Written Statement of
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before the
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Re: "Over-Criminalization of Conduct/Over-Federalization of Criminal Law"

July 22, 2009

I. Introduction

As the American Bar Association's 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." As of 2003, there were over 4,000 offenses that carried criminal penalties in the United States Code.[1] By 2008, that number had increased to over 4,450.[2] In addition, it is estimated that there are at least 10,000, and possibly as many as 300,000, federal regulations that can be enforced criminally.[3] Enforcement of this monstrous criminal code has resulted in 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. Enforcement of this inefficient and ineffective scheme is, of course, at tremendous taxpayer expense.

In its current state, our criminal justice system all too frequently prosecutes crimes and imposes sentences without ample justification. Criminal prosecution and punishment constitute the greatest power that government routinely uses against its own citizens. As Harvard Professor Herbert Wechsler famously put it, criminal law "governs the strongest force that we permit official agencies to bring to bear on individuals."[4] It is a truism that any governmental power that is not subject to effective limits is a formula for abuse and injustice. 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. When Congress disregards these constitutional and prudential limits by resorting to unprincipled and unnecessary criminalization, it is abusing our government's greatest power.

The injury inflicted by a single misguided act of overcriminalization is not limited to an individual defendant, but rather it damages our entire criminal justice system and society as a whole. We cannot continue the race exponentially to expand the body of criminal law. For all these reasons, we welcome this hearing and urge the committee to pursue in earnest the sensible and necessary reform of the federal criminal code.

II. Overcriminalization is an Abuse of Legislative Authority and Exceedingly Harmful

Although the harm caused by overcriminalization is frequently amplified by the executive and judicial branches, it generally originates in the legislative process. While it can take many forms, overcriminalization most frequently occurs through (i) the enactment of criminal statutes that often lack a meaningful *mens rea* requirement, (ii) the imposition of vicarious liability for the acts of others

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[1] 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.

[2] 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.

[3] 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).

[4] Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952).

with insufficient evidence of personal awareness or neglect, (iii) the expansion of criminal law into economic activity and areas of the law traditionally reserved for regulatory and civil enforcement agencies, (iv) the creation of mandatory minimum sentences that frequently bear no relation to the wrongfulness or harm of the underlying crime, (v) the federalization of crimes traditionally reserved for state jurisdiction, and (vi) the adoption of duplicative and overlapping statutes.

A. The Absence of Meaningful *Mens Rea* Requirements

Criminal offenses lacking meaningful culpable state-of-mind (or *mens rea*) requirements inevitably lead to unjust prosecutions, convictions, and punishments. With rare exception, the government should not be allowed to wield its power against a defendant without having to prove that he acted with a wrongful intent. Absent a meaningful *mens rea* requirement, a defendant's other legal and constitutional rights cannot protect him or her from unjust punishment for making honest mistakes or engaging in conduct that he had every reason to believe was legal. The presence of a strong *mens rea* requirement in a criminal offense, applicable to all the material elements of that offense, is the proper and effective mechanism for preventing this type of injustice.

Despite the inherent effectiveness of a meaningful *mens rea* requirement, a number of newly enacted criminal offenses frequently contain only a weak *mens rea* requirement, if they have one at all. Most new crimes only require general intent, i.e. "knowing" conduct, which federal courts usually interpret to mean conduct done consciously. The defendant need not have known that he was violating the law or acting in a wrongful manner. In the case of traditional crimes, such as murder, rape, or robbery, general intent is sufficient because the conduct is in itself wrongful. However, when applied to conduct that is not inherently wrongful, such as certain paperwork violations, the "knowingly" *mens rea* requirement allows for punishment without any shred of evil intent, culpability, or sometimes even negligence.

These types of criminal provisions do not effectively deter criminal activity because they do not require the defendant to have any notice of the law or the wrongful nature of his conduct. Yet, 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.[5] This type of criminalization occurs alongside the enactment of criminal laws that, on their face, contain no *mens rea* requirements. Despite every intention to follow the law, even the most cautious defendant can be found guilty under such laws.

