

For centuries, “guilty mind,” or *mens rea*, requirements restricted criminal punishment to those who were truly blameworthy and gave individuals fair notice of the law. No person should be convicted of a crime without the government having proved that he acted with a guilty mind—that is, that he intended to violate a law or knew that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal liability. In a sharp break with this tradition, the recent proliferation of federal criminal laws has produced scores of criminal offenses that lack adequate *mens rea* requirements and are vague in defining the conduct that they criminalize.

The National Association of Criminal Defense Lawyers and The Heritage Foundation jointly undertook an unprecedented look at the federal legislative process for all studied non-violent criminal offenses introduced in the 109th Congress in 2005 and 2006. This study revealed that offenses with inadequate *mens rea* requirements are ubiquitous at all stages of the legislative process: Over 57 percent of the offenses introduced, and 64 percent of those enacted into law, contained inadequate *mens rea* requirements, putting the innocent at risk of criminal punishment. Compounding the problem, this study also found consistently poor legislative drafting and broad delegation of Congress’s authority to make criminal law to unaccountable regulators.

According to several scholars and legal researchers, Congress is criminalizing everyday conduct at a reckless pace. This study provides further evidence in support of that finding. Members of the 109th Congress proposed 446 non-violent criminal offenses and Congress enacted 36 of them. These totals do not include the many offenses concerning firearms, possession or trafficking of drugs or pornography, immigration violations, or intentional violence. The sheer number of criminal offenses proposed demonstrates why so many of them were poorly drafted and never subjected to adequate deliberation and oversight.

Even more troubling is the study’s finding that many of the criminal offenses Congress is enacting are fundamentally flawed. Not only do a majority of enacted offenses fail to protect the innocent with adequate *mens rea* requirements, many of them are so vague, far-reaching, and imprecise that few lawyers, much less non-lawyers, could determine what specific conduct they prohibit and punish.

These failings appear to be related to the reckless pace of criminalization. Congress is awash with criminal legislation, and the House and Senate Judiciary Committees lack the time and opportunity to review each criminal offense and correct weak *mens rea* requirements. Over half (52 percent) of the offenses in the study were never referred to either judiciary committee. This is despite these committees’ special expertise in crafting criminal offenses, knowledge of the priorities and resources of federal law enforcement, and express jurisdiction over federal criminal law.

One encouraging finding is that oversight by the House Judiciary Committee does improve the quality of *mens rea* requirements. Oversight includes marking up a bill or reporting it out of committee for

consideration by the full House of Representatives. Based upon this analysis, and upon the specific criminal law jurisdiction and expertise of the House and Senate Judiciary Committees, automatic referral of all bills adding or modifying criminal offenses to these two committees is likely to improve *mens rea* requirements. More importantly, automatic referral could stem the tide of criminalization by forcing Congress to adopt a measured and prioritized approach to criminal lawmaking. By neglecting the expertise of the judiciary committees, Congress endangers civil liberties.

The study also revealed that Congress frequently delegates its criminal lawmaking authority to other bodies, typically executive branch agencies. Delegation empowers unelected regulators to decide what conduct will be punished criminally, rather than requiring Congress to make that determination itself. This “regulatory criminalization” significantly increases the scope and complexity of federal criminal law, prevents systematic congressional oversight of the criminal law, and lacks the public accountability provided by the normal legislative process.

To begin to solve the problems identified in the study, this report offers five specific recommendations for reform. Congress should:

1. Enact default rules of interpretation to ensure that *mens rea* requirements are adequate to protect against unjust conviction.

Congress should enact statutory law that directs federal courts to grant a criminal defendant the benefit of the doubt when Congress has failed to adequately and clearly define the *mens rea* requirements for criminal offenses and penalties. First, this reform would address the unintentional omission of *mens rea* terminology by directing federal courts to read a protective, default *mens rea* requirement into any criminal offense that lacks one. Second, it would direct courts to apply any introductory or blanket *mens rea* terms in a criminal offense to each element of the offense. In this way, it would improve the *mens rea* protections throughout federal criminal law, provide needed clarity, force Congress to give careful consideration to *mens rea* requirements when adding or modifying criminal offenses, and help ensure that fewer individuals are unjustly prosecuted and punished.

2. Codify the common-law rule of lenity, which grants defendants the benefit of doubt when Congress fails to legislate clearly.

