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Washington, DC 20515-6731

Memorandum

To: Over-Criminalization Task Force of the Committee on the Judiciary

From: Office of the Parliamentarian

Date: July 21, 2014

The Over-Criminalization Task Force of the Committee on the Judiciary is tasked with assessing the current federal criminal statutes and making recommendations for improvements. One of its areas of study is legislative jurisdiction in the House over proposals addressing federal criminal law. This memo provides guidance on the rules of the House and precedents in this area.

Rule X – the jurisdictional statement of the Committee on the Judiciary

The Parliamentarian, acting as the Speaker's agent, refers bills and other matters upon their introduction to committees pursuant to the jurisdiction of each committee as defined by rule X, taking into account any relevant precedents. Rule XII guides the Speaker in the type and timing of a referral.

The jurisdiction of each of the 20 standing committees of the House is set out in rule X of the rules of the House. The jurisdictional statement of the Committee on the Judiciary is found in clause 1(l) of rule X. The referral of measures on the subject of criminalization is based on clause 1(l)(1) addressing, "The judiciary and judicial proceedings, civil and criminal," and clause 1(l)(7), addressing "Criminal law enforcement."

The jurisdictional statement regarding "The judiciary and judicial proceedings, civil and criminal" has been in place since the creation of the Committee on the Judiciary in 1813. That statement has been interpreted to apply to matters "touching judicial proceedings." Hinds, vol. 4, sec. 4054.

The jurisdictional statement regarding "Criminal law enforcement" was added in the 109th Congress (sec. 2(a)(2), H. Res. 5, Jan. 4, 2005). This statement has been interpreted by the Office of the Parliamentarian as a codification of the committee's existing de facto jurisdiction over legislation addressing law *enforcement* powers, consistent with the absence of legislative history supplying any other meaning (Cong. Rec. Jan 4, 2005). This area of the committee's jurisdiction is often manifested in

measures addressing police powers, such as executing warrants and making arrests. The Office of the Parliamentarian has not noted a change in the body of precedents surrounding criminalization as a result of the addition of "Criminal law enforcement" to clause (1)(I)(7) of rule X.

Title 18 – the Criminal Code

The organization of the United States Code permeates many aspects of the legislative process. The Office of the Law Revision Counsel organizes the general and permanent laws of the United States in its compilation, restatement, and revision of the United States Code. In turn, the Office of the Legislative Counsel employs its framework in the drafting of bills and the Office of the Parliamentarian considers it when advising on jurisdictional matters. The organizational structure of the Code promotes consistency and predictability throughout the legislative process.

The structure of the Code, specifically the placement of the criminal code in title 18, has resulted in a consistent pattern of referrals of measures addressing criminalization within that title to the Committee on the Judiciary. Past referrals of measures criminalizing action within title 18 span many subjects that would otherwise fall within the subject-matter jurisdiction of other committees. For example, in the 113th Congress the Committee on the Judiciary received a referral for a measure amending title 18 to criminalize the counterfeiting or selling of Presidential inauguration tickets (H.R. 336) and a measure amending title 18 criminalizing the importation or exportation of mussels of a certain genus (H.R. 1823). Those measures were referred solely to the Committee on the Judiciary despite the fact that other committees otherwise would have jurisdiction over the subjects of inaugurations and invasive species. Past efforts by other committees to obtain additional or sequential referrals of criminalization measures within the confines of title 18 have not been successful absent a showing that the measure also contained a non-criminal aspect.

As a general matter, the non-criminal regulation of behavior does not fall within the jurisdiction of the Committee on the Judiciary. If a measure creates a new criminal penalty or modifies an existing criminal penalty within a larger regulatory initiative outside the confines of title 18, the Committee on the Judiciary may still obtain a referral for that direct address of criminalization. A more complex situation occurs when a measure subjects new or different conduct to regulation and that conduct is criminalized through the separate operation of an existing criminal penalty – resulting in criminalization without a textual address of the criminal penalty by the measure.

Referral Patterns

The issue presented by indirect criminalization can be found in examples spanning many different subject matters. One illustration is in the referrals of the Lacey Act, a frequently amended statute that regulates the trafficking of fish, wildlife, and plants. The Lacey Act is compiled in both title 16 and title 18 of the United States Code. In the case of H.R. 3049 of the 109th Congress (regulating the trafficking in Asian carp), the bill amended 18 U.S.C. 42 and addressed criminalization. Accordingly, it was referred to the Committee on the Judiciary. In contrast, H.R. 1497 of the 110th Congress (regulating plants harvested outside the United States) amended various regulatory sections of the Lacey Act Amendments of 1981 that have been compiled in title 16 of the United States Code. The bill extended the Lacey Act's coverage to plants harvested outside the United States and any address of criminalization was indirect. Accordingly, it was referred to the Committee on Natural Resources.

A more recent example is found in the animal welfare area. H.R. 2492 of the 112th Congress addressed attendance at animal fighting events through amendments to the Animal Welfare Act – compiled in title 7 of the United States Code – and to title 18. The bill was referred to both the Committee on Agriculture and the Committee on the Judiciary. Parts of the contents of this bill were later included in a larger measure in the 113th Congress – H.R. 2642, the Federal Agriculture Reform and Risk Management Act of 2013 (section 11311). The provision addressed a type of animal fighting to be covered by the Animal Welfare Act, but did not amend the existing criminal penalty in the Animal Welfare Act and did not touch title 18. The Parliamentarian advised that a referral to the Committee on the Judiciary was not consistent with past precedent.

Written Statement of
Steven D. Benjamin
on behalf of
National Association of Criminal Defense Lawyers

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

Re: "The Crimes on the Books and Committee Jurisdiction"

July 25, 2014

STEVEN D. BENJAMIN, ESQ., is the immediate Past-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 Indigent Defense Commission. He is 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. He is a frequent lecturer on criminal justice and defense issues.

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My name is Steve Benjamin, and I am the immediate Past-President of the National Association of Criminal Defense Lawyers (NACDL). On behalf of NACDL, I commend the House Judiciary Committee for the work the Overcriminalization Task Force has done in examining the problems and reviewing possible solutions to our country's serious problem of overcriminalization. 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 urges the Members of this Task Force to continue their work on these critically important issues in the bipartisan spirit that has been the hallmark of their work thus far.

Overcriminalization in America has a direct impact on commerce, free enterprise, and innovation. It also erodes the public's confidence in a fair and just criminal justice system. It is present in policies and practices that affect every person in society. Thus, NACDL urges the Task Force to take advantage of this opportunity to consider major systemic reforms. The problems the Task Force has explored over a series of nine hearings are not abstract or theoretical—at this very moment we are all 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.

Introduction

The greatest power that any civilized government routinely uses against its own citizens is the power to prosecute and punish under criminal law. This power necessarily distinguishes the criminal law from all other areas of law and makes it uniquely susceptible to abuse and capable of inflicting injustice. More than any other area of law, criminal law, because its prohibitions and commands are enforced by the power to punish, must be firmly grounded in fundamental principles of justice. Such principles are expressed in both substantive and procedural protections.

One such fundamental principle is embodied in the doctrine of fair notice, which is a critical component of the Constitution's due process protection. The fair notice doctrine requires that, in order for a person to be punished criminally, the offense with which she is charged must provide adequate notice that the conduct in which she engaged was prohibited. In the words of the Supreme Court: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or

forbids."[1] Due process therefore demands that a criminal law give "fair warning of the conduct that it makes a crime."[2] Unfortunately, there are a number of systemic flaws in the federal criminal justice system that undermine this fundamental constitutional right to fair notice.

Congress has revised the federal criminal code a handful of times over the last century and a half, most recently in 1948. It is past time for another comprehensive revision. Whether that review and revision should be led by the Judiciary Committee or delegated, at least as an initial matter, to a Commission or other body of stakeholders, is a question beyond today's hearing although we note the many practical and political obstacles that could potentially interfere with a fair and neutral rewrite of the federal code. Ideally, any such effort should focus on seven main goals : (1) reviewing the existence and placement of all federal criminal provisions, and revising or reorganizing the code to provide fair notice and avoid unnecessary duplication; (2) ensuring that the revised federal criminal code strikes a proper balance between federal and state criminal enforcement; (3) clearly defining the different levels of *mens rea* and applying those definitions in a fair and rational way to all federal offenses (both statutory and regulatory); (4) ameliorating the harm of regulatory overcriminalization and preventing future such instances; (5) establishing uniform rules of construction; (6) revising the counter-productive and unnecessarily harsh system of punishment that has produced an excessive federal prison population; and (7) addressing the many punitive collateral consequences of arrest or conviction that deny redemption, interfere with rehabilitation, and thwart productive reintegration with society

Proliferation of the Federal Criminal Code

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.[3] By 2008, that number had increased to over 4,450.[4] And, most recently, the Congressional Research Service has estimated that since 2008, at least another

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[1] *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (internal quotation marks omitted) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

[2] *Id.* at 350.

[3] 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).

[4] 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).

439 criminal offenses have been enacted.[5] Many scholars and even government officials have admitted that none of these counts can be deemed completely accurate, although just recently an anonymous Twitter account has started tweeting one federal crime each day and claims it will do so until all have been identified.[6] In addition to federal statutory crimes, it is estimated that there are at least 10,000, but possibly as many as 300,000, federal regulations that *also* can be enforced criminally.[7] Unfortunately, with this many criminal provisions scattered throughout the fifty-one titles of the U.S. federal statutory code and the fifty chapters of the Code of Federal Regulations (C.F.R.), neither criminal law professors nor lawyers who specialize in criminal law can know (or reasonably identify) *all* of the conduct that is criminalized. Average law-abiding individuals have no hope.

This proliferation of federal offenses has two main practical consequences. First, the sheer number of crimes, scattered throughout the Code and C.F.R., creates a notice problem. Justice Holmes said long ago that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."[8] But with the statutory scheme that currently exists, "fair warning" is a fiction. If our legal system is going to presume that everyone knows the law—and if we wish to deter citizens from violating the law—we must make the law knowable. Second, the existence of multiple federal statutes that address similar conduct encourages federal prosecutors to overcharge. Pruning the federal criminal code should reduce this practice and help to ensure even-handed application of the law.

For example, as a previous witness of this Task Force explained,[9] there are more than two dozen different false statement statutes in Chapter 47 of Title 18; there are seven different fraud statutes in Chapter 63 of Title 18; and 19 different obstruction offenses in Chapter 73 of Title 18. There are also other false statement, fraud, and obstruction offenses scattered throughout Title 18 and elsewhere that address the same conduct. Surely a comprehensive review of the federal criminal code would identify more such examples.

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[5] Memorandum from Alison M. Smith and Richard M. Thompson II on Criminal Offenses Enacted from 2008 – 2013 to the Crime, Terrorism, Homeland Security & Investigations Subcomm. (H. Judiciary) I (June 23, 2014) (on file with Cong. Research Serv.).

[6] A Crime a Day, https: www.twitter.com/CrimeADay (last visited July 23, 2014).

[7] 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).

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

[9] *Hearing on Criminal Code Reform Before the Over-criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of John D. Cline, Law Office of John D. Cline, San Francisco, CA).

For these reasons, NACDL strongly recommends a review of the federal code to identify overlapping, duplicative statutes—some of which could be repealed and/or revised in order to achieve a uniform and clear statement of the law. The inquiry should explore whether a criminal sanction is necessary at all—as opposed to civil and administrative remedies—and, if so, whether existing federal criminal statutes suffice to punish the conduct at issue. And, while NACDL has not yet taken a position on the issue of whether all criminal statutes must be organized into a single title of the code, common sense would dictate that most criminal provisions should reside in Title 18 unless clear evidence existed that a particular criminal provision belonged elsewhere. For criminal laws to be effective and fair, they must be accessible, not only to laypersons, but also to lawyers whose job it is to identify the laws and advise their clients concerning them. Having fewer criminal offenses, organized in a meaningful way, is one step towards that goal.

