"From Tool to Weapon: The FACE Act and the Dangers of Federalizing Criminal Law"

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[1] The views I express in this testimony are my own and should not necessarily be construed as representing any official position of The Heritage Foundation.

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SUMMARY

The federal criminal code has become an instrument of governance that the Founders would not recognize and that no individual citizen can fully know. By the most reliable recent count, the United States Code contained at least 5,199 distinct criminal offenses as of 2019, with the number growing each year.[2] Beyond the statutory code, an estimated 300,000 or more crimes lurk in federal regulations, promulgated by agencies without direct democratic accountability.[3] The result is a legal regime where ordinary Americans—from kids hunting for arrowheads while camping, to a father clearing a bird nest from a house gutter, to a family moving dirt on their land—can find themselves accused of federal crimes for conduct no reasonable person would regard as criminal. The danger of such a system extends beyond its absurdity. When federal criminal law is vast and vague, enforcement inevitably becomes discretionary, and discretion becomes power. That power does not remain neutral. It follows whoever sits in the executive branch and reflects

[2] GianCarlo Canaparo, Patrick McLaughlin, Jonathan Nelson and Liya Palagashvili, *Count the Code: Quantifying Federalization of Criminal Statutes*, Heritage Found. Special Report No. 251 (Jan. 2022), available at https://www.heritage.org/crime-and-justice/report/count-the-code-quantifying-federalization-criminal-statutes.

[3] 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) (citing Thomas B. Leary, *The Commission's New Option That Favors Judicial Discretion in Corporate Sentencing*, 3 Fed. Sentencing Rep. 142, 144 n.10 (1990)); see also Harvey Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (2011).

whatever ideological priorities animate the Department of Justice and federal agencies at any given moment.

This testimony examines the crisis of federal overcriminalization and offers the Freedom of Access to Clinic Entrances (FACE) Act[4] as an exemplary case study in how excessive federal zeal can produce unconstitutional statutes that hand federal prosecutors a weapon calibrated for abuse. Part I surveys the broader problem of overcriminalization: its constitutional foundations, the mechanisms by which federalizing criminal law transfers enormous discretion to unelected officials, and more than ten concrete historical examples of how that discretion has been—and will continue to be—used against groups that happen to be out of political favor. Part II turns to the FACE Act specifically, arguing that it lacks adequate constitutional grounding under the Commerce Clause and the Fourteenth Amendment, and that the Biden Department of Justice's enforcement record has demonstrated with painful clarity that such statutes are inherently vulnerable to weaponization. The conclusion offers recommendations for reform.

PART I: THE CRISIS OF FEDERAL OVERCRIMINALIZATION

A. A Code That No Citizen Can Know or Understand

James Madison said in Federalist No. 84 that "the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." This observation must be understood in conjunction with Federalist 62 where Madison said democracy is pointless "if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood."[5] Fast forward almost 250 years later and the federal criminal code is now so vast that

[4] Freedom of Access to Clinic Entrances Act, Pub. L. No. 103-259, 108 Stat. 694 (1994) (codified at 18 U.S.C. § 248).

[5] The Federalist No. 62 (James Madison).

the Department of Justice itself once attempted to count all the crimes on the books and gave up. And it is so complicated that armies of lawyers make handsome livings arguing over what impenetrable laws and regulations mean.

In 2022, researchers from The Heritage Foundation and the Mercatus Center deployed a text-analysis algorithm to count the criminal statutes in the 2019 United States Code. They found 1,510 criminal sections—and estimated, through careful sampling, that those sections contain approximately 5,199 distinct criminal offenses.[6] That number is still only a fraction of the total federal criminal law, because it does not include the Code of Federal Regulations. An earlier estimate placed the number of regulatory crimes at approximately 300,000, though no one—not Congress, not the Department of Justice, not any federal agency—knows the actual figure with confidence.[7]

The content of these crimes illuminates the scope of the problem. As my former Heritage colleague GianCarlo Canaparo has pointed out,[8] it is a federal crime to sell a package of bacon without a transparent window at least one and one-half inches wide showing at least seventy percent of a representative slice.[9] It is a federal crime to sell Swiss cheese that lacks "holes or eyes

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[6] GianCarlo Canaparo, Patrick McLaughlin, Jonathan Nelson and Liya Palagashvili, *Count the Code: Quantifying Federalization of Criminal Statutes*, Heritage Found. Special Report No. 251 (Jan. 2022), available at https://www.heritage.org/crime-and-justice/report/count-the-code-quantifying-federalization-criminal-statutes.

[7] 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) (citing Thomas B. Leary, *The Commission's New Option That Favors Judicial Discretion in Corporate Sentencing*, 3 Fed. Sentencing Rep. 142, 144 n.10 (1990)); see also Harvey Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (2011).

[8] GianCarlo Canaparo, "Quantifying and Remedying Overcriminalization in Federal Law," Testimony Before the U.S. House Judiciary Subcommittee on Crime and Federal Government Surveillance, The Heritage Foundation (May 7, 2025), available at https://www.heritage.org/crime-and-justice/report/quantifying-and-remedying-overcriminalization-federal-law.

[9] 9 C.F.R. § 317.344(e) and 21 U.S.C. § 333.

developed throughout."[10] It is a federal crime to submit a design to the Federal Duck Stamp contest unless the design primarily features eligible waterfowl.[11] It is a federal crime to sell a toy marble across state lines without a label saying "this toy is a marble."[12] These examples are laughable. But the criminal law is not supposed to a laughing matter. It is supposed to be society's most serious condemnation of morally blameworthy conduct. When it reaches toy marbles and bacon windows, it loses its moral authority—and opens the door to something more dangerous than absurdity: arbitrary and selective enforcement.

Equally troubling is the erosion of the *mens rea* requirement—the ancient requirement that a defendant possess a "guilty mind" before the criminal law attaches.[13] People intuitively understand this when it comes to serious crimes such as 1st degree murder which requires premeditation; versus crimes of negligence that receive lower sentences, such as distracted driving leading to involuntary manslaughter; versus deaths caused by the criminally insane which receive not punishment at all (but may require non-criminal detention). Many federal regulatory offenses contain no intent element at all. A person can be imprisoned for unknowingly violating a regulation they have never read and could not have discovered through any reasonable effort. This is not merely theoretically unjust—it has happened, repeatedly, as described below, to real Americans.

These cases are not outliers. They reflect the logical consequence of a system with too many crimes, worded too vaguely, and vesting too much discretion in distant federal prosecutors.

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[10] See 21 C.F.R. § 133.195 (requiring "holes or eyes developed throughout the cheese" for Swiss cheese); 21 U.S.C. § 333 (criminal penalties for violations of FDA regulations).

[11] 50 C.F.R. § 20.151(b) and 16 U.S.C. § 718j.

[12] 16 C.F.R. § 1500.19(d) and 15 U.S.C. § 2068.

[13] GianCarlo Canaparo, *supra* at note 8 ("With the rise of *malum prohibitum* offenses, came the fall of *mens rea*. Many of these thousands of crimes have no *mens rea* element of any kind, so you can be guilty of violating them even though you don't know that these laws exist and even if you don't intend to break them.").

B. The Constitutional Design and Its Subversion

The Tenth Amendment reserves to the states, or to the people, all powers "not delegated to the United States by the Constitution, nor prohibited by it to the States."[14] The Founders understood that criminal law—the definition of offenses against the community and the punishment of those who commit them—was paradigmatically the province of state and local government. As Madison explained in Federalist No. 45, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined."

For most of the nation's first century and a half, the federal criminal code remained modest and focused on genuinely federal concerns: treason, counterfeiting, offenses on the high seas. The transformation began during and after the New Deal, as the Supreme Court progressively expanded its interpretation of the Commerce Clause to accommodate an ever-broader federal regulatory agenda. By 1942, the Court held in *Wickard v. Filburn* that Congress could regulate a farmer's production of wheat grown and consumed entirely on his own farm, because of its supposed aggregate effect on interstate wheat markets.[15] The implications of that holding, carried to their logical conclusion, are nearly unlimited: virtually any local activity can affect national markets in some theorized way.

