more such stories on our Web site. When we divorce legal guilt from moral blame-worthiness and place excessive reliance on criminal law to address social problems rather than the administrative or civil justice systems, problems occur. When morally blameless people unwittingly commit acts that turn out to be crimes and are prosecuted for those offenses, the public's respect for the fairness and integrity of our criminal justice system is diminished, which is something that should concern everyone.

There are a number of proposals that I would encourage you to consider, such as passing a default *mens rea* provision for crimes in which no *mens rea* has been provided and passing a law requiring the government to identify every Federal crime and to post it in a manner that is easily accessible to the public at no charge. I look forward to future hearings in which these and other proposals are discussed in greater detail. And with that, I would be happy to answer any questions you might have.

[The prepared statement of Mr. Malcolm follows:]

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*LEGISLATIVE TESTIMONY*

# DEFINING THE PROBLEM AND SCOPE OF OVER-CRIMINALIZATION AND OVER-FEDERALIZATION

**Testimony before the Committee on the Judiciary**

**Over-criminalization Task Force**

**U.S. House of Representatives**

**June 14, 2013**

John G. Malcolm
Rule of Law Programs Policy Director and the
Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow
The Heritage Foundation

Mr. Chairman, Mr. Ranking Member, and other Members of Congress:

Thank you for the opportunity to speak to you today about the modern-day phenomenon of overcriminalization, a term used to describe the overuse and misuse of the criminal law and penalties. I applaud the House Judiciary Committee for establishing a Task Force designed to study this issue and for convening this hearing.

My name is John Malcolm. I am the Rule of Law Programs Policy Director and the Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation, where I supervise Heritage's Overcriminalization Project. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

I have also spent a good deal of my career involved in the criminal justice system—as an Assistant United States Attorney, an Associate Independent Counsel, a Deputy Assistant Attorney General in the Criminal Division at the Justice Department, and a criminal defense attorney. Therefore, I can speak to you today as someone who has experience on both sides of the courtroom.

On behalf of Heritage, I host regular meetings of the Overcriminalization Working Group consisting of organizations from across the political spectrum including, among others, the Manhattan Institute, the ACLU, the Federalist Society, the Vera Institute, Justice Fellowship, the National Association of Criminal Defense Lawyers, the Cato Institute, the American Bar Association, the U.S. Chamber of Commerce, and Families Against Mandatory Minimums. As you might imagine, these organizations do not agree on very many issues, but they do agree on this: overcriminalization is a serious and growing problem that needs to be remedied. The Heritage Foundation, under the leadership of former Attorney General Ed Meese[1], has also been writing about various facets of this problem for a long time.[2]

## WHY IS OVERCRIMINALIZATION A PROBLEM?

In April 1940, Attorney General Robert Jackson addressed a room full of prosecutors. He told them that they were "one of the most powerful peace-time forces known to our country." He continued: "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."[3] What Robert Jackson said is as true today as it was then, if not more so. Even the simple act of charging someone with a crime can alter that person's life forever. Today, the fact of the matter is that if someone were to look hard enough, they'd likely discover that we're all criminals, whether we know it or not, and regardless of whether we have any intent to violate the law.

Under the common law, there were only a handful of criminal offenses, such as murder, rape, robbery, and arson. Each offense prohibited conduct that was widely recognized as morally blameworthy, so-called *malum in se* offenses. For most of our history, all the crimes in this country -- and there weren't many of them -- were *malum in se* offenses. If somebody

[1] Mr. Meese is now the Ronald Reagan Distinguished Fellow Emeritus at The Heritage Foundation.
[2] A list of Heritage publications addressing overcriminalization is attached as an Appendix to this testimony.
[3] See The Federal Prosecutor, available at http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-federal-prosecutor/.

claimed not to know it was against the law to commit murder or robbery, it could fairly be said, to quote one of the great legal maxims, that "Ignorance of the law is no excuse." If you knew something was morally blameworthy when you did it, it shouldn't surprise you to discover it was a crime too.

Today, however, buried within the 51 titles of the United States Code and the far more voluminous Code of Federal Regulations, there are approximately 4,500 statutes and another 300,000 (or more) implementing regulations with potential criminal penalties for violations.[4] There are so many criminal laws and regulations, in fact, that nobody really knows how many there are, with scores more being created every year. And that's just federal offenses. Every new law gives prosecutors more power, and many of these laws, unfortunately, contribute to the overcriminalization problem.

Many federal laws are duplicative of other federal laws. For example, given the ubiquitous use of the mail and telecommunications facilities, the federal mail and wire fraud statutes[5] can be used by federal prosecutors to reach almost any fraud scheme one could imagine, including many garden-variety schemes that could easily be handled by state authorities. Nonetheless, despite the existence of these two broad statutes, there are dozens of other federal fraud laws focused on different regulatory fields.[6]

And many federal laws duplicate state criminal laws. If something is already a state crime, unless there is some unique federal interest or expertise involved, there should be no reason to make the same conduct a federal offense just because a horrific crime is committed that leads to sensationalistic headlines.

Other statutes increase the penalties for crimes, adding to taxpayers' burden, without any demonstrated need to impose an additional punishment on the offender.

While these are serious problems, perhaps the most fundamental problem caused by overcriminalization is the fact that the average person no longer has fair notice of what the criminal code makes an offense. It is an elementary principle of criminal and constitutional law that the government must provide everyone with notice of what the penal code outlaws.

Many, if not most, of these new laws are *malum prohibitum* offenses, which on their face do not violate any moral code. They are only offenses because Congress has said they are, not because they are inherently blameworthy. These laws and regulations touch nearly every aspect of our lives -- the food we eat, the property we own, how we run our businesses, and many of our routine activities.

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[4] *See, e.g.*, John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (June 16, 2008); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991).

[5] 18 U.S.C. §§ 1341 & 1343.

[6] *See, e.g.*, STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 152 (2006) ("Under American federal law, for example, there are now dozens of statutory provisions that criminalize offenses such as mail fraud, wire fraud, bank fraud, health care fraud, tax fraud, computer fraud, securities fraud, bankruptcy fraud, accounting fraud, and conspiracy to defraud the government."); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1881 (2000)("The federal criminal code contains over three hundred separate fraud and misrepresentation offenses, some of which cover not just lies but concealment, and many of which do not require that the false or misleading statement be material to anything.").

Unlike *malum in se* offenses, these regulations do not prohibit morally indefensible conduct. Regulations *allow* conduct, but they circumscribe -- often in ways that are very hard for the non-expert to understand -- when, where, how, how often, and by whom certain conduct can be done. When criminal penalties are attached to violations of obscure regulations, overcriminalization problems often ensue.

But there's an even bigger problem. It used to be the case that, before somebody could be convicted of a crime, a prosecutor would have to prove that the defendant committed some act that constituted a crime (the *actus reus*) and that he did so knowing that he was violating the law and therefore had a "guilty mind" (the *mens rea*). So, for example, to convict a person of murder, a prosecutor must prove the accused (1) caused the death of the victim, and (2) intended to kill or cause serious bodily injury to the victim. Only when an *actus reus* and a *mens rea* coincided could a person be convicted for his conduct, providing protection against criminal liability for unknowing or unblameworthy conduct.

Today, many criminal laws lack an adequate (or any) *mens rea* requirement -- meaning that a prosecutor does not even have to prove that the accused knew he was violating a law in order to convict him. Innocent mistakes or accidents are transformed into crimes. For example, to convict someone of violating the Clean Water Act, a prosecutor only has to show that the accused committed the physical acts which constitute the violation, regardless of that individual's knowledge of the law or intent to violate the law. Many of these "offenses" are so arcane or incomprehensible that a reasonable person would not know that what he was doing was, in fact, a crime.

And there's another problem. If somebody wanted to find out what was legal and illegal, there is no conveniently accessible place to go that has a complete list of federal crimes. The best you could do is to read through the entirety of the massive federal code and the even more massive code of federal regulations -- that is, if you had the time and the ability to understand what you were reading. And even that might not be enough! For example, under some laws, such as the Lacey Act, it may be a criminal violation in this country to do something in a manner that violates another country's laws.

The criminal code today is so vast, and some of the criminal statutes and regulatory crimes are so complex, that even judges and lawyers have a lot of trouble discerning what conduct is illegal. So what hope do ordinary citizens have? The best that most people who want to stay out of trouble can do is to proceed cautiously and hope for the best. For some, that's not good enough.

## FOR WHOM IS OVERCRIMINALIZATION A PROBLEM?

The size and complexity of today's laws, along with the absence of a usable yardstick to guide non-lawyers, mean that morally blameless parties inevitably, but unwittingly, will commit some acts that turn out to be crimes and, as a result, could wind up in prison. While overcriminalization is certainly a problem for corporations, it is important to remember that this problem can, and frequently does, ruin the lives of ordinary persons.

Abner Schoenwetter spent six years in a federal prison for importing Honduran lobsters that were packed in plastic bags rather than cardboard boxes and for supposedly violating a

Honduran regulation (later declared invalid by the Honduran Attorney General) that made his lobsters marginally too small.[7]

The federal government pursued a criminal investigation of the Gibson Guitar Company for importing wood for guitar frets allegedly exported illegally from India and Madagascar in violation of those nations' laws—which, in the case of Madagascar, were not even written in English. In other words, the federal government claimed that Gibson was guilty of a *federal* crime because it did not know the law of a *foreign nation*.[8]

Steven and Cornelia Joyce Kinder, who own a caviar business in Kentucky, were charged by the federal government for reporting that all of their caviar had been harvested from Kentucky waters when, in fact, some of their caviar had been harvested from adjoining Ohio waters.[9]

Lawrence Lewis, a man who worked his way up from humble beginnings to become the head engineer at a military retirement home, was charged with a felony and pleaded guilty to a misdemeanor for following the procedure he had been instructed to use (and which had been used for years) to clean up accidental toilet overflows which wound up, unbeknownst to Lewis, in a small creek that flows into the Potomac River.[10]

The Heritage Foundation, along with several of our coalition partners, has just published a booklet entitled "USA vs. You" that outlines the tragic stories of several morally blameless individuals who got caught in the web of overcriminalization. For those interested in obtaining a copy of this booklet and in reading other overcriminalization stories, I would invite you to go to www.USAvsYOU.com.

**Why Relying on Prosecutorial Discretion is Not Enough**

The frequent retort of prosecutors to the overcriminalization problem is that they are very busy people and that we can "trust them" to decide which cases to prosecute and which to reject when it comes to enforcing vague laws. I know this argument very well because I used to make it myself. Upon reflection, though, I have come to believe that this is argument is wrong, not because most prosecutors are untrustworthy, but because it is fundamentally unfair and undermines the very foundations of our legal system. It is not part of a prosecutor's constitutional function to draw the line between lawful and unlawful conduct. That is the job of the legislature, and the prosecutor is hardly a disinterested player in the process.

Most prosecutors are people of good will, but as is the case in any profession, there are good ones and bad ones. Some, fortunately very few, may be prejudiced against a particular group or individual. Some prosecutors are ambitious and might see some personal advantage in

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[7] *See* United States v. McNab, 331 F.3d 1228 (11th Cir. 2003), discussed in detail in Chapter 1 of *One Nation, Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty* (2013). To see a video about this story, go to http://www.youtube.com/watch?v=6ySmOwGTRDM.