Reform of the code affords another, closely related opportunity: to restore the balance between federal and state law enforcement. Our federalist system contemplated that law enforcement would be primarily a state function. Initially, there were only a few federal offenses, and those offenses focused on the protection of clearly federal interests. Although the Supreme Court has recognized the need to exercise caution in altering this traditional federal-state balance in law enforcement, federal criminal jurisdiction has expanded so immensely that now almost any culpable conduct can be brought within the federal purview.[10] Certain witnesses have testified to this Task Force regarding which subject matters are appropriate for federal jurisdiction.[11] Regardless of how Congress ultimately strikes the federal-state balance in law enforcement, the issue deserves careful, systematic consideration. Reform of the federal criminal code affords that opportunity.

Enforcement of a 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 at tremendous taxpayer expense.

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[10] *Bond v. United States*, 134 S. Ct. 2077 at *2 (2014) ("Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.").

[11] E.g., *Hearing on Agency Perspectives Before the Over-criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (2014) 4 (statement of Judge Irene Keeley, Chair of the Comm. on Criminal Law, Judicial Conf. of the U.S.) (setting forth several broad areas it deems appropriate for federal jurisdiction). NACDL encourages more inquiry into the appropriately narrow scope of federal criminal jurisdiction.

The Absence of Meaningful Criminal Intent Requirements in Federal Statutes and Regulations

At the first hearing of the Task Force, and at almost every hearing since, there has been near unanimous agreement among the witnesses that, in addition to the overwhelming number of federal criminal offenses, the erosion of *mens rea* in these offenses is the most pressing aspect of the overcriminalization problem and that its restoration should be the top priority of this Task Force.

As a cornerstone of our criminal justice system since our nation's founding, the constitutionally-based principle of fair notice is embodied in the requirement that, with rare exceptions, the government must prove the defendant acted with criminal intent before subjecting her to criminal punishment. More specifically, no individual should be subjected to condemnation and prolonged deprivation of liberty, and the serious, life-altering collateral consequences that follow, unless she intentionally engages in inherently wrongful conduct or acts with knowledge that her conduct is unlawful. It is only in such circumstances that a person is truly blameworthy and thus deserving of criminal punishment.

The criminal intent requirement is not just a legal concept—it is the fundamental anchor of the criminal justice system. Absent a meaningful criminal intent requirement, an individual's other legal and constitutional rights cannot adequately protect that individual from unjust prosecution and punishment for honest mistakes or engaging in conduct that they had no reason to know was wrongful. Moreover, the inclusion of criminal intent requirements in criminal offenses serves the broad purpose of deterrence in the criminal justice system while acting as a safety valve against criminal punishment for innocent actors. Black's Law Dictionary defines deterrence as "[t]he act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of punishment."[12] Deterrence of criminal conduct cannot be achieved in a system that punishes those who are not culpable. If a person is unaware of the prohibited nature of the conduct in which she is engaging, then the risk of criminal punishment simply cannot affect, let alone prevent, engagement in that conduct. This is especially the case with strict liability, which "is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future[.]"[13]

Whether the offense is relatively straightforward like homicide or a more complicated regulatory prohibition, careful consideration must always be given to the fundamental principles of culpability and fair notice when defining the guilty mind and guilty act that constitute the

[12] Black's Law Dictionary (rev. 9th ed. 2009).

[13] Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 109.

crime. Furthermore, strict liability should only be employed in the criminal law after full deliberation. As the Supreme Court has recognized, "[a]ll are entitled to be informed as to what the State commands or forbids."[14] By its own terms, a criminal offense should prevent the conviction of an individual acting without intent to violate the law and knowledge that her conduct was unlawful or sufficiently wrongful so as to put her on notice of possible criminal liability. A person who acts without such intent and knowledge does not deserve the government's greatest punishment or the extreme moral and societal censure such punishment carries.

Unfortunately, there is now a congressional practice of enacting criminal laws with weak, or inadequate, criminal intent requirements. Whether this is a product of careless draftsmanship or political expediency, the result is always the same—the loss of due process for the average person. This troubling trend was well-documented in NACDL's ground-breaking joint report, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, released with the Heritage Foundation in May 2010 (hereinafter "*Without Intent* Report"), and can be seen in many pending and recently enacted laws.

Congress also 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 "regulatory overcriminalization" has a dramatic impact on individuals as well as businesses large and small. These regulatory crimes are especially pernicious because they rarely, if ever, receive careful scrutiny from Congress. In addition, many of these criminal regulations lack meaningful criminal intent requirements or apply vicarious criminal liability, which allow for criminal punishment absent blameworthiness. The oversight of compliance with complicated and extensive rules and regulations is no longer reserved for civil and regulatory enforcement agencies, but is also under the jurisdiction of federal prosecutors. Regulatory crimes represent a dangerous confluence of power: the Executive Branch that prosecutes crimes also creates and defines them.

The injury caused by the erosion of meaningful criminal intent requirements in federal statutes and federal regulations is not limited to the individual; it infects our entire criminal justice system and disrupts the rule of law in society as a whole. When Congress fails to ensure that its laws contain adequate criminal intent requirements, it effectively abdicates its power and responsibility by providing prosecutors with unbridled discretion and inviting judges to engage in lawmaking from the bench. Citizens rely on their 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. The failure to adhere to these constitutional and prudential limits is a true abuse of our government's greatest power.

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[14] *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

While the cause of these failures is not entirely clear, the solutions are. Going forward, Congress should approach new criminalization with caution and ensure that the drafting of all criminal statutes and regulations is done with deliberateness, precision, and by those with specialized expertise. Given the unique qualifications of the Judiciary Committees, which alone possess the special competence and broad perspective required to properly draft and design criminal laws, this Congressional evaluation should always include Judiciary Committee consideration prior to passage. This practice could be guaranteed by changing congressional rules to require every bill that would add or modify criminal offenses or penalties to be subject to automatic sequential referral to the relevant Judiciary Committee.[15] The positive impact of such a practice was documented in the *Without Intent* Report, which found a statistically significant positive correlation between the strength of a *mens rea* provision and Judiciary Committee action on a bill containing such a provision.[16] The Members of this Committee are far better suited to take on this critical role and to encourage other Members to always seek Judiciary Committee review of any bills containing new or modified criminal offenses. Hopefully, such oversight would stem the tide of criminalization, result in clearer, more specific and high quality criminal offenses with meaningful criminal intent requirements, and would reduce the number of times criminal law-making authority would be delegated to unelected regulators.

However, because an intention to do better is not enough to address the current situation, Congress should also explore solutions to the existing problem, including enacting a statutory law establishing a default criminal intent requirement to be read into any criminal offense that currently lacks one. As discussed in greater detail by other witnesses who have testified before this Task Force, this requirement should be protective enough to prevent unfair prosecutions and should apply retroactively to all, or nearly all, existing laws. Although it is usually unwise to do so, Congress could draft the legislation to allow for the enactment of, or continuing existence of, certain strict liability offenses. NACDL urges that strict liability not be imposed in the criminal law as a general matter. Where strict liability is deemed necessary, NACDL cautions this body to employ it only after full deliberation and then only if explicit in the statute. Invocation should be a true rarity, as even the Supreme Court has cautioned against the imposition of strict liability in the criminal law and has stated that all but minor penalties may be constitutionally impermissible without any intent requirement.[17]

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[15] Sequential referral is the practice of sending a bill to multiple congressional committees. In practice, this first committee has exclusive control over the bill until it reports the bill out or the time limit for its consideration expires, at which point the bill moves to the second committee in the sequence, in the same manner.

[16] *See Without Intent* Report at 20-21.

[17] In *Morissette v. United States*, the Supreme Court held that, as a general matter, the penalties imposed for public welfare offenses for which the imposition of strict liability is permitted "commonly are relatively small, and conviction does not grave damage to an offender's reputation." 342 U.S. 246, 256 (1952). The Court was clear about why the imposition of strict liability in the criminal law is traditionally disfavored:

As for addressing the current problems caused by a massive, and yet uncountable number of criminal federal regulations, a number of potential reforms have been proposed or referenced during testimony before this Task Force. These reforms range from a total ban on regulatory criminal law-making, to "sun-setting" provisions that would phase out criminal (but not civil) enforcement of existing regulations, to a requirement that all agencies publicly identify all regulations that authorize criminal enforcement and how frequently they are invoked, to a requirement that regulatory provisions only be eligible for criminal enforcement after a second offense, among others. NACDL encourages the Task Force to continue to explore these and other potential reforms.

Ultimately, if Congress determines that the time has finally come for a comprehensive overhaul of the federal criminal code, that process would afford an ideal opportunity to do what has not yet been done on the federal level—to establish uniform terminology for different levels of *mens rea* and to assign to each offense in a revised federal criminal code an appropriate level of *mens rea.*[18] Wholesale reform of the federal criminal code would afford the opportunity to decide, in a reasoned and systematic way, when knowledge of illegality should be required and how specific that knowledge must be—something that is very much needed in federal jurisprudence.

Beneficial Rules of Construction

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

> 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. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Id. at 250-51 (citations omitted).

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

First, as discussed many times throughout the Task Force's hearing, the rule of lenity—a rule requiring that any doubts about the scope of a criminal statute should be resolved in the defendant's favor—should be codified and made applicable to all federal crimes. The rule of lenity, especially in conjunction with a strong *mens rea* requirement, meaningfully fulfills the basic constitutional requirement of "fair warning."

Second, courts often struggle to determine the reach of a criminal provision's *mens rea* element. Does the requirement that the defendant act "knowingly," for example, extend to all aspects of the conduct that makes up the offense? Does it extend to jurisdictional elements, such as the use of interstate commerce? Does it extend to circumstances that make the conduct criminal, such as the age of a victim of sexual misconduct? Does it extend to elements that affect punishment, such as the quantity of drugs involved? Many of these difficult questions of interpretation can be resolved with a simple, generally applicable rule that the specified *mens rea* applies to all elements of the offense unless the statute creating the offense specifically provides otherwise. Or, Congress might adopt something akin to the Model Penal Code's rule that a *mens rea* term applies to all "material elements" of an offense.[19] These and possibly other straightforward rules of construction will increase uniformity—and thus fairness—in the interpretation of federal criminal statutes. They will also conserve judicial resources that are now devoted to interpreting federal criminal statutes on a case-by-case, ad hoc basis.

Effective, Not Overly Harsh, Punishment

Revision of the federal criminal code also affords an opportunity to rethink punishment. Most significantly, the use of mandatory minimum sentences should be carefully reviewed and abandoned or at least greatly restricted. Mandatory minimum sentences are a harsh, blunt tool that has led to the prolonged incarceration of many men and women who could be appropriately punished and returned to society through less draconian means. Other means of reducing the bloated federal prison population without diminishing deterrence or jeopardizing public safety should be considered as well

The same can be said for U.S. Sentencing Guidelines that continue to recommend disproportionately high sentences across a broad spectrum of criminal offenses. 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 overly broad criminal offenses that lack meaningful criminal intent requirements often results in the incarceration of innocent

[19] Model Penal Code § 2.02(4).

people. Unfettered prosecutorial discretion and draconian sentences are responsible for what is known as the "trial penalty," which chills exercise of the right to trial in federal court. Few people would risk going to trial, facing possible 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.

Other witnesses have testified that among the other possible reforms worth considering are the reinstitution of federal parole, the expansion of the amount of "good time" a federal prisoner can earn, and an increase in the power of federal judges to reduce or alter the conditions of federal prison terms in light of certain hardships. Through these means or others, federal prisoners who have received just punishment and present no danger can return to their families and become productive members of society, rather than a burden on taxpayers.

The Importance of the Restoration of Rights[20]

As discussed during the last hearing, Congress must do its part to promote a change in the national mindset to embrace the concepts of redemption and forgiveness, including a public education campaign to combat erroneous and harmful stereotypes and labels applied to individuals who have had an encounter with law enforcement and the criminal justice system. As a cornerstone of this movement, the United States should establish a "National Restoration of Rights Day" to recognize the need to give individuals who have successfully fulfilled the terms of a criminal sentence the opportunity to move on with their lives.

First, mandatory consequences must be repealed, and discretionary disqualifications should be limited based on relevancy and risk factors. Legislatures should not impose a mandatory collateral consequence unless it has a proven, evidence-based public safety benefit that substantially outweighs any burden it places on an individual's ability to reintegrate into the community.

