"OVERCRIMINALIZATION AND THE NEED FOR LEGISLATIVE REFORM"

TESTIMONY BEFORE THE SUBCOMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY
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Thank you Chairman Scott, Ranking Member Gohmert, and Members of the Committee for giving me the opportunity to speak with you about this important topic. I have served on both sides of the federal criminal aisle – as a federal prosecutor for many years and currently as a defense attorney involved in proceedings adverse to the Department of Justice. I believe I have a balanced view of the issues before the Committee and hope I can provide some insight and suggest some ideas to deal with the current phenomenon of overcriminalization.

The problem of overcriminalization is truly one of those issues upon which a wide variety of constituencies can agree – witness the broad and strong support from such varied groups as the Heritage Foundation, Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the ABA, the Cato Institute, the Federalist Society and the ACLU.

These groups share a common goal: to have criminal statutes that punish *actual criminal acts*, and do not seek to criminalize conduct that is better dealt with by the seeking of civil and regulatory remedies. The criminal sanction is a unique one in American law, and the stigma, public condemnation and potential deprivation of liberty that go along with that sanction demand that it should be utilized only when specific mental states and behaviors are present.[1]

By way of background, let me briefly remind you of some fundamentals of the criminal law. Traditional criminal law encompasses various acts, which may or may not cause results, and mental states, which indicate volition or awareness on the part of the actor. These factors are

[1] *See* Erik Luna, "The Overcriminalization Phenomenon," American University Law Review, Vol. 54:703, 713. Professor Luna stated that "[g]iven the moral gravity of decision-making in criminal justice and the unparalleled consequences that flow from such determinations, criminal liability and punishment must always be justifiable in inception and application." *Id*. at 714; *see also* Julie O'Sullivan, "Symposium 2006: The Changing Face of White-Collar Crime: The Federal Criminal "Code" is a Disgrace" Obstruction Statutes as a Case Study," 96 J. Crim. L. & Criminology 643, 657 (2006) (stating that "[c]riminal liability imports a condemnation, the gravest we permit ourselves to make. To condemn when fault is absent is barbaric.").

commonly known as the requirements of an *mens rea*, and *actus reus*, or an "evil-meaning mind [and] an evil-doing hand."[2]

With respect to what has now become known as "overcriminalization," objections are focused on those offenses that go beyond these traditional, fundamental principles and are grounded more on what were historically civil or regulatory offenses without the mental states required for criminal convictions.

My fellow panelists will be discussing the *mens rea* requirement for federal crimes, and the need to reform statutes that lack such a requirement. Without a clear *mens rea* requirement, citizens are not able to govern themselves in a way that assures them of following the law, and many actors are held criminally responsible for actions that do not require a wrongful intent. Indeed, a recent Federalist Society report states that federal statutes provide for over 100 separate terms to denote the required mental state with which an offense may be committed,[3] and the Heritage Foundation issued a report stating that 17 of the 91 federal criminal offenses enacted between 2000 and 2007 *had no mens rea requirement at all.*[4] This trend cannot continue, and suggested legislative reform in the nature of a default *mens rea* requirement when a statute does not require it is worthy of consideration.[5]

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[2] *See Morissette v. United States*, 342 U.S. 246, 251 (1952).

[3] *See* John S. Baker, Jr., "Measuring the Explosive Growth of Federal Crime Legislation," Federalist Society for Law and Public Policy Studies, May 2004, at 10.

[4] *See* John S. Baker, Jr., "Revisiting the Explosive Growth of Federal Crimes," The Heritage Foundation Legal Memorandum, No. 26, June 16, 2008, at 7.

[5] *See* Brian W. Walsh, "Enacting Principled, Nonpartisan Criminal-law Reform," The Heritage Foundation, January 9, 2009, at 2-3 (stating that possible reforms to remedying offenses with unclear or non-existent criminal intent requirements are to apply a default criminal-intent to criminal statutes that do not have any such requirement, to mandate that any introductory or blanket criminal intent requirement be applied to all material elements of the criminal offense, and to codify the rule of lenity, which resolves ambiguity in criminal statutes in favor of the defendant.)

Although many scholars and the Department of Justice have tried to count the total number of federal crimes, only rough estimates have emerged. The current "estimate" is a staggering 4,450 crimes on the books. If legal scholars and researchers and the Department of Justice itself cannot accurately count the number of federal crimes, how do we expect ordinary American citizens to be able to be aware of them?[6] One criminal law expert stated that we can no longer say with confidence the long-standing legal maxim that "ignorance of the law is no excuse," because the average American citizen cannot actually know how many criminal laws there actually are.[7]

Although I could probably spend my whole panel time citing you the often-mentioned, truly absurd examples of overcriminalization, such as using the character of "Woodsy Owl" or the slogan "Give a Hoot, Don't Pollute" without authorization; mixing two kinds of turpentine; or wearing a postal uniform in a theatrical production that discredits the postal service, the dangers of overcriminalization for more serious offenses are real and impact real people such as the individuals before you today and corporations, which I will discuss later in these remarks.

