BEFORE THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON JUDICIARY'S TASK FORCE ON OVER-CRIMINALIZATION

"REGULATORY CRIME: DEFINING THE SCOPE OF THE PROBLEM"

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FOR

THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

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My name is Reed D. Rubinstein and I am a partner in the Washington, D.C. office of Dinsmore & Shohl, LLP. I also represent and am Senior Vice President for Litigation of Cause of Action, Inc., a 501(c)(3) non-profit corporation focused on federal agency accountability and transparency.

For over twenty-five years, I have practiced environmental and administrative law, defending individuals and companies in federal civil and criminal enforcement matters. I also have served as the U.S. Chamber of Commerce's Senior Counsel for Environment, Technology and Regulatory Affairs and was for many years an adjunct professor of environmental law at the Western New England School of Law.

I am testifying today on behalf of the U.S. Chamber Institute for Legal Reform ("ILR") to help define the scope of the regulatory over-criminalization problem. ILR is an affiliate of the U.S. Chamber of Commerce dedicated to making our nation's overall legal system simpler, fairer, and faster for all participants. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region and dedicated to promoting, protecting, and defending America's free enterprise system.

I. SUMMARY

The consensus that "over-criminalization" presents a clear and present danger to American freedom and individual civil liberties is broad and deep.[1] The metastatic growth in the number of federal crimes, the broad scope of modern criminal codes and, most importantly, past Congresses' willingness to provide the Executive Branch with plenary police powers unconstrained by traditional *mens rea* requirements protecting those who did not intend to commit crimes from unwarranted prosecution and conviction, are eroding foundational Anglo-American jurisprudential norms that preserve liberty.[2]

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[1] *See generally* Smith, *Overcoming Overcriminalization,* 102 J. CRIM. L. & CRIMINOLOGY 537, 538-39 (2012)(*citations omitted).*

[2] Baker, HERITAGE FOUND., LEGAL MEMORANDUM NO. 26: REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 5 (2008), cited in Smith, *supra* at fn. 4. According to Baker:

Regulatory over-criminalization is particularly corrosive to our fundamental freedoms. First, regulatory "crimes" nearly always punish conduct that is *malum prohibitum*, or wrongful only because it is prohibited and all too often "consciousness of wrongdoing" is irrelevant.[3] Vast expanses of conduct are criminalized without any explicit Congressional sanction or notice to the ordinary person that his or her everyday activities may be subject to criminal punishment.[4]

Second, regulatory crimes are the product of bureaucratic actions, not legislative enactments. Criminal law is the primary system for public communication of societal values, and it is unwise and generally improper for crimes to be defined by unelected, unaccountable bureaucrats through convoluted rulemaking processes.

Third, criminalizing regulatory violations without respect for intent, or *mens rea*, has a chilling effect on small businesses, entrepreneurs, and scientific innovation. ILR supports laws that conserve our environment, guard the quality of our food, and ensure the efficacy of our medicines. But it is simply wrong for unaccountable federal agencies to have functionally limitless discretion to first make the law by promulgating regulations and then to criminally prosecute citizens for their "violations" without prosecutorial consistency, predictability, or proof of wrongful intent.

ILR believes that Congress should enact a general statute that ensures inclusion of appropriate threshold *mens rea* requirements in criminal laws, including laws the criminalize violations of administrative regulations. Such a statute could require all new laws to provide adequate definition of both the *actus reus* (guilty act) and the *mens rea* in specific and unambiguous terms. Any general *mens rea* statute should also provide a default intent standard that would apply in the event that a law, whether new or existing, fails to adequately define an *actus reus* and *mens rea*. Additionally, Congress should consider taking steps to put in place mechanisms for meaningful agency oversight, transparency and accountability in order to counteract some of the more egregious secondary and tertiary effects of regulatory over-criminalization.[5] These mechanisms ought to include reasonable

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> The federal government is supposedly a government of limited powers and, therefore, limited jurisdiction. Each new crime expands the jurisdiction of federal law enforcement and federal courts. Regardless of whether a statute is used to indict, it is available to establish the legal basis upon which to show probable cause that a crime has been committed and, therefore, to authorize a search and seizure….Historically, nearly all crimes concerned acts that were *malum in se*, or wrong in themselves, such as murder, battery, and theft. Today, however, new crimes and petty offenses created by statute almost always concern acts that are *malum prohibitum*, or wrong only because it is prohibited.