Second, existing legal mechanisms that restore rights and opportunities must be reinvigorated and new ones established. Congress should provide individuals with federal convictions with meaningful opportunities to regain rights and status. Congress should also provide individuals with state convictions the effective mechanisms needed to avoid collateral consequences imposed by federal law. The federal criminal justice system lacks viable mechanisms for relief from a federal conviction. Individuals with federal, military and District of Columbia Code convictions have even more severely limited access to relief from collateral consequences than do individuals with state convictions. Unlike many state systems, there is no expungement, sealing, or certificate of relief from disabilities for federal convictions, or even for non-conviction records. The only avenue for someone with a federal conviction, a petition for

[20] *See* NACDL's report, *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime: A Roadmap to Restore Rights and Status After Arrest or Conviction,* available at: www.nacdl.org/restoration/roadmapreport.

presidential pardon, unfortunately, rarely leads to relief. Countering this deficit of federal relief options requires a two-pronged approach. First, the pardon process must be reinvigorated. Congress can expand opportunities for relief and restoration by giving sentencing judges the power to relieve collateral consequences at sentencing. Additionally, Congress should create a federal certificate of relief from disabilities. Certificates should be available for all federal convictions pursuant to clear, objective eligibility standards.

Third, non-conviction dispositions must be expanded and utilized. To avoid harmful and unnecessary collateral consequences, diversion and deferred adjudication should be available for all but the most serious crimes, and prosecutors and courts should be encouraged to use these alternatives. Fourth, incentives must be created to encourage employers, landlords and other decision-makers to consider individuals with convictions for certain opportunities.

Finally, access to criminal history records for non-law enforcement purposes must be subject to reasonable limitations. Government entities that collect criminal records should have set mechanisms for ensuring that official records are complete and accurate and must facilitate opportunities for individuals to correct any inaccuracies or omissions in their own records. Criminal records that do not result in a conviction should be automatically sealed or expunged, at no cost to their subject. The federal government must develop policies that limit access to and the use of criminal history records for non-law enforcement purposes in a manner that balances the public's right of access to information against the government's interest in encouraging successful reintegration of individuals with records and privacy interests. The federal and state systems must never sell criminal records, and the federal government should strictly regulate private companies that collect and sell records.

Conclusion

No matter which form it takes, overcriminalization results in the abuse of the criminal law and 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 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 or from challenging the constitutionality of a federal statute. 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.

NACDL is grateful for the opportunity to share our expertise and perspective with the Task Force and commends the efforts of the Task Force to address the problem of 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 political spectrum have highlighted the problem of overcriminalization for several years. NACDL believes that the solutions outlined above constitute meaningful, important, and achievable remedial steps that will garner broad support. We continue to be inspired by your willingness to tackle this problem and stand ready to assist in every way possible.

Respectfully,

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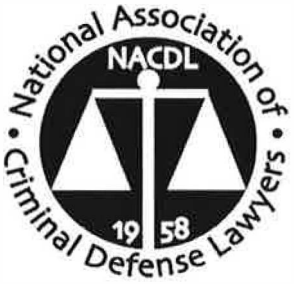

Written Statement of
Norman L. Reimer, Executive Director
National Association of Criminal Defense Lawyers

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

Re: "*Mens Rea*: The Need for a Meaningful Intent Requirement in Federal Criminal Law"

July 19, 2013

NORMAN L. REIMER is the Executive Director 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 bar to ensure justice and due process for all and to advocate for rational and humane criminal justice policies. As Executive Director, Mr. Reimer leads a professional staff based in Washington, D.C. serving NACDL's approximately 10,000 direct members and 90 local, state and international affiliate organizations with up to 35,000 members.

Prior to assuming this position, Mr. Reimer practiced law for 28 years, most recently at Gould Reimer Walsh Goffin Cohn LLP. A criminal defense lawyer throughout his career, with expertise in trial and appellate advocacy in both state and federal jurisdictions, he is also a recognized leader of the organized bar, and a spokesperson on behalf of reform of the legal system. Mr. Reimer served as an Adjunct Professor of Law at New York Law School, where he taught Trial Practice from 1990 until 2004. He earned both his undergraduate and juris doctor degrees at New York University. Since joining NACDL, Mr. Reimer has overseen a significant expansion of the Association's educational programming and policy initiatives.

* * * * *

I. Introduction

My name is Norman Reimer, and I am the Executive Director of the National Association of Criminal Defense Lawyers (NACDL). On behalf of NACDL, I commend the House Judiciary Committee for establishing this bipartisan Overcriminalization Task Force and for holding hearings on our country's serious addiction to overcriminalization. At the first hearing of the Task Force, there was unanimous agreement among the witnesses that the erosion of *mens rea* in federal criminal offenses is the most pressing aspect of the overcriminalization problem and that its restoration should be the top priority of this Task Force. As criminal defense lawyers, we are uniquely positioned not only to understand the necessity of an adequately protective *mens rea* requirement, but to witness the practical effects of its erosion each and every day. NACDL is especially grateful for this opportunity to share our expertise on this concept, which is of fundamental import to our entire criminal justice system, and to present our views, supported by others across the ideological divide, on why *mens rea* reform demands immediate action.

It is important to begin this discussion with some background on the topic of today's hearing. For anyone who has attended law school, *mens rea*, the Latin phrase for "guilty mind," is familiar and understood as integral to the realm of criminal law. For the general public, however, the concept of *mens rea* is more commonly understood and known as "criminal intent." These phrases are not identical in meaning, but for the sake of consistency and greater understanding, my testimony will use the phrase criminal intent, rather than *mens rea*, from this point forward.

II. Criminal Intent Requirements Are Fundamental to Constitutional Due Process

The greatest power that any civilized government routinely uses against its own citizens is the power to prosecute and punish under criminal law. This power necessarily distinguishes the criminal law from all other areas of law and makes it uniquely susceptible to abuse and capable of inflicting injustice. More than any other area of law, criminal law, because its prohibitions and commands are enforced by the power to punish, must be firmly grounded in fundamental principles of justice. Such principles are expressed in both substantive and procedural protections.

One such fundamental principle is embodied in the doctrine of fair notice, which is a critical component of the Constitution's due process protection. The fair notice doctrine requires that, in order for a person to be punished criminally, the offense with which she is charged must provide adequate notice that the conduct in which she engaged was prohibited. In the words of the Supreme Court: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or

forbids."[1] Due process therefore demands that a criminal law give "fair warning of the conduct that it makes a crime."[2]

As a cornerstone of our criminal justice system since our nation's founding, this constitutionally-based principle of fair notice is embodied in the requirement that, with rare exceptions, the government must prove the defendant acted with criminal intent before subjecting her to criminal punishment. More specifically, no individual should be subjected to condemnation and prolonged deprivation of liberty, and all the serious, life-altering collateral consequences that follow, unless she intentionally engages in inherently wrongful conduct or acts with knowledge that her conduct is unlawful. It is only in such circumstances that a person is truly blameworthy and thus deserving of criminal punishment.

The criminal intent requirement is not just a legal concept—it is the fundamental anchor of the criminal justice system. The Supreme Court has described this principle "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."[3] The bedrock of Anglo-American criminal law for over six centuries, this principle has even deeper roots in English common law, Roman law, and canon law.[4] It is this essential nexus between a person's conduct and mental culpability that provides the moral underpinning for criminal law. Absent a meaningful criminal intent requirement, an individual's other legal and constitutional rights cannot adequately protect that individual from unjust prosecution and punishment for honest mistakes or engaging in conduct that they had no reason to know was wrongful.

For crimes involving the taking of property or battery committed against another person—such as murder, arson, rape, and robbery—the law properly affords the inference of criminal intent where the government proves that the conduct was committed voluntarily. With such crimes, the law assumes that the inherent wrongfulness of the act forecloses the possibility of punishing individuals who are not truly culpable. There are, however, hundreds of federal statutory offenses, and an estimate of tens of thousands of federal regulatory offenses, that criminalize conduct that is not inherently wrongful. Rather, such conduct is wrongful only because it is "*malum prohibitum*," or prohibited by law. Although there may be legitimate reasons for prohibiting such conduct, the acts themselves, independent of the prohibition, are not wrongful and therefore do not usually justify the inference that an individual intended to violate

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[1] *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (internal quotation marks omitted) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).
[2] *Id.* at 350.
[3] *Morissette v. United States*, 342 U.S. 246, 250 (1952).
[4] Brief of the National Association of Criminal Defense Lawyers *et al.* as *Amici Curiae* in Support of Petitioner at 18-22, Shelton v. Sec'y *Dept. of Corrections*, 802 F.Supp.2d 1289 (M.D. Fla. Jan. 28, 2011) (No. 6:07-cv-839-Orl-35KRS) (detailing the history and origins of the *mens rea* or guilty mind requirement in criminal law).

the law or knew her conduct was wrongful. This is why the criminal intent requirement is essential to a just system of criminal law; when the conduct is not inherently wrongful, fair notice is diminished or eliminated, and the burden to compensate for that deficiency should fall squarely on the criminal intent requirement.

In addition, an adequate criminal intent requirement serves the critical function of protecting those who are reasonably mistaken about or unaware of the law. As one travels along the continuum from pure inherently wrongful conduct, such as murder, towards merely prohibited conduct, such as bringing sand onto one's property without a permit, the fair notice provided by the conduct itself diminishes to the point of vanishing. It is an obvious injustice to punish an individual for conduct that is not inherently wrongful if she did not know, and had no reasonable expectation to know, that her conduct was prohibited by law. Requiring proof of a guilty mind, not just a guilty act, is an essential component of a just system of criminal law.

Accordingly, when society, through its elected representatives, specifies the particular conduct and mental state that constitute a crime, "it makes a critical moral judgment about the wrongfulness of such conduct, the resulting harm caused or threatened to others, and the culpability of the perpetrators."[5] Therefore, a proper and adequate criminal intent requirement should reflect the differences in culpability that result when individuals with different mental states engage in the same prohibited conduct. This point is well illustrated by the differing criminal intent requirements that apply to homicide, or the killing of a human being. Even with the same bad act—a killing—different levels of criminal intent define different offenses, which carry different punishments. These distinctions not only help to assign appropriate levels of punishment, but also to protect those who committed prohibited conduct accidentally or inadvertently.

Moreover, the inclusion of criminal intent requirements in criminal offenses serves the broad purpose of deterrence in the criminal justice system while acting as a safety valve against criminal punishment for innocent actors. Black's Law Dictionary defines deterrence as "[t]he act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of punishment."[6] Deterrence of criminal conduct cannot be achieved in a system that punishes those who are not culpable. If a person is unaware of the prohibited nature of the conduct in which she is engaging, then the risk of criminal punishment simply cannot affect, let alone prevent, engagement in that conduct. This is especially the case with strict liability, which "is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future[.]"[7]

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[5] Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 713-14 (2005).
[6] Black's Law Dictionary (rev. 9th ed. 2009).
[7] Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 109.

Whether the offense is relatively straightforward like homicide or a more complicated regulatory prohibition, careful consideration must always be given to the fundamental principles of culpability and fair notice when defining the guilty mind and guilty act that constitute the crime. Furthermore, strict liability should only be employed in the criminal law after weighty deliberation. As the Supreme Court has recognized, "[a]ll are entitled to be informed as to what the State commands or forbids."[8] By its own terms, a criminal offense should prevent the conviction of an individual acting without intent to violate the law and knowledge that her conduct was unlawful or sufficiently wrongful so as to put her on notice of possible criminal liability. A person who acts without such intent and knowledge does not deserve the government's greatest punishment or the extreme moral and societal censure such punishment carries.

III. The Decline of Criminal Intent In Federal Law

Despite representing organizations that span the ideological divide, all of the witnesses at the first Overcriminalization Task Force hearing agreed that ending the decline of and restoring criminal intent requirements in federal laws is of utmost concern. At its core, this agreement is an acknowledgment of the longstanding Congressional practice of enacting criminal laws with weak, or inadequate, criminal intent requirements. Whether this is a product of careless draftsmanship or political expediency, the result is always the same—the loss of due process for the average person. This troubling trend was well-documented in NACDL's ground-breaking joint report, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, released with the Heritage Foundation in May 2010 (hereinafter "*Without Intent* Report"), and can be seen in many pending and recently enacted laws.[9] With just a snapshot of this report's findings, and a brief review of a few of these laws, one can quickly uncover the serious implications that the erosion of criminal intent carries for individual defendants and the criminal justice system as a whole.

