



**Written Statement of
Jim E. Lavine, President
National Association of Criminal Defense Lawyers**

**Before the
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security**

Re: “Reining in Overcriminalization: Assessing the Problems and Proposing Solutions”

September 28, 2010

JIM E. LAVINE, ESQ., is the President of the National Association of Criminal Defense Lawyers (NACDL). A former prosecutor, Mr. Lavine is a practicing criminal defense attorney in Houston, Texas, with extensive trial and appellate level experience in federal and state courts. He has been board certified in criminal law since 1985 by the Texas Board of Legal Specialization and since 1986 by the National Board of Trial Advocacy. In 2007, Jim Lavine received the Robert C. Heeney Memorial Award, NACDL's most prestigious honor, given annually to the one criminal defense lawyer who best exemplifies the goals and values of the Association and the legal profession. In 2006, Mr. Lavine was the Percy Foreman Lawyer of the Year, awarded by the Texas Criminal Defense Lawyers Association, as well as the Harris County Criminal Lawyers Association 2006 Attorney of the Year. He graduated from Williams College and the Illinois Institute of Technology, Chicago Kent College of Law. Mr. Lavine is admitted to practice in both Texas and Illinois.

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The National Association of Criminal Defense Lawyers (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. A professional bar association founded in 1958, NACDL's more than 10,000 direct members — and 80 state and local affiliate organizations with another 28,000 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.

My name is Jim E. Lavine, and I am the President of the National Association of Criminal Defense Lawyers (NACDL), an organization of over 10,000 members. NACDL is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. I am also a practicing criminal defense attorney in Houston, Texas, with extensive trial and appellate level experience in federal and state courts. I specialize in criminal law, primarily white collar crime, and now spend approximately ninety-percent of my time on federal cases. Before moving to private practice, I was a prosecutor for over eleven years. I appreciate the opportunity to testify on behalf of NACDL today.

There are over 4,450 federal crimes scattered throughout the 50 titles of the United States Code. In addition, it is estimated that there are at least 10,000, and quite possibly as many as 300,000, federal regulations that can be enforced criminally. The truth is no one, including the government, has been able to provide an accurate count of how many criminal offenses exist in our federal code. This is not simply statistical curiosity, but a matter with serious consequences.

The hallmarks of enforcing this monstrous criminal code include a backlogged judiciary, overflowing prisons, and the incarceration of innocent individuals who plead guilty not because they actually are, but because exercising their constitutional right to a trial is all too risky. This enforcement scheme is inefficient, ineffective and, of course, at tremendous taxpayer expense. The cost of incarcerating one of every one hundred adults in America is always troubling, but particularly so during a time of economic instability and ever-increasing federal debt.

On July 22, 2009, this subcommittee came together, under the bipartisan leadership of Representatives Bobby Scott (D-VA) and Louie Gohmert (R-TX), to learn about our nation's addiction to overcriminalizing conduct and overfederalizing crime.¹ An esteemed panel of experts explained that this trend takes many forms, but most frequently occurs through: (i) enacting criminal statutes absent meaningful *mens rea* requirements; (ii) imposing vicarious liability for the acts of others with insufficient evidence of personal awareness or neglect; (iii) expanding criminal law into economic activity and areas of the law traditionally reserved for regulatory and civil enforcement agencies; (iv) creating mandatory minimum sentences that fail to reflect actual culpability; (v) federalizing crimes traditionally reserved for state jurisdiction; and (vi) adopting duplicative and overlapping statutes. The harm caused by this dangerous trend is frequently amplified by the executive and judicial branches, but it is born in the legislative process.

¹ *Overcriminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009), available at http://judiciary.house.gov/hearings/hear_090722_2.html [hereinafter *House Hearing*].

Supported by a broad coalition of organizations—ranging from the right to the left—last summer’s hearing received attention from national media and ignited the overcriminalization reform movement. Two coalition organizations, NACDL and the Heritage Foundation, dedicated themselves to analyzing the legislative process for enacting criminal laws in order to provide Congress, and the public, with concrete evidence of the problem. This analytic study formed the basis of a groundbreaking, non-partisan, joint report entitled: *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*. At the official release event, held on May 5, 2010, on Capitol Hill, Chairman Scott heralded the report as a “road map” for reform and Ranking Member Gohmert lamented the victimization of citizens by criminal laws lacking adequate intent requirements.