B. Criminal Punishment for the Conduct of Others

Similarly, through the imposition of vicarious liability for the acts of others, defendants can be prosecuted, convicted, and punished without any evidence of personal awareness or neglect. Under this theory of criminal liability, off-duty supervisors can be criminally punished for the accidental acts of their employees absent any knowledge, approval, or connection to said conduct[6] and landowners can

[5] 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.* (2000). Specifically, 16 U.S.C. § 3373(d) provides a criminal penalty for "knowingly" violating "any provision of [Chapter 16]" and, in that one clause, criminalizes *all* the conduct proscribed by any of the Lacey Act's statutory provisions or corresponding regulations.

[6] *See United States v. Hanousek*, 176 F.3d 1116, 1120-23 (9th Cir. 1999) (upholding conviction of an off-duty construction supervisor under the Clean Water Act when one of his employees accidentally ruptured an oil pipeline with a backhoe).

be convicted for moving sand onto their property without a federal permit.[7] Corporate criminal liability employs the doctrine of *respondeat superior*, which is identical to the standard used in civil tort law. This means that, as long as an employee is acting within the scope of his or her employment (as broadly defined), the corporation is deemed criminally liable for that employee's actions, despite the corporation's best efforts to deter such behavior.[8] Regardless of compliance programs or employment manuals, or even strict instructions to the contrary, if an employee violates the law, then the corporation can be criminally punished.

C. The Criminalization of Business and Economic Activity

Because the lack of meaningful *mens rea* provisions together with the application of vicarious criminal liability allow for criminal punishment absent blameworthiness, the expansion of the criminal code into economic activity and areas of the law traditionally reserved for regulatory and civil enforcement agencies is particularly problematic. This expansion has turned aggressive business behavior and questionable judgment calls into prison sentences. In addition, this form of criminalization upstages the work of the regulatory agencies.

Civil and regulatory agencies have diverse tools at their disposal to prevent misconduct, order compliance, and impose monetary penalties to compensate injured parties or disgorge unlawful profits. But before regulators have the opportunity to declare what conduct is unlawful or use any of these tools, defendants are being hauled into criminal court. Whereas the criminal process is executed at the taxpayer's expense and often causes innocent employees to lose their jobs, civil and regulatory enforcement can minimize those costs and produce financial benefits without guaranteeing business failure and job losses.

D. Mandatory Minimums Render Blameworthiness and Harmfulness Irrelevant

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 thirty years can serve to deter a defendant from intentionally violating the law, such a sentence can have no deterrent effect where the defendant had no intention to commit a wrong or had every reason to believe his conduct was lawful. Rather, the combination of such high sentences with broadly written criminal offenses that lack meaningful *mens rea* provisions often results in the incarceration of innocent people. Why would anyone risk going to trial when the potential punishment is ten or twenty years in jail but the plea offer is fifteen months? A genuine lack of blameworthiness is no match for this risk.

Further, mandatory minimum sentences bear little to no relation to the wrongfulness or harmfulness of the underlying crime. For example, a multi-year prison term imposed for possession of a single bullet without a firearm or corrupt motive is grossly disproportionate to the virtually non-

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[7] *See United States v. Rapanos*, 376 F.3d 629, 632-33, 640-44 (6th Cir. 2004) (affirming defendant's conviction under the Clean Water Act due to classification of his property as federally protected "wetlands").

[8] *See New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909) (holding that, "in the interest of public policy," corporations can be held criminally liable for the actions of their agents); *see also United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972) (holding the corporation liable "for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent").

existent blameworthiness of the defendant.[9] Mandatory minimums remove discretion from judges, who are best suited to assess a particular defendant's culpability because they are the party closest to the facts and circumstances of the particular matter, and instead, concentrate too much discretion in the hands of the charging prosecutors. For example, once charged, defendants facing mandatory minimums lose any significant ability to contest their culpability and frequently plead guilty to *some* of the charges in order to avoid imposition of the sentences associated with *all* of the charges.

The correlation between various forms of overcriminalization – mandatory minimums and weak or no *mens rea* provisions – cannot be ignored. Under Section 924(c)(1)(A) of the Gun Control Act of 1968, the mandatory minimum sentence for possession of a firearm during a crime of violence or drug trafficking offense is five years.[10] However, that minimum increases to seven years if the gun is *brandished* and to ten years if the gun is *discharged*. If, for example, a particular defendant, charged under this statute, *accidentally* discharges the gun, then his sentence automatically increases to ten years.[11] Due to the failure of Congress to include a *mens rea* provision in this statute, a defendant who neither brandishes nor intentionally discharges a gun will have his sentence double automatically.