Despite the inherent effectiveness of a meaningful criminal intent requirement, many federal criminal offenses contain only a weak intent requirement, if they have one at all, and for those familiar with the federal criminal lawmaking process that number appears to be growing. In order to provide Congress and the public with concrete evidence of this problem, NACDL and the Heritage Foundation undertook a comprehensive study of the federal criminal lawmaking process of the 109th Congress (2005-06). Based on this study, the *Without Intent* Report sets forth troubling findings that truly demonstrate just how far federal criminal lawmaking has drifted from its doctrinal anchor in fair notice and due process.

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[8] *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

[9] 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 July 11, 2013) (hereinafter "*Without Intent* Report").

Specifically, 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.[10] The study also documented a pattern of poor legislative draftsmanship and found that "[n]ot only do a majority of enacted offenses fail to protect the innocent with adequate [criminal intent] 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 concluded, ultimately, that Congress is frequently enacting "fundamentally flawed" criminal offenses.[11]

As evidenced in the *Without Intent* Report, omission of criminal intent requirements is no longer the rare exception to the rule and, where Congress does include a criminal intent requirement, it most often only requires general intent, i.e., "knowing" conduct, which federal courts usually interpret to merely mean conduct done consciously.[12] Further, 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[13] or provides blanket regulatory authority enforceable with criminal penalties.[14] The

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[10] *Id.*

[11] *Id.*

[12] As the U.S. Supreme Court has recognized, "'[U]nless the text of the statute dictates a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.'" *Dixon v. United States*, 126 S. Ct. 2437, 2441 (2006) (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998)). Further, "[t]he term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law." *Bryan*, 524 U.S. at 192. In fact, in some federal circuits, any *mens rea* requirement based on knowledge (e.g., "knowingly," "knowing," or "knew") is likely to draw a government request for a jury instruction on willful blindness. *See, e.g.*, *United States v. Jewell*, 532 F.2d 697, 700–04 (9th Cir. 1976) (*en banc*) (holding that a jury may convict under a "knowingly" standard if it finds the evidence satisfies a liberal formulation of the "willful blindness" or "deliberate ignorance" doctrine). Any "willful blindness" instruction that follows, for instance, the *Jewel* line of cases is likely to be inferior to and less protective than the formulation of the doctrine in the American Law Institute's Model Penal Code. *See* Model Penal Code § 2.02(7) (2009) ("Requirement of Knowledge Satisfied by Knowledge of High Probability.").

Unfortunately, the federal courts have set forth varied definitions of the *mens rea* terms commonly used in federal offenses. Whereas "willfully" is considered a word of many meanings, the word "knowingly" is similarly situated; its precise definition varies from court to court and, sometimes, from statute to statute. While it can be said that, at a minimum, "knowingly" requires some voluntary conduct, whether and what it requires in addition to that ultimately varies by jurisdiction. Despite its definitional issues, from the perspective of protecting law-abiding citizens, NACDL believes that the term "willfully" is more protective, and more universally understood, than the term "knowingly." Federal courts have held that, at a minimum, "willfully" requires proof that a person acted with knowledge that her conduct was, in some general sense, unlawful. *See Bryan*, 524 U.S. at 191-92. The use of "willfully" in a statute, therefore, is a mechanism for separating those who act knowingly and with a bad purpose, from those who lack that bad purpose. This mechanism is critical both for protecting innocent actors who make every attempt to comply with the law as well as for punishing those who are truly culpable—individuals who engage in conduct knowing that it is unlawful. When an offense involves broad, vaguely defined conduct or complex rules and regulations, the term "knowingly" is inadequate to protect all innocent, law-abiding actors.

[13] 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

consequence is that even the most cautious person, acting with the full intent to follow the law, can become ensnared by these criminal laws.

The *Without Intent* Report documented various examples, in addition to statistical data, to support and explain its findings. One such example was the Stolen Valor Act of 2005 (S. 1998), which was enacted into law by the 109th Congress.[15] Prior to its enactment, federal law criminalized the use of certain military emblems or badges in an act of deception. The Stolen Valor Act of 2005 expanded that prohibition to criminalize any false verbal or written claim that one had been awarded a decoration or service medal. Passed on a voice vote in the House and through unanimous consent in the Senate, the Stolen Valor Act of 2005 essentially made it a crime to lie or even mistakenly claim receipt of a military award. The Act made such claims criminal regardless of whether they were made in public, believed by the listener, caused any harm, or made with an intent to deceive—or any intent whatsoever—and, moreover, failed to contain any exceptions for artistic or satiric claims.

Describing the Act's reach as "sweeping," "limitless," and "without regard to whether the lie was made for the purpose of material gain," the Supreme Court recently struck it down as an unconstitutional abridgment of the First Amendment.[16] Congress quickly responded to the Court by enacting the Stolen Valor Act of 2013 (H.R. 258)—the principle difference being a new requirement that the fraudulent representation be made with the specific intent to "obtain money, property, or other tangible benefit."[17] Without endorsing the validity of this new version, or the overall wisdom of such criminalization, one cannot help but ask whether it should have taken a criminal prosecution, a defendant having to appeal his criminal conviction to the highest court of the land, that Court then throwing out his conviction, and Congress passing a revised version of the statute just to obtain an offense that included an intent requirement in its actual language? This kind of process is also certainly not an efficient use of taxpayer funded resources.

When confronted with the mere possibility that a particular criminal law is vague, the typical reaction of those supporting it is: "Don't worry; prosecutors will exercise their discretion wisely." That argument is made under the mistaken assumption that, even if the laws are too broad, too vague, and have inadequate criminal intent requirements, individuals can count on the

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"knowingly" violating "any provision of [Chapter 16]" and, in that one clause, criminalizes all the conduct proscribed by any of the Lacey Act's numerous statutory provisions or corresponding regulations.

[14] For example, Bobby Unser was prosecuted under 16 U.S.C. § 551, which sets forth broad and blanket regulatory authority enforceable with a criminal penalty. *See United States v. Unser*, 165 F.3d 755 (10th Cir. 1999).

[15] Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266.

[16] *United States v. Alvarez*, 567 U.S. ___, 132 S. Ct. 2537, 2547 (2012).

[17] Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat 448.

executive branch and its line prosecutors to use the laws wisely and in the interest of justice. The validity of that argument should be assessed in the context of prosecutions like *Brigham Oil*.[18]

In August 2011, the U.S. Attorney's Office in the District of North Dakota charged seven oil companies with a violation of the Migratory Bird Treaty Act for the illegal "taking" of migratory birds. The company that would eventually become the named defendant in a federal district court decision dismissing the charges was Brigham Oil & Gas, L.P. This company was charged with "taking" two mallards found dead near its lawful reserve pits, which are areas near gas and oil drilling operations that are used to contain drill cuttings and other byproducts of the drilling.[19]

The prosecutors based their case upon an extravagantly broad reading of the Migratory Bird Treaty Act with criminal penalties originally enacted by Congress in 1918 to codify the provisions of a 1916 treaty between the United States and Great Britain (for Canada). The treaty was intended to reach conduct directed at birds, such as hunting and poaching, and not acts or omissions that have the incidental or unintended effect of killing birds.[20] Nevertheless, the prosecutors asserted that the words "take" or "kill" in the Act encompass not only activity directly targeting birds, but also habitat modification and other consequences of lawful commercial activity.[21] In other words, in the absence of a clear description of the specific conduct that would constitute a violation of the Act, the prosecutors exercised their discretion to interpret a statute that had been on the books for nearly a century to include behavior that was never contemplated at the time of enactment.

When dismissing the charges, the district court noted that extending the Act in the manner proposed by these prosecutors would cause "absurd results," including the criminalization of cutting brush and trees, and planting and harvesting crops.[22] In fact, "many ordinary activities such as driving a vehicle, owning a building with windows, or owning a cat, inevitably cause migratory bird deaths."[23] Although the government recently decided not to appeal the dismissal, the mere fact that this case was prosecuted calls into question the prosecutorial restraint that is so frequently cited to rationalize the enactment of flawed criminal laws lacking in adequate criminal intent requirements.[24]

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[18] *United States v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202 (D.N.D. 2012).
[19] *Id.* The two other defendants on the motion to dismiss were Newfield Production Company and Continental Resources Inc. They were charged with "taking" four birds and one bird, respectively.
[20] *Id.* at 1208.
[21] *Id.* at 1211.
[22] *Id.* at 1212.
[23] *Id.*
[24] Although the primary injustice in this case came through a stretching of the statute to cover conduct never contemplated by Congress, the fact that the offense charged was a strict liability crime surely assisted in that poor

This critique should not be misunderstood as being anti-regulation. It is precisely because the sight of a dead bird encased in an oil slick is so sickening that it is imperative to rein in overly expansive criminalization and the resulting unbridled prosecutorial discretion. Emotional overreaction and criminal justice are a combustible mix. The case of *Brigham Oil* is just one example of how the criminal law can easily become untethered from its moral anchor when it is used as a tool for social or regulatory control. This is as true when the criminal law is used to prosecute controlled substance abusers as it is when it is used against companies whose lawful commercial activities unfortunately, but incidentally, kill birds. In the eyes of some prosecutors, both are "disliked" and "deserve" to be prosecuted. Common sense and the prudent exercise of prosecutorial discretion should have counseled restraint, but ultimately failed to do so.

Unfortunately, a quick review of two major pieces of recently enacted federal legislation demonstrates that Congress continues to enact overly broad, vague crimes, frequently without clear intent requirements, which encourage prosecutors to unilaterally define laws. For example, the Dodd-Frank Wall Street Reform & Consumer Protection Act of 2009, is 848 single-spaced pages in length and contains over two dozen criminal offenses—many lacking clear and adequate criminal intent requirements.[25] One provision in particular criminalizes the "reckless" disclosure of systematic risk determinations and carries a penalty of up to five years imprisonment and up to a $250,000 criminal fine.[26] And yet, a person can be convicted of this offense without the government needing to prove very much. The government need not prove that the defendant knew the disclosure was prohibited, nor that the defendant made the disclosure knowingly, or even that the defendant knew what she was disclosing—and certainly no requirement on the government to prove that the defendant acted with criminal intent.

The recent Violence Against Women Reauthorization Act, a perfectly laudable proposal to fund the investigation and prosecution of violent crimes against women, restitution, and civil redress, contains yet another iteration of this trend.[27] Buried near the end of its 400 pages is a new enhancement to the federal cyber-stalking statute, 18 U.S.C. § 2261A, which prohibits the use of the mail, any interactive computer service, or any facility of commerce, to "engage in a course of conduct that causes substantial emotional distress to [a] person or places [a] person in reasonable fear of the death of, or serious bodily injury to, [themselves, a member of their immediate family, or a spouse or intimate partner,]" if done with the intent to "kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress to a person in another State."[28]

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exercise of judgment. *See* 16 U.S.C. §§ 703 and 707(a). The inclusion of <u>any</u> sort of criminal intent requirement in the language of this particular offense could have gone a long way in foreclosing this prosecution.

[25] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376.

[26] Pub. L. No. 111-203, 124 Stat. 1446 codified at 12 U.S.C. § 5382(a)(1)(C).

[27] The Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat 54.

[28] 18 U.S.C. § 2261A(2) (2013).

Certainly some of the conduct covered by this statute warrants criminalization, but its reach is disturbingly broad and some of its key terminology is exceedingly vague and left undefined. What does it mean "to intimidate"? What does it mean to cause someone else emotional distress and under what circumstances is it "substantial"? Does this mean that whether an act is a federal crime is determined solely by the reaction of the person who reads or hears it? This offense is drafted in such a poor manner that it could result in a federal conviction—with up to five years imprisonment—for the emotionally immature college student who sends angry emails to a cheating boyfriend or the blogger who threatens to organize a protest against a public official in relation to a particular vote. What about the parents who text their children threatening to ground them for two weeks if they do not return home by curfew? When a criminal offense is written so vaguely, even if it includes some criminal intent requirements, it can and will be used in ways that Congress never intended and that contradict the fundamental principles underlying our criminal justice system. Prosecutorial discretion is never the solution to—or an excuse for—such poor criminal lawmaking.