[8] See Daniel Dew & Gavriel Swerling, *DOJ Bullies Gibson into Submission: Will Congress Allow this to Happen Again?*, The Heritage Foundation, The Foundry (Aug. 7, 2012), available at http://blog.heritage.org/2012/08/07/doj-bullies-gibson-into-submission-will-congress-allow-this-to-happen-again/.

[9] See *The Great Kentucky Caviar Criminal Caper Comes To An End In Ohio*, Forbes (Jan. 18, 2012), available at http://www.forbes.com/sites/billsinger/2012/01/18/the-great-kentucky-caviar-criminal-caper-comes-to-an-end-in-ohio/.

[10] See Gary Fields & John R. Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, Wall St. J., Dec. 12, 2011. To see a video about this story, go to http://www.youtube.com/watch?v=CqEtlp0x50s.

pursuing a questionable prosecution against a big company or an infamous person. There are, after all, many incentives for prosecutors to bring charges, and very few not to bring charges. Prosecutors get public kudos for bringing cases. They rarely get praised for declining to prosecute a case. Some might succumb to pressure from law enforcement officers, who may have spent a lot of time investigating a case, to find some charge to file to justify that effort, even when doing so is unfair and unjust. And some might simply have bad judgment or be mistaken about what a vague law really means.

Whatever the reason, when you boil it down, the government's "trust us" argument asks the public to bear the risk that prosecutors might not always do the right thing. This should not be permitted in a system that is premised on being a government of laws, and not men.

As a former prosecutor, I do not mean to denigrate the motives or integrity of the many dedicated public servants who endeavor to keep us safe and to uphold the rule of law. Much of the blame for this problem lies at Congress's doorstep for passing vague statutes and for empowering unelected bureaucrats to promulgate nebulous regulations enforced with criminal penalties.[11] However, when law enforcement officials investigate and prosecute otherwise law-abiding people for "crimes" that no reasonable person would have known was a crime, they do more harm than good.

## AN AGENDA TO ADDRESS OVERCRIMINALIZATION

These are the kinds of problems that occur when we divorce legal guilt from moral blameworthiness and place excessive reliance on criminal law, rather than the administrative or civil justice systems, to address social problems. On behalf of my colleagues at The Heritage Foundation, I look forward to working with the members of this Task Force toward devising creative ways to address this problem. There are a number of proposals that we are anxious to discuss with you, such as having Congress pass a default *mens rea* provision for crimes in which no *mens rea* has been provided unless Congress manifests its clear intent to enact a strict liability offense, passing a law requiring the government to identify every federal statute and regulation that contains a criminal provision and to post it in a manner that is easily accessible to the public without charge, and amending or repealing statutes such as the Lacey Act that criminalize violations of foreign law.

The notion that a crime ought to involve a purposeful culpable intent has a solid historical grounding. In 1952, Robert Jackson, now a Supreme Court Justice, wrote in *Morissette v. United States*: "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[12]

Honest mistakes should not result in prison time. Absent extraordinary circumstances, criminal laws should require proof beyond a reasonable doubt that the person acted with the intent to violate the law. When morally blameless people unwittingly commit acts that turn out to be crimes and are prosecuted for those offenses, not only are the lives of the accused adversely

[11] To see a "checklist" of questions that federal legislators ought to ask themselves when contemplating enacting a new federal crime, go to http://thf_media.s3.amazonaws.com/2013/pdf/CriminalLawChecklist.pdf.
[12] Morissette v. United States, 342 U.S. 246, 250 (1952)

impacted, perhaps irreparably, but the public's respect for the fairness and integrity of our criminal justice system is diminished, which is something that should concern everyone.

I thank you for inviting me here today. I look forward to future hearings in which some of these proposals are discussed in greater detail. With that, I would be happy to answer any questions you may have.

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## APPENDIX

### HERITAGE BOOKS

Paul Rosenzweig, ed., *One Nation, Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty* (2013)

Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (Apr. 2010)

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Gerard V. Bradley, *"Retribution and Overcriminalization,"* The Heritage Foundation, Legal Memorandum No. 77 (March 1, 2012), available at http://www.heritage.org/research/reports/2012/03/retribution-and-overcriminalization

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Paul J. Larkin, Jr., *"The FOCUS Act and Environmentalism,"* The Heritage Foundation, Legal Memorandum No. 80 (May 7, 2012), available at http://www.heritage.org/research/reports/2012/05/the-focus-act-and-environmentalism

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Paul J. Larkin, Jr., *Overcriminalization Interrupted, Senate Passes House Version of STOCK Act*, The Foundry, The Heritage Foundation (Mar. 22, 2012), available at http://blog.heritage.org/2012/03/22/overcriminalization-interrupted-senate-passes-house-version-of-stock-act/

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Mr. SENSENBRENNER. Thank you very much.
Mr. Benjamin.

**TESTIMONY OF STEVEN D. BENJAMIN,**
**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

Mr. BENJAMIN. Thank you, Mr. Chairman and Ranking Member Scott. My name is Steve Benjamin, and I am the president of the National Association of Criminal Defense Lawyers, and on behalf of NACDL, I commend the House Judiciary Committee for establishing this Over-Criminalization Task Force.

As a practitioner from the Commonwealth of Virginia, I am personally grateful for the leadership and support of two Members from my own congressional delegation, Judiciary Committee Chair Goodlatte and Task Force Ranking Member Scott, whose work on this critical issue demonstrates that the danger of over-criminalization transcends the traditional ideological divide.

The problem you confront is not abstract or theoretical. Over-criminalization directly impacts commerce, free enterprise, and innovation. But it is not just a problem with white-collar implications. It encompasses policies and practices that affect every person in society, and in my written testimony I have provided numerous examples. The fact is we have become addicted to the use of criminal law as a blunt instrument to control social and economic behavior. As a result of over-criminalization, the United States has more prisoners than any Nation on Earth, and an estimated 65 million Americans are now stigmatized by a criminal conviction and the collateral consequences that increasingly result.

This is not because we are a country of lawbreakers or criminals. It is because we use the Federal criminal law for regulatory purposes far beyond the traditional purpose, exercised historically at the State level, of deterring and punishing criminal conduct.

A fundamental question before this Task Force is whether the body of Federal crimes should continue to expand, and to answer this question requires acknowledgement that where Congress has created new crimes, it has done so poorly and without regard for whether those new crimes reach conduct that represents genuinely bad behavior. Congress often fails to speak clearly and with the necessary specificity when legislating criminal offenses, instead enacting overly expansive and poorly defined criminal laws, which lack clear requirements of criminal intent. With rare exception, the government should not be allowed to punish a person without having to prove he acted with wrongful intent. When the average citizen cannot determine what constitutes unlawful activity in order to conform her conduct to the law, that is unfairness in its most basic form.

Further, Congress often delegates its criminal lawmaking authority to executive branch agencies and officials. Regulatory agencies are empowered to unilaterally enact massive criminal provisions with little oversight. As a result, the legislative branch has ceded the ability to limit the weighty economic, social, and individual costs of the entire criminal justice system. Poorly written laws and weak intent standards have jeopardized the fundamental protection of a trial. Unlimited discretion over charging decisions combined with mandatory minimum sentences and high sentencing

guidelines afford prosecutors the power to deter the accused from asserting their innocence or attesting new laws before a jury of their peers. Rarely will the right to trial justify the risk of a harsh sentence if a more favorable plea agreement can be struck.

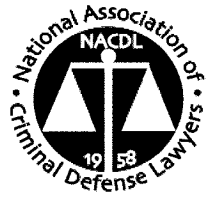
Lastly, overly broad laws combined with weak intent requirements allow the criminal law to be improperly used to pursue what otherwise would be resolved by civil claims or penalty. Both government and corporate entities resort to the threat of criminal sanction to extract civil judgments and forfeitures, eliminate competitors, and improperly control behavior.

Of special concern to NACDL is the fact that the government's expenditure on Federal law enforcement significantly outpaces its spending on the defense function. It is inexcusable that during this 50th anniversary of *Gideon v. Wainwright* and the right to counsel our indigent defense system is in crisis. That crisis has long afflicted the States, but now budget cuts imperil the Federal indigent defense system even as resources for the prosecutorial function flow unabated. This imbalance imperils the integrity of the criminal justice system.

To conclude, we encourage this Task Force to consider the passage of a law that would apply a criminal intent requirement by default to laws that lack one. And while the enactment of criminal penalties does have a certain allure, the true and tremendous cost of doing so means that an assessment of impact should be a condition of enactment.

The position of NACDL and its purpose in testifying here today is clear: The criminal defense lawyers of this Nation value and seek a criminal justice policy for America that ensures fairness, due process, and the equal protection of the law while providing compassion for the victims and witnesses of crime, the protection of the innocent, and the just punishment of the guilty. We are inspired by your bipartisan efforts and will support and assist you however we can.

[The prepared statement of Mr. Benjamin follows:]




**Written Statement of**
**Steven D. Benjamin, President**
**National Association of Criminal Defense Lawyers**

**Before the**
**House Committee on the Judiciary**
**Over-Criminalization Task Force**

**Re: "Defining the Problem and Scope of Over-criminalization and Over-federalization"**

**June 14, 2013**

STEVEN D. BENJAMIN, ESQ., is the President of the National Association of Criminal Defense Lawyers (NACDL). NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct, and promoting the proper and fair administration of criminal justice. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial and local affiliate organizations totaling up to 40,000 members—include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

Mr. Benjamin is the founding partner of the Richmond, Virginia firm Benjamin & DesPortes. He also serves as Special Counsel to the Virginia Senate Courts of Justice (Judiciary) Committee, and is a member of the Virginia Board of Forensic Science and the Virginia Indigent Defense Commission. He is the President of the National Association of Criminal Defense Lawyers, a Fellow of the American Board of Criminal Lawyers, and a Past President of the Virginia Association of Criminal Defense Lawyers. Mr. Benjamin was counsel in the landmark Virginia Supreme Court decision recognizing a constitutional right to forensic expert assistance at state expense for indigent defendants. In other cases, he argued through the trial courts and on appeal that Virginia's mandatory fee caps on compensation for court-appointed counsel deprived indigent defendants of conflict-free representation, and he led the litigation and legislative effort to abolish those caps.

At the request of the Virginia Supreme Court, Mr. Benjamin helped establish and chair an annual Advanced Indigent Defense Training Seminar to draw top lecturers from across the country to train Virginia's defenders at no cost. With his law partner, he won the non-DNA exoneration and release of a man serving a life sentence for a murder he did not commit, and he argued in the United States Supreme Court that a Richmond trespassing policy violated the free speech rights of public housing residents. He assisted the State Crime Commission in the creation of Virginia's Writs of Actual Innocence, and after determining that criminal defendants throughout Virginia were routinely losing their appellate rights because of attorney error, he helped draft the procedure that was enacted by the Virginia General Assembly to restore those rights. When biological evidence was discovered in twenty years of old case files stored in Virginia's crime laboratories, he helped persuade state political leadership to order statewide DNA testing. When the pace of that testing stalled, he worked to obtain the passage of two successive bills mandating effective notification of interested parties that this new evidence had been discovered. He is a recipient of the Virginia State Bar's Lewis F. Powell Pro Bono Award in recognition of his years of indigent defense and efforts toward indigent defense reform. And he is a frequent lecturer on criminal justice and defense issues.