Congress did not hesitate to exploit this opening. Over the following decades, federal criminal law expanded from a manageable code focused on distinctly national concerns into a sprawling apparatus that now touches every corner of American life. The number of federal crimes

[14] U.S. Const. amend. X.

[15] Wickard v. Filburn, 317 U.S. 111 (1942).

increased by an estimated 73 percent between 1982 and 2019 alone.[16] Each new federal crime, however well-intentioned at its creation, represents a permanent transfer of power from states and localities to federal prosecutors, agents, and bureaucrats.

C. The Commerce Clause as the Engine of Expansion

The Commerce Clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. In its post-New Deal incarnation, this clause became the all-purpose vehicle for federal criminal legislation. Congress learned that it could federalize virtually any crime by adding a findings section asserting that the prohibited conduct "burdens interstate commerce" or "affects commercial activity."

The Supreme Court pushed back, beginning in 1995. In *United States v. Lopez,*[17] the Court struck down the Gun-Free School Zones Act of 1990, which prohibited possession of a firearm within 1,000 feet of a school. Chief Justice Rehnquist, writing for the majority, held that the Commerce Clause authorizes Congress to regulate three broad categories of activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that have a substantial effect on interstate commerce. The last category—the one Congress had most aggressively exploited—came with a critical limitation: the regulated activity must be economic or commercial in nature. A firearm in a school zone was not.

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[16] Wayne A. Logan McLaughlin & Alex Tabarrok Palagashvili, *Counting the Code: How Many Criminal Laws Has Congress Created?* (Mercatus Ctr. at George Mason Univ., Policy Brief, 2019), https://www.mercatus.org/system/files/mclaughlin-counting-the-code.pdf.

[17] United States v. Lopez, 514 U.S. 549 (1995).

Five years later, in *United States v. Morrison,*[18] the Court applied *Lopez's* framework to invalidate the civil remedy provision of the Violence Against Women Act (VAWA). Congress had asserted Commerce Clause authority based on detailed findings that gender-motivated violence deters women from traveling interstate and participating in commercial activity. The Court flatly rejected this reasoning: the Commerce Clause does not authorize Congress to regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[19] The activity being regulated—violence by private individuals—was not economic or commercial in nature, and the connection to commerce was achieved only by piling inference upon inference in a manner that would, if accepted, give Congress in practice a kind of general plenary power only proper to the states.

The import of *Lopez* and *Morrison* for the broader overcriminalization debate is profound. Not every serious social problem—however morally troubling, however harmful, however widespread—automatically becomes a federal matter. The Commerce Clause is not a general license for Congress to address any problem it identifies. Violence against women is a terrible thing. Possession of a firearm near a school is a genuine concern. Yet neither automatically becomes a federal crime simply because Congress declares it to burden commerce. The same principle applies to a wide range of conduct that Congress has rushed to federalize: gang activity, domestic violence, hate crimes, interference with official proceedings, and—as this testimony argues below—obstruction of abortion clinics.

The point is not that these are unimportant problems. They are often serious problems. The point is that the federal government is often the wrong vehicle for addressing them, and that

[18] United States v. Morrison, 529 U.S. 598 (2000).

[19] *Id.* at 617.

federalizing these crimes creates a permanent institutional apparatus—prosecutors, agents, grand juries, mandatory minimums—that will outlast any particular administration's intentions and can be turned against any group that future officials decide to target.

D. The Structural Danger: Discretion Without Accountability

Madison observed in Federalist No. 51 that "if men were angels, no government would be necessary."[20] Many people are familiar with this quote and see in it a justification of coercive government power, but they often neglect to read the very next sentence which says: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[21]

The observation contains within it the core structural insight of constitutional design: power must be constrained not because its current holders are corrupt, though they very well might be, but because we know its future holders at some point *will* be. This insight is nowhere more important than in the realm of federal criminal law.

When Congress creates a new federal crime or expands an existing one, it does not simply prohibit conduct. It creates a power. That power vests, institutionally, in the Department of Justice, the Federal Bureau of Investigation, and the constellation of federal agencies with criminal enforcement authority, including through regulations. These institutions persist across administrations. A statute signed by a Democratic president and enforced aggressively against

[20] The Federalist No. 51.

[21] *Id.*

Republican activists does not disappear when a Republican takes office—and depending how the statute is drafted, the shoe may end up on the other foot in a never-ending cycle of politicization.

Several structural features make this transfer of discretionary power particularly dangerous. **First,** federal prosecutors have almost unlimited charging discretion. A United States Attorney who wants to prosecute a particular individual or organization needs only to identify a plausible theory under which that conduct might violate one of the thousands of available federal statutes—no difficult task in a system with 5,000-plus crimes. **Second,** the decision to investigate, to seek a grand jury indictment, and to bring charges is largely unreviewable. Courts do not second-guess prosecutorial charging decisions absent a showing of discriminatory intent that is nearly impossible to prove. **Third,** the mere fact of federal investigation and indictment imposes devastating consequences—reputational, financial, and professional—even when the defendant is ultimately acquitted or the charges are dropped. The process is the punishment. **Fourth,** crimes can be made by regulatory agencies and buried in dense regulatory code, without any additional input from the people's representatives in Congress.[22] **Fifth**, outside advocacy groups have learned to exploit the pipeline between their organizations and sympathetic federal officials to direct enforcement resources toward their opponents. As the FACE Act enforcement record examined below demonstrates, this dynamic is not theoretical.

The answer to these structural dangers cannot simply be "elect better officials." Political administrations change. Career officials persist. Institutional practices become entrenched. The only durable solution is to limit the underlying authority—to ensure that Congress does not create

[22] Giancarlo Canaparo, "Big Government Controls Our Lives With More Rules Than Anyone Knows," The Heritage Foundation (Jun. 12, 2023), https://www.heritage.org/government-regulation/commentary/big-government-controls-our-lives-more-rules-anyone-knows.

more criminal laws than are strictly necessary, that those laws contain meaningful *mens rea*, or criminal intent, requirements and that their jurisdictional reach is genuinely connected to the limited federal interests they purport to serve. A federal criminal code that is modest, clear, and constrained is far harder to weaponize than one that is vast, vague, and elastic.

E. Concrete Examples: How Federal Criminal Law Gets Weaponized

The following examples illustrate how federal criminal statutes created for one purpose have been expanded, reinterpreted, or selectively enforced in ways their creators did not anticipate and that the affected populations would not have endorsed. They demonstrate that the danger of overcriminalization is not hypothetical—it is a recurring feature of the federal system that cuts across ideological lines.

1. RICO: From La Cosa Nostra to Pro-Life Protesters

Congress enacted the Racketeer Influenced and Corrupt Organizations Act in 1970 to target the Mafia and organized crime.[23] Its broad language—making it a federal crime to conduct an "enterprise" through a "pattern of racketeering activity"—was quickly recognized as having far broader potential than busting up the mob. In 1986, the National Organization for Women sued a coalition of pro-life organizations under RICO, alleging that their clinic blockades constituted a "pattern of racketeering." The case, *NOW v. Scheidler,* traveled to the Supreme Court three times over two decades.[24] In each trip, the Court ultimately ruled in the pro-life groups' favor. But the litigation cost those groups millions of dollars and consumed decades of organizational energy.

[23] Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title IX, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968).

[24] NOW v. Scheidler, 537 U.S. 393 (2003); Scheidler v. NOW, 547 U.S. 9 (2006). The case was first argued in 1993 and was not finally resolved in the pro-life groups' favor until the Supreme Court's 2006 decision.

The threat of RICO treble damages had a profound chilling effect on pro-life advocacy during that period—exactly as its proponents intended.

2. The Hobbs Act: Extortion's Elastic Reach

The Hobbs Act, enacted in 1946, prohibits robbery and extortion that "in any way or degree obstructs, delays, or affects commerce."[25] Its "in any way or degree" commerce hook has made it one of the most frequently cited federal criminal statutes, applicable to everything from organized crime to local corruption to—in some prosecutorial theories—aggressive union organizing, political fundraising, and public officials' routine decisions. The breadth of the Act's commerce element means that any act of alleged extortion by anyone involved in any commercial transaction can become a federal case. Prosecutorial creativity has expanded the Hobbs Act far beyond its anti-extortion origins, making it a Swiss Army knife for federal prosecutors seeking a nexus to federal jurisdiction.