Unfortunately, these examples only offer a tiny glimpse of the many dangerous offenses lurking in our ever-expanding federal criminal code. Historically, it was presumed that the law, and especially the criminal law, was "definite and knowable," even by the average person.[29] Ignorance of the law was therefore no defense to criminal punishment. The small number of criminal offenses, and the fact that the majority of offenses criminalized inherently wrongful conduct, made this presumption both reasonable and just. With the enormous growth of federal criminal offenses, however, this presumption has become a trap for the unwary. As criminal law professor Joshua Dressler has explained:

> Whatever its plausibility centuries ago, the "definite and knowable" claim cannot withstand modern analysis. There has been a "profusion of legislation making otherwise lawful conduct criminal (*malum prohibitum*)." Therefore, even a person with a clear moral compass is frequently unable to determine accurately whether particular conduct is prohibited. Furthermore, many modern criminal statutes are exceedingly intricate. In today's complex society, therefore, a person can reasonably be mistaken about the law.[30]

Indeed, with over 4,450 federal statutory crimes and an estimate of tens of thousands more in federal regulations, neither criminal law professors nor lawyers who specialize in criminal law can know all of the conduct that is criminalized. Average law-abiding individuals are at an even greater disadvantage.

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[29] Joshua Dressler, *Understanding Criminal Law* 166 (3d ed. 2001).
[30] *Id.* (internal citation omitted).

As the maze of federal criminal offenses continues to grow, the severe implications of the persistent erosion of criminal intent will only increase the injustice in our criminal system. The injury caused by this erosion is not limited to the individual; it infects our entire criminal justice system and disrupts the rule of law in society as a whole. When Congress fails to include adequate criminal intent requirements in its laws, it effectively abdicates its power and responsibility by providing prosecutors with unbridled discretion and inviting judges to engage in lawmaking from the bench. 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. The failure to adhere to these constitutional and prudential limits is a true abuse of our government's greatest power and a considerable threat to the stability of our entire social system.

IV. Solutions

With nearly any problem, the most important step towards a solution is acknowledging the problem's existence and gaining an understanding of its root cause. Addressing the decline of criminal intent is no different—the solution can be derived almost entirely from the path that led to the problem. In this case, that path is the flawed federal criminal lawmaking process. Congress consistently fails to include criminal intent requirements in new and modified criminal offenses. While the cause of this failure is not entirely clear—it could be oversight, poor draftsmanship, or even deliberate Congressional reasoning—the solution is. Congress should carefully evaluate criminal intent requirements in all criminal lawmaking going forward. And, given the unique qualifications of the Judiciary Committees, which alone possess the special competence and expertise required to properly draft and design criminal laws, this evaluation should always include Judiciary Committee consideration prior to passage.[31] The Members of this Committee are far better suited to take on this critical role and to encourage other Members to always seek Judiciary Committee review of any bills containing new or modified criminal offenses.

But because an intention to do better is not enough to address the current situation, Congress should also enact statutory law establishing a default criminal intent requirement to be read into any criminal offense that lacks one. This requirement should be protective enough to

[31] This practice could be guaranteed by changing congressional rules to require every bill that would add or modify criminal offenses or penalties to be subject to automatic sequential referral to the relevant Judiciary Committee. Sequential referral is the practice of sending a bill to multiple congressional committees. In practice, this first committee has exclusive control over the bill until it reports the bill out or the time limit for its consideration expires, at which point the bill moves to the second committee in the sequence, in the same manner. The positive impact of such a practice was documented in the *Without Intent* Report, which found a statistically significant positive correlation between the strength of a *mens rea* provision and Judiciary Committee action on a bill containing such a provision. *See Without Intent* Report at 20-21.

prevent unfair prosecutions and the default rule should apply retroactively to all existing laws.[32] Enacting this default *mens rea* legislation will not only address the unintentional omission of criminal intent terminology, it will force all members of Congress to give careful consideration to criminal intent requirements when adding or modifying criminal offenses and to speak clearly and deliberately when seeking to enact strict liability criminal laws.

Although it is usually unwise to do so, Congress could draft the reform legislation to allow for the enactment of, or continuing existence of, certain strict liability offenses. Going forward, however, Congress would need to make it clear in the express language of any strict liability statute that it is the intentional will of Congress to create a strict liability offense and that the ramifications of dispensing with any intent requirements were expressly considered. Invocation of this exception should be a true rarity, as even the Supreme Court has cautioned against the imposition of strict liability in the criminal law and stated that all but minor penalties may be constitutionally impermissible without any intent requirement.[33] NACDL urges against the imposition of strict liability in the criminal law as a general matter. Where strict liability is deemed necessary, NACDL cautions this body to employ it only after weighty deliberation.

As the *Without Intent* Report and the enactment of the recent legislation discussed above demonstrate, even when Congress actually includes a criminal intent requirement in a new or modified criminal offense, the requirement is frequently weak and inadequate. Again, this problem undoubtedly stems from the flawed federal criminal lawmaking process that rarely affords, or encourages, the great deliberation needed for determining the proper criminal intent requirement for a particular offense and articulating it with sufficient precision and clarity. When drafting a criminal offense, one must carefully consider how the criminal intent requirement will actually operate when applied to the specific conduct being criminalized.

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[32] As previously stated, when evaluating criminal intent requirements, NACDL believes that the term "willfully" is preferable to the term "knowingly." *See supra* n. 12. Rather than rely on federal courts to apply a variety of definitions based on the jurisdiction of the offense, any statute enacting a default criminal intent requirement should clearly define any criminal intent terms that are used by, or contained in, the legislation.

[33] In *Morissette v. United States*, the Supreme Court held that, as a general matter, the penalties imposed for public welfare offenses for which the imposition of strict liability is permitted "commonly are relatively small, and conviction does not grave damage to an offender's reputation." 342 U.S. 246, 256 (1952). The Court was clear about why the imposition of strict liability in the criminal law is traditionally disfavored:

> 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. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Id. at 250-51 (citations omitted).

Merely relying on a standard criminal intent term located in the introductory language of a criminal offense will almost never produce a criminal offense that is both clear and adequately protective. Criminal offenses that provide the best protection against unjust convictions are those that include specific intent provisions and provide sufficient clarity and detail to ensure that the precise mental state required for each and every act and circumstance in the criminal offense is readily ascertainable.

Enactment of default criminal intent legislation would be a significant step in the right direction, but it would not absolve lawmakers of their responsibility to draft with clarity and precision. The importance of sound legislative drafting simply cannot be overstated, for it is the drafting of the criminal offense that frequently determines whether a person, who acts without intent to violate the law and knowledge that their conduct is unlawful, will endure a life-altering prosecution and conviction, a deprivation of liberty, and the tremendous collateral consequences that follow.[34] Further, Members of Congress drafting criminal legislation must resist the temptation to bypass this arduous task by handing it off to unelected regulators to engage in criminalization by regulation. The United States Constitution places the power to define criminal responsibility and penalties in the hands of the legislative branch. Therefore, it is the responsibility of that branch to ensure that no one is criminally punished if Congress itself did not devote the time and resources necessary to clearly and precisely articulate the law giving rise to that punishment.

V. Conclusion

NACDL is grateful for the opportunity to share our expertise and perspective with the Task Force and commends the efforts of the Task Force to address the problem of 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 political spectrum have highlighted the problem of overcriminalization for several years. Deficient intent provisions are a core aspect of that problem. NACDL believes that the solutions outlined above constitute meaningful, important, and achievable remedial steps that will garner broad support. We continue to be inspired by your willingness to tackle this problem and stand ready to assist in every way possible.

Respectfully,
Norman L. Reimer
Executive Director, National Association of Criminal Defense Lawyers
1660 L Street N.W. 12th Fl., Washington, D.C. 20036
Phone: (202) 465-7623 Email: nreimer@nacdl.org

[34] For more information on the collateral consequences that flow from a criminal conviction, visit NACDL's Restoration of Rights Project at *www.nacdl.org/rightsrestoration/*.

RPTS ZAMORA

DCMN WILTSIE

THE CRIMES ON THE BOOKS AND COMMITTEE JURISDICTION

Friday, July 25, 2014

House of Representatives,

Over-Criminalization Task Force

Committee on the Judiciary,

Washington, D.C.

The task force met, pursuant to call, at 10:20 a.m., in Room 2237, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the task force] presiding.

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

Staff Present: Brian Northcutt, Majority Counsel; Robert Parmiter, Majority Counsel; Ron LeGrand, Minority Counsel; Veronica Chen, Minority Counsel; Alicia Church, Clerk; and Veronica Eligan, Minority Clerk.

Mr. Sensenbrenner. Committee on the Judiciary Over-criminalization Task Force will be in order. We have to get this hearing in before the votes start between 11:30 and noon.

Even though it is noticed for 10:30, I think the time for opening statements will burn up the time between now and 11:30. So we can get to the witnesses.

I would like to welcome everyone to today's hearing on the Judiciary Committee's Over-criminalization Task Force. The tenth and final hearing will focus on the abundance of Federal criminal offenses on the books, and the role of the Judiciary Committee's jurisdiction, or lack thereof, under House rules plays this issue.

Over the past year, the task force has examined many important topics in this area, gained valuable perspective on the issues from a number of highly qualified witnesses, two of which rejoin us today for today's hearing.

I anticipate that they will be able to provide this body with meaningful insight into the subject of today's hearing, and I appreciate their continued cooperation in the furtherance of the goals of the task force.

Despite the fact that it is generally accepted that the Federal Government does not possess a general police power, recent studies have concluded that the number of Federal criminal offenses on the books has grown from less than 20, which were directly related to the operation of the Federal Government in the years following this Nation's founding, to nearly 5,000 today, which cover many types of

conduct undoubtedly intended by the framers to be left to the individual States.

At the current rate, the Congress passes an average of over 500 new crimes every decade. This surge is highlighted by a particularly telling statistic. Nearly 50 percent of the Federal criminal provisions enacted since the Civil War have been enacted since 1970.

The sheer number of Federal crimes leads to a number of concerns, issues of notice and fairness where legal practitioners, not to mention the general public, have difficulty in determining if certain conduct violates Federal law and, if so, under which statute.

The disorganization, decentralization and duplicative nature of the Federal collection of criminal laws needs to be addressed. I have introduced legislation to do just that in the Criminal Code Modernization and Simplification Act.

This bill would cut more than a third of the existing Criminal Code, reorganize the code to make it more user friendly, then consolidate criminal offenses from other titles so that Title 18 includes all major criminal provisions.

There are likely a number of reasons for this rapid expansion of Federal criminal law, including the fact that many criminal statutes are drafted hurriedly in response to pressure from the media or public and, as a result, often duplicate offenses already on the books and omit critical elements, such as a valid mens rea or criminal intent.

Additionally, under the current interpretation of the House Rules, it is possible and not uncommon for new criminal legislation

to make its way to the House floor without ever receiving proper scrutiny from the Judiciary Committee.

This committee is comprised of lawmakers and professional staff with expertise in drafting criminal provisions and the ability to avoid redundancy through situational awareness of the entire body of Federal criminal law.

As we move toward wrapping up the business of the task force, in addition to other potential recommendations, we should consider pursuing an amendment to the rules clarifying the jurisdiction of the committee with respect not only to criminal law enforcement, but criminalization and criminal offense legislation as well.

Again, I would like to thank our witnesses for appearing today and would also like to thank the members of the task force for their service over the past year. In the coming months, I hope we can begin to come together to address many of the concerns with over-criminalization that have been identified.

[The statement of Mr. Sensenbrenner follows:]

******** COMMITTEE INSERT ********

Mr. Sensenbrenner. Before introducing Mr. Scott for his opening statement, I would like to ask unanimous consent to include for the record a memorandum dated July 21st, 2014, from the Office of the House Parliamentarian, and a CRS report entitled "Subject: Updated Criminal Offenses Enacted From 2008-2013," dated July 7th, 2014, into the record. And without objection, it is so ordered.

[The information follows:]

******** INSERT 1-1 ********

Mr. Sensenbrenner. And it is now my pleasure to introduce the gentleman from Virginia, Mr. Scott.

Mr. Scott. Thank you, Mr. Chairman.

Mr. Chairman, we created this task force in recognition of the need to address the explosive growth of the Federal prison population and the dramatic expansion of the U.S. Criminal Code.

For 5 decades, Congress has increasingly addressed societal problems by adding a criminal provision to the Federal code. Too often we have done this in a knee-jerk fashion, charging ahead with the same failed tough-on-crime policy and addressing the crime of the day instead of legislating thoughtfully and with the benefit of evidence-based research.

