LEGISLATIVE TESTIMONY

Regulatory Crime: Solutions

Testimony before the Committee on the Judiciary

U.S. House of Representatives

Task Force on Over-criminalization

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

Thank you for inviting me to return to testify before the Task Force. When I appeared before you on July 19th, we discussed the fundamental principle of *mens rea*. This hearing today addressing possible ways to correct the danger of convicting innocent persons due to the absence, or the inadequacy, of a *mens rea*, especially in regulatory offenses, naturally follows from your earlier hearings. Again, I applaud the House Judiciary Committee for creating the Task Force to study these issues.

My name is John Baker. I am a Visiting Professor at Georgetown Law School; a Visiting Fellow at Oriel College, University of Oxford; and Emeritus Professor at LSU Law School. In the past, I have been a consultant to the U.S. Senate Judiciary Committee Subcommittee on Separation of Powers, and to the U.S. Department of Justice. Prior to teaching, I prosecuted criminal cases in New Orleans and have since been involved in the defense of a few federal criminal cases. I have written extensively on state and federal criminal law,[1] including a criminal law casebook.[2] I was a member of the ABA Task Force that issued the report "The Federalization of Crime" (1998).

POSSIBLE REMEDIES FOR THE NOTICE AND MENS REA PROBLEMS IN FEDERAL CRIMES AND REGULATORY OFFENSES

The tremendous number of federal crimes[3] and the astronomical and unknown number of federal regulatory offenses[4] makes remedying the notice and *mens rea* problems extremely challenging. Obviously, it is not possible to amend all the statutes so that they provide clear definitions of criminal conduct as well as an adequate *mens rea*. Rather, as mentioned in my previous testimony, protecting the principle of *mens rea* in federal criminal law could be accomplished through an interpretive rule that, like *Morissette v. United States*,[5] reads in a *mens rea* where one is not literally provided in the statutory language. Such a rule could be similar to

[1] *See, e.g.*, John S. Baker, Jr., *Mens Rea and State Crimes: 50 Years Post-Promulgation of the Model Penal Code*, 92 CRIM. L. REP. (BNA) 248 (Nov. 28, 2012); *see also* John S. Baker, Jr., Revisiting the Explosive Growth of Federal Crimes, The Heritage Foundation, Legal Memorandum No. 26 (2008), http://s3.amazonaws.com/thf_media/2008/pdf/lm26.pdf.

[2] John S. Baker, Jr., Daniel H. Benson, Robert Force, B.J. George, Jr., HALL'S CRIMINAL LAW: CASES AND MATERIALS (5th ed. 1993).

[3] *See generally* AM. BAR ASS'N TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIME (1998) (discussing the remarkable growth of federal criminal law since 1970).

[4] *See* John C. Coffee Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991) (estimating, as of 1991, over 300,000 regulatory offenses capable of being the basis of criminal prosecution).

[5] *See* 342 U.S. 246. 250-52 (1951).

the approach suggested by the Model Penal Code.[6] One or more proposals have suggested taking an analogous approach to federal criminal law.[7] Given the differences terminology, the exact default language of the MPC would not work well in federal criminal law.[8]

Rules of construction, like the one suggested, aid operationally in protecting the principle of *mens rea*. Another rule of construction, mentioned in my previous testimony, is that of "strict construction," usually referred to in federal court opinions – I think inaccurately – as "the rule of lenity." As the Supreme Court noted in 2008, the judicial rule of lenity exists because "no citizen should be held accountable [to] a statute whose commands are uncertain, or subjected to punishment that is not clearly proscribed."[9] Courts may prefer to speak of "the rule of lenity" because it makes the rule appear to have only criminal law significance. As such, federal judges tend to view it as a judge-made rule that they can expand or contract. The "rule of strict construction," however, has an important separation of powers significance. As Chief Justice Marshall wrote the rule of "strict construction" of penal laws is not only rule favoring a criminal defendant, but one limiting the courts: "[the principle] is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department."[10] Congress not only has the power, but also the obligation, to define criminal laws. Having done an inadequate job with so many criminal statutes, Congress could and should at least give clear guidance to the federal courts through a rule of construction that broad and ambiguous criminal statutes should be strictly construed.