Make no mistake, when individuals commit crimes they should be held responsible and punished accordingly. The line has become blurred, however, on what conduct constitutes a crime, particularly in corporate criminal cases, and this line needs to be redrawn and reclarified. The unfortunate reality is that Congress has effectively delegated some of its important authority to

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[6] *See* Brian Walsh, "Exploring the National Criminal Justice Commission Act of 2009," Congressional Testimony before the Subcommittee on Crime and Drugs of the Committee on the Judiciary, United States Senate, June 11, 2009 at 14 (stating that "[i]f criminal-law experts and the Justice Department itself cannot ever count them, the average American has no chance of knowing what she must do to avoid violating federal criminal law.").

[7] *See* Paul Rosenzweig, "Overcriminalization: An Agenda for Change," American University Law Review, Vol. 54:809, 819. Professor Rosenzweig also stated that although many scholars have sought to provide an estimate on the number of federal crimes, the Congressional Research Service, the arm of Congress charged with conducting research, "has proffered that it is impossible to know the exact number." *Id.*

regulate crime in this country to federal prosecutors, who are given an immense amount of latitude and discretion to construe federal crimes, and not always with the clearest motives or intentions.[8]

A striking example of this is the "honest services" mail and wire fraud statute, 18 U.S.C. §1346. That statute has been subject to scrutiny because of its expansion from traditional public corruption cases to private acts in business or industry that are deemed to be criminal almost exclusively at the whim of the individual prosecutor who is investigating the case.

Indeed, in a recent dissenting opinion on a denial of a writ of certiorari in the Supreme Court in an honest services case, Justice Scalia stated that the state of the law for honest services fraud was "chaos," and stated the practical reality of the statute as currently applied:

> [w]ithout some coherent limiting principle to define what "the 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 CEO's who engage in any manner of unappealing or ethically questionable conduct.[9]

This overbreadth leads to a near paranoid corporate culture that is constantly looking over its shoulder for the "long arm of the law" and wondering whether a good faith business decision will be interpreted by an ambitious prosecutor as a crime. Perhaps even more significant is the impact on corporate innovation – if an idea or concept is novel or beyond prior models, a corporation may

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[8] *See* Luna, *supra* Note 1, at 722 ("[l]ike all other professionals, police and prosecutors seek the personal esteem and promotion that accompany success, typically measured by the number of arrests for the former and convictions for the latter. To put it bluntly, beat cops do not become homicide detectives by helping little old ladies across the street, and district attorneys are not reelected for dismissing cases or shrugging off acquittals.").

[9] *See Sorich v. United States*, 129 S.Ct. 1308, 1310 (2009) (Scalia, J., dissenting). Justice Scalia also quoted a recent dissent in the Second Circuit Court of Appeals that asked "[h]ow can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?") (citing *United States v. Rybicki*, 354 F.3d 124, 160 (Jacobs, J., dissenting)); *see also* Judge Alex Kozinski and Misha Tseytlin, "You're (Probably) a Federal Criminal," In the Name of Justice, (Timothy Lynch, Ed.) (2009) (stating that "[c]ourts have had little success limiting the 'intangible right to honest services' doctrine," and "it is unsurprising that courts have been unable to successfully confine this doctrine, since any number of actions could reasonably be seen as depriving an employer or agent of 'the intangible right to honest services.'").

stifle it if they are concerned about potential criminal penalties. This stifling may render some corporations unable to compete in a global marketplace just to ensure compliance with the laws – certainly a "cutting off one's nose to spite the corporate face."

Justice Scalia further stated in his dissent that *"[i]t is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail."*[10] I couldn't agree more. This type of overbroad, arbitrary use of a federal criminal law demonstrates the dangers of overcriminalization and simply must be remedied.[11]

As noted, the issue of overcriminalization is especially poignant in corporate crime. A corporation is an "artificial entity." The legal persona of a corporation is wholly dependent on the laws that formed it. Thus, a corporation is a stable being separate and distinct from the human beings that perform its functions. The corporation is, in the eyes of the law, very much an *entity*.

Nevertheless, in 1909, the Supreme Court held in a railroad regulation case that a corporation could be held criminally liable for the acts of its agents under a theory of what is known as "*respondeat superior*," or, in non-legalese, "the superior must answer," or an employer is responsible for the actions of employees performed within the course of their employment.[12]

Since 1909, corporations have routinely been held criminally liable for the acts of its employees. In recent history, one of the more significant cases is Arthur Andersen, a case of which the Committee is no doubt aware, in which a business entity received effectively a death sentence based on the acts of isolated employees over a limited period of time. As this case

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[10] *Id*. (emphasis added).