When it comes to criminal law, only those matters that cannot be handled by the States need to be addressed by the Federal Government. What valid purpose is served by creating crimes at the Federal level if they duplicate crimes being effectively enforced by the States?

For example, why should there be a Federal carjacking statute? State and local law enforcement have investigated and prosecuted carjacking effectively for years, long before Congress made it a Federal crime.

2 weeks ago, in testimony before this task force, Judge Irene Keeley reminded us of the following recommendations made by the Judicial Conference in 1995 regarding five types of criminal offenses it deemed appropriate for Federal jurisdiction: Offenses against the Federal Government or its inherent interest, criminal activity with

substantial multistate or international aspects, criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using Federal resources or expertise, serious high-level, widespread State or local corruption, and criminal cases raising highly sensitive issues.

We have ignored these recommendations. Earlier this month the Congressional Research Service of the Library of Congress informed us that 403 criminal provisions were added to the U.S. Code between 2008 and 2013, for an average of 67 new crimes a year.

Of those 403 new provisions, 39 were not even referred to the Judiciary Committee. Over the past several years, we have estimated that there were 4,500 Federal crimes. Now, the new estimate from CRS is approximately 5,000.

In addition to the 5,000 crimes in the U.S. Code, there are approximately 300,000 Federal regulations that are enforced with criminal penalties.

Several witnesses at our hearings have testified that many of the regulations lack an adequate criminal intent or mens rea requirement to protect those who do not intend to commit wrongful or criminal acts from prosecution.

Witnesses have suggested the enactment of a default mens rea as well as legislating the rule of lenity for statutory construction as an appropriate fix for existing statutes and regulations.

We have also heard concerns about Federal agencies' promulgation of regulations that carry criminal sanctions. It is time for Congress

to put an end to that practice, reclaim that authority and retain sole discretion in determining which actions are criminal and what sanctions are appropriate when deprivation of one's liberty is at stake. Regulations can still be enforced with civil penalties. But when criminal penalties are considered, Congress should be involved.

The result of decades of criminalizing more and more activities has been the growth of the Federal prison population from about 25,000 in 1980 to over 200,000 today, making the United States the world's leader in incarceration, about seven times the international average.

The Pew Center on The States estimates for any incarceration rate over 350 per 100,000, the crime reduction value begins to diminish because, at that point, you certainly have all the dangerous people locked up.

We have also learned from the collateral consequences that more than 65 million Americans are now stigmatized by the criminal convictions, bombarded by over 45,000 collateral consequences of those convictions, making reentry and job prospects dim.

In spite of this research that over 350 per 100,000 population yields diminishing returns and the Pew Research Center also said that anything over 500 per 100,000 is actually counterproductive, the United States leads the world at over 700 per 100,000.

That is because unnecessarily locking up people wastes money that could be put to better use. Families are disrupted, making the next generation more likely to commit crimes, over 700 per 100,000 counterproductive, and we lock up well over 700 per 100,000 -- 500 pe

100,000 counterproductive. We lock up over 700.

The testimony received during these hearings has consistently told us that longer sentences are not the answer. Yet, we continue to create more crimes, increase sentences and add more mandatory minimums.

Mandatory minimums has specifically been studied extensively and have been shown to disrupt rational sentencing patterns, discriminate against minorities, waste the taxpayers' money, do nothing to reduce crime, and often require judges to impose sentences that violate common sense.

A "code" is defined as a systemic and comprehensive compilation of laws, rules, regulations that are consolidated and classified according to subject matter.

Our Criminal Code is not a criminal code by that definition, as Federal criminal offenses have spread all over the 51 titles of the U.S. Code, making it virtually impossible for practitioners, not to mention an ordinary citizen, to make any sense out of it.

It is time not only to move all criminal provisions into one title, Title 18, but also clean up and revise it as recommended by witnesses in previous task force hearings.

We need to consider how to proceed, and we also need -- how to proceed and whether or not this should be done by Congress itself or by an appointed commission. It is time that we consider evidence-based research and make wiser policies in our sentencing policy.

We are wasting billions of dollars in crime policy that has been

failing for the past 4 decades. It is time we look for more realistic and reasoned approach to the issue of incarceration, understanding that not every offense requires a long sentence of incarceration.

Mr. Chairman, while this is a final task force hearing, there is still much more to do, and I look forward to working with you in drafting a consensus report, presenting it to the full committee and taking the necessary actions to improve our criminal justice system.

[The statement of Mr. Scott follows:]

******** COMMITTEE INSERT ********

Mr. Sensenbrenner. Time of the gentleman has expired.

Without objection, all members' opening statements will be placed in the record at this point.

[The information follows:]

******** COMMITTEE INSERT ********

Mr. Sensenbrenner. It is now my pleasure to introduce the witnesses.

First is Dr. John S. Baker, Jr., who is the visiting professor at Georgetown Law School, a visiting fellow at Oriel College, University of Oxford, and Emeritus Professor of Law at the LSU Law School. He also teaches short courses on the separation of powers for the Federalist Society with Supreme Court Justice Antonin Scalia.

Dr. Baker previously worked as a Federal court clerk and an assistant district attorney in New Orleans and has served as a consultant to the U.S. Department of Justice, U.S. Senate Judiciary Subcommittee on Separation of Powers, the White House Office of Planning, USIA and USAID.

He was a Fulbright scholar in the Philippines and a Fulbright specialist in Chile. Dr. Baker served as a law clerk in the Federal District Court and Assistant District Attorney in New Orleans before joining LSU in 1975.

While a professor, he has been a consultant of the State Department and the Justice Department. He has served on the ABA Task Force, which issued the report "The Federalization of Crime."

He received his bachelor of arts degree from University of Dallas, his JD from the University of Michigan Law School, and his Ph.D. in political thought from the University of London.

Mr. Steven D. Benjamin is the President of the National Association of Criminal Defense Lawyers. The NACDL 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 & DesPortes.

"DesPortes"? "DesPortes"?

Mr. Benjamin. "DesPortes."

Mr. Sensenbrenner. He serves as special counsel to the Virginia Senate Courts of Justice Committee and is a member of the Virginia Board of Forensic Science and Virginia Indigent Defense Commission. He previously served as the President of the Virginia Association of Criminal Defense Lawyers.

I would like to ask each of you to confine your remarks to 5 minutes. You know what the red, yellow and green lights mean. Without objection, your full written statements will be placed in the record.

And, Dr. Baker, you are first.

STATEMENTS OF JOHN S. BAKER, PH.D., VISITING PROFESSOR, GEORGETOWN LAW SCHOOL, PROFESSOR EMERITUS, LSU LAW SCHOOL; STEVEN D. BENJAMIN, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

STATEMENT OF JOHN S. BAKER, PH.D.

Mr. Baker. Thank you, Mr. Chairman, Mr. Ranking Member and Members of Congress.

I have testified here twice before and I appreciate --

Mr. Sensenbrenner. Turn the mic on.

Mr. Baker. I have testified here twice before, and I thank the task force for allowing me to come back. Actually, I am coming back on the issue that I started out on on my own, which was counting Federal crimes.

And I have to concur with everything that I have heard about the problem of Federal courts. And I began with the numbers. And while numbers are not everything, they do tell a certain story.

So I want to do three things quickly: One, talk a little bit about what the numbers are; two, where are we going with the numbers; and, three, what is the significance of these numbers.

When I testified on November 13th, I mentioned the tremendous number of Federal crimes and, really, the unknown number of Federal regulatory offenses. After that, this task force asked the Congressional Research Service to conduct a count from 2008 to 2013,

which is where my last count left off. They came up with the number of 403 new Federal crimes. That is a not counting regulatory offenses. That is just from the U.S. Code.

And it is important to say that the counts from CRS, my count and the Department of Justice counts have used fundamentally the same methodology, and that is important for consistency.

What is significant -- second point -- about where we are going, it seems to me, is what this says about the average number of crimes and the total number of crimes.

When I did the count in 2008, as of 2008, there were 4,450 crimes at least. CRS has noted that we have an additional 403 crimes. That brings us up at least to 4,853 crimes, almost 5,000 crimes. It means that, essentially, Congress is passing 500 new crimes a decade.

Now, in the ABA Task Force that I served on back in the 1990s, the notation was that, since the Civil War, 40 percent of all Federal crimes since the Civil War had been passed since 1970, from 1970 until about 1996.

Well, when you add what has gone on since 1996, we are approaching 50 percent of all Federal crimes ever enacted in this country, enacted since 1970, and that was the beginning of the war on crime, which, you know, we haven't been winning that war too well.

What does this mean for the future? Well, the rate of crimes appears possibly to be increasing. When I did my count, it was 56.5 crimes a year. CRS count shows 67-point-something per year. Now, that number may be skewed because, in 2008, Congress passed 195 crimes.

What is the significance of all this? Well, if you talk to an assistant U.S. attorney -- and I have debated a number of former assistant U.S. attorneys -- they will tell you that the numbers mean nothing.

They don't use all of these crimes, and they are right. In a certain sense, they don't mean that much to the prosecutor or to the judges because there are only so many cases that you can bring in Federal court.

But where they are really important is in law enforcement, that we have plenty of law enforcement agencies out there that do searches and seizures and arrest in cases that never actually get even an indictment, much less trial.

Given the broad array of crimes, there is virtually nothing that you can't get a basis for probable cause on, which is the basis for arrest, search and seizure.

There is a lot of concern in this country, rightly, about privacy, but I think people ought to be focusing on the fact that surveillance is not just a matter of "privacy," it is a matter of the police power.

The Federal Government, which the Supreme Court has stated twice in recent years, has no general police power. In reality, de facto, it has complete police power, and we are going to see it in the surveillance.

Now, people have been focusing on NSA, but think about drones. There is nothing a drone can't search, basically, because there is every possibility for coming up with the basis of it.

And some of the Federal agencies will conduct raids that will never result in an indictment or, if it does result in an indictment, will not result on those crimes.

It is easy to come up with a RICO charge and a money laundering charge and go out and seize somebody's property. That is the reality of where the real power is.

I think that this task force has done an amazing job of bipartisanship in coming together and identifying the problem. Now it is necessary for your colleagues in both houses to understand what the problem is.

They are taking this tremendous power and dumping it in the executive branch with various agencies that, in reality, have their own agendas. I am not saying they are bad agendas, but they are agendas. And there is really lack of control over what is happening out there in the field.

Thank you for allowing me to make this statement.

Mr. Sensenbrenner. Thank you, Dr. Baker.

[The statement of Mr. Baker follows:]

******** INSERT 1-2 ********

Mr. Sensenbrenner. Mr. Benjamin.

STATEMENT OF STEVEN D. BENJAMIN

Mr. Benjamin. Mr. Chairman and Members of the Task Force, my name is Steve Benjamin, and I am the immediate Past President of the National Association of Criminal Defense Lawyers, this country's preeminent Bar Association advancing the goals of justice and due process for persons accused of crime.

On behalf of NACDL, I commend the House Judiciary Committee for creating the Over-criminalization Task Force, and I congratulate the task force for its impressive work over the past year.

I am especially grateful for the leadership and support of two members of 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. This problem is real and it affects us all.

The sheer number of Federal offenses -- 4,800 at last count, with 439 new enactments since 2008 -- competes only with our number of prisoners, a number greater than any nation on Earth as the most visible consequence of over-criminalization. But the consequences of this problem extend far beyond the number of those imprisoned or stigmatized.

One such consequence is the difficulty of being a law-abiding

citizen. Because criminal law is enforced by punishment, fairness and reason require adequate advanced notice of conduct that is considered criminal.

Adequate notice of prohibited conduct permits people to conform their conduct to the law and, at the same time, justifies punishment when they cross a clearly drawn line. Notice is especially important in a legal system that presumes a knowledge of the law.

Before punishing someone for breaking the law, we should at least ensure that the law is knowable. This is especially true where the conduct is not wrongful in itself and the offense requires no criminal intent. Criminal laws must be accessible not only to laypersons, but also to the lawyers whose job it is to identify those laws and advise their clients.

The problem, however, is that the Federal statutory crimes in the 10,000 to 300,000 Federal regulations that can be enforced criminally are scattered throughout 51 titles of the code and 50 chapters of the CFR.