Baker, *supra* at 6.

[3]*United States v. Dotterweich*, 320 U.S. 277, 284 (1943). Regulatory offenses differ from the types of crimes punishable at common law, which were deemed *mala in se*, or wrong in and of themselves. *See Morissette v. United States*, 342 U.S. 246, 251–57 (1952) (distinguishing common law and regulatory offenses).

[4]Walsh and Joslyn, HERITAGE FOUND./NACDL, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW, 11 (2010).

[5]*See generally* Walsh & Joslyn, WITHOUT INTENT: HOW CONGRESS IS ERODING THE INTENT REQUIREMENT IN FEDERAL LAW 26 – 31 (2010*) available at* http://www.nacdl.org/withoutintent/ (accessed July 8, 2013).

limits on agencies' prosecutorial discretion and stronger procedural guarantees to ensure that the targets of agency action receive an independent, fair, and level review of their cases than current law provides.

II. DISCUSSION.

A. The Scope of "Regulatory Crimes."

Over-criminalization results when Congress expands criminal liability through strict liability offenses that dispense with culpable mental states; imposes vicarious liability without some evidence of personal advertence; inflicts grossly disproportionate penalties that bear no relation to the wrongfulness of the underlying crime, the harmfulness of its commission, or the blameworthiness of the criminal; and broadly delegates criminal enforcement authority and discretion to executive agencies.[6]

The threat posed by over-criminalization to Americans' individual freedom and civil liberties has long been recognized. As Sanford Kadish wrote in 1967:

> American criminal law…has extended the criminal sanction well beyond…fundamental offenses to include very different kinds of behavior, kinds which threaten far less serious harms, or else highly intangible ones about which there is no genuine consensus, or even no harms at all. The existence of these crimes and attempts at their eradication raise problems of inestimable importance for the criminal law. Indeed, it is fair to say that until these problems of over-criminalization are systematically examined and effectively dealt with, some of the most besetting problems of criminal-law administration are bound to continue.[7]

For two generations, the over-criminalization problem has grown at a fantastic rate in scope, depth and complexity. According to a widely-cited 1998 American Bar Association report, an incredible 40% of the thousands of federal criminal laws passed since the Civil War were enacted after 1970, many incident to broad economic and environmental regulatory statutes that eviscerate traditional *mens rea* requirements. Estimates are that 4,500 federal laws carry criminal penalties.[8] "Thus, whether crime rates are rising or falling, the one constant—as predictable as death and taxes—is that scores of new federal criminal statutes are being enacted."[9] No one knows, precisely,

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[6] *See* Luna, *The Overcriminalization Phenomenon*, 54 AMERICAN UNIV. L. REV. 703, 715 (2005); Rosenzweig, The Over-Criminalization of Social and Economic Conduct, 7 HERITAGE FOUND. LEGAL MEM. 1, 3-12 (2003) (discussing elimination of *mens rea* requirements and limitations on vicarious liability).

[7] Kadish, *The Crisis of Overcriminalization*, ANNALS AM. ACAD. POL. SCI. 157, 158 (Nov. 1967).

[8] Gary Fields and John R. Emshwiller, "As Criminal Laws Proliferate, More Are Ensnared," The Wall Street Journal (July 23, 2011) *available at* http://online.wsj.com/news/articles/SB10001424052748703749504576172714184601654 (accessed October 28, 2013)(citation omitted).

[9] Smith, *supra* at 538 citing AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998); Baker, Jr., Corporations: Measuring the Explosive Growth of Federal Crime Legislation, ENGAGE: J. FEDERALIST SOC'Y'S PRAC. GROUPS, Oct. 2004, at 23, 27, *available at* http://www.fed-soc.org/doclib/20080313_CorpsBaker.pdf (finding more than a one-third increase in the number of federal crimes since the early 1980s).

how many federal regulations have possible criminal consequences – the best estimates are in the tens of thousands.[10]

Our apparently insatiable appetite for broad and indistinct strict liability criminal regulatory schemes[11] has weakened the bedrock principles of Anglo-American criminal law. Simply put, these schemes degrade the criminal law and prevent the imposition of just and proportional punishments for offenses. A sprawling criminal code based substantially on agency regulations is especially likely to contain crimes in which the all-important conduct (*actus reus*) and state of mind (*mens rea*) elements are incompletely fleshed out.[12] Such a system engenders prosecutorial abuses, especially by bureaucratic agencies unencumbered by the cultural and prudential limits that restrain state and federal prosecutors.

