Written Statement of

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Subcommittee on Crime, Terrorism, and Homeland Security

Re: "Reining in Overcriminalization: Assessing the Problems and Proposing Solutions"

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Thank you Chairman Scott and Ranking Member Gohmert for allowing me the opportunity to speak with you about this important topic of overcriminalization.

I have practiced law on both the prosecution and defense side, and am now a professor of law -- altogether stretching over a period in excess of thirty years. I have been teaching and authoring books and articles on the subjects of criminal law, white collar crime, and legal ethics for many years, and feel that my background allows me to offer you a balanced perspective on overcriminalization issues that are being addressed by this committee.

Clearly we all are opposed to crime, and the goal to eradicate its existence is of the utmost importance. Laws that punish individuals when they commit crimes serve the important goals of deterring future criminality and isolating those who may present a harm to society.

But efforts toward achieving these goals are hampered by the reality that, in some cases, criminality is not clearly defined, and society is not properly notified of what conduct is prohibited by law. If we were speaking about murder, rape, robbery, arson, and other common law - *malem in se* - types of crimes we would not be having this conversation. We all know that these actions are wrong and that such conduct will result in harsh punishment. The problem arises with respect to *malum prohibitum* crimes - crimes enacted by Congress that have enormous breadth, crimes that often do not require that the accused acted with criminal intent, and in many cases crimes that are scattered throughout the fifty titles of the federal code.

Overcriminalization is a two-fold problem: 1) the number of statutes, and 2) the breadth of existing statutes. The effect of overcriminalization can be seen in different ways, and your July 22, 2009 hearing under the bipartisan leadership of Representatives Bobby Scott (D-VA) and Louie Gohmert (R-TX) considered many of the important effects of overcriminalization and overfederalization, namely the problems of imposing punishment on individuals who may be unaware that their conduct is criminal, the expansion of criminal law into areas normally reserved for civil or regulatory oversight, and the tension regarding what should be the appropriate balance between the state and federal governments.[1]

My remarks will elaborate on how overcriminalization increases prosecutorial discretion and judicial creativity, at the expense of Congress's legislative function. I will then offer for your consideration three solutions to alleviate the problems caused by overcriminalization. These solutions are: 1) providing increased recognition of the overcriminalization problem in the legislative drafting process so that affirmative steps can be taken to minimize its effects; 2) providing a default *mens rea* term that, at a minimum, requires alleged offenders to know that their actions are illegal; and 3) codifying the rule of lenity so that courts will be apprised of the legislative intent to interpret statutes as written and to assure that ambiguities do not allow conduct to be criminalized beyond the statutory language. In this regard I support the Report of the Heritage Foundation and National Association of Criminal Defense Lawyers, *Without Intent:*

[1] *See also* Symposium, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

How Congress is Eroding the Criminal Intent Requirement in Federal Law. My remarks today do not speak to whether a re-examination of the entire federal criminal code is warranted.

I. Effects of Overcriminalization

A. Increased Prosecutorial Discretion

Prosecutors are afforded enormous discretion in a multitude of decisions. They decide who to charge with crimes,[2] what crimes will be charged, what evidence will be submitted to a grand jury,[3] whether an accused will receive the benefits of cooperation with the government, and whether cases will be plea bargained, dismissed, or tried. It is seldom that constitutional constraints impede the discretionary power of prosecutors,[4] which means the only real limit in the federal system is that the charges must be for crimes passed by Congress.

It has been noted by others, that there are over 4,450 federal criminal statutes scattered throughout the federal Code, with thousands more regulatory provisions that allow for criminal punishment.[5] The American Bar Association Task Force on the Federalization of Criminal Law noted that "[m]ore than forty percent of the federal criminal provisions enacted since the Civil War have been enacted since 1970." It is clear that there has been an explosion in criminal law writing. Couple this with many overlapping statutory provisions,[6] and you are basically providing prosecutors with enormous power that cannot be constrained by the courts. Something needs to be done.

One should not only look at prosecutorial power from the perspective of the substantive law, as procedural powers come with the power to indict. With every ability to charge a crime comes the ability for government agents and prosecutors to investigate that crime, seize evidence, proceed with a grand jury and arrest individuals. Individuals in, for example, white collar matters, can be under scrutiny by the government for several years as grand juries sift through reams of documents to determine if the conduct merits indictment.

Consistency in charging crimes becomes problematic when prosecutors in different jurisdictions can select from a menu with many different choices. One alleged misstep and an individual will find herself or himself the subject of a lengthy indictment, with multiple counts all for the same incident. What may have once been a single white collar offense can become a multi-count indictment with charges of mail fraud, obstruction of justice, false statements and

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[2] *See* Wayte v. United States, 470 U.S. 598, 608 (1985)(holding that absent an impermissible standard such as race or religion, prosecutors have discretion to decide who will be charged with a crime).

[3] *See* United States v. Williams, 504 U.S. 36 (1992)(holding that prosecutors do not have to present exculpatory material to a grand jury).