The crime of attempted illegal reentry further demonstrates the connection between mandatory minimums and *mens rea* requirements. In order to be convicted of the crime of attempted illegal reentry, punishable by up to twenty years in prison,[12] the defendant may or may not need the specific intent to attempt to reenter illegally; in most circuits, all that must be shown is evidence of general intent.[13] Therefore, a defendant's guilt and possible punishment of twenty years depends on the location of his conduct and not the conduct itself. Such variances, removed entirely from the defendant's conduct and intent, do not deter criminal activity, fail to treat similarly situated persons the same, and are fundamentally contrary to our system of fairness and justice.

E. The Overfederalization of Crime

Another equally disturbing congressional trend is the overfederalization of crime. Congress tends to respond to every crisis with a new federal crime. As former United States Supreme Court Chief Justice William H. Rehnquist explained:

> Over the last decade, Congress has contributed significantly to the rising caseload by continuing to federalize crimes already covered by state

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[9] *See United States v. Yirkovsky*, 259 F.3d 704, 707 n.4 (8th Cir. 2001) (reasoning that although a sentence of fifteen years for possessing a single bullet "is an extreme penalty under the facts as presented to this court," "our hands are tied in this matter by the mandatory minimum sentence which Congress established"); *see also United States v. Yirkovsky*, 276 F.3d 384, 385 (8th Cir. 2001) (Arnold, J., dissenting from denial of rehearing en banc) (suggesting "that on its face the sentence is grossly disproportionate to the offense for which it was imposed").

[10] 18 U.S.C. § 924(c)(1)(A) (2000).

[11] *Dean v. United States*, 129 S.Ct. 1849 (2009).

[12] 8 U.S.C. § 1326(a)-(b) (2000).

[13] The Ninth and Eighth Circuits require evidence of specific intent. *See United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1190 (9th Cir. 2000); *see also United States v. Kenyon*, 481 F.3d 1054, 1069 (8th Cir. 2007). The majority of circuits, however, hold that general intent is sufficient to be convicted of attempted illegal reentry. *See United States v. Reyes-Medina*, 53 F.3d 327 (1st Cir. 1995); *United States v. Rodriguez*, 416 F.3d 123, 125 (2nd Cir. 2005); *United States v. Morales-Palacios*, 369 F.3d 442, 449 (5th Cir. 2004); and *United States v. Peralt-Reyes*, 131 F.3d 956, 957 (11th Cir. 1997).

> laws. . . . The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system.[14]

The federal criminal code is littered with offenses that have traditionally been the domain of state criminal law, and it is often the case that these offenses have attenuated connections to the powers of the federal government.

Aside from the obvious tension that is created by dual federal-state criminal prosecution authority, the negative impact on individual defendants is significant. The federal system boasts of generally harsher punishments, stricter forfeiture rules, and fewer innovative programs for dealing with low-level offenders. Yet again, an individual defendant's experience in the criminal justice system ultimately turns not on his conduct or intent, but rather on the authority that prosecutes him. Two defendants, who possess the same intent and commit identical conduct, may nevertheless receive significantly disparate treatment and punishment based solely on the federal government's decision to take the case of one defendant and to leave the other for the state to prosecute.[15] Perhaps the best example of this abuse is the federalization of purely intrastate drug offenses, particularly low-level crack cocaine offenses.

F. The Abysmal State of the Federal Criminal Code

Finally, the utter disarray of the federal criminal code is both a cause and symptom of the overcriminalization problem. Take, for example, the many criminal provisions in Section Two of the recently enacted Fraud Enforcement Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617. Virtually all of the criminal provisions prohibit conduct that was already prohibited under the federal criminal code.[16] At the hearing to consider this particular piece of legislation, federal law enforcement witnesses made it clear that existing federal law is more than adequate to punish any actual criminal conduct associated with the current financial crisis.[17] Yet, it was passed and signed into law. This is certainly not a unique example. This type of redundancy is commonplace in the federal legislative process.

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[14] William H. Rehnquist, 1998 Year-End Report of the Federal Judiciary (Jan. 1, 1999), at 4-5. *See also e.g.*, *Rehnquist Blames Congress for Courts' Increased Workload*, Wash. Times, A6, (Jan. 1, 1999).