* * * * *

My name is Steve Benjamin, and I am the President of the National Association of Criminal Defense Lawyers (NACDL). On behalf of NACDL, I commend the House Judiciary Committee for establishing the Overcriminalization Task Force to review and propose possible solutions to our country's serious problem of overcriminalization. Because NACDL represents the national criminal defense bar in all of its diversity, both in membership and beliefs, it is meaningful that this Task Force represents a bipartisan effort to address the problem at hand. As a practitioner from the Commonwealth of Virginia, I am personally grateful for the leadership and support of two members from my own Congressional delegation, Judiciary Committee Chair Goodlatte and Task Force Ranking Member Scott, whose work on this critical issue demonstrates, yet again, that the danger of overcriminalization transcends any ideological divide.

NACDL is also grateful for the opportunity to share our expertise and perspective with the Task Force today. As the Task Force embarks on this important and unprecedented project, NACDL urges you to view the problem expansively. Overcriminalization in America has a direct impact on commerce, free enterprise, and innovation, but it is not solely a white collar problem. It embraces policies and practices that affect every person in society. Thus, NACDL urges the Task Force to take this opportunity to consider major systemic reform. This problem is not abstract or theoretical—at this very moment we are living with the consequences of a misguided public infatuation with the use of criminal law as a massive tool of social and economic control. That infatuation has left the United States with more prisoners than any other nation on earth, an estimated 65 million Americans marred by a criminal record, and billions of dollars unnecessarily diverted from core functions and responsibilities of government.[1]

The dynamic between overcriminalization and overincarceration cannot be ignored. Each comes at substantial cost—whether directly through expenditures on courts, prosecutors, and prisons, or indirectly as a financial burden on our citizens, businesses, and economy created by the threat of the criminal sanction and the uncertainty such a threat creates. When combined, however, the costs of overcriminalization and overincarceration are a tremendous weight on our society as a whole. This weight is unsustainable morally, as well as financially. Therefore, the fundamental question that this Task Force must address is whether the federal criminal law should be an endlessly expansive universe, or whether it is time to return to the fundamental principle that the use of the criminal law is essentially a state function limited to addressing genuinely bad behavior.

[1] Michelle Natividad Rodriguez and Maurice Emsellem, *65 Million "Need Not Apply" The Case for Reforming Criminal Background Checks for Employment* (The National Employment Law Project) (March 2011) *available at http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1* (last visited June 11, 2013).

## I. Introduction

Overcriminalization should concern—if not frighten—each and every person in the United States. In 1998, the American Bar Association's Task Force on the Federalization of Crime described the federal criminal law as being so large that there existed "no conveniently accessible, complete list of federal crimes." As of 2003, over 4,000 offenses carried criminal penalties in the United States Code.[2] By 2008, that number had increased to over 4,450.[3] In addition, it is estimated that there are at least 10,000, and possibly as many as 300,000, federal regulations that can be enforced criminally.[4] Enforcement of this monstrous criminal code has resulted in a backlogged judiciary, overflowing prisons, and the incarceration of innocent individuals who plead guilty to avoid the draconian sentences that prosecutors often seek when individuals assert their right to trial. Enforcement of this inefficient and ineffective scheme is, of course, at tremendous taxpayer expense.

At its core, the problem the Task Force will explore is a criminal regime that is an affront to the most fundamental notions of fairness, with profound implications for the average person. In its current state, our criminal justice system too frequently prosecutes crimes and imposes sentences without ample justification. As Harvard Professor Herbert Wechsler put it, criminal law "governs the strongest force that we permit official agencies to bring to bear on individuals."[5] A governmental power without limits is a formula for abuse and injustice. As citizens, we rely on our constitutional rights, the separation of powers among the three branches of government, and the division of power between the state and national governments, to check otherwise unrestrained government power. When Congress disregards these constitutional and prudential limits by resorting to unnecessary criminalization, and criminalization without adherence to fundamental principles, it is abusing our government's greatest power.

The harm of overcriminalization does more than injure an individual defendant; it damages our criminal justice system and society as a whole. Although this harm is amplified by the Executive and Judicial branches, as discussed by NACDL's joint report with the Heritage Foundation, "*Without Intent: How Congress Is Eroding the Criminal Intent Requirement in*

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[2] John S. Baker, Jr., The Federalist Soc'y for Law & Pub. Policy Studies, *Measuring the Explosive Growth of Federal Crime Legislation* (2004), at 3, *available at* http://www.fed-soc.org/doclib/20070404_crimreportfinal.pdf (last visited June 11, 2013).

[3] John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation Legal Memorandum No. 26, June 16, 2008, *available at* http://www.heritage.org/Research/LegalIssues/lm26.cfm (last visited June 11, 2013).

[4] Task Force on Federalization of Criminal Law, Criminal Justice Section, Am. Bar Ass'n, *The Federalization of Criminal Law*, at 9 n.11, app. C (1998).

[5] Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952).

*Federal Law*," the problem originates through systematic failures in the legislative process.[6] And, just as the problem begins with Congress, so must any meaningful reform. We simply cannot continue an unnecessary race to expand the criminal law or remain passive as it snowballs beyond control. The creation of this Task Force and the commencement of these hearings evidence recognition of this mandate and a commitment to reform.

## II. Defining Overcriminalization: A Problem At Every Stage of the Criminal Process

The harm of overcriminalization exists at every stage of the criminal process. While it can take many forms, overcriminalization most frequently occurs through (i) the ambiguous criminalization of conduct without meaningful definition or limitation, (ii) the enactment of criminal statutes that lack a meaningful criminal intent (or *mens rea*) requirement, (iii) the imposition of vicarious liability for the acts of others with insufficient evidence of personal awareness or neglect, (iv) the expansion of criminal law into areas of the law traditionally reserved for regulatory and civil enforcement agencies, (v) the federalization of crimes traditionally reserved for state jurisdiction, (vi) the creation of mandatory minimum sentences that frequently bear no relation to the wrongfulness or harm of the underlying crime, and (vii) the adoption of duplicative and overlapping statutes. These problems are reflected in federal dockets across the nation.

### A. Poor Legislative Draftsmanship

When tort or other civil laws are vague, unclear, or confusing, substantial consequences can result. But those consequences generally are monetary. When the criminal laws are vague, unclear, or confusing, the consequences are dire. Where Congress fails to speak clearly and to legislate criminal offenses with the necessary specificity, it creates governmental authority to deprive people of their physical freedom and personal liberty for conduct they neither could nor did know was a crime. This failure in simple draftsmanship endangers the freedom of well-meaning, law-abiding individuals, and it creates substantial uncertainty for the business community and an environment ripe for selective or misguided prosecution.

Consider, for example, the Foreign Corrupt Practices Act (FCPA) and the risk it poses for legitimate businesses and the people who work for them.[7] The purpose of the FCPA—to deter and redress bribery and corruption worldwide—is laudable, but its overly broad language has created an enforcement climate where the statute means whatever the government says it means.

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[6] Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement In Federal Law* (The Heritage Foundation and National Association of Criminal Defense Lawyers) (2010) *available at* www.nacdl.org/withoutintent (last visited June 11, 2013) (hereinafter "*Without Intent* Report").

[7] Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 *et seq.* (2013) (hereinafter "FCPA").

Despite its more than 30-year history, published judicial decisions interpreting the FCPA are sparse, because enforcement has largely focused on corporations unwilling to undertake the life-or-death risk inherent in the defense of a felony criminal case. Further evidence of this point came last fall when, after significant pressure, the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) issued a 120-page guide on the government's interpretation of the FCPA.[8] While this guidance is certainly helpful to companies and individuals seeking to comply with the current enforcement regimes, the manual sets forth untested legal theories. Because the statutory language does not provide all of the answers to the questions that its broad language permits, the enforcers of the law are left to "fill in the blanks." And because the document is not legally binding, it affords no reliable protection from prosecution even if a regulated person or entity acts in accordance with the Government's enforcement guidance. Such a state of affairs is not only bad for business and economic certainty, it is fundamentally unfair and in direct conflict with our constitutional principles of fair notice and due process.

Nearly every day another news story appears on the Computer Fraud and Abuse Act (CFAA), a statute that epitomizes the epidemic of overcriminalization and the risk it imposes on innocent individuals.[9] Originally enacted in 1984, the CFAA addressed computer hacking as it existed prior to the commercialization of the internet. Since then, however, Congress has expanded the statute to criminalize conduct that the average internet-user engages in daily. Using an office computer to surf the web in violation of an employer's computer use policy, or using a false name or lying about one's age on a social networking site, are now federal offenses. Violating a non-compete clause in an employment contract, which under certain circumstances may appropriately result in civil liability, is now a federal crime. These examples may sound laughable, but such prosecutions are underway or have already taken place.[10] Surely these are not an appropriate use of federal criminal power. Rather than direct its prosecutors to focus on cyber-attacks by foreign entities on our nation's critical infrastructure, DOJ is encouraging its prosecutors to haul in high school students and charge them with federal crimes for pranking the

[8] U.S. Department of Justice Criminal Division and the U.S. Securities and Exchange Commission Enforcement Division, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (November 2012) *available at* http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf (last visited June 11, 2013).

[9] The Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2013) (hereinafter "CFAA").

[10] *See United States v. Drew*, 259 F.R.D. 449 (C.D.Cal. 2009) (prosecution under CFAA for violating MySpace's terms of service, which prohibited lying about identifying information, including age); *see also United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010) (prosecution under CFAA for accessing personal information in Social Security Administration databases for nonbusiness reasons); *United States v. John*, 597 F.3d 263 (5th Cir. 2010) (prosecution under CFAA for using information, obtained with authorization, in an unauthorized manner); *but see U.S. v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (in prosecution for breach of confidentiality agreement court held that the phrase "exceeds authorized access," within the meaning of the Computer Fraud and Abuse Act, is limited to access restrictions, not use restrictions).

website of a rival school's football team—an actual example employed in DOJ's Computer Crimes Prosecution Manual.[11]

### B. The Absence of Meaningful Criminal Intent Requirements

Criminal offenses lacking meaningful culpable state-of-mind, or criminal intent, requirements inevitably lead to unjust prosecutions, convictions, and punishments. With rare exception, the government should not be allowed to wield its power against an accused person without having to prove that he or she acted with a wrongful intent. Absent a meaningful criminal intent requirement, a person's other legal and constitutional rights cannot protect him or her from unjust punishment for making honest mistakes or engaging in conduct that he or she had every reason to believe was legal. The presence of a strong criminal intent requirement in a criminal offense, applicable to all the material elements of that offense, is the proper and effective mechanism for preventing this type of injustice.

Despite the inherent effectiveness of a meaningful criminal intent requirement, a number of newly enacted criminal offenses frequently contain only a weak intent requirement, if they have one at all. In May, 2010, NACDL and the Heritage Foundation completed a study of the federal legislative process for non-violent criminal offenses introduced in the 109th Congress in 2005 and 2006.[12] The study revealed that offenses with inadequate criminal intent requirements are ubiquitous at all stages of the legislative process: Over 57 percent of the offenses introduced, and 64 percent of those enacted into law, contained inadequate criminal intent requirements, putting the innocent at risk of criminal prosecution.[13] The study also documented the poor legislative draftsmanship discussed above, finding that "[n]ot only do a majority of enacted offenses fail to protect the innocent with adequate *mens rea* requirements, many of them are so vague, far-reaching, and imprecise that few lawyers, much less non-lawyers, could determine what specific conduct they prohibit and punish" and concluding, ultimately, that Congress is frequently enacting "fundamentally flawed" criminal offenses.[14]

As evidenced in the *Without Intent* Report, most new crimes only require general intent, i.e., "knowing" conduct, which federal courts usually interpret to merely mean conduct done consciously. The accused need not have known that he or she was violating the law or acting in a wrongful manner. In the case of traditional crimes, such as murder, rape, or robbery, general intent is sufficient because the conduct is in itself wrongful. However, when applied to conduct

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[11] Department of Justice Office of Legal Education, *Prosecuting Computer Crimes* 39 *available at* http://www.justice.gov/criminal/cybercrime/docs/ccmanual.pdf (last visited June 11, 2013) (hereinafter "Computer Crimes Manual").