3. Mail and Wire Fraud: The Prosecutor's Darling

The mail fraud and wire fraud statutes—prohibiting the use of the mails or electronic communications in furtherance of "any scheme or artifice to defraud"—are, as federal practitioners well know, "the prosecutor's darling."[26] First advanced in 1872, the phrase "scheme to defraud" has been stretched far beyond its ordinary meaning and courts have applied it to cover false statements to the government (even without economic harm). When prosecutors cannot find a

[25] Hobbs Act, 18 U.S.C. § 1951 (1946). The Act prohibits robbery or extortion "in any way or degree" obstructing, delaying, or affecting commerce.

[26] Mail fraud statute, 18 U.S.C. § 1341; wire fraud statute, 18 U.S.C. § 1343. See, Christopher Q. Cutler, *McNally Revisited: The "Misrepresentation Branch" of the Mail Fraud Statute a Decade Later*, 13 BYU J. Pub. L. 77 at 77 (2013) ("If conspiracy is indeed the darling of the prosecutor's nursery, then mail fraud must surely be its younger sibling"), available at https://digitalcommons.law.byu.edu/jpl/vol13/iss1/5.

specific statute to fit the alleged wrongdoing, mail and wire fraud are frequently the catchall backup theory.

In 1988 Congress amended federal fraud law to include any "scheme or artifice to deprive another of the intangible right of honest services."[27] Congress provided no further definition. No list of covered conduct. No *mens rea* requirement beyond what the underlying fraud statutes supply. No limiting principle of any kind. Federal prosecutors promptly deployed this blank check to federalize an enormous range of conduct that state law had always governed or tolerated entirely. Corporate executives were charged with honest services fraud for making business decisions that, while self-interested, harmed no identifiable victim. State legislators were prosecuted for conduct that was not illegal under state law. Employees were indicted for failing to disclose conflicts of interest that had caused their employers no measurable loss.

In *Skilling v. United States* (2010), the Supreme Court confronted the resulting chaos and rescued the statute by limiting "honest services" fraud to bribery and kickback schemes and nothing else. Justic Ginsberg reasoned for the majority that "reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine."[28] That's quite the understatement. The Court's narrowing construction was a judicial rescue operation for a statute Congress had drafted with deliberate vagueness, handing prosecutors a malleable weapon and leaving courts to spend two decades litigating what it meant. Even after *Skilling*, the boundaries of honest services fraud remain contested, and the pattern is unchanged: a broadly worded federal criminal statute, minimal congressional guidance, maximum

[27] 18 U.S.C. § 1346.
[28] Skilling v. United States, 561 U.S. 358 (2010).

prosecutorial discretion, and the predictable result that enforcement follows the priorities — and the enemies — of whoever controls the Department of Justice.

4. The Computer Fraud and Abuse Act: Criminalizing Ambiguous Access

Congress enacted the Computer Fraud and Abuse Act in 1986 (CFAA) to target hackers who gained unauthorized access to computer systems.[29] The Act's prohibition on "exceeding authorized access" to a computer has proven dangerously vague. Because virtually every computer use is governed by terms of service agreements that most users do not read, prosecutors have argued that violating a website's terms of service constitutes a federal crime. The most notorious example involves Aaron Swartz, a computer programmer and open-access advocate who faced up to 35 years in federal prison and $1 million in fines for mass downloading academic journal articles from a university network—articles that were freely accessible to any university affiliate.[30] The prosecution was widely condemned as grotesquely disproportionate; Swartz died by suicide at age 26 while awaiting trial. The CFAA's vagueness continues to chill legitimate security research and whistleblowing by creating criminal exposure for anyone who accesses a computer in a manner that a prosecutor later deems to "exceed" authorization.

5. Environmental Law: When Dry Lands are Counted as Wetlands

The Clean Water Act's prohibition on discharging pollutants into "navigable waters" or "waters of the United States" spawned decades of aggressive EPA interpretation that swept in isolated wetlands and ephemeral streambeds far from any navigable waterway into the federal

[29] Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (1986).

[30] See generally Justin Peters, *The Idealist: Aaron Swartz and the Rise of Free Culture on the Internet* (2016).

regulatory maw.[31] The Supreme Court finally corrected this overreach in *Sackett v. EPA* (2023),[32] but only after federal prosecutors had used the statute's ambiguous jurisdictional reach to threaten criminal prosecution against landowners, farmers, and small developers who could not have known their properties, often dry and far from navigable rivers, were covered as federal wetlands.

While the *Sackett* case dealt with $40,000 per day civil penalties, the majority opinion acknowledged that the EPA's interpretation put "a staggering array of landowners at risk of criminal prosecution for such mundane activities as moving dirt."[33]

6. The Lacey Act: Importing Foreign Law as American Crime

The Lacey Act makes it a federal crime to import or transport fish and wildlife "in violation of any foreign law."[34] As interpreted, this means that an American businessperson can be prosecuted in U.S. federal court for violating a *foreign* country's regulations—even if those regulations are ambiguous, disputed, or ultimately declared invalid by the foreign government itself. Abbie Schoenwetter's case illustrates the injustice: he was sentenced to 97 months in federal prison for importing undersized lobster tails that were packed in bags instead of boxes, allegedly in violation of Honduran regulations.[35] Although Honduran officials later concluded they were imported in compliance with Honduran law, the Eleventh Circuit declined to credit the Honduran government's change in position and let the conviction stand. The Lacey Act has also been used against Gibson Guitar Company, which was raided by federal agents for allegedly importing wood

[31] Sackett v. EPA, 598 U.S. 651 (2023)

[32] Id. (holding that "waters of the United States" under the Clean Water Act does not include wetlands that lack a continuous surface connection to waters that are navigable in fact, reversing decades of expansive EPA interpretation).

[33] Sackett v. EPA, 598 U.S. 651 (20230 (Syllabus).

[34] Lacey Act, 16 U.S.C. § 3372(a)(2)(A) (making it unlawful to "import, export, transport, sell, receive, acquire, or purchase" fish or wildlife "in violation of any foreign law").

[35] United States v. McNab, 331 F.3d 1228 (11th Cir. 2003).

in violation of Indian and Madagascar harvesting regulations—a prosecution ultimately resolved without criminal charges but only after years of legal cost and reputational damage.

7. ARPA: Criminalizing the Arrowhead Hunter

The Archaeological Resources Protection Act makes it a federal felony to "excavate, remove, damage, or otherwise alter or deface" any archaeological resource on federal land without a permit.[36] In 2009, a father and son went camping on federal land, looked for arrowheads, found none, and were charged with attempted violation of ARPA—a federal felony. They were not archaeologists. They were not dealers in stolen antiquities. They were curious campers facing felony exposure who pled guilty to misdemeanors and paid $1,500 each. The prosecution achieved nothing of legitimate law enforcement value. It succeeded only in demonstrating that the federal government possesses criminal authority so broad that ordinary recreation and curiosity can become a federal case.

8. The Migratory Bird Treaty Act: Federal Crimes in Your Backyard

The Migratory Bird Treaty Act of 1918 (MBTA), enacted to stop commercial plume hunters from driving bird species to extinction, makes it a federal crime to possess any feather, nest, egg, or other part of any of the approximately 1,100 covered species, regardless of how the item was obtained. Simple possession is a strict liability misdemeanor: intent is irrelevant, and the defense that a feather was found on the ground is legally unavailing by design.

In 2012, a Tlingit artist in Alaska was threatened with ten years in prison for advertising traditional handicrafts online that he had made from flicker feathers he received from another

[36] 16 U.S.C. § 470ee(a).

person (he settled with a $2,000 fine).[37] This leaves federal prosecutors with a weapon that can be drawn against not just commercial traffickers but birdwatchers, Indigenous artists, and children who collect feathers from their backyards.