[11] O'Sullivan, *supra* Note 1 at 670 (stating that "[t]he same principles that demand that Congress take the laboring oar in identifying the conduct that will be subject to penal sanction – beforehand and with reasonable specificity and clarity – also, of course, bars prosecution law-making.").

[12] *See New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909).

illustrates, this is not a partisan issue – Arthur Andersen was prosecuted under a Republican administration.

I gave a speech at the Georgetown Law Center in 2007 regarding overcriminalization,[13] and mentioned the Arthur Andersen case and referenced a political cartoon that was published after the Supreme Court reversed the company's conviction in which a man in a judicial robe was standing by the tombstone for Arthur Andersen and said "***Oops. Sorry***."[14] That apology didn't put the tens of thousands of partners and employees of that Firm back to work. This simply cannot be repeated, and reform is needed to make sure there are no future abuses.

What can be done to curb future abuses? First, I have advocated for many years that we adopt a true Federal Criminal Code. While this may not be the first thing that comes to mind when analyzing the issues of concern in the criminal justice system, it is an important one that should be undertaken without delay. As I mentioned, there are now some 4,450 or more separate statutes – a hodgepodge without a coherent sense of organization. There is a template in existence, the Model Penal Code, that can act as a sensible start to an organized criminal code, and has formed the basis for many efforts to establish state criminal codes in this country. What is needed is a clear, integrated compendium of the totality of the federal criminal law, combining general provisions, all serious forms of penal offenses, and closely related administrative provisions into an orderly structure, which would be, in short, a true Federal Criminal Code.[15]

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[13] *See* Dick Thornburgh, "The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes," American Criminal Law Review, Volume 44, Fall 2007.

[14] *See* Politicalcartoons.com, http://www.politialcartoons.com/cartoon/5b7d87f6-41b7-9c8f-cfa126a1776d.html (last visited July 15, 2009).

[15] *See* Thornburgh, *supra* note 13 at 1285; *see also* O'Sullivan, *supra* Note 1, at 643 (stating that "[t]here actually is no federal criminal "code" worthy of the name. A criminal code is defined as 'a systematic collection, compendium, or revision of laws.' What the federal government has is a haphazard grab-bag of statutes accumulated over 200 years, rather than a comprehensive, thoughtful, and internally consistent system of criminal law."). Professor

A Commission should be constituted, perhaps in connection with Senator Webb's National Criminal Justice Commission Act, to review the federal criminal code, collect all similar criminal offenses in a single chapter of the United States Code, consolidate overlapping provisions, revise those with unclear or unstated *mens rea* requirements, and consider overcriminalization issues.[16] This is not a new idea – Congress has tried in the past to reform the federal criminal code, most notably through the efforts of the "Brown Commission" in 1971.[17] The legislative initiatives based on that Commission's work failed despite widespread recognition of its worth. It is incumbent on this Congress to seek to make sense out of our laws and make sure that average ordinary citizens can be familiar with what conduct actually constitutes a crime in this country.

Second, Congress needs to rein in the continuing proliferation of criminal regulatory offenses. Regulatory agencies routinely promulgate rules that impose criminal penalties that are not enacted by Congress.[18] Indeed, criminalization of new regulatory provisions has become seemingly mechanical. One estimate is that there are a staggering ***300,000*** criminal regulatory offenses created by agencies.

O'Sullivan also stated that "our failure to have in place even a the modestly coherent code makes a mockery of United States much-vaunted commitments to justice, the rule of law, and human rights." *Id*. at 644.

[16] *See* Walsh, *supra* Note 5 at 2 (stating that "[t]he American Law Institute's Model Penal Code includes key provisions standardizing how courts interpret criminal statutes that have unclear or nonexistent criminal-intent requirements. Federal law should include similar provisions.").

[17] *See generally* Ronald L. Gainer, "Federal Criminal Code Reform: Past and Future," 2 Buffalo Criminal Law Review 45 (1998).

[18] *See* Washington Legal Foundation, "Federal Erosion of Business Civil Liberties," 2008 Special Report at 1-5 (stating that "regulatory agencies promulgate rules that not only depart from the intent of Congress, but also impose criminal penalties that dispense with the showing of criminal intent," and referenced a speech made by the former General Counsel of the Treasury about the agency's "invention" of a bank regulation designed to prevent a particular form of money laundering by eliminating *mens rea* and making bank employees strictly liable, contrary to the intent of Congress.).