[12] *Without Intent* Report, *supra* note 6 at X.

[13] *Id.*

[14] *Id.*

that is not inherently wrongful, such as certain paperwork violations, the "knowingly" requirement allows for punishment without any shred of evil intent, culpability, or sometimes even negligence.

These types of criminal provisions do not effectively deter criminal activity because they do not require the accused to have any notice of the law or the wrongful nature of his or her conduct. Yet, Congress frequently turns hundreds, even thousands, of administrative and civil regulations into strict liability criminal offenses by enacting just *one* law that criminalizes "knowing violations" of said regulations.[15] This type of criminalization occurs alongside the enactment of criminal laws that, on their face, contain no intent requirements. Despite every intention to follow the law, even the most cautious person can be found guilty under such laws.

Similarly, through the imposition of vicarious liability for the acts of others, people can be prosecuted, convicted, and punished without any evidence of personal awareness or neglect. Under this theory of criminal liability, off-duty supervisors can be criminally punished for the accidental acts of their employees absent any knowledge, approval, or connection to said conduct[16] and landowners can be convicted for moving sand onto their own property without a federal permit.[17] Corporate criminal liability employs the doctrine of *respondeat superior*, which is identical to the standard used in civil tort law. This means that, as long as an employee is acting within the scope of his or her employment (as broadly defined), the corporation is deemed criminally liable for that employee's actions, despite the corporation's best efforts to deter such behavior.[18] Regardless of compliance programs or employment manuals, or even strict instructions to the contrary, if an employee violates the law, then the corporation can be criminally punished.

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[15] For example, the Lacey Act makes it a federal crime to violate any foreign nation's laws or regulations governing fish and wildlife. 16 U.S.C. § 3371 *et seq.* (2013). Specifically, 16 U.S.C. § 3373(d) provides a criminal penalty for "knowingly" violating "any provision of [Chapter 16]" and, in that one clause, criminalizes *all* the conduct proscribed by any of the Lacey Act's statutory provisions or corresponding regulations.

[16] *See United States v. Hanousek*, 176 F.3d 1116, 1120-23 (9th Cir. 1999) (upholding conviction of an off-duty construction supervisor under the Clean Water Act when one of his employees accidentally ruptured an oil pipeline with a backhoe).

[17] *See United States v. Rapanos*, 376 F.3d 629, 632-33, 640-44 (6th Cir. 2004) (affirming defendant's conviction under the Clean Water Act due to classification of his property as federally protected "wetlands").

[18] *See New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909) (holding that, "in the interest of public policy," corporations can be held criminally liable for the actions of their agents); *see also United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972) (holding the corporation liable "for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent").

### C. Regulatory Criminalization: The Criminalization of Business and Economic Activity

Congress frequently delegates its criminal lawmaking authority by passing a statute that establishes a criminal penalty for the violation of any regulation, rule, or order promulgated by an Executive Branch agency or an official acting on behalf of such an agency. This form of overcriminalization is referred to as "regulatory criminalization," and has a dramatic impact on business and economic activity. Because the lack of meaningful criminal intent requirements together with the application of vicarious criminal liability allow for criminal punishment absent blameworthiness, the ever-increasing expansion of the criminal code through regulatory criminalization is particularly problematic. The oversight of business behavior, questionable judgment calls, and compliance with complicated and extensive rules and regulations, is no longer reserved for civil and regulatory enforcement agencies, but is now under the jurisdiction of federal prosecutors.

The expansion of the criminal code through regulatory criminalization carries significant costs in addition to the risk that regular business activity could result in prison sentences. The thousands of criminal offenses in the United States Code are already spread over 49 different titles. Federal regulations, numbering anywhere from 10,000 to 300,000, are scattered throughout 200 volumes of the Federal Register. If a business hopes to stay on the right side of the law, it must expend significant resources to sift through this complicated network of regulations and, even then, the proper course of action may be unclear. Although large businesses may be able to hire experienced legal counsel to guide them through this network and establish strong compliance programs, the same cannot be said for many small businesses. Even where a business is able to afford such a safety net, the exorbitant cost is most likely passed onto the consumer, further burdening the economy. Such a system not only stifles innovation, but curbs the entrepreneurial spirit that should be the backbone of our economy.

Civil and regulatory agencies have diverse and effective tools at their disposal to prevent misconduct, order compliance, and impose monetary penalties to compensate injured parties or disgorge unlawful profits. Whereas the criminal process is executed at the taxpayer's expense and often causes innocent employees to lose their jobs, civil and regulatory enforcement can minimize those costs and produce financial benefits without guaranteeing business failure, job losses, and possible prison terms.

### D. The Overfederalization of Crime

Another equally disturbing congressional trend is the overfederalization of crime. Congress tends to respond to every crisis with a new federal crime. As former United States Supreme Court Chief Justice William H. Rehnquist said:

> Over the last decade, Congress has contributed significantly to the rising caseload by continuing to federalize crimes already covered by state laws. . . . The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system.[19]

The federal criminal code is littered with offenses that have traditionally been the domain of state criminal law, and it is often the case that these offenses have attenuated connections to the powers of the federal government.

Aside from the obvious tension that is created by dual federal-state criminal prosecution authority, the negative impact on individual defendants is significant. The federal system has generally harsher punishments, stricter forfeiture rules, and fewer innovative programs for dealing with low-level offenders. Yet again, an individual defendant's experience in the criminal justice system ultimately turns not on his or her actual conduct or intent, but rather on the prosecutorial authority. Two people, who possess the same intent and commit identical conduct, may nevertheless receive significantly disparate treatment and punishment based solely on the federal government's decision to take the case of one and to leave the other for the state to prosecute.[20]

Consider, for example, the federal prosecution of Carol Anne Bond for violating 18 U.S.C. § 229(a)(1), a statute designed to implement the United States' treaty obligations under the 1993 Chemical Weapons Convention.[21] Carol Anne Bond is not a terrorist. Rather, she is a scorned wife who sought revenge against her best friend for cheating with Bond's husband. Bond obtained common household grade chemicals and applied them to surfaces of her former friend's property, intending to cause an uncomfortable rash. Instead of allowing local law enforcement to handle the matter as a physical assault or another state offense, federal prosecutors stepped in and prosecuted Bond for violating the Chemical Weapons Convention. Bond's conviction is pending before the U.S. Supreme Court. Regardless of the outcome, any sound justification for such a prosecution is undoubtedly lacking—is this really the proper domain of the federal government and an efficient use of federal resources? The overfederalization exemplified in the *Bond* case is, unfortunately, not unusual, and this Task

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[19] William H. Rehnquist, 1998 Year-End Report of the Federal Judiciary (Jan. 1, 1999), at 4-5. *See also e.g.*, *Rehnquist Blames Congress for Courts' Increased Workload*, Wash. Times, A6, (Jan. 1, 1999).

[20] *See* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747, 764 (2005).

[21] *Carol Anne Bond v. United States*, 581 F.3d 128 (3rd Cir. 2009), *cert. granted*, 131 S. Ct. 455 (2010) (No. 12-158, 2013 Term).

Force should explore the impact of overfederalization in the area of other crimes, such as carjacking, mortgage fraud, and drug offenses, to name just a few.

### E. Disproportionate Sentences and Mandatory Minimums Render Blameworthiness and Harmfulness Irrelevant

The problems created by overcriminalization are exacerbated by sentences that fail to account for the individual circumstances of particular conduct. While a potential sentence of 30 years may serve to deter a person from intentionally violating the law, such a sentence can have no deterrent effect where a person had no intention to commit a wrong or had every reason to believe his or her conduct was lawful. Rather, the combination of such high sentences with broadly written criminal offenses that lack meaningful criminal intent requirements often results in the incarceration of innocent people. Few people would risk trial facing incarceration of 10 or 20 years when the plea offer is "only" 15 months. A genuine lack of blameworthiness is no match for this risk.

Further, mandatory minimum sentences often bear little or no relation to the wrongful nature or harm of the underlying crime. For example, a multi-year prison term imposed for possession of a single bullet without a firearm or corrupt motive is disproportionate to the blameworthiness of the accused.[22] Mandatory minimums remove discretion from judges, who are best suited to assess a particular person's culpability because they are the party closest to the facts and circumstances of the particular matter. Instead, mandatory minimums concentrate too much discretion in the hands of the charging prosecutors. Once charged, defendants facing mandatory minimums lose any significant ability to contest their culpability and frequently plead guilty to *some* of the charges in order to avoid imposition of the sentences associated with *all* of the charges.

The correlation between various forms of overcriminalization—mandatory minimums or disproportionately high Sentencing Guidelines, and weak or no criminal intent requirements—cannot be ignored. Under Section 924(c)(1)(A) of the Gun Control Act of 1968, the mandatory minimum sentence for possession of a firearm during a crime of violence or drug trafficking offense is five years.[23] However, that minimum increases to seven years if the gun is *brandished* and to ten years if the gun is *discharged*. If, for example, a particular defendant, charged under this statute, *accidentally* discharges the gun, then his sentence automatically increases to 10

[22] *See United States v. Yirkovsky*, 259 F.3d 704, 707 n.4 (8th Cir. 2001) (reasoning that although a sentence of fifteen years for possessing a single bullet "is an extreme penalty under the facts as presented to this court," "our hands are tied in this matter by the mandatory minimum sentence which Congress established"); *see also United States v. Yirkovsky*, 276 F.3d 384, 385 (8th Cir. 2001) (Arnold, J., dissenting from denial of rehearing en banc) (stating "that on its face the sentence is grossly disproportionate to the offense for which it was imposed").

[23] 18 U.S.C. § 924(c)(1)(A) (2013).

years.[24] Due to the failure of Congress to include a criminal intent provision in this statute, a person who neither brandishes nor intentionally discharges a gun will have his sentence double automatically.

The crime of attempted illegal reentry further demonstrates the connection between mandatory minimums and criminal intent requirements. In order to be convicted of the crime of attempted illegal reentry, punishable by up to 20 years in prison,[25] the accused may or may not need the specific intent to attempt to reenter illegally; in most circuits, all that must be shown is evidence of general intent.[26] Therefore, a person's guilt and possible punishment of 20 years depends on the location of his conduct and not the conduct itself. Such variances, removed entirely from the accused's conduct and intent, do not deter criminal activity, fail to treat similarly situated persons the same, and are fundamentally contrary to our system of fairness and justice.