To begin with:

> One of the most elementary requirements of criminal and constitutional law is that the government must offer the public adequate notice of what the law forbids before a person can be held liable for violating a criminal statute….Today, however, the proposition that everyone knows the law is not just a fiction or a "legal cliché"; it is an absurdity. The criminal law no longer merely expresses societal condemnation of inherently nefarious acts that everyone knows are wrong (e.g., murder), so-called *malum in se* offenses. It also regulates the conduct of individuals by making it a crime to commit a variety of acts that are unlawful only because Congress has said so, crimes known as *malum prohibitum* offenses….Given this reality, it is dishonest to presume that anyone, much less everyone, knows everything that the federal penal code outlaws today.[13]

Congress and the Executive Branch, each for their own reasons, have discarded traditional constraints on culpability when ostensibly acting on behalf of the public welfare.[14] In addition, the

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[10]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).

[11]*See, e.g.,* Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 289 (1998) (citing over three hundred federal proscriptions against fraud and misrepresentation).

[12]*See* Smith, 102 J. OF CRIM. L. & CRIMINOLOGY at 540.

[13]Paul J. Larkin, Jr., The Heritage Foundation Senior Legal Research Fellow, *Oversight Hearing On The Lacey Act: Why Should U.S. Citizens Have to Comply with Foreign Laws?* TESTIMONY BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES SUBCOMMITTEE ON FISHERIES, WILDLIFE, OCEANS, AND INSULAR AFFAIRS at 2 – 4 (July 17, 2013)(citations omitted).

[14]According to Kadish:

> The plain sense that the criminal law is a highly specialized tool of social control, useful for certain purposes but not for others; that when improperly used it is capable of producing more evil than good; that the decision to criminalize any particular behavior must follow only after an assessment and balancing of gains and losses-this obvious injunction of rationality has been noted widely for over 250 years, from Jeremy Bentham [forward]…And those whose daily business is the administration of the criminal law have, on occasion, exhibited acute awareness of the folly of departing from it. The need for restraint seems to

U.S. Supreme Court long ago acquiesced to federal crimes that lack a *mens rea* requirement and instead impose liability without regard for a guilty mental state.[15] Contemporary regulations often reject historic limitations on vicarious criminal responsibility for the acts of others. And, Congress has delegated the immense power to define prohibited conduct through rulemaking to unaccountable, opaque bureaucracies, and then to prosecute violations with un-cabined enforcement "discretion."

The criminal prosecution of a well-respected marine biologist, Nancy Black, illustrates the problem.[16] Black's research has led to important advances in scientific knowledge regarding whale range, behavior, and population structure. Nevertheless, for reasons that cannot be readily ascertained from the record, she was singled out to suffer the full weight of the government's power, and charged with a variety of crimes including one count of violating 18 U.S.C. § 1519 (alteration of a record with the intent to impede, obstruct, or influence an investigation), one count of violating 18 U.S.C. § 1001(a)(2) (knowingly and willfully making a false statement in a matter), and two misdemeanor counts of violating 16 U.S.C. § 1375(b) and 50 C.F.R. §§ 216.3 and 216.11(b) (knowingly violating a Marine Mammal Protection Act ("MMPA") regulation that prohibits "feeding" marine mammals in the wild). A forfeiture allegation was also alleged under 16 U.S.C. §§ 1377(d) and 1377(e)(3)(B) and 28 U.S.C. § 2461(c) (seeking forfeiture of a 22-foot dinghy and its gear). Black eventually pled guilty to one count of violating a regulation prohibiting feeding.[17]

According to the Department of Justice ("DOJ"), the genesis of the prosecution is that killer whales (orcas) enjoy eating gray whales in the Monterey Bay National Marine Sanctuary. When orcas manage to kill a gray whale, they do not always eat it all at once. Often, portions of the

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> be recognized by those who deal with the criminal laws, but not by those who make them or by the general public which lives under them.