The *Without Intent* report methodologically dissects the legislative process for enacting criminal laws, sets forth troubling findings, and offers a blueprint for reform. The report demonstrates just how far federal criminal lawmaking has drifted from its doctrinal anchor in fair notice and due process; that is, individuals should not be subjected to criminal prosecution and conviction unless they intentionally engage in inherently wrongful conduct or conduct that they know to be unlawful. The report supports the expert testimony from the first hearing and evidences the conclusion that the legislative process itself is flawed and disjointed. Finally, it proposes commonsense, workable solutions to a problem that transcends political affiliation or ideology.²

And it was that message that echoed throughout the tremendous media coverage that followed the report’s release. Just one month after its release, over 300 articles, from news organizations spread coast to coast, were written about the report.³ The press has taken notice of this unlikely coalition between the left and the right, and the broad bipartisan support for

² The *Without Intent* report recommends that Congress pursue the following five reforms: (1) Enact default rules of interpretation to ensure that *mens rea* requirements are adequate to protect against unjust conviction; (2) Codify the common-law rule of lenity, which grants defendants the benefit of doubt when Congress fails to legislate clearly; (3) Require Judiciary Committee oversight of every bill that includes criminal offenses or penalties; (4) Provide detailed written justification for and analysis of all new federal criminalization; and (5) Draft every federal criminal offense with clarity and precision. 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.

³ See, e.g., *The Congressional Assault On Criminal Justice*, THE BULLETIN, May 7, 2010; Editorial, *Ignorance of the law, Congress going down a dangerous path*, LAW VEGAS REVIEW-JOURNAL, May 6, 2010; *Guilty, or not, Bipartisan group tackles the overcriminalization of the legal process*, Fredericksburg.com, May 10, 2010; Mark Sherman, *Report: Congress makes too many vague laws*, ASSOCIATED PRESS, May 4, 2010 (reprinted in The Seattle Times, the Cleveland Plain Dealer, the Boston Globe, and many others).

overcriminalization reform.⁴ The interest in this report and the attention paid to this problem extends beyond the press. NACDL has received requests for copies of the report from members of every branch of government.

The report focuses primarily on the non-personal aspects of this problem, such as the legislative process, empirical data, and fundamental legal concepts. But another side of this problem has received even more attention by members of this chamber and national media alike—the personal side, the human side, or as we refer to it, the face of overcriminalization.

Presenting the face of overcriminalization is critical to raising public awareness of the dangerous trend of overcriminalization. For this reason, I will spend the remainder of my testimony doing just that. During last summer’s hearing, members of this subcommittee heard the heart-wrenching tales of two victims of overcriminalization—Krister Evertson and George Norris. Today we are joined by two more victims, Abner Schoenwetter and Bobby Unser. Over my career as a prosecutor and defense attorney, I have seen the faces of similar victims and represented individuals that have suffered tremendous, unjustified loss as a result of overcriminalization and the harm it perpetrates on our criminal justice system.

First, let us take a few moments to reflect on the stories of the overcriminalization victims from the the first hearing. From Krister Evertson and Kathy Norris, testifying on behalf of her husband George Norris, we learned how an unwarranted prosecution can destroy the lives of productive, law-abiding citizens and community members.

Krister Evertson never had so much as a parking ticket prior to his arrest on May 27, 2004.⁵ An Eagle Scout, National Honor Society member, science whiz, clean energy inventor, and small business entrepreneur, Krister is now a felon. The nightmare that took two years of his freedom and hundreds of thousands of dollars in invention materials began when he made a simple error: he failed to put a “ground” sticker on a package that he shipped. Despite his clear intention to ship by ground—as evidenced by his selection of “ground” on the shipment form and payment for “ground” shipping—the government prosecuted him for this error anyways.

When the jury acquitted Krister, the government turned around and charged him again, this time for his alleged abandonment of toxic materials. Krister had securely and safely stored his valuable research materials in stainless steel drums, at a storage facility, while he fought for

⁴ Adam Liptak, *Right and Left Join Forces on Criminal Justice*, N.Y. TIMES, Nov. 23, 2009, at A1.

⁵ The facts of Krister Evertson’s story are taken from multiple sources. See, e.g., ONE NATION UNDER ARREST (Paul Rosenzweig & Brian W. Walsh eds., 2010); *House Hearing* (written statement of Krister Evertson, July 22, 2009, available at <http://judiciary.house.gov/hearings/pdf/Evertson090722.pdf>); Quin Hillyer, *Examiner Special Report: How one good man’s intentions took him from a fuel cell to a jail cell*, THE WASHINGTON EXAMINER, Jan. 22, 2009.

his freedom in trial over the missing shipping sticker. He ultimately spent two years in a federal prison for that mistake.