The same can be said for the all too frequently draconian U.S. Sentencing Guidelines that continue to recommend disproportionately high sentences across a broad spectrum of criminal offenses. NACDL has long deplored excessive sentences, especially as applied to non-violent offenders, particularly for offenses involving controlled substances. Increasingly, however, the Guidelines at §2B1.1 now regularly create unjust results in white collar cases due to the extraordinary weight placed on "loss" as a sentencing factor. These "loss" calculations frequently do not relate to actual culpability. The ambiguous concept of "loss," both in the Guidelines and in statutes, sometimes fails to account for the role an individual played in a particular scheme, an individual's specific culpability, or even whether the individual financially gained anything from the conduct. For example, the CFAA defines loss very broadly: "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service."[27] The DOJ's Computer Crimes Prosecution Manual outlines a variety of different ways to increase the "loss" in order to reach the statutory threshold of $5,000 in loss, and encourages prosecutors to "think creatively about what sorts of harms in a particular

[24] *Dean v. United States*, 129 S.Ct. 1849 (2009).
[25] 8 U.S.C. § 1326(a)-(b) (2013).
[26] The Ninth and Eighth Circuits require evidence of specific intent. *See United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1190 (9th Cir. 2000); *see also United States v. Kenyon*, 481 F.3d 1054, 1069 (8th Cir. 2007). The majority of circuits, however, hold that general intent is sufficient to be convicted of attempted illegal reentry. *See United States v. Reyes-Medina*, 53 F.3d 327 (1st Cir. 1995); *United States v. Rodriguez*, 416 F.3d 123, 125 (2nd Cir. 2005); *United States v. Morales-Palacios*, 369 F.3d 442, 449 (5th Cir. 2004); and *United States v. Peralt-Reyes*, 131 F.3d 956, 957 (11th Cir. 1997).
[27] 18 U.S.C. § 1030(e)(11).

situation meet this definition."[28] Prosecutors are not, however, encouraged to consider the relationship between an individual's actual culpability and the losses they are working so hard to compile.

### III. The Legislative Branch Has Ceded Control of Its Criminal Lawmaking Authority

No matter which form it takes, overcriminalization results in the abuse of the criminal law and, increasingly, facilitates and encourages the executive branch, rather than the legislative branch, to define the criminal law. Not only are prosecutors given unlimited charging discretion with broad undefined laws at their disposal, but regulatory agencies are empowered to unilaterally enact massive criminal provisions with little oversight. As a result, the legislative branch has not only ceded control of the criminal law, but also the ability to limit the weighty economic, social, and individual costs of the entire criminal justice system. This abdication of Congress' criminal lawmaking has some additional unintended consequences.

First, the poorly written laws and weak intent standards create an environment that is ripe for selective, and sometimes political, prosecution. Second, poorly drafted laws create too high of a risk to exercise the constitutional right to a trial. The right to have a neutral, third party review the evidence and facts is fundamental to the foundation of our criminal justice system. And, yet, even if an accused person has minimal culpability or a strong defense, when faced with a sentence of 20, 30, or more years, he or she will often forego the right to a trial. Unlimited discretion over charging decisions, along with the power of mandatory minimum sentences and disproportionately high Sentencing Guidelines, afford prosecutors the power to deter the accused from exercising their right to a fair trial. Lastly, overly broad laws combined with inadequate criminal intent requirements allow the criminal law to be improperly used as a tool to pursue civil claims. Both government and corporate entities resort to the threat of a criminal sanction to extract civil judgments and forfeitures, eliminate competitors, and improperly control behavior. Unfortunately, it is not uncommon for companies to provoke government criminal enforcement against each other to obtain corporate advantages and as a way to maintain control over the marketplace.

Our nation's criminal justice system should not be used as a pawn between competing mega-corporations, as a career ladder for an ambitious prosecutor, as a political device, or as a blank canvas for unelected bureaucrats to expand their regulatory jurisdiction. It is the sacred and solemn duty of Members of Congress to create and define our nation's laws in a careful and thoughtful manner to prevent such abuses.

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[28] Computer Crimes Manual, *supra* note 11 at 43.

## IV. The Costs of Overcriminalization

While one can attempt to calculate the expense of overcriminalization on the government, in terms of direct expenditures, the true cost of overcriminalization and overincarceration on society is beyond measure. The federal government's expenditure on DOJ and law enforcement significantly outpaces its spending on indigent defense, which is funded through the federal courts. For the 2013 fiscal year, the Judiciary's budget underwent a nearly $350 million cut, and that cut was further aggravated by the March 1 sequester, which included a $51 million shortfall for defender services.[29] The current and impending cuts to funding for federal indigent defense are precipitating a crisis in many jurisdictions, where defender layoffs, furloughs and office closures threaten the integrity of the federal criminal process. In contrast, the DOJ was federally funded $26.7 billion dollars for its own operations and the Federal Bureau of Investigation, Bureau of Prisons, and law enforcement generally.[30] This is despite the fact that "[v]irtually all of the Judiciary's core functions are constitutionally and statutorily required," as Chief Justice Roberts wrote in his 2012 End of Year Report on the Judiciary, "[u]nlike executive branch agencies, the courts do not have discretionary programs they can eliminate or projects they can postpone."[31] When considering these inequities in funding, it is important to note that the DOJ also earned over $3 million in revenue from the fiscal year of 2012 through settlements, non-prosecution agreements, deferred prosecution agreements, and fines.[32] At the same time this nation is celebrating the 50th anniversary of *Gideon v. Wainwright*, and its articulation of the Constitutional mandate that all accused persons have access to legal counsel, our indigent defense system is in crisis. The funding discrepancies between the prosecution and enforcement of crimes and the constitutionally mandated defense function certainly shed light on this contradiction.

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[29] *See* Chief Judge William B. Traxler, Jr., *Statement on Impact of Sequestration on Judiciary, Defender Funding*, U.S. Courts, (Apr. 17, 2013), *available at http://news.uscourts.gov/statement-impact-sequestration-judiciary-defender-funding* (last visited June 11, 2013); *see also* David Harper, *Federal Budget Problems Straining Public Defenders' Operations*, Tulsa World, (June 10, 2013) *available at* http://www.tulsaworld.com/article.aspx/Federal_budget_problems_straining_public_defenders/20130610_11_A1_CUTLIN950590 (last visited June 11, 2013); *Judiciary Seeks Supplemental Funding*, (May 21, 2013) *available at* http://news.uscourts.gov/judiciary-seeks-supplemental-funding (last visited June 11, 2013).

[30] Compared with the FY 2012 enacted level, the FY 2013 Budget is essentially the same as FY 2012 in gross discretionary budget authority with an increase of 826 positions. *FY 2013 Budget Summary*, U.S. Dep't of Justice, *available at* http://www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf#bs (last visited June 11, 2013).

[31] *See Fiscal Year Funding and Cost Containment Initiatives*, U.S. Courts, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/annual-report-2012/fiscal-year-funding-cost-containment-initiatives.aspx (last visited June 11, 2013).

[32] *Section 1: Management's Discussion and Analysis* at I-3, U.S. Dep't of Justice, *available at* http://www.justice.gov/ag/annualreports/pr2012/section1.pdf#section6 (last visited June 11, 2013).

These funding numbers do not, however, provide the full picture of the cost of overcriminalization and overincarceration. A criminalized economy is one that stifles innovation, free enterprise, and capitalism. Overcriminalization is in direct conflict with the free market values and entrepreneurial spirit that are the backbone of this nation's economic system. Worse, a criminalized society—one in which every individual's life has been or will be touched by the criminal justice system—is in direct conflict with the constitutional principles that built our democracy. We cannot continue down this path without putting our fundamental values at risk of obliteration.

## V. Conclusion: Consider the Problem of Overcriminalization Broadly and Act Boldly

NACDL appreciates that this hearing is focused on understanding the problem of overcriminalization and that there will be future hearings dedicated to potential solutions. When considering those solutions, NACDL encourages the Task Force to consider the problem of overcriminalization broadly and to act boldly on solutions that will tackle this problem once and for all.

NACDL urges the Task Force to consider the recommendations outlined in the *Without Intent* Report. For example, the enactment of legislation that would apply a meaningful criminal intent requirement by default to laws lacking such a requirement would go a long way toward protecting innocent individuals; but your work should not end there.[33] Representation by overburdened, under-resourced defense attorneys results in wrongful convictions and enormous societal costs, including unnecessary incarceration and the expense of new trials. Yet, right now we see the funding for indigent defense under attack and, notwithstanding the sequestration, not one penny from the prosecutorial budget has been withheld.[34] Any reform must look to these funding inequities and begin to assess the impact of criminalization systemically and globally. New criminal penalties offer the allusion of not costing anything, but in reality they carry a tremendous price tag on many levels.

NACDL commends the efforts of this Task Force to address overcriminalization and to work towards reform. The bipartisan approach to this problem, especially in the current political climate, is meaningful and important. As you know, NACDL and its partners from across the

[33] *Without Intent* Report, *supra* note 6 at 26-32 *available at* http://www.nacdl.org/withoutintent. The *Without Intent* Report recommendations are listed in the *Without Intent* Fact Sheet and the *Without Intent* Executive Summary available online at www.nacdl.org/withoutintent.

[34] Jordy Yager, *Holder: No furloughs at Justice Department*, The Hill, April 25, 2013, *available at* http://thehill.com/homenews/administration/296053-holder-no-furloughs-at-justice-department (discussing Congressional authorization of DOJ's "reprogramming" of $313 million in funds to "help stave off automatic budget cuts known as sequestration, which would have forced the department to furlough 59,550 employees") (last visited June 11, 2013).

political spectrum have highlighted the problem of overcriminalization for several years. Hopefully, the creation of this Task Force is a reflection that the message of concern has been heard. NACDL is inspired by your willingness to tackle this problem and stand ready to assist the Task Force in every way possible.

Respectfully,

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Mr. SENSENBRENNER. I would like to thank each of the witnesses for very excellent testimony. I think that all of the members of the Task Force agree with all of you and amongst ourselves. This is a vast undertaking, and we are operating under somewhat of a time limit because the life of task forces are supposed to be 6 months, but I would guess that when we get toward the end of the Congress, we are going to ask for a reupping on this, because this is not going to get done in 6 months.

The staff has asked the Congressional Research Service to update the calculation of criminal offenses in the Federal code, which was last undertaken in 2008. CRS' initial response to our request was that they lack the manpower and resources to accomplish this task. And I think this confirms the point that all of us have been making on this issue and demonstrates the breadth of over-criminalization.

The Task Force staff is going to meet with CRS to figure out how to resolve this problem so that at least we can see what we are doing and where the problems are so that we can get a dragnet—pun intended—of the criminal laws, both in the code, as well as in Federal regulations.

Now, that being said, I would like to ask each of the witnesses to give us your priorities, just a phrase, since I have got a limited amount of time, on where we ought to start on this, whether it should be over-criminalization versus over-federalization, *mens rea*, section 1811, administrative criminal penalties, and the like.

And, Mr. Terwilliger, I guess you are first and we will go down the panel.

Mr. TERWILLIGER. Thank you, Mr. Chairman. And recognizing the brevity of time, I would be happy to expand on this later, but I think there should be two priorities. One, because it is of great importance in terms of both the reality and the perception of the fundamental fairness of the Federal criminal justice system, is to address the intent issue, which each witness here has raised in one form or another. Nobody should be convicted of a crime that doesn't have the intent to do something that the law forbids and ought to have an opportunity to test whether that intent is there in an adversarial proceeding.

Mr. SENSENBRENNER. Okay. I have got a limited amount of time, so——

Mr. TERWILLIGER. The second priority, just one phrase, is on the overregulation, because it is stifling economic expansion and development to American corporations.