Kadish, *supra.*

[15] *See United States v. Park*, 421 U.S. 658, 663-64, 670-73 (1975) (holding that the Federal Food, Drug, and Cosmetic Act does not require a guilty mental states and affirming CEO's conviction for unsanitary food storage conditions); *Dotterweich*, 320 U.S. at 285 (1943) (holding a corporate president criminally liable without proof of a culpable mental state because he stood in "responsible relation" to the distribution of mislabeled pharmaceuticals); *see also United States v. Balint*, 258 U.S. 250, 251-52 (1922) (refusing to impose the common law requirement of a culpable mental state when legislative intent was to create strict liability on a class of persons); *United States v. Weitzenhoff*, 35 F.3d 1275, 1283-85 (9th Cir. 1993) (strict liability for Clean Water Act violations without knowledge of the law or illegality of conduct); *United States v. Hanousek*, 176 F.3d 1116, 1120-22 (9th Cir.) *cert. denied* 528 U.S. 1102 (2000) (upholding conviction of a supervisor under the Clean Water Act when a backhoe operator ruptured a pipeline because, inter alia, legislation was enacted for the public welfare).

[16] Cause of Action, Inc. is part of the team representing Ms. Black.

[17] *See* U.S. Dep't of Justice, Office of Public Affairs, *"California Woman Pleads Guilty to Feeding Whales in Marine Sanctuary,"* (April 23, 2013), *available at* http://www.justice.gov/opa/pr/2013/April/13-enrd-463.html (accessed October 27, 2013). As part of the plea agreement, the Government agreed to, inter alia, dismiss Count One (violation of 18 U.S.C. § 1519) and Count 2 (18 U.S.C. § 1001). At the change of plea hearing, the Government moved to dismiss Counts 1, 2 and 4.

carcass, including strips and chunks of blubber (some over six feet in length and weighing over a hundred pounds), remain floating or semi-submerged after a kill. Orcas and sea birds feed on the leftovers while they are still available in the area.[18]

DOJ reports that according to the plea agreement, on or about April 25, 2004, Black was on her boat in the Monterey Bay National Marine Sanctuary, when she and her assistants encountered orcas eating a baby gray whale. She watched the orcas eat pieces of the calf floating in the water. To facilitate her research, she or her crew grabbed a floating bit of the unlucky calf, cut a hole through the corner and inserted a rope through the hole to stop the blubber from floating away from the boat. They returned the piece of blubber to the water and monitored the feeding behavior of the orcas, which ate the blubber off of the rope. Black and her crew repeated the process with the rope and other calf pieces. In court papers, Black admitted that, although she had a valid permit to research orcas, she did not have a permit for this. She also admitted that on or about April 11, 2005, she or her crew did the same thing.

To understand how it could be that this relatively innocuous conduct led Black to spend more than eight years in a very public and immensely burdensome regulatory and criminal morass of investigations, indictments and charges, it is necessary to walk carefully through the relevant statutes and regulations.

First, Congress enacted 16 U.S.C. § 1375(b) as a statute of general application criminalizing prohibited conduct. It provides that "[a]ny person who knowingly violates any provision of this title or of any permit or regulation issued thereunder (except as provided in section 118 [16 U.S.C. § 1387]) shall, upon conviction, be fined not more than $ 20,000 for each such violation, or imprisoned for not more than one year, or both." The statute's *mens rea* requirement ("knowingly," not "willfully") is weak. A person need not know that his or her conduct is prohibited by the MMPA to suffer criminal liability, only proof of general intent and knowledge of the facts constituting the offense are needed.

Second, 16 U.S.C. § 1372(a), falls within § 1375(b)'s scope and prohibits the "taking" of a marine mammal. "Taking" is defined at 16 U.S.C. § 1362(13) to mean "harassment." "Harassment," in turn, is defined at 16 U.S.C. § 1362(18) to mean anything that could "disturb" marine mammals by "caus[ing] disruption of behavioral patterns … including … feeding."