In addition to these two possible solutions that were mentioned in my previous testimony, I will add three additional possibilities. As emphasized in my previous and current testimony, the fundamental criminal law (as opposed to federalism) issue with federal crimes is definitional.

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[6] The Model Penal Code's (MPC) default provision desired to ensure a culpability element in all crimes. *See* Model Penal Code § 2.02(4) (1962) (directing courts to apply general *mens rea* terms in a criminal offense to each element of the offense – striving for a "default" *mens rea* term in each statute). Many states adopting parts of the MPC did not include its default-*mens rea* provision. In part, this failure may have been due to the MPC's decision to codify particular mental states (purposely, knowingly, recklessly, and negligently) without mentioning the traditional, normative basis of *mens rea*. That is, state legislators may have viewed the default provisions as optional, rather than fundamental– as the drafters intended. The net effect was to caveat the impact the MPC had on preserving the foundations for *mens rea*, making it easier for legislatures to rationalize an offense without it. *See* John S. Baker, Jr., *Mens Rea and State Crimes: 50 Years Post-Promulgation of the Model Penal Code*, 92 CRIM. L. REP. (BNA) 248 (Nov. 28, 2012).

[7] *See, e.g.*, Brian W. Walsh and Tiffany M. Joslyn, Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law, The Heritage Foundation and the National Association of Criminal Defense Lawyers 27 (2010), http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=17613. The report identifies the following recommended initiatives:

> Enact default rules of interpretation to ensure that *Mens Rea* requirements are adequate to protect against unjust conviction;
> Codify the common-law rule of lenity, which grants defendants the benefit of the doubt when Congress fails to legislate clearly;
> Require judiciary committee oversight of every bill that includes criminal offenses or penalties;
> Provide detailed written justification for and analysis of all new federal criminalization; and
> Draft every federal criminal offense with clarity and precision.

[8] *See supra* note 6.

[9] United States v. Santos, 533 U.S. 507, 514 (2008).

[10] United States v. Wiltberger, 18 U.S. 5 Wheat 76, 95 (1820).

That is to say, so many federal crimes fail to define the prohibited conduct in language ensuring that persons have clear notice of what is prohibited and that they cannot be convicted without a *mens rea*. Therefore, the Task Force might wish to consider: (1) Adding a definition of "crime" in the General Provisions of Title 18; (2) Preventing the Executive Branch for defining regulatory crimes; and (3) allowing interlocutory appeals of expansive court interpretations of federal crimes.

I. Definitions to Distinguish "Crime" from Non-Criminal Offenses on the Basis of a *Mens Rea* and Punishment.

Chapter 1, Part I, of Title 18, entitled "General Provisions," contains some definitions, but does not define "crime," "felony," or "misdemeanor." The closest it comes to these terms are its definitions of "crime of violence," Section 16, and "petty offense," Section 19. The necessity of certain basic definitions is reflected by the fact that the Sentencing Commission has adopted its own definitions of felony and misdemeanor.[11] The Commission's definitions cover state and local, as well as federal, law because the purpose of the definitional distinctions is to determine sentencing ranges based on a convicted person's criminal history.[12]

Congress's failure to enact adequate definitions is the source of much of the confusion with which this Task Force is attempting to grapple. As reflected in Title 18's definition of "petty offense," federal statutory law blurs the distinction between criminal and non-criminal, illegal conduct.[13] That is to say, the definition of petty offense includes certain classes of misdemeanors as well as "infractions." In the language of the criminal law, however, a misdemeanor is a crime but an infraction is not a crime.[14] The Sentencing Commission has implicitly recognized this problem by counting, for purposes of criminal histories, certain misdemeanors but not infractions.[15] Minor traffic violations such as running a stop sign (when it does not amount to reckless driving) are "illegal;" such "infractions" have been labeled "petty offenses," but they are not "crimes." My previous testimony discusses the issue at length.[16]