[4] *See* Ellen S. Podgor, *Race-ing Prosecutors Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 462-64 (2009).

[5] *See* John S. Baker, Jr., The Heritage Foundation, Revisiting the Explosive Growth of Federal Crimes (2008), *available at* http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes.

[6] *See* Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107 (2005).

money laundering. And the individual being charged with the crime may have no clue why he or she is being charged with something called "mail fraud" when he or she did not mail a letter. This "alleged criminal" may have no idea that his or her conduct even crossed the line into criminality. Well-intentioned efforts to be tough on crime end up being tough on some who might not ever think of committing a crime had they known that their acts were criminal.

This is equally problematic in the corporate sphere, where corporate counsel has to juggle compliance not only with the exorbitant number of federal statutes and regulations, but also with state statutes and regulations and possibly international concerns. One can only imagine the difficulty for a corporation to be schooled on the vast number of prohibitions while also trying to assure that a single rogue employee does not place the company in the corporate criminal liability corridor.[7]

Obviously, with new forms of criminality continually emerging, it would be difficult to put a moratorium on passing criminal laws. But it is also insufficient to say that prosecutorial guidelines will alleviate this problem. The U.S. Attorneys Manual specifies that it is intended only for internal use, and that it "is not intended to, does not, and may not be relied upon to create rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."[8] Further, when the guidelines are not adhered to, the Department of Justice (DOJ) has argued that the hortatory nature of these rules make them unenforceable at law. A court that finds the failure to abide by DOJ guidelines to be "deplorable"[9] is left with few remedies to correct the conduct.[10]

B. Increased Judicial Creativity

Overcriminalization also permits an expanded judicial interpretive function. Statutes that are absent *mens rea* terms leave courts with the task of determining whether intent will be required and what level of intent will be used.[11] When the judiciary finally offers an opinion, it may not be in accord with legislative intent, thus necessitating its return to Congress for revision. Innocent individuals, incarcerated and deprived of their liberties, may be caught in the middle of the pendulum swings between the judicial and legislative branches of government, while others that need punishment may be allowed to go free.

Additionally, statutes that encompass a wide breadth of conduct may offer courts an invitation to redraft the statute's language. This judicial creativity diminishes the legislative

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[7] *See* Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537 (2007).
[8] U.S. ATTYS. MANUAL 1-1.100 (1997).
[9] United States v. Serrano, 680 F. Supp. 58 (D. P.R. 1988).
[10] *See generally* Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice"*, 13 CORNELL J. L. & PUBL. POL'Y 167 (2004).
[11] *See, e.g.*, Staples v. United States, 511 U.S. 600 (1994); United States v. United States Gypsum Company, 438 U.S. 422 (1978).

function. For example, the Supreme Court in *United States v. Skilling*,[12] wrestled with section 1346 of title 18, which provides that "scheme or artifice to defraud" as used in the mail and wire fraud statutes includes "a scheme or artifice to deprive another of the intangible right of honest services." Justice Scalia, in a concurring opinion joined by Justices Thomas and Kennedy, aptly states that:

> "The Court strikes a pose of judicial humility in proclaiming that our task is 'not to destroy the Act ... but to construe it,' . . . But in transforming the prohibition of 'honest-services fraud' into a prohibition of 'bribery and kick-backs' it is wielding a power we long ago abjured: the power to define new federal crimes." (citations omitted)[13]
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> "Arriving at that conclusion requires not interpretation but invention. The Court replaces a vague criminal standard that Congress adopted with a more narrow one (included within the vague one) that can pass constitutional muster. I know of no precedent for such 'paring down,' and it seems to me clearly beyond judicial power." (citations omitted)[14]

II. Solutions to Overcriminalization

There are, of course, many ways to address the concerns raised by overcriminalization. Discussed here are three from the Report of the Heritage Foundation and National Association of Criminal Defense Lawyers, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*.

A. Reforming the Legislative Drafting Process

It has long been said that the first step to correcting a problem is recognizing that a problem exists. This hearing should be used as the impetus to move forward a new mentality in legislative drafting, one that continually recognizes the problem of overcriminalization and takes corrective measures in the legislative drafting process. In this regard, I recommend the adoption of the reporting requirement measures offered by the Heritage Foundation and National Association of Criminal Defense Lawyers in the report, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*.

Taking affirmative steps to minimize the effects of overcriminalization in the drafting process can be accomplished through a requirement that new statutes provide a statement of explicit constitutional authority, a statement that demonstrates ample consideration as to whether the prohibited conduct is covered or could be encompassed within state statutes, and a detailed

[12] 130 S.Ct. 2896 (2010).
[13] *Id*. at 2935.
[14] *Id*. at 2939.

neutral study to determine if the conduct is already subject to punishment under existing federal legislation. Ascertaining whether there is truly a need for the new legislation and whether constitutional authority was intended to cover the conduct, offers safeguards to haphazard legislative drafting and agency focused initiatives. It also avoids federalism problems that may plague the law when eventually reaching court review.