Mr. SENSENBRENNER. Okay. *Mens rea* and overregulation.

Mr. Shepherd.

Mr. SHEPHERD. And I would agree that *mens rea* is number one, and number two, overregulation, but the way I would phrase it is we have taken Chevron deference where the courts encourage us to look at the expert regulators and expanded that to Chevron prosecution, and I think that is really the fundamental problem here. But *mens rea* is number one and Chevron prosecution is number two.

Mr. SENSENBRENNER. Mr. Malcolm.

Mr. MALCOLM. Yeah, I would certainly default. *Mens rea* would be my top priority. I would echo what Mr. Terwilliger and Mr.

Shepherd have said. You know, I think that is a good list. You know, my general belief is that if it is something that is important enough that somebody could go to jail, it is something you ought to vote on and not have a regulator implement.

Mr. SENSENBRENNER. I would agree with that.

Mr. Benjamin.

Mr. BENJAMIN. Well, what they said. *Mens rea* and overbreadth, I would add.

Mr. SENSENBRENNER. Okay. Thank you very much. I yield back the balance of my time.

Gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Let me follow through on that because everybody has talked about enforcing regulations with the criminal code. What about regulations that involve serious safety and health regulations, violation of those, shouldn't they be criminal, if you have people who are putting workers, for example, in life or death situations?

Mr. Terwilliger.

Mr. TERWILLIGER. I suppose there could be a reservation for the most egregious kind of conduct of that nature, but in general, Mr. Scott, that slippery slope is how we got here, respectfully. And I think there are more than adequate civil remedies to actually affect the way businesses, for example, behave.

Something on the notion of intentional conduct that, for example, recklessly disregards a known standard of safety that puts a worker in danger, that might be a reservation for a criminal offense, but we have gone way beyond that standard at this point, in my view.

Mr. SCOTT. Well, we are talking about getting rid of all of them and some of them we might want to reserve for the reasons you have articulated.

Mr. TERWILLIGER. Yes, sir.

Mr. SCOTT. If you didn't know about the regulation, would you put your workers in danger of life and safety without a *mens rea*?

Mr. TERWILLIGER. Well, that comes back to the intent issue, and that is why my formulation would be proof of intent would require a showing of a purposeful disobeying or disregarding a law. We have the notion of turning a blind eye to the requirements of the law, consciously avoiding, knowing what the law requires. If it is within someone's responsibility to know what the law requires and they don't undertake to at least minimally understand what that requirement is, that may be enough to support a conviction, assuming those other elements are present.

Mr. SCOTT. Mr. Malcolm, you want to comment on that?

Mr. MALCOLM. Yeah, I do, Mr. Scott. If Congress blesses a regulation prohibiting this sort of conduct and notice is provided to affected parties, then it is fine to make it a crime. If the conduct is clearly blameworthy and intent is proven, there is nothing wrong with making this a crime. However, if that is not the case, there is no reason why, even if a harmful result occurs, that such conduct cannot be addressed effectively, indeed harshly, by both the civil justice system and the administrative system. That way the harm can be remedied, general deterrence message can be sent out, and you are not branding somebody as criminal.

Mr. SCOTT. Well, was reckless disregard of life and safety enough?

Mr. MALCOLM. Well, reckless disregard is an intent standard, and under the realm of intent standard——

Mr. SCOTT. And what about disregard if it is within your responsibility to know and you just didn't bother to find out what the regulations were?

Mr. MALCOLM. Well, generally, if it is a highly regulated industry, the government ought to do a better job about letting those industries know what is prohibited, but if it is reckless disregard of a known danger, then generally there is nothing wrong with criminalizing that, and Congress has done so and blessed that on a number of occasions.

Mr. SCOTT. Somebody want to comment on when it should be a Federal criminal law rather than a State? Most of the Federal criminal code just overlaps State laws. I mentioned carjacking. Why should that be a Federal law and why should we leave most of this stuff to the States?

Mr. SHEPHERD. I would be glad to address that, sir. My own background, as I told you, is as a State prosecutor. Most of the cases that we prosecuted, whether they were individual defendants or racketeering cases against large groups of violent gangs or large white-collar crime cases, could have easily been filed in Federal court. I agree, there is a large duplication of that.

Oftentimes there is a balancing between prosecutors and law enforcement to figure out where do we have more leverage against the defendant. Do we have a better sentencing structure for this particular crime in State court or Federal court? Are there evidentiary rules in State decisions that support the prosecution in this versus the other? So that is how the leverage developed.

Mr. SCOTT. So, Mr. Benjamin, what does that do to a defendant, having to both look at both Federal and State, and why should we have the overlap?

Mr. BENJAMIN. Well, the practical effect is that it makes his legal fee unattainable, just nobody can afford private counsel because the consequences are so severe and far reaching. That is a very real practical effect. But one of the benefits to deferring to the States is that that is one of the benefits of federalism, permitting each of the 50 States to decide for its own what conduct within that State should be criminal and what penalties should attach. That is one of reasons for our federalist structure.

Mr. SCOTT. Thank you.

Mr. SENSENBRENNER. Gentleman's time has expired.

The gentleman from North Carolina, Mr. Holding.

Mr. HOLDING. Thank you.

I am sure we all appreciate the distinction and abilities of our panelists today, especially my friend Mr. Terwilliger. It is always a pleasure.

Mr. TERWILLIGER. Nice to see you, sir.

Mr. HOLDING. Yesterday, Director Mueller testified before the Committee and talked about the priorities of the FBI, and he noted with sequestration and declining budget and budget cuts that you have to really sharpen up what your priorities are, and as a criteria you have to prioritize things where Federal law enforcement

brings something extra to the table, something unique about Federal law enforcement, that is why we should devote FBI resources to enforcement.

So, Mr. Terwilliger, what areas of current Federal law now, criminal law, do you think that Federal resources ought to be devoted to, if you had to prioritize?

Mr. TERWILLIGER. I think clearly the threat of terrorism, both now more homegrown perhaps as we saw in Boston and what happened in London, has to remain a top priority for Federal law enforcement. And it is a good example of where what might be, Mr. Scott, a street crime, setting off an improvised explosive device, deserves and needs the Federal resources to treat it.

Beyond that, I think the leveraging of Federal resources, which certain Federal laws are important to permitting through the Task Force approach to things like street crime and gangs and other organized criminal activity, including drugs, which we don't talk much about anymore, which are—span regions, States, or multistate in nature or transnational in nature, I think those things are important.

And then third, only the Federal Government, perhaps with the exception of a couple of States, has shown the wherewithal to address what I think is one of the most fundamental duties of the Federal Government, and that is to keep our marketplaces free and honest, because a dishonest market is not a free one. So keeping the means and instrumentalities of commerce free from fraud should also be a priority.

Mr. HOLDING. Mr. Shepherd, you want to chime in on this?

Mr. SHEPHERD. Well, the only thing I would add to that, sir, is that as the FBI has rightly shifted their work into the terrorism area and other areas of national importance, State law enforcement and local law enforcement has had to step in and up their involvement in cases where they might have been able to get help from the local FBI field office and they don't now because those agents are doing other things. So there is a trickle-down effect, but I think it is an appropriate use of resources and the way it should be structured. We don't need to see an FBI agent at every liquor store robbery scene. Sheriff should handle that.

Mr. HOLDING. Mr. Malcolm.

Mr. MALCOLM. Yeah, if it is something transnational in nature or if the Federal Government has some unique knowledge or expertise, it would an appropriate use of Federal resources. The problem is, is that these days it is so easy to use the instrumentality of the phones, the mail that take you interstate that essentially all State crimes, except for the most local of crimes, become Federal crimes, and then you have problems of the spreading of resources and also a problem of accountability. The public doesn't know whether, if something isn't getting done, whether it is the Federal Government's fault or the State government's fault, and there is no need for that.

Mr. HOLDING. Mr. Benjamin.

Mr. BENJAMIN. To terrorism and international criminal activity, I would add political corruption and the denial of civil rights.

Mr. HOLDING. Often there is, you know, something that will raise a Federal priority in a particular State is the disparity between

sentences that you can get in State court versus Federal court, and perhaps that is something that we can address in a further question. But I yield back.

Mr. SENSENBRENNER. Thank you.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you.

Attorney Benjamin, your testimony noted that almost 68 million Americans have a criminal record, and we talked about the direct costs of law enforcement presence in courts as well as to businesses and the economy. But can you discuss what the criminal record means for the average American? How does that impact their quality of life and their ability to contribute to society and the overall economy, and how does it affect the system itself with that many people walking around with records?

Mr. BENJAMIN. Thank you, Congressman. The effect of the problem we discussed today is that we have deepened the divide between us. In a country that values equality, we have deepened the divide between our people and we have created a caste system populated by third-class citizens who are marked by the stigma of conviction and bear a lifetime of the consequences that flow from their conviction, even after they have served their time.

This is a country that once valued the right of redemption. It used to be said that once you had erred, which of course is human, and paid your debt to society, you were then free, you were redeemed to pursue life as a free citizen. But that is no longer the case. Now, after you have paid your debt, you are marked for the rest of your life with consequences such as where you can live, where you can work, whether you can pick your children up from school. That is not what this country was ever meant to be about.

Mr. CONYERS. Let me ask Bill Shepherd, one aspect of over-criminalization is over-federalization and how the Federal Government frequently intrudes on matters that should be left to the States. Is there anything that we can think about doing to minimize this? Do you have any examples that we might turn around here this morning?

Mr. SHEPHERD. Well, I think, sir, that the American Bar Association has been working with Congress for decades on this issue. In 1998 we came out with a report that involved Attorney General Meese on the over-federalization of crimes. We talked about some of those statistics earlier this morning. I think there is a natural reaction when something bad happens that we want to say we are taking action, exactly, and we are here to protect you.

But part of the way the Federal Government can say we are here to protect you is to encourage the local State officials, who already have carjacking, as you said, sir, on the books, to further enforce their carjacking statute, to give them resources they might need. If the FBI lab needs to be helpful in tracing the gun, then we use the FBI lab or the ATF, but perhaps we don't need a new Federal statute.

And I realize it is difficult, in a position where your constituents demand action, to say, for example, well, I don't think we should have a Federal carjacking statute. That ends up on a mailer in my mailbox come election cycle. I understand that is a difficult posi-

tion, and that is part of the reality, whether it is at the State level or the Federal level or the county level.

But I think the point that you raise and where law enforcement can help is to say, no, smart justice here doesn't mean more statutes. Your Member of Congress is right, we don't need a new statute, and on behalf of the sheriffs and the local prosecutors, we think the laws are on the books, we maybe need funding to enforce them, but we don't need more laws.

And I think coalitions like the one you see here offer some of that help and support for lawmakers when they need those issues addressed and to have people who are experts in that substantive field help explain to the constituents why it is important that we have the laws on the books we have and not increased to add new ones.

Mr. CONYERS. So we ought to use this phrase a little less often: There ought to be a law.

Mr. SHEPHERD. Agreed.

Mr. CONYERS. I yield back.

Mr. SENSENBRENNER. Thank you.

The gentleman from Alabama, Mr. Bachus.

Mr. BACHUS. Thank you.

I have talked to Federal judges, I have talked to State judges, I have talked to criminal defense attorneys, and I have actually talked to people who have been caught in this dragnet that you describe. And no one defends the status quo. I mean, it is amazing how we said we all agree. I can tell you horror stories of things that have happened to some of my constituents that you just think this can't be true.