The subcommittee also heard from George Norris, a father, grandfather, and elderly retiree who turned his orchid hobby into a part-time business running the greenhouse behind his home.⁶ He had never had a run-in with the law before that fateful day in October 2003 when three pickup trucks pulled up outside his home. Federal agents, clad in protective Kevlar and bearing guns, stormed the house. For hours the agents refused to tell George what he had done wrong and, instead, ordered him to remain seated in his kitchen, under supervision, while they ransacked his home and seized his belongings.

For months after the raid, George remained unaware as to its cause. He was eventually indicted in Miami for orchid smuggling. His crime, at its core, was a paperwork violation: he had the wrong documents for some of the plants he had imported. The plants themselves were legal to import and he likely could have obtained the right documents with a bit more time and effort. Although he made a simple mistake, one made regularly by dealers in imported plants, he had certainly complied with the spirit of the law.

The court denied George's request to transfer the case to his home state of Texas. Mounting a defense became very expensive very quickly. Unable to defend himself, George reluctantly gave up the fight, pled guilty to inflated charges, and was sentenced to 17 months in federal prison.

George, in his late sixties at the time, was also diabetic, with cardiac complications, and suffered from arthritis, glaucoma, and Parkinson's disease. While incarcerated, his health declined substantially and he now faces the additional issues of depression, paranoia, and sleep complications. During her testimony at the last hearing, George's wife Kathy described the impact this experience has had on their family. George became detached and was no longer interested in the things he had held so dear—his children, grandchildren, the outdoors, and gardening. Afraid to even leave his home, George is now a broken man.

Krister, George, Kathy, and their families are the face of overcriminalization. Sadly, their stories are not unique, for there are so many other victims. Consider the case of Georgia

⁶ The facts of George Norris' story are taken from multiple sources. See, e.g., ONE NATION UNDER ARREST (Paul Rosenzweig & Brian W. Walsh eds., 2010); Andrew Grossman, *The Unlikely Orchid Smuggler: A Case Study in Overcriminalization*, HERITAGE FOUND. L. MEMO. No. 44, July 27, 2009; *House Hearing* (written statement of Kathy Norris, July 22, 2009, available at <http://judiciary.house.gov/hearings/pdf/Norris090722.pdf>).

Thompson, a Wisconsin civil servant convicted of federal corruption charges in 2006.⁷ Georgia has been described as a hard-working and apolitical state employee. Responsible for putting the state's travel account up for competitive bid, she was prosecuted for doing her job well.

Specifically, Georgia awarded the state's travel contract to the company that submitted the lowest-cost bid. Prosecutors alleged she made this award because, unbeknownst to her, that company had contributed to the then Democrat Governor's re-election campaign. A 56-year-old civil servant, hired by a Republican Governor, with no identifiable interest in politics, Georgia was charged and convicted of violating 18 U.S.C. § 1346, commonly known as the honest services fraud statute, for conscientiously doing her job. Upon hearing oral argument in her appeal, the 7th Circuit panel of judges immediately reversed her conviction and, without waiting to issue a written opinion, ordered her release from prison without delay. Georgia has since been reinstated to the Wisconsin civil service, awarded back pay, and reimbursed for her legal expenses.

You may ask yourself, how could this happen? How could an innocent woman, a hard-working civil servant, end up spending four months in prison just for doing her job? Georgia Thompson is the face of overcriminalization—her story is evidence of the harm caused when Congress fails to draft statutes clearly and with adequate *mens rea* protection, when prosecutors stretch already broad statutes to reach everyday conduct never intended to be criminalized, and when judges inconsistently apply rules of interpretation.

The honest services fraud statute, responsible for victimizing countless law-abiding individuals, is a prime example of overcriminalization. Legal experts have criticized the honest services fraud statute as vague and overbroad. It fails to define or limit the phrase “intangible right of honest services,” and it has been stretched to cover conduct that no reasonable legislator would deem criminal.⁸ The failure of Congress to define criminal conduct in a clear and specific

⁷ The facts of Georgia Thompson's story are taken from multiple sources. See, e.g., John Diedrich, *Freed official back on state job, Thompson's action no crime, judges write*, Journal Sentinel Online, Apr. 21, 2007; Adam Cohen, *A Woman Wrongly Convicted and a U.S. Attorney Kept His Job*, N.Y. TIMES, Apr. 16, 2007; *United States v. Georgia Thompson*, 484 F.3d 877 (7th Cir. 2007).