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[11] U.S. Sentencing Comm'n Office of Gen. Counsel, Criminal History Primer April 2013, Parts II. B. 3-4.
[12] *Id.*
[13] 18 U.S.C. § 19.
[14] Many state statutes and cases – where the bulk of criminal prosecution occurs – explicitly denote the distinction. See, e.g., Mo. Rev. Stat. §§ 569.140, 569.150 (noting that an infraction is not criminal, but can provide the basis for probable cause); see also Haw. Rev. Stat. § 291-58 (classifying the failure to provide parking for disabled persons as cause for "a civil action," not a criminal prosecution).
[15] As Part II. B. 4 explains:

> Certain misdemeanors — careless or reckless driving, gambling, driving without a license, disorderly conduct, prostitution, resisting arrest, trespassing — are counted only if they resulted in a prison sentence of at least thirty days or more than one year of probation, or they are similar to the instant offense. Other petty offenses — fish and game violations, juvenile status offenses, hitchhiking, loitering, minor traffic infractions, public intoxication, vagrancy — are never counted. Convictions for driving while intoxicated and other similar offenses are always counted.

See supra note 11 at Part II. B. 4 (internal citations ommitted).
[16] *See* Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary, July 19, 2013,

The Task Force may wish to consider first defining the term "crime," and doing so in a way that clearly distinguishes felonies, misdemeanors, and non-criminal offenses, which could labeled as "infractions," or "violations." The definition of "crime," I submit, should include the requirement of a *mens rea*. Such a definition would be coordinated with the proposal, discussed above and in my previous testimony, for a default *mens rea*.[17]

Some offenses have been drafted in such a way that the government can choose to proceed civilly and/or criminally, such as retaliation against whistleblowers prohibited by the Sarbanes-Oxley Act**.**[18] Without redrafting such legislation, the definition of crime applicable to all statutes could specify that no imprisonment could be imposed unless a *mens rea* is actually proved.

II. Criminal Penalties and Regulations

For reasons discussed in my previous testimony, regulatory offenses – often strict liability offenses -- are not actually crimes and, I submit, should not be so treated.[19] Nevertheless, the Department of Justice takes the position that it is perfectly legitimate to prosecute as "strict liability" offenses.[20] In fact, however, the Supreme Court's treatment of strict liability offenses has been more guarded. It has refused to declare them unconstitutional, but in doing so has said they do not violate due process if certain conditions exist.[21] In fact, prosecutions by the Justice Department are not limited to those conditions.[22]

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http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=101161 at 5 (statement of John S. Baker, Ph.D.) ("For *malum prohibitum* crimes and petty offenses, *mens rea* requirements are needed in order to protect individuals who have accidentally or unknowingly violated the law" as such conduct is not wrong in itself).

[17] *See id.* at 10-12.

[18] *See* Sarbanes-Oxley Act of 2002 806(c)(1), 18 U.S.C. 1514A(c)(1); Sarbanes-Oxley Act of 2002 1107, 18 U.S.C. 1513(e).

[19] This critique of strict liability offenses is hardly novel. *See, e.g.*, Laurie L. Levenson, *Strict Liability Offenses: Are They Real Crimes?*, 25 CRIM. JUST. 13, 13 (2010) (finding strict liability crimes to not be crimes at all, "having no moral or rational justification.") (citing Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958)).

[20] A telling example in white-collar crime is the "Park Doctrine," also known as the "Responsible Corporate Officer Doctrine." The doctrine, rooted in United States v. Park, 421 U.S. 658 (1975), allows certain corporate officers to be criminally liable for conduct that occurred "on their watch," irrespective of their lack of knowledge – turning the Food, Drug, and Cosmetic Act into a strict liability offense. Despite the limiting constructions imposed upon the Park Doctrine by certain federal appellate courts, the FDA announced in a letter to U.S. Senator Charles Grassley in March 2010 that it would work with the Justice Department to "increase the appropriate use of misdemeanor prosecutions . . . to hold responsible corporate officers accountable." Letter from Margaret Hamburg, Commissioner of Food and Drugs, to Sen. Charles E. Grassley, Ranking Member, Senate Committee on Finance (Mar. 4, 2010), *available at* http://www.grassley.senate.gov/about/upload/FDA-3-4-10-Hamburg-letter-to-Grassley-re-GAO-report-on-OCI.pdf (last visited Nov. 12, 2013). Assistant Attorney General Tony West buttressed the increased interest in prosecuting via the Park Doctrine in a November 2011 speech at the Annual Pharmaceutical Regulatory and Compliance Conference. He stated that "demanding accountability means we will consider prosecutions against individuals, including misdemeanor prosecutions under the Park Doctrine, which provides . . . strict[] liab[ility] for criminal violations of the Food, Drug, and Cosmetic Act." Tony West, Assistant Attorney General, Address at the 12th Annual Pharmaceutical Regulatory and Compliance Congress (November 2, 2011), *available at* www.justice.gov/iso/opa/civil/speeches/2011/civ-speech-111102.html (last visited Nov. 12, 2013).