[15] *See* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747, 764 (2005).

[16] Letter from the Nat'l Ass'n of Criminal Def. Lawyers and the Heritage Found., to the Honorable Patrick Leahy and the Honorable Arlen Specter, (Feb. 11, 2009), *available at* http://www.nacdl.org/public.nsf/freeform/Testimony?OpenDocument.

[17] *The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn: Hearing on S. 386 Before the S. Comm. on the Judiciary*, 111th Cong. (Feb. 11, 2009).

III. Possible Legislative and Policy Reforms

Aside from its fundamental inconsistency with our justice system, the abuse of overcriminalization exacts a heavy burden on innocent defendants, the federal judiciary, the federal prisons, and taxpayers. The massive federal criminal code may require significant reform; however, there are several reforms that can be implemented immediately to prevent the situation from getting further out of control and to reduce significantly the negative effects of overcriminalization.

To ensure that only those with sufficient culpability are convicted and punished, we recommend that Congress enact two new federal statutes to address the frequently lacking *mens rea* requirements in federal criminal offenses. First, Congress should enact a federal statute that would apply a default *mens rea* requirement to criminal statutes that lack any such requirement. Second, Congress should enact a federal statute that would mandate that any introductory or "blanket" *mens rea* requirement be applied to all material elements of the offense. These two reforms will ensure that innocent, law-abiding citizens are protected from unjust conviction under criminal offenses with inadequate *mens rea* provisions. Further, these reforms will require Congress to enact criminal offenses with weak or no *mens rea* requirements *consciously* by setting out its intent in clear legislative language. With these two simple legislative enactments, Congress will take the first step towards preventing disparate treatment, unjustified punishment, and the conviction of law-abiding citizens. In addition, Congress should be skeptical of Department of Justice efforts to water down offense elements – a practice that has exacerbated the negative impact of the harm of minimum intent requirement.

To guarantee that the punishment is proportionate with the blameworthiness of the individual defendant and the harm caused by the defendant's conduct, we recommend the repeal of all mandatory minimum sentences. The repeal of mandatory minimum sentences will remove the shackles from judges who are frequently forced to sentence defendants without regard for their intent, conduct, and culpability. While a full repeal of mandatory minimums will not ensure that the punishment always fits the crime, it will increase the likelihood of such. At a minimum, we urge this body against any effort to make the federal sentencing guidelines more rigid or to further limit the discretion of individual judges. The power to sentence properly belongs to the judge, and not the prosecutor who brings the charges. Increasing judicial discretion at sentencing will keep that power in the right hands. Further, repealing mandatory minimums and providing judges with the ability to craft defendant-specific sentences may have the positive effect of decreasing the number of innocent individuals who plead guilty rather than risk going to trial.

To prevent the further expansion of the federal criminal code, we recommend that Congress strengthen its rules and procedures to require that the Judiciary Committee of each chamber receive sequential referral over every Congressional bill that adds or modifies criminal offenses and penalties. This amendment should not be limited to those bills related to Title 18, but rather it should cover any bill that contains any type of criminal offense or penalty regardless of its particular location in the federal code. The House and Senate Judiciary Committees are uniquely positioned to take on the responsibility of ensuring that all new criminal offenses are necessary and not duplicative. Further, these committees have specialized knowledge on fundamental criminal law principles such as *mens rea*, vicarious liability, sentencing and federalism, to name a few. Funneling all new criminalization through the Judiciary Committees, which are limited in time and resources, will facilitate the prioritization of criminalization and reduce the proliferation of unnecessary federal criminal offenses.

IV. Conclusion

The federal judiciary is backlogged, the federal prisons are overflowing, and the number of innocent, law-abiding individuals locked behind bars is growing. In these tough economic times especially, the cost of enforcing the federal criminal code constitutes reason alone for serious reflection, though the most important reason has always been and remains that we should have a rational and fair criminal justice administration.

Overcriminalization causes harm to every member of our society. This costly abuse must come to a halt now and be replaced by serious and genuine reforms. For all these reasons, we welcome this hearing, we urge the committee to make the most of this window of opportunity, and we recommend the committee enact legislation embodying the aforementioned reforms.

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The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 12,000-plus direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.