Beyond feather possession, the MBTA's misdemeanor bird "take" provision has been applied by some federal circuits to the entirely accidental killing of covered birds by otherwise lawful industrial activity. The resulting enforcement record is a textbook illustration of administration-driven selective prosecution. The Obama Department of Justice pursued criminal charges against oil and gas companies whose reserve pits and waste facilities accidentally killed 28 protected birds, while makers of glass windows, which kill millions of birds annually, faced no enforcement action,[38] not to mention the Obama administration's favored wind energy developers, whose turbines kill an estimated 700 thousand to 1 million birds annually.[39] The first Trump administration reversed course by formal DOJ opinion, concluding that the MBTA's prohibition does not reach incidental take; the Biden administration reversed again, reinstating the incidental take theory through regulations[40] but this too may be on the chopping block with the new administration, once again leaving ordinary citizens wondering what the law is.

Federal circuits remain split on the question, but notably, in *United States v. FMC Corp.* (2d Cir. 1978), the Second Circuit acknowledged that the MBTA could arguably cover bird "deaths

[37] Sealaska Heritage Institute, "Tlingit Artist Tells Cautionary Tale About Use of Feathers in Art," Alaska Public Media (Oct. 15, 2012), https://alaskapublic.org/programs/2012-10-15/tlingit-artist-tells-cautionary-tale-about-use-of-feathers-in-art.

[38] David Unger, "Romney's charge: Obama used bird deaths to attack Bakken oil producers. True?" Christian Science Monitor (Oct. 17, 2012), (reporting on prosecution of seven oil companies over 28 dead birds and reporting that U.S. Fish and Wildlife Service found that glass windows may account for 97 million to 976 million bird deaths per year), https://www.csmonitor.com/Environment/Energy-Voices/2012/1017/Romney-s-charge-Obama-used-bird-deaths-to-attack-Bakken-oil-producers.-True.

[39] American Bird Conservancy, "Rethinking Wind Turbines," last accessed April 27, 2026, https://abcbirds.org/solutions/rethinking-wind-turbines/.

[40] Final Rule: Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 1134-1165. https://www.federalregister.gov/documents/2021/01/07/2021-00054/regulations-governing-take-of-migratory-birds

caused by automobiles, airplanes, plate glass modern office buildings or picture windows into which birds fly" and that this "would offend reason and common sense." But the court's answer to this absurdity was not to say the law was overbroad and unconstitutional, but that "an innocent technical violation" could be handled with a "nominal fine" through "the sound discretion of prosecutors and the courts."[41] That's cold comfort for a person staring down a federal prosecutor with unlimited discretion.

9. HIPAA: Protecting Patient Privacy or Silencing Whistleblowers

The Health Insurance Portability and Accountability Act (HIPAA) was enacted in 1996 to protect the privacy of patients' medical records and prevent their unauthorized disclosure for commercial or personal gain.[42] It was not enacted to shield hospitals from exposure of institutional dishonesty. That distinction collapsed in the case of Dr. Eithan Haim. In 2022, Texas Children's Hospital, the largest pediatric hospital in the United States, publicly announced it would cease providing sterilizing transgender related procedures to minors following a Texas state directive that such treatments constituted child abuse under state law. Haim, then a surgical resident suspected the hospital was lying about ending the treatments, examined hospital records that confirmed the lies, and blew the whistle publicly without disclosing any protected health information of particular patients. Nevertheless, the Biden Department of Justice indicted Haim on felony HIPAA charges of wrongful access and he faced a ten year sentence. One month before trial, the Trump DOJ dismissed the case.[43] The Haim case illustrates the precise dynamic that makes overcriminalization dangerous: How many people even know that a doctor merely looking

[41] United States v. FMC Corp. (2d Cir. 1978), quoting United States v. Schultze, 28 F. Supp. 234, 236 (W.D. Ky. 1939).
[42] Public Law 104-191 (1996).
[43] Steve Adler, "DOJ Drops Charges Against Surgeon Who Exposed Continuing Transgender Care at Texas Children's," The HIPAA Journal (Jan. 27, 2025), https://www.hipaajournal.com/doj-unseals-criminal-hipaa-charges-eithan-haim/.

at medical files can carry criminal penalties? Moreover, an ideologically motivated DOJ used this thin reed to prosecute a whistleblower who acted to protect children solely because his views on gender ideology conflicted with the government's.

10. Sarbanes-Oxley and the Fish That Was Not a Document

The Sarbanes-Oxley Act of 2002 was Congress's response to the Enron scandal and revelations that accountants at Arthur Andersen LLP had systematically shredded documents to obstruct federal investigators. Section 1519 of the resulting legislation made it a federal felony, punishable by up to twenty years in prison, to "knowingly alter, destroy, mutilate, conceal, cover up, falsify, or make a false entry in any record, document, or tangible object" with intent to impede a federal investigation.[44] The law's target was obviously corporate fraudsters destroying paper trails, but the statute's actual reach, in the hands of created federal prosecutors, proved considerably wider.

In August 2007, John Yates' commercial fishing vessel was boarded by a Florida Fish and Wildlife Conservation Commission officer who found seventy-two undersized red grouper in his catch in violation of federal conservation regulations. After the officer departed, Yates instructed a crew member to throw the undersized fish overboard and Federal prosecutors charged him, not merely with a fishing violation, but with violating Section 1519 of the Sarbanes-Oxley Act on the theory that tossed fish were close enough to shredded Enron documents.[45] A jury convicted him and the Supreme Court reversed in *Yates v. United States*, 574 U.S. 528 (2015), holding that

[44] 18 U.S.C. § 1519.
[45] Yates v. United States, 574 U.S. 528 (2015).

Section 1519 covers objects used to record or preserve information such as hard drives, not groupers.[46]

11. The Logan Act: A 227-Year-Old Dead Letter as Political Weapon

The Logan Act was enacted in January 1799, during an undeclared naval conflict with France, after a Pennsylvania Quaker named George Logan traveled to Paris to negotiate a private peace, successfully, as it happened, but to the fury of the ruling Federalist Party whose diplomatic strategy he had disrupted. Congress responded by making it a federal felony for any private citizen to conduct "any correspondence or intercourse with any foreign government" with intent to influence that government's conduct in disputes with the United States.[47] In the 227 years since its enactment, no one has ever been successfully prosecuted under the Logan Act. Only two individuals have ever been indicted under it, most recently in 1853, and neither indictment resulted in conviction. Legal scholars across the ideological spectrum regard the statute as almost certainly unconstitutional under the First Amendment, as it directly criminalizes political speech on matters of foreign policy.[48] The Act has survived only because no administration was reckless enough to actually press a prosecution to verdict.

In late 2016, after a politicized FBI counterintelligence investigation of General Michael Flynn found no derogatory information and the Washington field office moved to close the case, senior FBI officials kept it open and began internally discussing whether Flynn's phone calls with Russian Ambassador Sergey Kislyak during the Trump presidential transition could support a

[46] Sarbanes-Oxley was also used to prosecute Jan. 6 defendants for obstructing an official proceeding, but the Supreme Court held in Fischer v. United States, 603 U.S. 480 (2024), that the statute does not reach all forms of obstruction; its scope is limited to conduct involving the impairment of record evidence, such as official documents.
[47] 18 U.S.C. § 953.

[48] Congressional Research Service, "The Logan Act: An Overview of a Sometimes Forgotten 18th Century Law," (Jan. 12, 2018), https://www.congress.gov/crs_external_products/LSB/PDF/LSB10058/LSB10058.3.pdf.