[21] *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978) ("While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, . . . the limited circumstances in which

This situation exists, in large part, because the Executive Branch has been allowed to define crimes by issuing regulations.[23] Such a practice is actually a violation of separation of powers. Unfortunately, at a time when it was not as concerned about separation of powers as it is currently, the Supreme Court upheld the practice.[24] That decision certainly flies in the face of Chief Justice Marshall's insistence in the *Wiltberger* case that legislating crime is strictly within the power of Congress.[25]

Allowing the Executive Branch to both define a crime and then prosecute it presents the very danger that separation of powers was adopted to prevent. As James Madison wrote in Federalist #47, "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates[.]"[26]

In order to guard against this very real threat to liberty, per *Wiltberger*, it is for Congress only to define a crime. But how can Congress address the current situation where countless regulatory offenses have been defined by Executive Branch agencies? Consistent with the approach mentioned above, Congress could specify in a definitional section placed in the General Provisions of Title 18 that regulatory offenses can be prosecuted and punished as crimes only if Congress has actually enacted legislation which defines the elements of the criminal offense.

III. An Interlocutory Appeal for Novel Prosecution Theories

Congress has created and this Court has recognized such offenses . . . attest to their generally disfavored status.") (internal citations omitted); *see also* Staples v. United States, 511 U.S. 600, 606 (1994) (presuming that, in the absence of a contrary legislative judgment, some *mens rea* is an element of the crime at issue); *id.* at 616-17 ("[T]he small penalties attached to [strict liability] offenses complemented the absence of a *mens rea* requirement: In a system that generally requires a 'vicious will' to establish a crime, . . . imposing severe punishments for offenses that require no mens rea would seem incongruous.") (quoting 4 William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND *21 (1769)); *cf.* Park, 421 U.S. at 666 (noting that Park's punishment was only a fine of $50 for each of his five counts).

[22] *See, e.g.*, Friedman v. Sebelius, 686 F.3d 813 (D.C. Cir. 2012). The D.C. Circuit upheld the Health and Human Services' decision to punish three executives who pleaded guilty to misdemeanor charges under the Park Doctrine by excluding them from federal health programs for 20 years. Given the age of the executives, this amounted to a lifetime ban from participation in the pharmaceutical industry. The court's majority rejected their due process challenge that characterized such a sentence as contrary to the requirement that severe punishments emanate from crimes requiring proof of a *mens rea*.

[23] *See, e.g.*, Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary, July 19, 2013, http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=101161 (statement of John S. Baker, Ph.D.) (discussing the authority possessed by the U.S. Department of the Interior to implement regulations defining the criminal conduct of the Migratory Bird Act); *see also* FDA, Inspections, Compliance, Enforcement, and Criminal Investigations: Special Procedures and Considerations for Park Doctrine Prosecutions § 6-5-3, *available at* http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/ucm176738.htm#SUB6-5-3 (defining criteria for recommendation of criminal prosecution under the Park Doctrine).

[24] *See* Touby v. United States, 500 U.S. 160, 166-67 (1991) (rejecting the argument that "greater congressional specificity [to administrative agencies that could contemplate criminal sanctions in their regulations] is required in the criminal context" based on that argument not being established in post-New Deal case law).

[25] United States v. Wiltberger, 18 U.S. 5 Wheat 76, 95 (1820).

[26] THE FEDERALIST No. 47, at 303 (Clinton Rossiter ed., 1961).