NACDL does not have a position on whether all criminal statutes should be organized into a single title of the code. Common sense would dictate that most criminal provisions should reside in a single title unless clear evidence exists that a particular criminal provision belongings elsewhere.

Fair notice goes beyond being able to locate criminal statutes within the code. It includes clarity in drafting precise definition and specificity in scope.

With rare exception, the government should not be permitted to punish a person without having to prove that she acted with a wrongful intent, and criminal law should be understandable. 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.

Unfortunately, when legislating criminal offenses, Congress has failed to speak clearly and with specificity, has failed to determine the necessity of new criminal provisions, and has failed to assess whether targeted conduct is already prohibited or better addressed by State law.

While the cause of these failures is not clear, the solutions are. Moving forward, Congress should approach new criminalization with caution and ensure that the drafting and review of all criminal statutes and regulations is done with deliberation, precision and by those with specialized expertise.

Given the unique qualifications of the Judiciary Committee and their counsel, which alone possess a special competence and broad perspective required to properly draft and design criminal laws, this congressional evaluation should always include Judiciary Committee consideration prior to passage.

This practice could be guaranteed by changing congressional rules to require every bill that would add or modify criminal offenses or penalties to be subject to automatic sequential referral to the relevant Judiciary Committee.

The members of this committee are far better suited to take on this critical role and to encourager other members to always seek Judiciary Committee review of any bills containing new or modified criminal offenses.

Hopefully, such oversight would stem the tide of criminalization and result in clearer, more specific, understandable criminal offenses with meaningful criminal intent requirements and would reduce the number of times criminal law-making authority would be delegated to unelected regulators.

These comments are limited to the issues I was invited to address. The problems of over-criminalization are pervasive, and the measures necessary to reform go much further than reorganization or committee oversight. Further discussion, of course, is contained in my written testimony.

I thank you for your bipartisan commitment to the task of ensuring that our Nation's criminal laws are not themselves a threat to liberty. NACDL will continue to support and assist you however we can.

Mr. Sensenbrenner. Thank you very much, Mr. Benjamin.

[The statement of Mr. Benjamin follows:]

******** INSERT 1-3 ********

Mr. Sensenbrenner. The chair is going to reserve his questioning to the end of the questions, assuming we still have time before the bell rings.

And the chair at this time recognizes the gentleman from Alabama, Mr. Bachus.

Mr. Bachus. I thank the chair.

I was looking at Mr. Benjamin's testimony -- both your testimony, but I think we are to the point where we are ready to act, hopefully. We know the problem. It has been reinforced several times. We have gotten the message. And I think the key is what do we do.

And on page 9 of your testimony, Mr. Benjamin, you suggest at least four things I hear, and I know Congressman Scott has mentioned one or two of these.

One is by changing congressional rules to require every bill that would add or modify criminal offenses or penalties be subject to automatic referral to the relevant judicial committee, you know, and I think that is very important because, as you say, this is the committee with the expertise.

Two: Enact a statutory law establishing a default criminal intent requirement to be read into any criminal offense that currently lacks one.

Three -- and it says this requirement should be protective enough to prevent unfair prosecutions and should apply retroactively to all or nearly all existing laws. And I actually know that is a radical idea, but I believe in that.

And I think there ought to be something where you can go before a judge and present some evidence or before a board, particularly some of these environmental crimes. I could mention several cases of where people discovered hazardous waste on their property and reported it, but they couldn't afford to dispose of it fast enough.

And a lot of these cases, I talked to a former Congressman -- Energy and Commerce was dealing with this -- and he said we had a lot of these cases in the 1980s and early 1990s and we kept trying to do something, but we couldn't figure out what to do. And maybe that is because it wasn't judiciary.

The next thing -- and I am going to ask your reaction -- on strict liability, your association urges strict liability not be imposed in a criminal law as a general matter. Where strict liability is deemed necessary, the body only employ it only after full deliberation and then only if explicit in the statute. I think that, you know, we ought to say, if it is not explicit in the statute, there is no strict liability.

And the fourth one is that -- I did not know this, but -- and I will say this to the members of the panel. At the bottom of the page, he says, "Supreme Court has cautioned against the imposition of strict liability and criminal law and has stated that all but minor penalties may be constitutionally impermissible without any intent requirement."

You know, we have said several times in our deliberations -- and witnesses have -- that, without an intent requirement, you know, I can see a minor fine, but when you are talking about putting someone in

jail for a year and a day, that is pretty scary.

But I would just say -- I would ask both of you to give us five or six specific statutes that we can do or your associations can even, you know, draft some just as a model and we could look at them, and I think that would be particularly helpful.

I really appreciate your testimony. And, Dr. Baker, you have been here before.

This, to me, is such an important thing because I think we have seen travesties of justice. We have seen people with no criminal intent. And, if anything else, the government can use that power to force them to do things just with the threat. You know, they don't have to get a conviction.

And you could really -- it could be used in a way that we see some countries around the world that use the judicial process simply to put people in jail that stand in their way of whatever their goal is. And I hate that, on certain cases, people with agendas have maybe done that here. That is a shame because that is not America. That is not what our constitutional forefathers envision.

My time is up.

Mr. Sensenbrenner. Time of the gentleman has expired.

The gentleman from Virginia, Mr. Scott.

Mr. Scott. Thank you, Mr. Chairman.

Dr. Baker, what problems could occur if we defer to States for prosecution of virtually all cases that do not have a bona fide Federal nexus?

Mr. Baker. Well, even today, in most cases, the overwhelming number of cases are still prosecuted at the State level. It is more or less on a selective basis that prosecutors pick cases.

Sometimes there are conflicts between local law enforcement people in terms of where the jurisdiction is fighting over certain cases -- high-profile cases. Other times, it's cooperation based on money.

When I was prosecuting in New Orleans, we had longer sentences than the Federal, if you can believe that. And so all of the Federal drug cases the Federal agents would steer into our courts because of the longer sentences. Some States, the drug people will steer the case still into State court if there is a tougher provision on search and seizure.

So law enforcement people are very practical. And so to give a general answer to it, you would have to be specific place by place. I am not exactly sure what you are trying to -- would it overwhelm the State? Is that what you are talking about?

Mr. Scott. No. Just as a general matter, we ought to defer to the States.

One of the previous witnesses said, in ascertaining -- when you go through the list of things that you ought to consider, the differential in penalties was not on their list of things that were legitimate to consider.

Mr. Baker. Really?

Mr. Scott. Do you agree with that?

Mr. Baker. No.

Mr. Scott. That you can pick and choose your jurisdiction based on the --

Mr. Baker. Absolutely. We did it.

Mr. Scott. Well, yeah, you did it.

Mr. Baker. Yeah. I mean, we did it. The question was --

Mr. Scott. And then we did it in Richmond, and people brag about the fact that Project Exile worked.

Mr. Baker. I wrote against -- I have an article against Project Exile. I will show it to you.

Mr. Scott. Good. Well, without pointing out that, in Richmond, the crime rate went down because it had Project Exile, but in other cities in Virginia that didn't have Project Exile, the crime rate went down more.

Mr. Baker. Exactly. I point that out in my article.

Mr. Scott. Mr. Benjamin, you mentioned a notice. How do you get noted -- if you had mens rea, obviously, you had notice because you had criminal intent.

How else would you get notice out there so the people know that they are committing a crime?

Mr. Benjamin. Well, you make the laws accessible. Now, if someone wants to determine in advance whether their conduct -- their proposed conduct is criminal, they have got to hire a lawyer to answer that question and then the lawyer has got to find the statute within the 51 titles of the code.

It is nearly an impossible task. And that is why we always hedge our bets. Few lawyers are going to say you can do that. It is because the law permits such uncertainty. It is so ambiguously written that it is impossible to know even by lawyers whether proposed conduct is truly lawful or unlawful.

Mr. Scott. Is that why the rule of lenity is so important?

Mr. Benjamin. That is exactly why the rule of lenity is so important.

Mr. Scott. Can you say a word about the overlapping crimes in State and Federal and what it does for the so-called trial penalty.

Mr. Benjamin. I certainly can.

The trial penalty is the penalty for going to trial, meaning that, if you -- let me back up. Because I think it is a unique and cherished American value consistent with freedom and liberty, that if the government accuses us of a crime and threatens to take away our freedom, we have that right to stand up to the government and not only deny it, but make them prove it, to say, "Oh, yeah? Prove it."

But we have completely lost that right because, if we go to trial either because we want to make the government prove their allegation or we want to challenge the constitutionality of a dubious statute or because we are innocent, we can no longer do that because, if we lose our bid to challenge the government, then we face staggering mandatory minimum sentences that can be stacked by the prosecution to beat us into guilty pleas. That is not how our system was designed.

Mr. Scott. Are there problems in consolidating all of our codes

into Title 18 or would it be better to have them spell all around where the subject matter crime goes with the subject matter like the Agriculture Code?

Mr. Baker. Well, first of all, when the proposed Federal Criminal Code back in the 1980s came before the Judiciary Committee, the real problem was, in organizing the code, people didn't pay attention to all of the many provisions. In one sense, it was a code, but in another sense the Federal Government should not have a code, because a code is a comprehensive statement of criminal law.

And if you believe, as I do, constitutionally that Congress has only limited powers and has to justify it on particular enumerated powers, then the idea of a comprehensive Criminal Code is very difficult to create without, in effect, expanding Federal power.

My main concern about a general code like that would -- even with an attempt to limit Federal power, it would de facto end up expanding Federal power.

Mr. Sensenbrenner. The gentleman's time is expired.

The gentleman from Michigan, Mr. Conyers.

Mr. Conyers. Thank you, Mr. Chairman.

I want to thank both of you gentlemen.

And this is our tenth hearing, and both of you have been here before. So this is a good place and a good point to begin with, is: How do you see the cumulative effect and impressions and understanding that we have gleaned out of these ten hearings this year and last year?

Dr. Baker, why don't you start us off on that.

Mr. Baker. Well, if I compare back to Federal criminal trials that I sat back -- through when I was a law clerk and Federal trials today, the biggest thing that strikes me is the imbalance of power and how the power has shifted so dramatically towards Federal law enforcement to the point where not everyone, but there is a certain arrogance that pervades the prosecutors. And it goes with the territory, unfortunately. When you give anybody too much power, they are going to use it.

And I don't mean that they are using it for what they perceive to be bad things. They believe that what they are doing is the right thing. Of course, when they then resign and become criminal defense attorneys, they get a different perspective and they realize, "Well, maybe, maybe, we were a little too aggressive." And I can tell you that I have been on panels with former AUSAs and they have said that, now that they are on the defense side.

The reality is there are three perspectives: The prosecutor, the defense, and the judge or jury. And they are not the same perspectives. And there has to be a balance between the two sides, and I think at this point that the balance is too much in favor of Federal prosecution.

Mr. Conyers. But, still, State crimes are far more numerous than are Federal.

Mr. Baker. They do. But here is the difference: You know from Detroit -- and I can tell you from New Orleans -- people trying to prosecute and arrest, they are running around trying simply to deal with the violent crimes that they have to. Very few prosecutors in

major cities have time to go looking for things. They can't find what has already been done.

That is not the case in Federal court. In Federal court, you convene the grand jury and you go out looking. You got the defendant, potential target, and then you figure out, "Well, what has this person" -- "What can we nail him on?" That is not the way local prosecutors work.

Mr. Conyers. Attorney Benjamin, would you weigh in on this discussion, please.

Mr. Benjamin. I agree absolutely with Dr. Baker, that the most striking facet of the current state of the criminal justice system and the biggest, most dramatic change when I first began 35 years ago to defend criminal cases is the overbalance of power. Federal criminal defense now is all about negotiating a resolution.

Mr. Baker. That is all it is.

Mr. Benjamin. That is all it is.

It is no longer about guilt or innocence. Guilt is presumed, at least by the prosecution, and they have the tools available to compel the guilty plea so that that is not even a question. It is all about snitching out, cooperating, doing whatever you have to to get the leniency -- the fair treatment that you seek.

Mr. Conyers. So what, then, do we bring to our full Judiciary Committee in the House of Representatives in terms of these ten hearings that we have had this year and last year? I mean, what can we take?