The rule of lenity directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant. In a recent U.S. Supreme Court decision, *United States v. Santos*, Justice Antonin Scalia explained that this “venerable rule 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.” Giving the benefit of the doubt to the defendant is consistent with the traditional rules that all defendants are presumed innocent and that the government bears the burden of

proving every element of a crime beyond a reasonable doubt. Codifying this venerable common-law rule would serve the rights of all defendants at every stage of the criminal process. This reform would also protect Congress's lawmaking authority because it would restrict the ability of federal courts to legislate from the bench and reduce the frequency with which those courts must speak because Congress has failed to legislate clearly.

3. Require judiciary committee oversight of every bill that includes criminal offenses or penalties.

Congressional rules should require every bill that would add or modify criminal offenses or penalties to be subject to automatic referral to the relevant judiciary committee. A "sequential" referral requirement would give the House or Senate Judiciary Committee exclusive control over a bill until it reports the bill out or the time limit for its consideration expires, and only at that point could the bill move to another committee. The judiciary committees have special expertise in crafting criminal offenses, knowledge of the priorities and resources of federal law enforcement, and express jurisdiction over federal criminal law. While automatic referral may not produce stronger, more protective *mens rea* requirements, it should result in clearer, more specific, and higher quality criminal offenses. More importantly, this rule could help stem the tide of criminalization by forcing Congress to adopt a measured and prioritized approach to criminal lawmaking. Further, it would increase congressional accountability for new criminalization and ultimately reduce overcriminalization.

4. Require detailed written justification for and analysis of all new federal criminalization.

This reform would require the federal government to produce a standard public report assessing the purported justification, costs, and benefits of all new criminalization. This report must include:

- A description of the problem that the criminal offense or penalty is intended to redress, including an account of the perceived gaps in existing law, the wrongful conduct that is currently unpunished or under-punished, and any specific cases or concerns motivating the legislation;
- A direct statement of the express constitutional authority under which the federal government purports to act;
- An analysis of whether the criminal offenses or penalties are consistent with constitutional and prudential considerations of federalism;
- A discussion of any overlap between the conduct to be criminalized and conduct already criminalized by existing federal and state law;
- A comparison of the new law's penalties with the penalties under existing federal and state laws for comparable conduct;
- A summary of the impact on the federal budget and federal resources, including the judiciary, of enforcing the new offense and penalties to the degree required to solve the problem that the new criminalization purports to address;
- A review of the resources that federal public defenders have available and need in order to adequately defend indigent defendants charged under the new law; and

- An explanation of how the *mens rea* requirement of each criminal offense should be interpreted and applied to each element of the offense.

This reform would also require Congress to collect information on regulatory criminalization, including an enumeration of all new criminal offenses and penalties that federal agencies have added to federal regulations, as well as the specific statutory authority supporting these regulations.

Mandatory reporting would increase accountability by requiring the federal government to perform basic analysis of the grounds and justification for all new and modified criminal offenses and penalties.

5. Draft every criminal offense with clarity and precision.

One overarching reform recommendation is a slower, more focused, and deliberative approach to the creation and modification of federal criminal offenses. When drafting criminal offenses, Members of Congress should always:

- Include an adequate *mens rea* requirement;
- Define both the *actus reus* (guilty act) and the *mens rea* (guilty mind) of the offense in specific and unambiguous terms;
- Provide a clear statement of whether the *mens rea* requirement applies to all the elements of the offense or, if not, which *mens rea* terms apply to which elements of the offense; and
- Avoid delegating criminal lawmaking authority to regulators.

The importance of sound legislative drafting cannot be overstated, for it is the drafting of a criminal offense that frequently determines whether a person acting without intent to violate the law and lacking knowledge that his conduct was unlawful or sufficiently wrongful to put him on notice of possible criminal liability will endure a life-altering prosecution and conviction—and lose his freedom.

It is equally important that Members of Congress resist the temptation to bypass the arduous task of drafting criminal legislation by delegating it to unelected regulators. It is the legislative branch's responsibility to ensure that no individual is punished if Congress itself did not devote the time and resources necessary to clearly and precisely articulate the law giving rise to that punishment.

These five reforms would help ensure that every proposed criminal offense receives the attention due whenever Congress determines how to focus the greatest power government routinely uses against its own citizens: the criminal law. Coupled with increased public awareness and scrutiny of the criminal offenses Congress enacts, these reforms would strengthen the protections against unjust conviction and prevent the dangerous proliferation of federal criminal law. With their most basic liberties at stake, Americans are entitled to no less.