This tendency, together with the lack of any congressional requirement that the legislation pass through the judiciary committees - which are responsible for keeping an eye on the rationality of the traditional criminal offenses - has led to an evolution of a new and troublesome catalogue of criminal offenses. Congress should not delegate such an important function to agencies. Indeed, in remedial legislation introduced in 2005 entitled the "Congressional Responsibility Act of 2005," the Bill sought to ensure that Federal regulations would not take effect unless passed by a majority of the members of the Senate and House and signed by the President.[19] Thus, the Bill sought to "end the practice whereby Congress delegates its responsibility for making laws to unelected, unaccountable officials of the executive branch and requires that regulations proposed by agencies of the executive branch be affirmatively enacted by Congress before they become effective."[20] This type of legislation deserves reconsideration.

In this area, one solution that a reknown expert and former colleague from the Department of Justice, Ronald Gainer, has advocated is to enact a general statute providing administrative procedures and sanctions for all regulatory breaches.[21] It would be accompanied by a general provision removing all criminal penalties from regulatory violations, notwithstanding the language of the regulatory statues, except in two instances. The first exception would encompass conduct involving significant harm to persons, property interests, and institutions designed to protect persons and property interests - the traditional reach of criminal law. The second exception would permit criminal prosecution, not for breach of the remaining regulatory provisions, but for a pattern

[19] *See* Congressional Responsibility Act of 2005 (H.R. 931), introduced by Rep. J.D. Hayworth (R-AZ).

[20] *Id*. at p. 2.

[21] *See generally*, Ronald L. Gainer, *Creeping Criminalization and Its Social Costs*, Legal Backgrounder, Washington Legal Foundation, Vol. 34 No. 13, Oct. 2, 1998.

of intentional, repeated breaches. This relatively simple reform could provide a much sounder foundation for the American approach to regulatory crime than previously has existed.

Third, Congress should also consider whether it is time to address whether "*respondeat superior*" should be the standard for holding companies criminally responsible for acts of its employees. As the Committee is certainly aware, the Department of Justice has issued a succession of Memoranda from Deputy Attorneys General during the past ten years, from one issued by current Attorney General Holder in 1999, to the Thompson Memorandum in 2003 by former Deputy Attorney General Larry D. Thompson to the McNulty Memorandum in 2006 by former Deputy Attorney General Paul J. McNulty, to the most recent Filip Memorandum authored by former Deputy Attorney General Mark Filip. Although these Memoranda have evolved over time and addressed critical issues regarding charging corporations, particularly regarding the protection of the attorney-client privilege, the current Guidelines may not be sufficient because they continue to vest an unacceptable amount of discretion in federal prosecutors.[22]

A law is needed to ensure uniformity in this critical area so that the guidelines and standards do not continue to change at the rate of four times in ten years. Indeed, if an employee was truly a "rogue" or acting in violation of corporate policies and procedures, Congress can protect a well-intentioned and otherwise law abiding corporation by enacting a law that holds the

[22] The Filip Memo revised the Principles of Federal Prosecution of Business Organizations, and the Principles are set forth in the *United States Attorney's Manual*. Section 9-28.500 (A) of the Manual, entitled "Pervasiveness of Wrongdoing Within the Corporation," states that "[a] corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees, or by all the employees in a particular role within the corporation, or was condoned by upper management. On the other hand, *it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee." Id.* (emphasis added); see also August 28, 2008 Memorandum by Mark Filip, Deputy Attorney General, available at www.usdoj.gov/dag/readingroom/dag-memo-08282008.pdf (last viewed July 20, 2009).

individual rather than the corporation responsible for the criminal conduct without subjecting the corporation to the whims of any particular federal prosecutor.

Before I close, I wanted to commend Chairman Scott and other members of this Subcommittee for your role in securing passage of the Attorney-Client Privilege Act of 2007 in November 2007. The privilege is one that goes back to Elizabethan times, and the preservation of that privilege is something about which I have expressed concern for many years. Mr. Chairman, your recognition of the issue and legislation to stop "coercive waivers" and overreaching to gain access to privileged communications is precisely the type of legislation needed to protect this important privilege.[23]

With respect to the problem of overcriminalization, let me report that reform is needed. True crimes should be met with true punishment. While we must be "tough on crime," we must also be intellectually honest. Those acts that are not criminal should be countered with civil or administrative penalties to ensure that true criminality retains its importance and value in the legal system.

Thank you Mr. Chairman, Ranking Member Gohmert and Members of the Committee for giving me this opportunity to address the Committee on this important issue.

[23] *See* Walsh, *supra* Note 5 at 4 (stating that "[w]hat is needed [regarding the attorney-client privilege] is a permanent solution with the force of law that applies to all federal agencies – *i.e.*, comprehensive legislation with provisions like those in the bipartisan Attorney-Client Privilege Protection Act that passed the House last year by a unanimous voice vote.").