One of the things is, if you buy a piece of property and there is hazardous materials on it. I actually know of a man who bought a business, found hazardous materials, and went to the EPA and said, this is what I found, but because he didn't dispose of it in as short a time as they wanted, he was charged with maintaining hazardous materials, and he served a prison term because he said, I am not going to plead to something I didn't do.

And the cost. The cost of disposing. He kept saying, I can't get anybody to tell me who will take this, and they want this much. I don't have the financial ability to dispose of it. He even offered the government, I will turn over title to the land to you.

He is a convicted felon. And I can tell you that that causes disrespect for the law. I mean, the next person is going to say, I am not going to look, see what is on the back of this property. It is even hard to sell property now if there is any suspicion that there might be something. So this stuff is not being disposed of because no one will buy it.

So, intent, I mean, Al Unser. I mean, I know of a public official who accepted a pair of shoes from a business that did work with the county, a national company, and then she thought, well, I am not sure I should have done that.

So she asked an attorney in her home town and he said, well, why don't you just give them to charity or send them back? So she donated them to a charity. She just gave them to them within 3 weeks, a pair of shoes. Four or 5 years later she was being questioned by grand jury about did she accept any benefits or some-

thing for a certain contract and she said no. Now, she didn't, but she had accepted these shoes.

So later on she said, you know, we need to tell them about these shoes. So she told them. Well, the U.S. Attorney wanted to get a plea, so said, I will give you 6 months suspended sentence or we will try this case, and offered 3 years. Her attorney said, you know, so she pled. Now she has a record.

Let me move on to another thing and get your comments. I have been told by friends of mine, judges and attorneys, that some offenses for drug cases, if you go to the Jefferson County courthouse or Shelby County courthouse, in Shelby County it is diverted, you go into a diversion program for one offense. Jefferson County you will serve maybe—I mean, you will get a year-and-a-day sentence max. Probably serve 30 days, 60 days. If it is the same thing and you go to Federal court, it can be 10 years. So it just depends on where you are arrested.

And the third thing—and I will let you comment on any of these—we aren't rehabbing people with this foolishness. I mean, the end result is things are much worse. You know, somebody serves a sentence, they get out, they can't get a job. We don't train them. They end up back in the system.

So any comments you all have to say, I mean. But this thing about the difference, I mean, and getting 10 years in the Federal system and serving 8 or 9, and getting a year in a State court and maybe serving 6 months, or getting a diversion program in another county.

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

Mr. BACHUS. Could they respond briefly?

Mr. SENSENBRENNER. Well, I said at the beginning of the hearing that because we are voting, I want to get to the other members of the Task Force before the bell rings.

The gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chair. And thank you Representative Scott for your tremendous leadership on this issue, and to the distinguished panelists that we have here before us.

Seems to me that there are three issues that we should look to tackle as it relates to dealing with the problem of over-criminalization, and I would like to get your thoughts on those three different segments.

The first is just the general problem of too many crimes within the Federal code and perhaps those crimes being too punitive in nature in terms of the sentencing. That is sort of broad over-criminalization.

The second problem that you seem to have touched upon is the overly broad exercise of prosecutorial discretion.

And then the third problem seems to be the lack of adequate counsel on the back end to make sure that when a citizen finds themselves in criminal jeopardy as a result of the first two problems, over-criminalization and overly broad exercise of prosecutorial discretion, there is an opportunity to actually provide an adequate defense consistent with the Sixth Amendment of the United States Constitution and the Founders' intent.

So if we can start with the first issue, and I will direct this to Mr. Shepherd. On the intent issue, there is sort of a sliding scale

of severity. There is intentional willful intent of course. There is reckless disregard, commonly referred to also as depraved indifference in some instances. Then there is criminal negligence. And I am interested in getting your comments on when, if ever, is it appropriate to have a criminal negligence intent standard built into the law.

Mr. SHEPHERD. I think that is going to be a rare case where a criminal negligence standard is appropriate. I think that is what the tort laws are for. That is what the civil court system is for. And that it is the rare case where a standard like that is appropriate.

That is not to say that there aren't some where it is appropriate. And I think that the Ranking Member was trying to flesh that out in his question. But I think that is the rare case. I would be glad to talk about some of your other issues or come back to that.

Mr. JEFFRIES. Okay. Let me ask Mr. Benjamin with respect to sort overly broad exercise of prosecutorial discretion, what are some of the things that we on the Task Force can look at attempt to rein that in?

Mr. BENJAMIN. I don't know that you can rein in the exercise of overly broad prosecutorial discretion. Instead you should recognize the powerful force that the prosecutorial function has become in our criminal justice system. That will always be the case, I am afraid. We have very many excellent prosecutors who will prosecute appropriately, but we will always have some who in their zeal might be excessive.

The answer rests with your third point. See, there will always being problems within the criminal justice system. There will always be penalties that are too harsh, conduct that shouldn't be criminalized. The safety net is the defense function. We are the safety net, the final protector of our citizens who were either unjustly accused or overly accused. And that is why it is so important and so vital that we have sufficient resources to do our job.

Mr. TERWILLIGER. Mr. Jeffries, if I may, maybe we finally found something we can have a little bit of disagreement about here today. Not Mr. Benjamin's last point, but his former point.

I think that the Task Force is very fortunate to have, for example, a former prosecutor with distinguished service such as Mr. Holding as a member, because if we look at these series of cases that the examples that have been given here, in every one of those I think, at least on a prima facie basis, some prosecutor made a very bad decision to pursue a case. And I think looking at how and why that occurs is a legitimate area of inquiry here.

And I think the answer, having been both an assistant U.S. attorney and a U.S. attorney myself, is a lack of adequate supervision, of not having supervisors, including United States attorneys, as Mr. Holding did I can tell you from personal experience, who is willing to question the judgment of assistants.

Mr. JEFFRIES. I appreciate that observation. If I could just say in my remaining time, Mr. Malcolm, I am encouraged by the diverse ideological group that you at the Heritage Foundation have assembled. And one of the things that I would be interested in taking a look at is the notion of the cost to our economy as it relates to lost human capital and lost economic productivity.

Mr. MALCOLM. We could certainly look into that, Congressman.

Very quickly, if I could just add a quick point on prosecutorial discretion, one problem is we are a government of laws and not men, and what we should have are clear laws so the prosecutors are not left to themselves through regressive interpretations to determine what is legal and illegal. Prosecutors are people of very high integrity, but they are not disinterested people in this process. They get a lot of kudos for bringing charges and rarely get kudos for declining to prosecute.

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

The gentleman from Idaho, Mr. Labrador.

Mr. LABRADOR. Thank you, Mr. Chairman. Thank you for convening this hearing. I think this is a very important hearing. I was actually a criminal defense attorney, so I am a conservative Republican criminal defense attorney and former immigration lawyer as well, which makes me an anomaly in many ways.

But I just wonder, Mr. Bachus didn't have an opportunity to have you answer the questions. I saw a couple of people raising their hands that they wanted to comment on his comments. I don't know if anybody wants to do that.

Mr. TERWILLIGER. I really did try to address what I wanted to say, but thank you for the opportunity in terms of the importance of the exercise of prosecutorial discretion in the scheme of things.

Mr. LABRADOR. And he also raised another issue that I wanted to raise as well. We haven't discussed it here, but as we think about over-criminalization, what about the sentencing guidelines? Do you think that is something that we should be discussing here in this Committee? Do you think this is something that is leading to the problems that we are having of so many people being in prison? What are your comments on that?

Mr. TERWILLIGER. If I may, I lived through the era of indeterminate sentencing where actual sentences were determined by a parole commission behind closed doors, versus the system that we graduated to with the guidelines where sentences were determined by judges in open court and those were actually the sentences to be imposed. Unfortunately, what has happened, I think, with the evolution of the jurisprudence on the sentencing guidelines in a nutshell is that we are sort of somewhere between those two now. We still don't have a parole commission, but since the guidelines are largely just for guidance, the disparity in sentencing has grown again.

In some ways—and I don't mean this certainly as to any Members here—but Congress has in essence delegated its authority to set sentences to the Sentencing Commission. And therefore at least as part of legitimate oversight of that operation of government it seems to me to be a very legitimate subject matter for this Task Force to examine.

Mr. LABRADOR. Does anybody else have any comments on that?

Mr. SHEPHERD. Well, I would echo that and add to part of what Mr. Bachus was saying, which is that you get different charges and different sentences in different parts of your home State. Those are driven by the local community's outrage by particular crimes and also, frankly, by their workflow. Larger metropolitan areas often have lower sentencing for sort of quote/unquote "regular," crimes

because they need to move them through so they can focus on the murders and the rapes and the more serious victim crimes.

But the sentencing guidelines bring some level playing field to that and help defendants know and help lawyers advise their clients, here is what is going to happen to you, here is what could happen to you in that range. So there is an important role for it. But the guidelines, as Mr. Benjamin said, also drive a lot of guilty pleas because people know that if I am convicted, I am facing X number of years, and the prosecutor has offered me probation or offered me something that is going to give me that. So I am not going to fight it. And that is where you get administrative codes and laws that never really get hashed out in the courts because people don't go to trial.

Mr. LABRADOR. And that is one of my concerns. I think it was actually Justice Scalia who said that we should have more trials, not less trials, that you have too many people pleading. And I think that is a consequence of having these amazing sentences where you go to your client and you tell them, well, your option is to go to trial and if we lose you are going to go to prison for 20 years. They are always going to choose the option of pleading to something.

Mr. Benjamin, to you have any comments on that?

Mr. BENJAMIN. I do. You know, once we prized the fact that we lived in a country where we were free of the fear of unjust criminal accusation, you know, but we have arrived at the point where we have got to, any one of us, fear that the pursuit of happiness might be a crime even though we do nothing wrong and have no criminal intent. And so that is a problem for us.

Mr. LABRADOR. To reclaim my time, I am about to run out of time. My main concern when it comes to criminal law is many times when I was in the State legislature I had a bunch of prosecutors come in and say, well, we need to change the law because it is too difficult to prosecute this case. And I always said, good. You are taking people's liberty away. If you are going to take people's liberty away it should be difficult for the State or the Feds to take their liberty away.

Mr. BENJAMIN. It is called the trial penalty.

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

The gentlewoman from California, Ms. Bass.

Ms. BASS. Thank you very much, Mr. Chairman, Ranking Member, one, for convening this Task Force, and I am very happy to be on it. And I am really encouraged by the diversity of the groups that have come together around looking at over-criminalization.

I wanted to know if the panelists—I have three areas I wanted to cover rather quickly, and one is I wanted to know if you could comment about mandatory minimums and the, frankly, the need from my perspective to change them. We had a town hall meeting in my district last weekend and I was honored that Representative Scott came out, and we had over 200 people there talking about their concerns, many families talking about their family members that were incarcerated. So that is one issue I wanted you to comment on it.

And then I wanted your comments around the changing marijuana laws and what your thoughts are. I mean, California changed the law. A number of States are. And then we have all of

these folks that are incarcerated for very petty marijuana crimes. And I wanted to know your thoughts on that.

And I really appreciated Mr. Benjamin talking about how we did once have a society that, if you did the time, you paid your debt to society, you were then able to be incorporated back. So one of the things that has happened in my State, and I imagine it has in many other States, is that we have passed all of these laws now banning people from working. So we had one case in California where in the State prison we had a program to train you to be a barber, but then we banned you from having a barbering license. So we were able to change that. But I imagine if we had 52 examples of that in California, there probably are examples all around the country, and I am hoping that is something this Task Force can examine.