Logan Act charge.[49] The DOJ ultimately concluded that Flynn's interview was "untethered to, and unjustified by" any legitimate investigative basis.[50] Flynn was never charged under the Logan Act because no serious prosecutor believed it could sustain a conviction. Instead, the statute functioned as a pretext: a legal theory threadbare enough that its authors knew it was unusable, durable enough to justify opening an interview, and an interview conducted under circumstances sufficiently ambiguous to generate a false-statements charge when Flynn's recollections diverged from the agents' notes.[51] The Logan Act illustrates a dimension of overcriminalization that goes beyond absurd prosecutions of Swiss cheese makers and arrowhead hunters. A statute need not be enforced to cause harm. Its mere existence on the books — vague, broad, constitutionally suspect, and carrying a three-year felony — gives federal investigators a permanent pretext to open inquiries, justify surveillance, and pressure targets into the kind of interviews where a misstatement becomes a separate crime. Dead letters, it turns out, are not harmless.

F. How Outside Advocacy Groups Exploit the Federal Enforcement Pipeline

A recurring feature of weaponized federal law is the role of outside advocacy organizations in directing federal enforcement resources toward their ideological opponents. The federal government's enforcement apparatus—its investigators, prosecutors, and administrative agencies—is necessarily dependent on external information about alleged violations. This creates an inherent vulnerability: organizations with ideological agendas can cultivate relationships with sympathetic federal officials, monitor and surveil First Amendment protected activity in manners

[49] FBI Closing Communication in United States v. Flynn, No. 17-cr-232 (D.D.C.) (Dec. 8, 2020) (finding "no derogatory information" on Flynn) https://pacer-documents.s3.amazonaws.com/36/191591/04518206307.pdf.
[50] In re Flynn, No. 20-5143 (D.C. Cir. June 24, 2020) ("the government points to evidence that the FBI interview at which Flynn allegedly made false statements was 'untethered to, and unjustified by, the FBI's counterintelligence investigation into Mr. Flynn.'").
[51] Jonathan Turley, *Logan Act Is the Last Refuge for the American Prosecutorial Scoundrel*, The Hill (May 11, 2020).

that the federal government is prohibited from doing, supply dossiers on targeted individuals, and effectively outsource to the government the enforcement of their preferred policy outcomes.

This dynamic is not speculative. As documented in Part II below, the Biden Department of Justice's enforcement of the FACE Act involved precisely this pattern: pro-abortion advocacy groups including the National Abortion Federation, Planned Parenthood, and the Feminist Majority Foundation supplied dossiers on pro-life activists, fed targets to federal prosecutors, and received in return access to internal DOJ information about investigations. The federal government became, in effect, the one-sided enforcement arm of a contested political debate.

As the recent allegations about the Southern Poverty Law Center demonstrate, the Department of Justice should not get cozy with outside organizations that have clear ideological agendas and financial incentives to overstate the problems they are purporting to fight. As we saw with the SPLC, they allegedly funded the very hateful activities they were reporting to the FBI. The concern is not that different administrations may set different enforcement priorities, but that the existence of vague, broad federal criminal statutes creates institutional infrastructure that invites improper politically motivated outsourcing of enforcement. The solution is a more narrow, specific, and constrained federal criminal code, not a gamble on the virtue of whoever happens to occupy the White House.

PART II: THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT

A. Background and Legislative History

The Freedom of Access to Clinic Entrances Act was signed into law by President Bill Clinton on May 26, 1994.[52] It prohibits three categories of conduct: (1) using force, the threat of force, or physical obstruction to injure, intimidate, or interfere with persons (or any class of persons) obtaining or providing reproductive health services; (2) using the same means to interfere with persons exercising their right of religious worship at a place of worship; and (3) intentionally damaging or destroying the property of a reproductive health care facility or place of worship.[53] Violations carry criminal penalties ranging from fines and six months' imprisonment for first-time non-violent offenders, to 18 months for repeat offenses, to life imprisonment for offenses resulting in death, as well as civil remedies including compensatory and punitive damages and injunctive relief.

The FACE Act emerged from a specific political and legal context: pro-life demonstrators using civil-rights-era non-violent resistance tactics were disrupting abortion clinics' operations and bringing significant negative media attention. The National Organization for Women had twice sued pro-life groups under RICO and the Ku Klux Klan Act of 1871, achieving mixed results. The Supreme Court's decision in *Bray v. Alexandria Women's Health Clinic* (1993) held that Operation Rescue's activities did not constitute a conspiracy to deprive women of their constitutional rights within the meaning of the Klan Act, because opposition to abortion does not constitute "class-based" discriminatory animus, and the right to interstate travel is not protected against private encroachment. With litigation foreclosed, abortion advocates turned to Congress.

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[52] 18 U.S.C. § 248.
[53] 18 U.S.C. § 248(a)(1)–(3).

According to a Heritage Foundation Legal Analysis authored by Thomas Jipping and Seth Lucas, the legislative history of the FACE Act reveals, at each stage, a deliberate effort to maximize its breadth and weaponize it against ordinary pro-life activity. As Jipping and Lucas document,[54] Representative Schumer's original bill focused narrowly on physically obstructing ingress or egress to a medical facility. The House Judiciary Committee—without holding hearings—broadened the definition of prohibited conduct to cover "intimidation or interference" with anyone "obtaining or providing reproductive health services," removing any geographic limitation. The Senate further expanded the pool of potential plaintiffs, added attorneys general as enforcers, and multiplied available damages to include punitive awards. At each step, attempts by Republican members to narrow the bill's scope—for example, requiring that prohibited conduct occur near a clinic—were defeated by party-line votes.

The result was a statute designed not to target the specific violent or obstructive conduct that served as its stated justification, but to create the broadest possible weapon against pro-life advocacy.[55] The FACE Act's text covers physically "obstructive" conduct that "intimidates" or "interferes with" persons involved in reproductive health services—terms so elastic that they can reach ordinary sidewalk counseling, prayer vigils, and the distribution of literature. It empowers not only federal prosecutors but also the attorneys general of all fifty states and any "aggrieved" private plaintiff to bring suit. And it imposes punitive damages and civil penalties in addition to criminal sanctions. This structure has proven almost perfectly designed for ideological abuse.

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[54] Thomas Jipping & Seth Lucas, *Congress Should Repeal the Freedom of Access to Clinic Entrances Act*, Heritage Foundation Legal Memorandum No. 373 (Mar. 3, 2025) https://www.heritage.org/sites/default/files/2025-03/LM373.pdf.

[55] *Id.* at 2 ("Congress could have enacted a statute to address this problem in a way that minimized the likelihood it would be weaponized against individuals and used to suppress ordinary pro-life activity and expression. Congress could have done that, but it did not.").

B. Constitutional Infirmity I: The Commerce Clause

1. The Act's Three Attempts at a Jurisdictional Hook

As enacted, the FACE Act asserts Commerce Clause authority in a conspicuously thin manner. Jipping and Lucas identify three distinct approaches that were considered during the Act's legislative development, none of which satisfies the constitutional standard established in *Lopez* and *Morrison.*[56]

The original Schumer bill would have covered only conduct involving medical facilities that "affect interstate commerce"—attaching the commerce requirement to the regulated facilities rather than to the regulated conduct. The Senate version dropped this language from the substantive provisions and substituted a findings section asserting that the prohibited conduct "burdens interstate commerce" by interfering with clinic business activities and "forcing women to travel from States where their access to reproductive health services is obstructed to other states."[57] The final Act, as signed, dispensed with even this and stated merely that Congress had authority to enact it "under section 8 of article I of the Constitution"—a bare citation to the Commerce Clause and the Necessary and Proper Clause that includes no findings, no jurisdictional element, and no case-by-case nexus requirement.

None of these formulations satisfies constitutional requirements. The Senate's "burden on commerce" language is a conclusory assertion that does not identify any specific economic activity being regulated. The final Act's bare citation to Article I, Section 8 provides no jurisdictional hook at all. A statute's assertion of constitutional authority does not establish it.

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[56] *Id.* at 9–10.

[57] *Id.*

2. The Activity Regulated Is Not Commercial or Economic in Nature

The fundamental constitutional defect of the FACE Act is that the activity it regulates—threatening, physically obstructing, and intimidating persons who seek abortion and other pregnancy services—is not commercial or economic activity. It is conduct by private individuals. The fact that this conduct may affect a commercial enterprise (the clinic) does not convert the conduct itself into commerce.