As previously discussed, so many federal crimes are broadly and ambiguously defined. The proposed rule of strict construction could do much to rectify the problem. An additional measure, however, would likely make such a rule of construction more effective. In the first and most important instance, the federal district judge will be the one to apply the rule of strict construction. Congress could enact such a rule and some district judges might neutralize it. A natural response might be that appellate courts would correct misapplications by district judges. In fact, however, appellate courts have relatively few opportunities to do so.

No matter what president appointed them, federal district judges have one thing in common: they do not like to be reversed. As a result, some number of them will decide issues in ways that procedurally will avoid reversal. In federal criminal prosecutions, pretrial motions by defendants often pose purely legal issues which might end the prosecution. If a district judge rules for the defendant, the Government can appeal and might win a reversal. If the district judge rules for the Government, the chances are very high that the defendant will end up pleading guilty – if for no other reason than that he or she cannot afford the expense of trial. After a plea, unless the defendant has been able to preserve the legal issue for appeal, the matter is ended and the judge will not be reversed.

This reality emboldens federal prosecutors to "push the envelope" by inventing novel theories to prosecute ambiguously worded statutes. Federal prosecutors have often done so with their favorite statutes, the mail and wire fraud statutes. Prosecutors are especially fond of the mail and wire fraud statutes because they are so malleable.[27] That malleability means that, as applied, the statutes fail to give adequate notice of what business practices are and are not criminal. That situation can deter legitimate and ethical risk-taking. If federal prosecutors think that certain types of conduct are unethical and therefore should be criminalized, then the appropriate course is to bring the issue up for legislative debate both as to the merits of criminalizing the conduct and also as to whether Congress has the constitutional authority to do so. Instead, for decades, federal prosecutors have been using the mail and wire fraud statutes, as well as other statutes, retroactively to legislate what they consider to be unethical conduct and therefore -- in their minds -- criminal.[28]

The Supreme Court has often rejected the Justice Department's theories used to prosecute for mail and wire fraud.[29] Nevertheless, the Justice Department has largely prevailed in the lower courts. The district courts, ever looking to avoid reversal, rarely rule against the Government on substantive law issues. As a result, the government achieves a very high level of guilty pleas as defendants weigh the exorbitant costs of a federal trial and the potentially increased sentences for exercising their right to a jury trial against the lower sentences offered by plea deals. A clearer definition of fraud and other crimes would be the best approach. In the absence of narrowed

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[27] *See* Jed S. Rakoff, *The Federal Mail Fraud Statute* (Part I), 18 Duq. L. Rev. 771, 771-72 (1980); *see also* Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. Cin. L. Rev. 1, 1 (1998-1999).

[28] *See* Mike Koehler, *Foreign Corrupt Practices Act Enforcement as Seen Through Wal-Mart's Potential Exposure*, 7 White Collar Crim. Rep. 19 (Sept. 21, 2012) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145678 (explaining, in the context of the Foreign Corrupt Practices Act, how prosecutors use non-prosecution and deferred prosecution agreements to pursue conduct that, based on congressional intent, is not actually criminalized by the statute).

[29] *See* McNally v. United States, 483 U.S. 350 (1987); Cleveland v. United States, 531 U.S. 12 (2000); Skilling v. United States, 130 S. Ct. 2896 (2010).

definitions for federal crimes, the possibility of interlocutory appeals would make it more likely that district courts would fairly judge whether particular prosecutions actually fall within Congress's definition of the crime and within the constitutional jurisdiction of the federal courts.

CONCLUSION

The several hearings of this Task Force have, from various perspectives, addressed two fundamental themes: 1) the lack, or the inadequacy, of a *mens rea* in many federal crimes and regulations; and 2) the impossibility of knowing what conduct is criminal under federal law due a) to the vast number of crimes and the uncountable number of regulations with criminal penalties and b) the length and ambiguity of these criminal statutes and regulations. This paper has suggested several strategies that Congress might consider as solutions: 1) a default *mens rea*; 2) a rule of strict construction; 3) a definition of "crime," in the "General Provisions" of Title 18; 4) a prohibition of criminal penalties for violation of any administrative regulation unless the definition has gone through the legislative process; and 5) an interlocutory appeal for expansive interpretations of federal crimes and regulations carrying criminal penalties.