And I want to commend the chairman and ranking member,

Sensenbrenner and Scott, for having put this together as they have. But where do we go from here?

Mr. Benjamin. I think the immediate thing is reform of the mens rea problem. The immediate band-aid that is necessary is a default rule of mens rea where none appear in criminal statutes and are a rule of construction that applies a mens rea to all -- at least to all material elements.

Mr. Conyers. A single mens rea standard or --

Mr. Benjamin. No. No. Uniform mens rea standards --

Mr. Conyers. Okay.

Mr. Benjamin. -- clearly defined across the board.

Mr. Conyers. Uh-huh.

And what would you add, Dr. Baker?

Mr. Baker. Well, I would agree with that. I have been involved a little bit in trying to draft that statute, and I can tell you it is not an easy statute to draft because of the way, first of all, the Federal crimes are drafted and how differently they are.

I would add to those two things, which I endorse, clear definitions of what is a crime, what is a felony, what is a misdemeanor.

And a way to deal with the strict liability is simply to say noncriminal offense so that -- and this is in the model Penal Code, but not many States adopted it. I mentioned it in earlier testimony.

You have a provision for noncriminal offenses and that strict liability is limited to those. So if you think they need to be prosecuted, fine, but the stigma of crime is not on there.

Mr. Sensenbrenner. Time of the gentleman has expired.

Gentleman from Georgia, Mr. Johnson.

Mr. Johnson. Yes. As I listened through -- to the testimony and did a little reading, I was impressed with the fact that, Dr. Baker, in your paper, you cite statistics showing that, in 1983, it was estimated that there were 3,000 or so criminal offenses --

Mr. Baker. Right.

Mr. Johnson. -- in the code and, in 1998, you cited DOJ figures of 3300, as of 1998.

Mr. Baker. Well, no. Those were two different studies, and it is noted in there. One was by DOJ, the first one. The other one involved the same person, but there were different methodologies used and that is why the different numbers.

Mr. Johnson. I see.

But that does not indicate that there was no growth in the number of offenses.

Mr. Baker. Oh, there was growth. But, actually --

Mr. Johnson. May or may not have been 300, but --

Mr. Baker. No. It was more. It was more than that.

Mr. Johnson. Well, okay. All right. Well -- so that is a modest assessment, 3,300 as of 1998. That was 300 more than in 1983. And then between 1998 and 2008, that 10-year period saw a rise to 4,450, according to your --

Mr. Baker. The 1998 figure, which I explain in there, is not a reliable figure because it did not follow the methodology that --

Mr. Johnson. So you think it was higher?

Mr. Baker. It was much higher.

Mr. Johnson. Okay.

Mr. Baker. The DOJ methodology, which I used and which has been by email told to me by the person who conducted it that I use the same methodology that DOJ did, we explained that methodology to CRS and CRS basically followed that.

But what happened in the 1998, they did not break particular statutes down into the various crimes within one statute. They simply counted the statutes.

Mr. Johnson. I see. Okay.

So -- and between 2008 and 2013, you cite an additional 403.

Mr. Baker. Well, that is a CRS report, and the skewed year is 2008 with 195 crimes.

Mr. Johnson. Well, it puts us, according to the reports, to close to 5,000 offenses. And it looks like from 1983 through 2008 was an explosion, also, in the number of human beings we have imprisoned --

Mr. Baker. Right.

Mr. Johnson. -- in this country.

And then, at the same time, we have had the growth of what I will say is the conservative movement in the country, which has called for less government, less taxes, which, when you put on top of that the fact that you are needing more prisons -- more jail space and more prisons, you have seen a growth in the private prison --

Mr. Baker. Right.

Mr. Johnson. -- industry.

-- and, in fact, 1983, 3,000; 2013, close to 5,000.

1984, it should be noted, is when the Corrections Corporation of America, which is the largest private prison for-profit corporation -- that is the year that that was founded, 1984.

And since that time, they have experienced exponential growth and -- to the point where they, along with -- there is another big one. I forget the name -- Georgia -- not Georgia -- GPC or something like that. But those corporations are publicly held corporations selling stock on Wall Street.

What connection do you see between the growth of the private prison industry and the number of -- and the amount of contributions that those companies make to legislators, including on the Federal level, and the growth in the prison industry -- the growth in the prisons industry, the growth in lobbying, and the growth in statutes putting people in prison? What connection do you see?

Mr. Baker. Well, I can draw a connection between the growth and certain things. I can't between all of them. I actually represented at one point a sheriff in Louisiana who built the largest public prison system, and the whole thing was funded by Federal dollars. He went in the business of taking in Federal prisoners because the Federal rate was much higher than the State rate. There is a definite connection in terms of the growth of prisons.

But on the conservative side, especially in Texas and in Louisiana, they are understanding that this is bankrupting the States.

And so now you have some conservatives flipping and calling for a reduction even in State criminal penalties and State prison sentences because they realize that the growth of it, the expense is unsustainable.

Mr. Johnson. Well, I tell you --

Mr. Sensenbrenner. Time of the gentleman --

Mr. Johnson. Mr. Chairman --

Mr. Sensenbrenner. -- has expired.

Mr. Johnson. Mr. Chairman, could I make just one last statement?

I would imagine that we will now see a rise in lobbying costs that are incurred by the private prison industry.

Thank you, Mr. Chairman.

Mr. Sensenbrenner. Okay. The gentleman from New York, Mr. Jeffries.

Mr. Jeffries. Thank you, Mr. Chairman.

And let me thank the witnesses for your presence here today and your continued contributions to the efforts of this panel.

Attorney Benjamin, you mentioned something that was very troubling -- and, Dr. Baker, you agreed with it -- the notion that Federal criminal defense has simply become negotiation efforts toward resolution.

Mr. Baker. Right.

Mr. Jeffries. And that just seems fundamentally inconsistent with the notions that have always served to undergird our criminal justice system, the presumption of innocence.

If there is going to be a presumption of innocence, it seems to me it cannot be the case that, once someone is being investigated and/or is indicted by our government, that the only real option available to someone who, in theory, should be presumed innocent is to negotiate the most favorable resolution, which ultimately will likely result in some form of sanction and/or jail time.

Mr. Baker. Right.

Mr. Jeffries. So the question becomes: How do we unpack this dynamic in a way that allows this task force, the House, this Congress, to make a meaningful impact?

And I would suggest -- and I would like to get the observations of both of you -- that it seems to me that there has got to be some way to reign in the inappropriate exercise of prosecutorial decision-making.

You referenced the term "arrogance" that exists perhaps amongst some prosecutors, and I believe the majority are operating in good faith, though I may not agree with the decisions that they make.

But who, as it currently exists right now, has the capacity to oversee prosecutorial behavior and/or decision-making? And what consequences are there when inappropriate public policy decisions are being made?

Start with Attorney Benjamin, and we will go to Dr. Baker.

Mr. Benjamin. Well, the power of oversight and the power to reign in Federal prosecutors resides in either DOJ and the Attorney General or the U.S. attorney for a given district. The reality, however, is

that rarely will these individuals want to interfere with the career prosecutors who have been doing this all their lives and are on the line.

And so the answer is to take a look at the tools that are being used to produce this result. And I think that the biggest problem is the existence and the expansion of the use of mandatory minimum sentences. That is what gives the unfathomable power to Federal prosecutors, because they can, in their charging decisions, threaten 10, 20, 30 lifetime mandatory sentences.

That takes the judge completely out of it. If somebody is convicted, what we will say to our clients is, "Yes. Sure. I understand you are innocent. And maybe you have a triable case. But if you lose, you will get a life sentence."

Mr. Jeffries. Right. I appreciate that observation.

Dr. Baker, I want you to respond. But, also, I want to add this observation: Currently, Federal prosecutors have absolute immunity, as I understand it.

Mr. Baker. As long as they are -- well --

Mr. Jeffries. In the context of their --

Mr. Baker. Prosecution -- as long as they are not getting out of prosecution. Sometimes they get involved in investigation.

Mr. Jeffries. Okay. In the context of the prosecution, they have got absolute immunity. Law enforcement has got qualified immunity, as I understand it.

Is that something that we should explore?

Mr. Baker. I guess, as a former prosecutor, I liked absolute immunity when I had it.

I haven't given it enough thought. I think that there is a reason for immunity, whether it should be qualified and more like law enforcement. The assumption is that a prosecutor is under the control, to some extent, of a judge in a way that law enforcement is not.

Mr. Jeffries. Right. That is the assumption.

But I think the testimony that we have received is that that is no longer the case, that even Article III Federal judges to some degree have lost control.

So I am trying to figure out --

Mr. Baker. But the real responsibility is with the President and then the Attorney General.

Mr. Jeffries. Right.

Mr. Baker. The political reality is that -- I don't care what party you are talking about -- that it depends on the particular U.S. attorney and how he or she got appointed and whether they have got a Senator protecting them. That is really what it comes down to.

Mr. Jeffries. One last observation. The problem that we confront is both to rectify the damage that has been done, but also figure out how, moving forward, we can prevent a return to just the cycle of endless criminal statutes being added to the books. And it is often the case that elected officials react to the passions of the public. In fact, that is the kind of constitutional charge of the House of Representatives.

Mr. Baker. Right.

Mr. Jeffries. But in the criminal context, when you respond to the passions of the public, particularly as it relates to a particularly heinous crime, that results in perhaps doing things that, in retrospect, aren't in our best interest.

And I would just encourage all of us, certainly those who are contributing to this effort, to think about that dynamic as we move forward.

Mr. Sensenbrenner. Thank you very much. The time of the gentleman has expired.

Let me recognize myself for 5 minutes to wrap up, and this will be more of comments looking at the last year and what we have been able to discover.

First of all, I want to thank the witnesses for appearing.

The two authorizations of this task force I think have only scratched the surface of what needs to be done because, literally, the Congress and a lot of the agencies have been putting more and more layers on the onion and we are beginning to start to peel off the ones on the outside, and that just asks more questions.

You know, looking at how we got to this and, I think, in order to stop this from getting worse, we do have to very vigorously pursue a change in House Rules. And some of the lapses that have allowed other committees that really don't know very much about the criminal law -- to make criminal law is the fact that the Judiciary Committee has not been very vigorous in asserting its jurisdiction, and that has got to stop.

The parliamentarians have always said that, once we lose jurisdiction because we didn't claim it, then it is much harder to get it back and they will just forget about us when they refer bills. So exchanges of letters for further legislation, I think, is necessary.

We are going to need help in developing a default mens rea statute. "Default" means, when there is not a specific criminal intent in a statute, there will be one. If there is a specific criminal intent, the default statute would not apply. And at least you have to have a criminal intent as one of the elements in terms of obtaining an indictment or a conviction.

Now, in order to get at the proliferation of criminal penalties -- some of them are statutory; some of them are done administratively -- I would like to see the Judiciary Committee draft and get passed and enacted into law a sunset provision of all administrative criminal penalties. It should be a fairly long sunset.

And the committee, I think, can then ask each agency to come in and justify which of those criminal penalties they wish to have continued on the statute books and why. And if they can't justify that in order to get a reenactment through the Congress, then those administrative penalties would simply vanish and we wouldn't have to worry about them anymore.

Now, I think a way to start on the anti-duplication provisions of the code is to start scrubbing the bill that I have introduced in this Congress and the two preceding Congresses, which was designed to reorganize the code and to at least put some sense in it so that people

could look and see what activities were criminal in nature without having to go to a lawyer who can never give them a definitive answer because, no matter how hard the lawyer tries, he will never be able to find what statutes are involved in that.

And I know that, in the few days that we have left in this Congress, none of this is going to be accomplished; however, I would hope that, as we prepare to start the next Congress, we will be able to in a bipartisan manner, which has certainly permeated this particular task force, pick up each of these areas to figure out what to do and to figure out what we can get enacted into law.

And I think the American public -- while they will not see an immediate change in how we approach criminal issues, that there will be something that will be long term that will deal with many of the results of our over-criminalization.

So, again, I want to thank the witnesses.

I want to thank the Members of this task force for putting in a lot of time and, you know, doing a lot of good work. Remember, we have got probably the first two layers off the onion, but there are many more layers that we have got to go.

So, without objection, this subcommittee hearing is adjourned.

[Whereupon, at 11:20 a.m., the subcommittee was adjourned.]