This distinction was central to both *Lopez* and *Morrison.* In *Lopez,* the Court emphasized that possessing a firearm near a school was "not an economic activity that might, through repetition in the aggregate, substantially affect any sort of interstate commerce." In *Morrison,* the Court held that gender-motivated violence, notwithstanding Congress's detailed findings about its aggregate economic effects, was not commercial activity subject to federal regulation under the Commerce Clause.[58] The Court specifically rejected the argument that Congress could regulate conduct simply because that conduct has economic effects, warning that "[i]f accepted, [this] reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."

The FACE Act's defenders have attempted to distinguish it from *Morrison* on the ground that the Act directly targets interference with commercial activity (the clinic's business), rather than private violence generally. But this reasoning confuses the regulated conduct (the obstruction) with its setting (a commercial facility). A person who blocks the entrance to a hardware store is not thereby engaging in commercial activity; the commercial character of the blocked business does not transform the character of the blocking. Clinic protesters are not engaged in interstate

[58] Morrison, 529 U.S. at 617 ("[T]he activity in question [must be] some sort of economic activity.").

commerce. They are engaged in public expression and, in some cases, illegal obstruction. Neither is within Congress's Commerce Clause authority under *Lopez* and *Morrison.*

3. Courts' Errors in Upholding the Act

As discussed by Jipping and Lucas, Federal circuit courts that have upheld the FACE Act under the Commerce Clause have done so by making precisely the error that *Morrison* identified and rejected. In *United States v. Bird,*[59] the Fifth Circuit upheld the Act because the regulated activity "could have a deleterious impact on the availability of abortion-related services in the national market"—focusing on economic effects rather than the commercial nature of the activity. In *Hoffman v. Hunt,*[60] the Fourth Circuit acknowledged that "the activity regulated by FACE is not itself commercial or economic in nature" but upheld the Act because that activity was "directly" or "closely" connected with economic activity—a proximity test that *Lopez* and *Morrison* rejected. In *United States v. Dinwiddie,*[61] the Eighth Circuit upheld the Act by describing it as "prohibit[ing] interference with a commercial activity"—which accurately describes the effect but misidentifies the nature of the regulated conduct. In *United States v. Weslin,*[62] the Second Circuit simply held that Congress can regulate activity that "is not itself commercial."

These decisions are not merely erroneous; they demonstrate exactly the kind of reasoning that the Supreme Court in *Morrison* identified as constitutionally impermissible. After *Morrison* explicitly reaffirmed the economic-activity requirement, the Third Circuit in *United States v.*

[59] United States v. Bird, 401 F.3d 633 (5th Cir. 2005).

[60] Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997).

[61] United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996).

[62] United States v. Weslin, 156 F.3d 292 (2d Cir. 1998).

Gregg[63] conceded that "FACE does not contain an explicit jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce"—and yet upheld the statute anyway, conceding that the regulated conduct is "not motivated by commercial concerns" but concluding that its effects are "at their essence, economic." This is circular: any conduct that harms a business has "economic" effects, but the constitutional question is whether the conduct itself is economic, not whether its downstream consequences are.

4. The Absence of a Jurisdictional Element

A second fundamental defect is the FACE Act's absence of any jurisdictional element requiring case-by-case inquiry into whether the specific conduct at issue actually affected interstate commerce. As the Supreme Court noted in *Morrison,* a jurisdictional element is important because it "would ensure, through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce."[64] Without such an element, the statute's application does not depend on any actual demonstrated connection to interstate commerce in any particular case. The government need not show—and courts have not required it to show—that any specific clinic blockade or intimidation incident had any measurable effect on the flow of goods or services across state lines.

The *Gregg* court acknowledged this deficiency but declined to find it fatal, reasoning that the FACE Act's regulated activity broadly affects commerce. This reasoning, if accepted, would render the jurisdictional element requirement meaningless. Any statute targeting conduct that affects a class of businesses can make the same argument. The Commerce Clause requires more than the theoretical possibility that a category of conduct might affect commerce; it requires that

[63] United States v. Gregg, 226 F.3d 253 (3d Cir. 2000), cited in Jipping & Lucas at 12 (conceding that the FACE Act "does not contain an explicit jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce," yet upholding the statute).

[64] Morrison, 529 U.S. at 613.

specific legislative enactments regulate activity that substantially affects commerce, and that there be some mechanism for ensuring this requirement is met in individual cases.

C. Constitutional Infirmity II: The Fourteenth Amendment

The preamble to the FACE Act also invokes the Fourteenth Amendment's Section 5 enforcement power,[65] which grants Congress authority to "enforce, by appropriate legislation," the Amendment's substantive provisions. This basis is even more clearly inadequate than the Commerce Clause argument.

Setting aside the question of whether private citizen protestors count as state actors subject to Section 5 enforcement, the Fourteenth Amendment argument for the FACE Act depended critically on the existence of a constitutional right to abortion recognized in *Roe v. Wade* and *Casey.* During the FACE Act's Senate hearing, Attorney General Janet Reno testified that the Act was "crucial to ensuring that women have an unobstructed opportunity to choose whether or not to have an abortion"—explicitly grounding the Section 5 authority claim in the then-recognized constitutional right. The Supreme Court, in *Dobbs,* overruled both *Roe* and *Casey,* holding that "the Constitution does not confer a right to abortion."[66] Congress's Section 5 power is the power to enforce rights that actually exist under the Constitution. It does not grant Congress authority to enforce rights that the Supreme Court has held the Constitution does not contain. As Jipping and Lucas note, the Fourteenth Amendment "not only fails to provide Congress authority to maintain

[65] Pub. L. 103-259 § 2 (1994).
[66] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) ("We hold that Roe and Casey must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision.").

the FACE Act today, but it did not authorize Congress to enact it in the first place"—since the constitutional premises of the Act have been revealed as incorrect.[67]

The VAWA Parallel

The constitutional parallel between the FACE Act and VAWA, which the Supreme Court struck down in *Morrison,* is difficult to overstate. Both were enacted in 1994. Both cited the identical constitutional authority: the Commerce Clause and the Fourteenth Amendment. Both regulated the conduct of private individuals—not states, not commercial enterprises, but persons engaging in non-commercial conduct in public spaces. Both relied on congressional findings asserting that the regulated conduct had aggregate effects on interstate commerce. And both were invalidated, or should be invalidated, under the principles of *Lopez* and *Morrison* for exactly the same reasons: the regulated conduct is not economic or commercial in nature, and the causal chain from that conduct to interstate commerce depends on impermissible inference-stacking.

The fact that VAWA, which commanded far broader political support than the FACE Act, could not survive constitutional scrutiny under *Morrison* is powerful evidence that the FACE Act cannot either.

D. Politicized Enforcement: The Biden Administration's Weaponization of the FACE Act

Whatever the FACE Act's constitutional deficiencies as a matter of law, its record of enforcement removes any doubt about its practical character as an instrument of ideological warfare. The Justice Department's own Weaponization Working Group, in an April 2026 report

[67] Jipping & Lucas at 8.

based on a review of approximately 700,000 internal DOJ records, documented systematic abuse of the FACE Act by the Biden administration's Department of Justice.[68]

1. Collaboration with Pro-Abortion Advocacy Organizations

Perhaps the most troubling finding of the DOJ Weaponization Working Group is the degree to which pro-abortion advocacy organizations embedded themselves in the operations of the Biden DOJ for the purpose of generating FACE Act prosecutions. As the report documents:[69]

The National Abortion Federation, Planned Parenthood, and the Feminist Majority Foundation all cultivated cozy working relationships with Biden-era DOJ officials. These organizations compiled evidence and dossiers on pro-life activists and supplied that material to federal prosecutors—effectively outsourcing the investigative function to ideological organizations with an institutional stake in the outcome. Notably, however, the information was not compiled and forwarded by the affected clinics themselves, but by umbrella abortion advocacy groups. DOJ prosecutors, in turn, affirmatively asked these advocacy groups for information about pro-life activists' travel and constitutionally protected First Amendment activities.

