

January 5, 2015

Re: Bipartisan Support for Amending Rule on Judiciary Committee Jurisdiction

The Honorable John Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

We, the undersigned organizations, write in support of the proposed amendment to the Rules of the House of Representatives that would clarify the jurisdiction of the Committee on the Judiciary by adding “criminalization” to the Committee’s legislative jurisdiction. Currently, the House Rules give the Judiciary Committee jurisdiction over, among other things, “[t]he judiciary and judicial proceedings, civil and criminal,” as well as “[c]riminal law enforcement.” In practice, this should mean that the Judiciary Committee either receives a referral upon introduction or has the opportunity to seek a sequential referral when a bill either creates a new criminal law or modifies criminal penalties. Recently, however, an anomaly has developed in the referral practice that occasionally prevents the Judiciary Committee from obtaining a referral when a bill only criminalizes new conduct and does not modify a criminal penalty.

The result is that new criminal offenses are being created without being considered by the lawmakers on the Judiciary Committee who have valuable expertise in drafting and resolving potential conflicts with existing criminal law. By adding the word “criminalization” to the Judiciary Committee’s current Rule X jurisdiction, the Committee would be given the opportunity to seek a sequential referral over any measure that criminalizes new conduct. We believe that such a rules change will help to mitigate growing problems with our federal criminal legal system.

As documented by a joint report written by the National Association of Criminal Defense Lawyers and The Heritage Foundation,¹ legislation containing criminal law provisions is frequently introduced in the House, considered in other committees, reported to the full body for consideration, and even passed, without the benefit of Judiciary Committee involvement. This lack of Judiciary Committee participation contributes to the problem of overcriminalization.

Overcriminalization occurs when federal policymakers adopt vague, overbroad, or duplicative statutes; enact criminal statutes lacking meaningful *mens rea* (criminal intent) requirements; federalize crimes traditionally reserved for state jurisdiction; expand criminal law into areas more appropriately dealt with by civil enforcement; and create penalties unrelated to the

¹ Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* (Heritage Foundation and National Association of Criminal Defense Lawyers, 2010), available at: www.nacdl.org/withoutintent.

wrongfulness or harm of the underlying crime.² The American Bar Association's (ABA) Task Force on the Federalization of Crime observed in 1998, "So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes."³ Lawyers, academics, and even the American government have struggled to document the actual number of federal statutory offenses. During the 113th Congress, the House Judiciary Committee established an Over-Criminalization Task Force that took testimony from dozens of witnesses at 10 different hearings reviewing many of the problems associated with overcriminalization. Members and witnesses all agreed that a key step in halting overcriminalization is involving the Judiciary Committee in the drafting of new federal criminal laws. We agree.

The House Judiciary Committee has special expertise in drafting criminal offenses and knowledge of federal law enforcement priorities and resources. Furthermore, the Committee, with both a Crime and Constitution Subcommittee, is in a unique position to ensure due process protections and other bedrock civil liberties principles are considered when enacting new federal crimes. Therefore, allowing Judiciary Committee participation in any bills containing criminal offenses or criminal penalties will produce clearer, more specific criminal laws. It should also help protect against overcriminalization and foster a measured, prioritized approach to criminal lawmaking.

The criminal law is unique. No other law carries with it the potential of depriving an American's personal liberty through a prison sentence. For the foregoing reasons, we express our support for a rules change that would allow the Judiciary Committee to exercise its jurisdiction over any bill that proposes or modifies a criminal law or criminal penalty.

Sincerely,

Americans for Tax Reform

Cause of Action

The Constitution Project

James R. Copland, Director, Center for Legal Policy at the Manhattan Institute

Families Against Mandatory Minimums (FAMM)

Heritage Action for America

Mark Holden, General Counsel and Sr. Vice President, Koch Industries, Inc.

National Association of Criminal Defense Lawyers (NACDL)

U.S. Chamber of Commerce

U.S. Chamber Institute for Legal Reform

Washington Legal Foundation

² See *Smart on Crime: Recommendations for the Administration and Congress* (2010), Ch.1 p.3; available at: <http://www.constitutionproject.org/publications-resources/smart-on-crime-2010-recommendations/>.

³ American Bar Association, Criminal Justice Section, *The Federalization of Criminal Law* 9 (1998), available here: http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf.

Cc: The Honorable Cathy McMorris Rodgers, Republican Conference Chair