Likewise, limiting criminal provisions to statutes, as opposed to agency regulation, provides more notice of wrongful conduct, and therefore an increased ability to achieve compliance with the law. Even securities law recognizes the failings of providing inadequate notice of criminality in regulatory measures, as the Securities Exchange Act provides a "no knowledge" proviso that precludes imprisonment when a person is shown to have "no knowledge" of a rule or regulation.[15] Extending this proviso beyond securities law would certainly assist in moving administrative regulatory matters to the congressional floor.

As overcriminalization places financial stress on limited resources, there needs to be ample consideration of the costs of enacting new legislation and the resources available for implementation. Required reporting as a part of the passage of criminal laws will assist in offering "smart" solutions to criminal problems.

A final component of reforming the legislative drafting process is to require reflection on the overcriminalization problem on an annual basis. This can best be accomplished through data collection of new criminal statutes passed and examining how they are used. New statutes that are continually used in tandem with existing laws are suspect as to whether they truly were needed to remedy a gap in the law.

B. Strengthen the Mens Rea *in Statutes and Provide a Default* Mens Rea

The American Law Institute's Model Penal Code (MPC) has both a default *mens rea*[16] component and an explicit statement that "[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears."[17]

The federal criminal code should exceed what is required by the MPC, as it criminalizes *malum prohibitum* conduct that is not always nefarious or presumptively considered illegal. The Supreme Court recognized the complexity of tax laws, stating "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws."[18] This same posture was taken by the Court with a then-existing antistructuring law, raising the bar to require that the defendant

[15] 15 U.S.C. § 78ff(a).
[16] MODEL PENAL CODE § 2.02 (3).
[17] *Id.* at § 2.02 (4).
[18] Cheek v. United States, 498 U.S. 192 (1991).

know that the activity in which he was engaged was unlawful. [19] But many cases are not selected for certiorari review by the Court.

It is important in drafting legislation to incorporate specific *mens rea* terminology that would mandate that an accused act purposefully or with knowledge that the conduct was illegal. With many federal statutes failing to provide a clear statement of *mens rea*, or having a weak *mens rea* statement that fails to account for the importance of knowing the illegality of the conduct, it is important to provide a default *mens rea* that would require proof that the accused knew his or her conduct was illegal.

C. Codify the Rule of Lenity

Having specific *mens rea* terminology in statutes, and a default *mens rea* as a safety net may still leave gaps needing interpretation. Codifying the common-law rule of lenity can assist in assuring the supremacy of law-making in Congress. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."[20] This common law doctrine entered United States jurisprudence in an 1820 Supreme Court opinion, where Chief Justice Marshall stated:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It 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 legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."[21]

Its importance is seen more recently in Justice Scalia's opinion for the Court in *United States v. Santos*[22] where he stated:

> This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.[23]

Despite its long-standing historical base in U.S. precedent, legal scholarship and judicial opinions are not always consistent in accepting the rule.[24] Although one finds a mixed review of

[19] Ratzlaf v. United States, 510 U.S. 135 (1994).
[20] United States v. Santos, 553 U.S. 507, 513 (2008)(*citing* United States v. Gradwell, 243 U.S. 476, 485 (1917); McBoyle v. United States, 283 U.S. 25, 27 (1931); United States v. Bass, 404 U.S. 336, 347-349 (1971).
[21] United States v. Wiltberger, 18 U.S. 76 (1820).
[22] United States v. Santos, 553 U.S. 507 (2008).
[23] *Id*. at 514.
[24] *See generally* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. AND MARY L. REV. 57, 58 -61 (1998).

the rule of lenity in the states, some like Florida have clear codifications of the rule of lenity.[25] So too, one finds it inserted, albeit without referencing its name, in the International Criminal Court Rome Statute.[26]

Codifying the rule of lenity would offer legislative credibility to the important policy rationales underlying this rule, and also provide a clear statement to courts of congressional intent. The judiciary's interpretative function would not be lost since courts would make the initial decision of whether a statute was ambiguous. Likewise, the legislature would still have the ability to specify that lenity should not apply to a particular statute.

Conclusion

Overcriminalization is a flaw of our criminal justice process that needs a remedy. It erodes legislative power while promoting executive and judicial authority. That said, it is difficult to put a halt to the existing mentality of addressing immediate problems with criminalization. The solutions recommended here take an important step in recognizing the importance of the legislative role. They also recognize the need to have an internal structure to provide safeguards against a continued growth in federal criminal statutes, and continued breadth that allows for increased prosecutorial discretion and judicial creativity. But in the end, one also has to wonder if resources would be better spent on enforcing existing legislation as opposed to recriminalizing conduct.

[25] "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." F.S.A. § 775.021(1) (1988).

[26] "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." The Rome Statute of the International Criminal Court, Art. 22(2).