This pattern—in which a federal enforcement agency functions as the operational partner of a private advocacy organization—represents precisely the structural corruption that the rule of law is designed to prevent. When federal law enforcement becomes indistinguishable from

[68] DOJ Weaponization Working Group, "The Biden Administration's Weaponization of the Freedom of Access to Clinic Entrances (FACE) Act," U.S. Dep't of Justice (Apr. 14, 2026) [hereinafter "DOJ FACE Report"], available at https://www.justice.gov/opa/media/1436006/dl. The report was based on a review of approximately 700,000 internal DOJ records.

[69] U.S. Department of Justice, *Justice Department Reveals the Biden Administration's Weaponization of Federal Law Against Pro-Life Americans* (Apr. 14, 2026), https://www.justice.gov/opa/pr/justice-department-reveals-biden-administrations-weaponization-federal-law-against-pro-life (press release describing DOJ findings regarding enforcement of the FACE Act).

advocacy, the result is the selective, politically motivated prosecution of the agency's and the advocacy group's shared ideological opponents.

2. Prosecutorial Misconduct

The DOJ Weaponization Working Group found multiple instances of outright prosecutorial misconduct in FACE Act cases. Prosecutors knowingly withheld evidence that defense counsel had requested in order to prepare an affirmative defense.[70] Prosecutors attempted to screen potential jurors based solely on their religion—a practice that is both constitutionally impermissible and ethically prohibited.[71] In some cases, prosecutors authorized aggressive arrest tactics—including early-morning heavily armed raids at defendants' homes—rather than the standard practice of allowing defendants to self-surrender on agreed dates. The arrest of Mark Houck, a pro-life sidewalk counselor, exemplifies this pattern: nearly two dozen armed FBI agents descended on the Houck family home before dawn, arresting him in front of his wife and seven children, despite the fact that the charges arose from a minor altercation that local Philadelphia police had declined to pursue and that a jury took only three hours to reject as a FACE Act violation.[72]

3. Dramatic Sentencing Disparities

The sentencing data compiled by the Weaponization Working Group is stark. The Biden DOJ requested an average sentence of 26.8 months for pro-life defendants—more than double the 12.3 months requested for pro-abortion defendants convicted of comparable or more serious

[70] DOJ FACE Report at 3 ("Prosecutors knowingly withheld evidence that defense counsel requested to prepare an affirmative defense.").
[71] *Id.* ("[P]rosecutors tried to screen out jurors based on religion.").
[72] Jipping & Lucas at 1–2 (describing the arrest of Mark Houck, a pro-life counselor, in which nearly two dozen FBI agents stormed the Houck family home in an early-morning raid on September 23, 2022. A jury acquitted Houck on all charges after only three hours of deliberation).

conduct under the same statute.[73] The FACE Act applies, by its text, to interference with both abortion clinics and pro-life pregnancy resource centers and places of worship. The Biden DOJ's sentencing practices suggest that it did not treat the statute evenhandedly.

4. Near-Total Neglect of Violence Against Pro-Life Facilities

The most revealing evidence of the Biden DOJ's ideological approach to the FACE Act is what it did not do. Following the Supreme Court's 2022 decision in *Dobbs,* an organized campaign of vandalism, arson, and threats against pregnancy resource centers swept the country. Hundreds of pro-life facilities and churches were attacked; several were firebombed. By the statute's own text, these attacks violated the FACE Act—which prohibits "intentionally damag[ing] or destroy[ing] the property of a…place of religious worship" or a facility that provides "reproductive health services," a category that includes pregnancy resource centers offering counseling and referral services.[74] The Biden DOJ charged only five people for vandalism of pro-life pregnancy resource centers and none related to houses of worship.[75]

Concerns about politicized enforcement are not new. As far back as 2016, Senators Mike Lee and Ted Cruz sent official inquiries to DOJ about disparate enforcement, overzealous prosecution, collusion and outsourcing of investigatory and prosecution functions to outside groups, and complete lack of protection of houses of worship that were clear victims of FACE Act violations. See Appendix I, Sens. Lee and Cruz Letter of March 29, 2016. Their entreaties fell on deaf ears as proven by Congressman Chip Roy's office which obtained data from the Department

[73] DOJ FACE Report at 3.
[74] Jipping & Lucas at 14–16 (documenting the near-total absence of FACE Act enforcement to protect pregnancy resource centers despite substantial violence against them).
[75] DOJ FACE Report at 33.

of Justice showing that 97 percent of FACE Act prosecutions from 1994 to 2024 were brought against pro-life Americans.[76]

This enforcement record confirms what the FACE Act's legislative history suggested: the statute was designed not to evenhandedly protect access to health facilities and places of worship, and not to fill a gap that local law enforcement was unwilling or unable to fill, but to target pro-life activity. The Act provides a broad and vague criminal prohibition, an expansive set of civil plaintiffs, and a willing network of abortion advocacy organizations ready to feed targets to sympathetic prosecutors. The result is a statute that functions less as law than as a weapon.

CONCLUSION AND RECOMMENDATIONS

The crisis of federal overcriminalization is not a partisan issue; it is a structural one. It threatens the rule of law—the principle that the law is knowable, evenly applied, and limited to genuinely wrongful conduct—that is foundational to constitutional governance. When the federal criminal code contains more offenses than any citizen can count, when those offenses extend to conduct that no reasonable person would regard as criminal, when the *mens rea* requirement is eroded to the point of meaninglessness, and when the resulting discretion is vested in prosecutors who are influenced by political and ideological agendas, the criminal law loses its moral authority and becomes an instrument of oppression.

The Freedom of Access to Clinic Entrances Act represents all of these pathologies in concentrated form. It was enacted over a constitutional structure—the Commerce Clause and the Fourteenth Amendment—that the Supreme Court's subsequent decisions in *Lopez, Morrison,* and

[76] See Rep. Chip Roy, Press Release, "Rep. Roy Reintroduces Legislation to Repeal the FACE Act" (Jan. 21, 2025) ("Data my office obtained from Merrick Garland's DOJ showed that 97% of FACE Act prosecutions from 1994–2024 were against pro-life Americans.").

Dobbs have substantially undermined if not destroyed. Its legislative history reveals a deliberate effort to maximize the statute's breadth and weaponize it against ordinary pro-life advocacy. And its enforcement record, documented in the DOJ's own Weaponization Working Group report, demonstrates that the statute has functioned less as a neutral protection for health care access than as an instrument for the selective prosecution of one side of a contested political debate. Ninety-seven percent of FACE Act prosecutions over thirty years targeted pro-life Americans. The Biden DOJ collaborated with pro-abortion advocacy organizations to generate those prosecutions, withheld exculpatory evidence, tried to exclude religious jurors, and requested sentences more than twice as long for pro-life defendants as for pro-abortion defendants who violated the same statute.

This testimony respectfully urges the following responses to these findings:

First, Congress should repeal the FACE Act. The statute is constitutionally defective, institutionally corrupted, and irredeemable as policy. The legitimate harms it was purportedly designed to address—violence against health care facilities and their patients—are already addressable under state criminal law. The FACE Act adds nothing of legitimate law enforcement value that justifies its enormous potential for abuse.

Second, Congress should undertake a systematic review and reduction of the federal criminal code. As the Heritage Foundation and the Mercatus Center have documented, the federal criminal code now contains approximately 5,199 statutory crimes and potentially 300,000 regulatory offenses—a body of law that no citizen can know, that no agency fully understands, and that creates an unlimited reservoir of prosecutorial discretion. Congress should require the Attorney General to compile and publish a complete inventory of all federal criminal offenses,

including by regulation; it should repeal crimes that target conduct properly left to state law; and repeal those that do not have sufficient constitutional basis under today's jurisprudence.

Third, Congress should enact a default *mens rea* statute requiring proof of at least recklessness for any federal criminal offense that does not explicitly specify an intent element. The principle that punishment requires a guilty mind is ancient and foundational. A federal criminal code that imposes strict liability for violations of regulatory minutiae—is not compatible with the moral premises of the criminal law.