Third, bureaucratic regulations prohibit (and thus criminalize) any attempt to "feed or attempt to feed" a marine mammal in the wild without a permit. *See* 50 C.F.R. §§ 216.3 ("Take" means to harass … [and] includes, without limitation, any of the following: ... feeding or attempting to feed a marine mammal in the wild."), 216.11(b) (taking is unlawful). The anti-feeding regulation was designed to prevent for-profit companies from "baiting" marine mammals to create a "show" for their customers. For-profit companies that have run afoul of NOAA's anti-feeding regulations have typically been served with notices of violation and paid civil fines.[19] In one case, a forfeiture

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[18] *Id.*

[19] *See, e.g.,* NOAA Office of General Counsel, Enforcement Actions: July 1, 2012, through December 31, 2012, at 17 (Feb. 2013), *available at* http://www.gc.noaa.gov/documents/2013/enforce_Feb_02112013.pdf (accessed July 17, 2013) ("SE1003031, Marine Mammal Protection Act $5,000 NOV settled for $5,000, with $1,000 suspended for eighteen months. Owner and operator were charged for feeding wild dolphins."); NOAA Settlement Agreement, Marine Mammal Protection Act, Case No. SE0902854MM (Aquatic Adventures Management Group settles $5,000 NOV violating MMPA regulations prohibiting

action was filed against a company in which the alleged violations were far more extensive and egregious than in the Black case.[20] Yet only Black has been prosecuted.[21]

B. The Corrosive Effect of Regulatory Over-criminalization.

The human cost of regulatory over-criminalization has been well documented. Reports of armed administrative agency agents breaking into homes, factories and even animal shelters on the pretext of enforcing arcane federal and state regulations are particularly unsettling.[22] But from a systemic standpoint, the chief vice of regulatory over-criminalization is the wholesale abandonment of what Kadish called "the basic principle of legality upon which law enforcement in a democratic community must rest--close control over the exercise of the delegated authority to employ official force through the medium of carefully defined laws and judicial and administrative accountability."[23] Such abandonment has had a tremendously corrosive effect, and the systemic lack of "carefully

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feeding for $4,000); Notice of Violation and Assessment of Administrative Penalty, Marine Mammal Protection Act, issued to Ben Chancey and Eric Mannino, Case No. SE0903717MM ($5,000 NOV for alleged violation of MMPA regulation prohibiting feeding of marine mammals in the wild.)

[20] Complaint for Forfeiture, *United States v. Manfish*, CV-13-2690-EJD, Dkt. 1 (June 12, 2013).

[21] Virginia Hennessy, "Cousteau hands over boat to settle whale chumming case: Same footage used in criminal case against marine biologist Nancy Black," MONTEREY HERALD (Oct. 7, 2013), *available at* http://www.montereyherald.com/news/ci_24260396/cousteau-hands-over-boat-settle-whale-chumming-case (accessed Oct. 28, 2013); Daniel Dew, *Save the ~~Whales~~ NOAA* (September 5, 2012) *available at* http://blog.heritage.org/2012/09/05/save-the-whales-noaa/ (accessed October 27, 2013).

[22]Many federal and state administrative agencies maintain their own armed police forces to enforce regulations. For example, during the infamous Gibson Guitar raid, armed federal agents swarmed an iconic guitar maker, herding its employees at gunpoint based on allegations Gibson was using wood exported in violation of Indian domestic content laws to make musical instruments. Fox News*, "Fed Raid Targets Guitars Made From Endangered Trees,"* (Aug. 26, 2011) *available at* http://www.foxnews.com/politics/2011/08/26/feds-environmental-enforcement-on-guitars-leaves-musicians-in-fear/ (accessed October 27, 2013).

In another case, the Huffington Post reports that thirteen armed state law enforcement agents reportedly raided an animal shelter to capture and then kill a 35-pound orphan baby deer. All shelter employees were corralled near the parking lot while agents went through the property. When a young volunteer took photos of the raid on his phone, officers took his phone and deleted the pictures. The armed agents took the fawn, which was about to be sent to an animal rehabilitation facility in Illinois, stuffed it into a body bag, carried it out of the shelter and killed it. The search warrant for the raid lists a Wisconsin state law forbidding the possession of wildlife without proper permits, and the likelihood that shelter employees might hide the animal, as reasons for the raid. Hunter Stuart, *"Baby Deer, 'Giggles,' Killed After Raid on St. Francis Society Animal Shelter,"* (Aug. 2, 2013) *available at* http://www.huffingtonpost.com/2013/08/02/baby-deer-killed-raid_n_3691317.html (accessed October 27, 2013).