⁸ In his dissent from denial of certiorari in *Sorich v. United States*, Justice Antonin Scalia argued that such an overbroad law could be unjustly applied to make virtually any unseemly conduct a crime:

Without some coherent limiting principle to define what “intangible right of honest services” is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.

129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). More than 20 years after the statute's enactment, the federal courts of appeals became hopelessly divided on how to interpret the honest services fraud

manner allows, and quite possibly encourages, prosecutors to charge all sorts of innocent conduct—from errors in judgment to behavior that is the slightest bit unsavory. Rather than enact a specific, precise criminal statute, Congress instead relies on prosecutorial discretion to shape the contours of criminal offenses. The story of Georgia Thompson, as well as Krister Evertson and George Norris, demonstrates that such reliance is misplaced.

Duplicative statutes, federalization of conduct traditionally belonging to the states, criminalization of regular business activity or social conduct and interactions—this is overcriminalization. When any of these elements combine with poor legislative drafting, inadequate *mens rea* requirements, or unfettered prosecutorial discretion, the result is inevitably the victimization of more law-abiding citizens.

The stories of Krister Evertson, George Norris, and Georgia Thompson are not unique. Today you will hear from two more victims—Abner Schoenwetter and Bobby Unser. Abner spent nearly six years in prison for shipping lobster tails in plastic bags, rather than cardboard boxes, in violation of a Honduran law that was deemed null and void by the Honduran government.⁹ Bobby Unser got lost in a blizzard while snowmobiling and spent almost two days trekking through snow in search of aid.¹⁰ After this near death experience, Bobby was prosecuted for unknowingly entering protected land with his snowmobile. The fact that he got lost in a blizzard was no defense in the eyes of the government.

Abner and Bobby add two more stories to the face of overcriminalization, but there are so many others whose stories we will never hear. The cost of overcriminalization does not stop with the personal freedom of its direct victims. In my over 25 years as a criminal defense attorney, I have seen families shattered, careers ruined, businesses fail, thousands of innocent workers become unemployed, and entire communities devastated—all done at the taxpayers' expense. Whether in the form of a costly investigation or prosecution, a lengthy sentence at an overcrowded prison, or the loss of tax revenue from businesses and workers, the true cost of overcriminalization is immeasurable. The constitutional obligations of due process and fair

statute, prompting the Supreme Court to hear three separate honest services fraud cases in one term. See *Black v. United States*, 138 S. Ct. 2963 (2010); *Skilling v. United States*, 130 S. Ct. 2896 (2010); *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010). Ultimately, after over twenty years of prosecutors stretching this poorly written law as far as possible, the Court limited the scope of the honest services fraud statute to bribes and kickbacks.

⁹ The facts of Abner Schoenwetter's story are taken from multiple sources. See, e.g., ONE NATION UNDER ARREST (Paul Rosenzweig & Brian W. Walsh eds., 2010); Letter from Daniel J. Popeo, Chairman and General Counsel, Washington Legal Foundation, to The Honorable Alberto R. Gonzales, Attorney General of the United States (July 11, 2007) available at <http://www.wlf.org/upload/07-12WLF%20Petition%20to%20DOJ.pdf>; *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003).

¹⁰ The facts of Bobby Unser's story are taken from multiple sources. See, e.g., *United States v. Robert W. Unser*, 165 F.3d 755 (10th Cir. 1999); David Wallis, *Bobby Unser, Race car champion as scofflaw*, Salon.com, June 6, 1997.

notice demand reform and the critical need for fiscal responsibility makes that demand all the more urgent.

These personal stories and the NACDL-Heritage Foundation *Without Intent* report support the conclusion of a growing number of commentators and experts that the time has come for Congress to stop this dangerous trend, to acknowledge the threat to civil liberties by this unprincipled form of criminalization, and to carry out critical reforms that will protect against unjust prosecutions and convictions. The report offers five basic, good-government reforms that, if implemented, will provide that protection and potentially reverse the dangerous trend of haphazard federal criminalization.

The second panel will discuss these reforms further—reforms that have received broad support from a coalition of organizations ranging from the right to the left. A bi-partisan coalition is concerned that expansive and ill-considered criminalization has cast our nation’s criminal law enforcement adrift and believes criminal lawmaking must require true blameworthiness and provide fair notice of potential criminal liability. Further, the coalition understands that this problem, which transcends political affiliation or ideology, demands principled, nonpartisan reforms such as those offered by the *Without Intent* report.

NACDL is confident that today’s hearing will heighten awareness of overcriminalization and inspire future action. We welcome this hearing and urge the subcommittee to enact legislation embodying the aforementioned reforms.

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