Mr. TERWILLIGER. Ma'am, I will just address your question about mandatory minimums. Historically the Congress prescribed the penalty in the early days of Federal criminal law and said, if you do X, you get Y. And that is its prerogative to so prescribe that penalty. So it is within the prerogatives of Congress to prescribe mandatory minimum penalties as part of its lawmaking authority.

I do think mandatory minimums can be effective. They can be effective as deterrents. They can also be effective at removing the most dangerous of dangerous people from the street. They can also be highly ineffective if applied in circumstances where, frankly, the reason for them is far more political than it is substantive in terms of actually reducing crime.

Ms. BASS. Okay.

Mr. SHEPHERD. The American Bar Association has, as far as I am aware, never been in favor of mandatory minimums and has spoken against them as an organization. So that is my answer as it relates to that. But I would like to answer your question as it relates to collateral consequences and reentry issues.

Many States have the same problem you did in California with the barber license and the department of corrections training people for that. The collateral consequences that individual defendants face, frankly, I think your researchers who are trying to research the number of crimes might also have difficulty researching the number of collateral consequences.

I know that because the American Bar Association, with support from the Justice Department and from Congress and other groups that have been helping us, has started a project with a Web site called the National Inventory of Collateral Consequences, which will be a tool that judges, lawyers advising their clients, individual defendants, can look up and say, if I plead guilty to this, what are all the various business regulatory, housing impacts, student loan impacts, all those sorts of things so that they can really make a decision that is going to be based on knowing the universe of issues. And we have already accomplished quite a bit in that regard and have over half the States, I believe, up on that Web site and progress continues.

Ms. BASS. Thank you.

Mr. MALCOLM. I would say with respect to mandatory minimums, I would echo what Mr. Terwilliger said. The Congress can certainly do them and in appropriate cases they have their place.

I do think perhaps the pendulum has swung too far and that there are too many of them and some of them are too draconian. I would say this: In these very, very tough budgetary times, the budgetary pie for the Bureau of Prisons is not growing, and all of those dollars being put into prisons is less money for enforcement and other social services. So given that fiscal reality, I think it is incredibly important that Congress focus on, one, making sure that only the right people go to prison, and two, that they are there for the appropriate amount of time and no longer.

Mr. BENJAMIN. As time expires, I will note that NACDL during this past year has held hearings using a Task Force on the Restoration of Rights across the country and we will soon be publishing the results of this very extensive and thorough study.

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

The gentleman from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chair. I have got a statement to enter into the record.

Mr. SENSENBRENNER. Without objection.

[The prepared statement of Mr. Cohen follows:]

**Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Member, Over-Criminalization Task Force of 2013**

Mr. Chairman, I want to thank you for establishing this task force on over-criminalization. It's a critical issue and one I hope we can find some common ground on.

Short of capital punishment, there is no more serious act this government can take than to deprive someone of their liberty. It's something we should do in only the most serious and limited of circumstances, and after the greatest care and due process. Unfortunately, the criminal code has grown into a behemoth and our prisons are swelled with people who pose no danger to society.

There are some obvious questions we should look at—whether we have too many crimes, whether the *mens rea* required for them is appropriate, and whether the sentences are proportionate. In particular, I hope we'll look at mandatory minimums and the damage they have caused. Mr. Scott has important legislation to provide judges with safety valves to reduce these sentences where appropriate and I hope we'll look at that.

I would note that the proposed agenda for our Task Force includes a special emphasis on regulatory crimes. While it's a topic worthy of exploring, I hope that we won't turn this into a larger discussion on the value of regulation and the regulatory state—I get more than my share of that in the Regulatory Reform, Commercial and Antitrust Law Subcommittee and our attention would be better served on other the topics I described.

But in the months ahead, I hope we'll also take a more expansive look at the problem of over-criminalization. I especially hope we'll take a look at our federal drug policy, particularly with respect to marijuana, which is really a microcosm of the whole problem. We've taken an activity with no victim and minimal risks—certainly far fewer risks than with alcohol—and made it into a crime. In the process, we've made criminals out of millions of people with no increase in public safety.

Fortunately, the American public is changing their attitudes towards marijuana and a recent Pew Research poll found that 52% of people support legalization. They're waking up to the fact that 40 years of the War on Drugs has proven to be a failure. Not only are we throwing away the lives of millions of people, but we're also wasting precious resources through our vast prison industrial complex.

With sequestration in effect and a difficult budget environment, it's a good time for us to look at the fiscal and economic impact of our criminal policies. We also have to consider how criminal laws have been enforced, and the staggering racial disparities that have resulted. Just last week, the ACLU issued an alarming report on the racial disparities in marijuana arrests and found that Blacks were nearly four times more likely to be arrested than Whites. In Shelby County, Tennessee, which I represent, 83.2% of people arrested for marijuana possession were Black,

far higher than their percentage of the population at large. These statistics argue for a deep examination of how our criminal laws are enforced.

In addition, no discussion of the criminal code is complete without considering the consequences of conviction for those crimes. In our society, even a conviction for a minor, non-violent offense can effectively be a life sentence because the stigma of your conviction will follow you around for the rest of your life. In the case of marijuana, you practically have a scarlet M pasted across your chest. Employment, education, and housing opportunities—the very things necessary to start fresh—can all be denied on the basis of a conviction. Not only is this cruel, but it's self-defeating. We should consider expungement laws and other measures to mitigate these consequences and give people a second chance.

Finally, I hope we can consider the President's pardon power and the issue of executive clemency. While this is an executive function, we should be working with the Department of Justice to facilitate the review of candidates worthy of compassionate release.

I recognize that many of the issues I've discussed this morning, like drug policy, primarily occur at the state and local level but there is much we can do at the federal level. For one thing, we can and should serve as a model for the states.

We also need to determine whether our funding policies are inadvertently encouraging over-criminalization. For example, I have heard many concerns that the Byrne/JAG program encourages states and localities to arrest people for low-level offenses so that their statistics will increase and they will, in turn, earn more federal funding so that the cycle can continue. I hope we can look at this issue as well.

As you can see, this Task Force can remain very busy if we address all the issues before us. But if we do our job right, we have the opportunity to create a more just society and I look forward to the work we will produce.

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Mr. COHEN. Thank you.

I want to follow up on Ms. Bass' questions concerning marijuana. I think that is one of the biggest problems this country has. And the problem is not marijuana; it is the enforcement of the marijuana laws and the number of people who have been incarcerated. That is the biggest problem.

Has the Bar Association, Mr. Shepherd taken a position? I thought they might have on medical marijuana, but has it taken any position on incarceration for possession of marijuana?

Mr. SHEPHERD. Sir, I don't know the specific answer to your question about possession charges and prison time for——

Mr. COHEN. How about medical marijuana?

Mr. SHEPHERD. I know that there is a matter before the House of Delegates that will be addressed in August that deals with some of those issues.

Mr. COHEN. Do you of any position they have taken in the past where they have said that medical marijuana laws should be approved?

Mr. SHEPHERD. I personally don't.

Mr. COHEN. Over at some cocktail party where people were juggling some alcohol, they didn't talk about that sometime?

Mr. SHEPHERD. Perhaps I wasn't invited to that event.

Mr. COHEN. Mr. Benjamin, what are your thoughts on that issue?

Mr. BENJAMIN. I have just been advised that we in fact oppose the criminalization of personal use of marijuana and certainly the medical treatment that uses marijuana. We oppose the criminalization of the use of marijuana. That is correct.

Mr. COHEN. But wouldn't that take business away from you? Wouldn't you lose clients? What a noble thing. That is unique.

Mr. BENJAMIN. We are just that noble in fact. It is true, it is true. What we want is a just and fair criminal justice system over everything else. There will always be work for us. Never fear.

Mr. COHEN. I value being on this commission because I think it is so important. I think other than the death penalty, there is nothing more serious the Federal Government could do than take somebody's liberty. And it should be, in my opinion—and I am far from a member of the tea party—but it seems like the tea party should grasp this issue, because it is taking liberty and individual rights and it is using Federal resources financially in the hundreds of millions of dollars to incarcerate, to prosecute, and then later to lose the productivity of those people because they can't get jobs, they can't public housing, they can't get scholarships, et cetera. This is a tea party issue; they just haven't picked up on it yet. They need to smell the tea.

Mr. SENSENBRENNER. Will the gentleman yield?

Mr. COHEN. If I doesn't reduce my time, yes, sir.

Mr. SENSENBRENNER. I will ask unanimous consent that his previous comments about the tea party be expunged from the record so he will have more credibility when he goes and approaches them on the subject.

Mr. COHEN. Whatever.

The concern I have got—I am happy to be on the Committee, but I read that the Brown Commission got nowhere and they did so much work in the 1960's. My belief—and without taking on my President too much—is that the main way that we can deal with this is through pardons, by the pardon power of the President, which he has not used. There is still an 18-1 disparity in crack and cocaine punishments. It used to be a 100-1.

Mr. Benjamin, do you think the President would be correct in using his power to, not necessarily pardon, but commute the sentences of those people who were sentenced to jail in Federal prison and are still in Federal prison for serving at somewhere between 18 and 100 ratios, where if they had had the laws that Congress has passed and therefore they become what we believe is correct and right public policy, that he will be using his power correctly to get those folks out of the Federal system?

Mr. BENJAMIN. Well, that certainly makes sense to me. But I have got to note that the exercise of the pardon power is also an exercise of a political function and hence it is not something that we can should rely upon to correct injustices and imbalances within our criminal justice system.

Mr. COHEN. I agree with you, but if I was one of those people in jail I wouldn't worry about that and I wouldn't wait for us to pass the laws to change it. The President can do it now. And there are so many other laws, unjust sentences that he could take care of by commuting sentences, and he needs to do it. There are people rotting away in jail and causing us a lot of expense that don't need to be there, and that is it just needless.

As far as mandatory minimums, I think Mr. Terwilliger said he liked them. Sometimes it is a deterrent. Do you think if there is a mandatory minimum for drug sales, that you take one person and put them in jail, that there is not another person, like a shark's tooth right there to take over? After 40, 50 years of the

drug war, we haven't seen any reduction in people dealing because the other dealer was put in prison.

Mr. TERWILLIGER. I wasn't—at least in terms of what I think, what I personally think, Mr. Cohen, would be the appropriate use of mandatory minimums—thinking of drug offenses. I was thinking of violent offenders, people who have shown a propensity to commit violence over and over again.

Mr. COHEN. Thank you, sir.

And thank you, Mr. Chairman.

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

Before closing the hearing, during my opening statement I did make a comment about the Congressional Research Service being overworked and not having enough staff to tell us what criminal laws are on the books. And we are not going to take that kind of "no" for an answer.

The Task Force staff will be meeting with CRS next week and also outside experts to see if there is a path forward in this important endeavor so at least we know the extent of the criminal law, whether it is in the 51 titles of the U.S. Code or whether it is somewhere buried in the Code of Federal Regulations. We are not going to be able to do a complete job in this task without having this information, and we are going to get the information, no matter how long it takes.

So with that happy note, without objection, the Committee stands adjourned.

[Whereupon, at 10:25 a.m., the Task Force was adjourned.]

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