[23]Kadish, *supra.*

defined laws" and the absence of "administrative accountability" have unquestionably resulted in abuses by federal and state administrative agencies.[24]

Furthermore, regulatory over-criminalization has very strong secondary and tertiary effects that inhibit economic and personal liberty. The broad authority to "fill in" and define the terms of strict liability crimes and the unlimited prosecutorial discretion given by Congress to unaccountable bureaucratic regulators combine to chill companies and individuals from contesting even civil regulatory abuse. In most cases, targets of agency action must defend themselves in proceedings *run by that very agency*. Some agencies have even effectively done away with the limited due process protection provided by independent administrative law judges. Yet courts generally require targets of agency action to "exhaust" administrative remedies, often at great expense over a period of years, before coming to court for an independent, fair, and level review.

Generally speaking, settlement is almost always the only cost-effective strategy. Public companies facing charges of criminal regulatory violations often settle at least in part because the risk of insolvency associated with a criminal indictment (see Arthur Anderson) is so great that contesting a charge could amount to a breach of fiduciary duty. Small businesses usually lack the resources to effectively contest regulatory enforcement actions and there is no equivalent of the Federal Public Defender's Office for targets of administrative action. Therefore, only a few rare individuals are capable of standing up and vigorously defending themselves and their rights when facing charges with respect to alleged criminal (and often even alleged civil) regulatory violations.

Also, agency decision-making in an over-criminalized environment is rarely clear, consistent, or predictable.[25] Certainly, if a law declares a practice to be criminal, but cannot apply its policy with

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[24]The legal restrictions imposed on the bureaucracy's power to criminalize and punish are far and few between, "with the only vigorous substantive boundaries set in areas like speech and reproductive freedom." Generally applicable limitations such as judicially-imposed *mens rea* and actual notice requirements, barriers against shifting evidentiary burdens to the defense, and bans on strict liability status offenses are "derelict[s] on the waters of the law." This is likely due to a variety of reasons, including hesitance to limit the political branches in their enactment and enforcement of substantive crimes and punishments. Thus:

> Every augmentation provides officials a new legal instrument to apply against members of the so-called "criminal class" (many of whom look remarkably similar to the class of "normal" folks). Whether any given instance might be seen as abusive, of course, depends on an individual's personal predispositions and intellectual commitments, whatever they may be. But in general, "American criminal law's historical development has borne no relation to any plausible normative theory," William Stuntz suggests, "unless 'more' counts as a normative theory."

See Erika Luna, *The Overcriminalization Phenomenon*, 54 Am. Univ. L. Rev. 704, 711, 723 (2005) (citations omitted).

[25]For example, on August 24, 2011, Gibson Guitar factories in Nashville and Memphis were raided by armed agents from the Department of Homeland Security and the U.S. Fish & Wildlife Service for alleged Lacey Act violations. The company was not accused of importing banned wood. Rather, the raid apparently occurred because Gibson ran afoul of a technical Indian regulation governing the export of finished wood products, which was designed to protect Indian woodworkers from foreign competition. *See* Affidavit of Special Agent John M. Rayfield in support of Search Warrant 11-MJ-1067 A, B, C, D at ¶¶ 15-18 (Aug. 18, 2011) *available at*

consistency, its moral effect is necessarily weakened.[26] But the agencies' lack of consistency, transparency, and accountability also undermines public faith in the rule of law, impairing innovation and interfering with business investment and job-creation. Time and again in the course of my practice, in various regulatory contexts and in various ventures, I have seen large companies, small companies, and entrepreneurs assess the risks and uncertainty posed by regulatory over-criminalization, and then decline to build, to invest, or to grow. While I know of no empirical study that authoritatively accounts for the jobs lost and/or the economic activity aborted by regulatory over-criminalization, the harm is unquestionably pervasive, palpable, and real.[27]

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http://www.scribd.com/srcohiba/d/63869457-US-Government-s-Affidavit-in-Support-of-Search-Warrant-at-Gibson-Guitar-Factory (accessed May 4, 2012). To make matters worse, although the Indian government certified that the wood was properly and legally exported, the regulators substituted their own opinion to support their claims of a Lacey Act violation.