Fourth, Congress should resist the temptation to federalize every serious social problem. Not every harm that genuinely troubles the national conscience requires a federal criminal solution. As *Morrison* held, violence against women is serious but Congress cannot constitutionally regulate it under the Commerce Clause or the Fourteenth Amendment. Violence at abortion clinics and pregnancy resource centers is serious; the same constitutional limits apply. The Framers reserved to the states the authority to define and punish most crimes, and they did so for good structural reasons that the past three decades of overcriminalization have vindicated. When the federal government reaches beyond its constitutional authority to address local crimes, it does not merely expand its power—it creates the infrastructure for that power's abuse by whatever administration next takes the reins. That danger does not lessen over time but persists as long as the statute does. The appropriate response to the weaponization of federal criminal law is not simply to wait for more virtuous officials. It is to dismantle the weapons.

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Appendix I

Letter from Senators Mike Lee and Ted Cruz of March 29, 2016 to Attorney General Loretta Lynch

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

March 29, 2016

The Honorable Loretta E. Lynch
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Attorney General Lynch,

It is our duty, as members of the Senate Committee on the Judiciary, and the Oversight Subcommittee, to conduct oversight of the United Stated Department of Justice (DOJ).

As you know, the Freedom of Access to Clinic Entrances Act of 1994 (FACE) is enforced by the DOJ's Civil Rights Division. FACE prohibits any use or threat of force and physical obstruction that intentionally injures, intimidates, or interferes with any person seeking: (1) to obtain or provide reproductive health services, or (2) to exercise the First Amendment right of religious freedom at a place of religious worship.

During your testimony before the Senate Judiciary Committee on March 9, you discussed the DOJ's "active" and "increased" efforts to enforce FACE with respect to interference with reproductive health services. You did not mention places of religious worship. The Civil Rights Division's webpage discussing FACE takes a similar approach. *See* https://www.justice.gov/crt-12. After mentioning that FACE covers both abortion services and religious worship, the webpage discusses enforcement only in regard to abortion services. Specifically, the webpage states that the Civil Rights Division's Special Litigation Section

> has served a pivotal role in enforcing the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, to protect patients and health care providers against threats of force and physical obstruction of reproductive health facilities. The Department has filed more than 15 FACE actions in more than a dozen states and there are ongoing investigations in other states. Section attorneys have obtained temporary restraining orders and preliminary and permanent injunctions under the FACE and have won civil contempt motions for violations of these injunctions.[1]

This webpage also links to several FACE cases and settlement agreements concerning abortion clinic workers or abortion facilities. Interestingly, it does not list a single case concerning the freedom of religious exercise at houses of worship.

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[1] Additionally, the webpage notes that "the Section serves on the Attorney General's National Task Force on Violence Against Health Care Providers."

Instead, the webpage links to *United States v. Scott*, No. 11-cv-01430 (D. Colo. 2011), but neglects to mention that the case involved a legal action against a peaceful sidewalk counselor and that the Civil Rights Division was forced to seek dismissal of all its claims *with* prejudice after the judge ruled that "the government has failed to show likelihood of success on the merits, period."

The webpage also links to *Holder v. Pine*, No. 9:10-cv-80971 (S.D. Fl. 2010), another legal action against a peaceful sidewalk counselor, but neglects to mention that the judge in that case wrote that:

- "The Court can only wonder whether this action was the product of a concerted effort between the Government and the [clinic], which began well before the date of the incident at issue, to quell Ms. Pine's activities rather than to vindicate the rights of those allegedly aggrieved by Ms. Pine's conduct."

- "The Government's failure to take the necessary steps to prevent the destruction of potentially critical evidence was indeed negligent, and perhaps even grossly negligent."

- "FACE as applied would violate [Defendant] Pine's First Amendment rights."

- "The Court is at a loss as to why the Government chose to prosecute this particular case in the first place."

Finally, the webpage also neglects to mention that the Court in *Pine* subsequently approved a settlement agreement requiring the DOJ to drop its appeals and pay $120,000 to Ms. Pine for forcing her to incur legal fees in defending against this baseless suit.

The DOJ's brazen pursuit (and subsequent online promotion) of—at best—frivolous prosecutions in the abortion context, combined with its failure to list *any* prosecutions or enforcement activities in the religious worship context, gives the distinct impression of a warped and biased enforcement of FACE by the DOJ.

To assess whether or not that is the case, I ask that you please respond to the following requests, with the applicable time period for each being January 2009 to present:

<u>FACE Act enforcement with regard to abortion facilities:</u>

- Identify by date, location, and name of organization, every discussion, conference, or meeting (whether by e-mail, text message, phone, video, or in person) between the DOJ and any pro-abortion, "reproductive choice," or "pro-choice" advocacy group or similar organization, concerning FACE enforcement with regard to access to abortion facilities.

- Identify by date, location, and name of organization, every discussion, conference, or meeting (whether by e-mail, text message, phone, video or in person) between the DOJ

and any abortion clinic or facility, abortion provider, parent organization or affiliate, concerning FACE enforcement with regard to access to abortion facilities.

- Identify by date, location, and name of organization, every discussion, conference, or meeting (whether by e-mail, text message, phone, video or in person) between the DOJ and any anti-abortion, or "pro-life" advocacy group or similar organization, concerning FACE enforcement with regard to access to abortion facilities.

- Identify the number of matters the DOJ has investigated, looked into, or reviewed concerning potential FACE enforcement with regard to access to abortion facilities.

- Identify the number of matters the DOJ has assigned "DJ Numbers" to concerning FACE Act enforcement with regard to access to abortion facilities.

- Identify the number of complaints the DOJ has filed in court concerning FACE enforcement with regard to access to abortion facilities. Please provide copies of these complaints.

- Identify the number of settlement agreements the DOJ has reached concerning FACE enforcement with regard to access to abortion facilities. Please provide copies of these settlement agreements.

- Explain in detail what efforts the Civil Rights Division has undertaken to enforce FACE specifically with regard to access to abortion facilities.

<u>FACE Act enforcement with regard to houses of worship:</u>

- Identify by date, location, and name of organization, every discussion, conference, or meeting (whether by e-mail, text message, phone, video or in person) between the DOJ and any religious freedom or religious liberty advocacy group or similar organization, concerning FACE enforcement with regard to access to houses of worship.

- Identify by date, location, and name of organization, every discussion, conference, or meeting (whether by e-mail, text message, phone, video or in person) between the DOJ and any religious group, house of worship, or similar organization, concerning FACE enforcement with regard to access to houses of worship.

- Identify the number of matters the DOJ has investigated, looked into, or reviewed concerning potential FACE enforcement with regard to access to houses of worship.

- Identify the number of matters the DOJ has assigned "DJ Numbers" to concerning FACE enforcement with regard to access to houses of worship.

- Identify the number of complaints the DOJ has filed in court concerning FACE enforcement with regard to access to houses of worship. Please provide copies of these complaints.

- Identify the number of settlement agreements the DOJ has reached concerning FACE enforcement with regard to access to houses of worship. Please provide copies of these settlement agreements.

- Explain in detail what efforts the Civil Rights Division has undertaken to enforce FACE specifically with regard to access to houses of worship.

- State whether or not the Civil Rights Division investigated, or will investigate, the blocking of the entrance to, and interference with the religious exercise of members of, the Los Angeles, California, house of worship shown in this video, particularly beginning at the 5:08 mark. *See* https://www.youtube.com/watch?v=GxagcNFyHyc. If your answer is no, please explain in detail why the Civil Rights Division did not or will not investigate this incident.

Please provide the requested information as soon as possible, but **no later than 9:00 a.m.** on **Monday, April 11, 2015**.

We appreciate your cooperation in this very important matter and look forward to receipt of the requested material at the stated date and time. Please contact Committee staff at (202) 224-5225 if you have any additional questions about how to comply with the terms of this production request.

Very truly yours,

Ted Cruz
U.S. Senator

Mike Lee
U.S. Senator

Cc: The Honorable Charles E. Grassley
Chairman
Senate Committee on the Judiciary

The Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary

The Honorable Christopher A. Coons
Ranking Member
Subcommittee on Oversight, Agency Action,
Federal Rights and Federal Courts