On July 27, 2012, Gibson and the government settled all of their outstanding Lacey Act matters. As to the Indian ebony and rosewood that led to an armed raid:

> The Government and Gibson…agree that certain questions and inconsistencies now exist regarding the tariff classification of ebony and rosewood fingerboard blanks…Accordingly, the Government will not undertake enforcement actions related to Gibson's future orders…or imports of ebony and rosewood…from India, unless and until the Government of India provides specific clarification that ebony and rosewood fingerboard blanks are expressly prohibited by laws related to Indian Foreign Trade Policy.

See Letter from Jerry E. Martin to Donald A. Carr dated July 27, 2012 at 3 *available at* http://www2.gibson.com/News-Lifestyle/Features/en-us/Gibson-Comments-on-Department-of-Justice-Settlemen.aspx (accessed July 14, 2013).

[26]The bureaucratic impulse to grab discretion in order to punish selectively and for show is deeply rooted. As a World War II Office of Price Violations manual noted, "Criminal prosecution against a corporation is rather ineffective unless one or more of the individuals is also proceeded against." To justify selective enforcement, the Manual stated:

> One of the most difficult problems in this field is to combat the attitude, so prevalent in this country, that the criminal laws are made for the criminal classes and do not apply to respectable people. This attitude is clearly incompatible with enforcing general compliance on the part of the consumers. Meeting it calls for the judicious and telling selection of violations by average people in the various economic and social strata of society.

See Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 426, 439 (1962)(citations omitted).

[27]Brownfield development (or more accurately, the lack thereof) is one manifestation of this phenomenon. "Brownfields" are formerly productive factory or commercial sites that are vacant or underutilized due to the legal risk and uncertainty caused by the federal and state regulations governing responsibility for environmental contamination, lead paint or asbestos insulation. The conduct that led to the environmental contamination, the presence of lead paint or the use of asbestos insulation in the first instance was generally legal and common at the time it occurred. Yet, federal and state regulations promulgated in the 1980s and 1990s shifted the risk of civil and criminal liability for the condition of these properties to new owners. It took years of work by stakeholders, primarily including local governments, developers and community activists, plus the development of

IV. CONCLUSION.

ILR strongly supports measures to protect public health and safety and recognizes the importance of laws that protect the public welfare and of the agencies that implement them. Nonetheless, ILR believes that Congress should take action to address regulatory over-criminalization, which is contrary to our constitutionally-enshrined commitment to individual freedom and discourages entrepreneurship, investment, and job growth. Specifically:

- Congress should take a hard look at the enactment of a general and clear *mens rea* requirement for all federal crimes, including those based on regulations promulgated by administrative agencies. There are simply too many federal offenses and regulations for Congress to act piecemeal. And, even in cases where Congress has included a *mens rea* requirement in an authorizing statute, that language can be so far removed from the language in federal regulations defining specific prohibited conduct that it is difficult to determine what *mens rea* requirement, if any, applies to each given element of the alleged crime. The reality is that the "large solution" (e.g. a generally applicable *mens rea* statute) is the only practical and effective one.[28]
- Congress, and this Task Force, should more fully explore regulatory over-criminalization's corrosive secondary and tertiary effects, which must be addressed to preserve the rule of law and protect our system of free enterprise.

Thank you for your attention to this important matter. I am happy to answer any questions you may have regarding my testimony.

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advanced remediation techniques and insurance products by the private sector, to mitigate the regulatory risk.

[28]Arguably, the *mens rea* standard for "crimes" due to regulatory violations should be at least a "willful" violation, meaning that a person does not just intend to achieve a result but that he or she knows that what he or she is doing is prohibited by the regulations before he or she can be held criminally liable. *See Cheek v. United States*, 498 U.S. 192, 199-201 (1991).