

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism and
Homeland Security
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

The Honorable Robert Scott
Ranking Member of the Subcommittee
Subcommittee on Crime, Terrorism and
Homeland Security
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

April 12, 2005

Re: Gang Deterrence and Community Protection Act

Dear Mr. Chairman and Mr. Scott:

We are writing to express our strong opposition to Section 103(d) of H.R. 1279, the Gang Deterrence and Community Protection Act, which is scheduled for mark-up on April 5 before the Crime, Terrorism, and Homeland Security Subcommittee of the House Judiciary Committee. This section would quadruple the current term of imprisonment for a violation of 18 U.S.C. 371, the general federal conspiracy statute, from a maximum of five years to 20 years in prison.

This dramatic increase in the possible sentence under Section 371 would produce inconsistencies in the federal criminal code and unfairly expose defendants who are charged with misdemeanors or felony regulatory violations as substantive offenses to extraordinarily long prison terms. Although the undersigned organizations understand the need to address the problem of gangs and juvenile crime, we believe that the proposed increased penalty for conspiracy presents unduly severe consequences to the regulated community without significantly improving the mechanisms available to law enforcement officials.

As it is, a defendant who “conspire[s] to commit any offense against the United States” can be charged with conspiracy under Section 371. A prosecutor may prove a conspiracy case by presenting circumstantial evidence of an agreement to commit any offense, and by showing that *one* member of the conspiracy committed an act to further the conspiracy.

Because a violation of a misdemeanor, felony, or federal civil law can form the basis of a conspiracy, the undersigned organizations are extremely concerned that increasing the penalty for conspiracy from five to 20 years imprisonment would result in inequitably harsh sentences. Not infrequently, the substantive offense that the conspiracy defendant is charged with violating is a felony regulatory crime, or even a misdemeanor, that was committed with a negligent state of mind or “general intent”—as opposed to a willful intent or intent to defraud, which is more typically required for statutes with such harsh punishments. *Compare*, for example, the Lacey Act, which provides for a maximum one-year imprisonment for a “negligent” violation, and five years for certain “knowing” offenses (16 U.S.C. 3373(d)); the Endangered Species Act, punishable by six months or one year in prison for a “knowing” violation (16 U.S.C. 1538, 1540); the Clean Water Act, which is punishable by one-year imprisonment for a negligent violation and three years for a “knowing” violation (33 U.S.C. 1319); and the Internal Revenue

Code, which provides for one-year imprisonment for a negligent violation and five years for a “willful” violation (26 U.S.C. 7203); *with* mail fraud, which is punishable by a maximum 20 years in prison (18 U.S.C. 1341), and certain other provisions of the Clean Water Act that penalize “knowing endangerment,” 33 U.S.C. 1319 (15 years in prison).¹

Thus, by quadrupling the imprisonment penalty for conspiracy, Congress would transform Section 371 from one of a prosecutor’s many tools for augmenting substantive offenses in appropriate cases to the most important charge in an indictment. Importantly, such a conspiracy charge would be available in cases in which Congress has otherwise provided for more measured and reasonable sentences for defendants who possess less than criminal intent for the substantive crime.

The proposed amendment to Section 371 could, in essence, result in a penalty of 20 years in prison for regulatory violations, and violations that require only negligent or general intent—while adding little to the range of penalties already available for gang- and drug-related conspiracies. Therefore, we respectfully ask that Congress remove Section 103(d) from the Gang Deterrence and Community Protection Act.

Sincerely,

Association of Oil Pipe Lines

Business Civil Liberties, Inc.

Chamber of Commerce of the United States

National Federation of Independent Business

cc: Members of the Subcommittee on Crime, Terrorism and Homeland Security

¹ In fact, in several areas of law enforcement, federal prosecutors are specifically instructed to try to charge misdemeanor offenses as felonies by combining a misdemeanor offense with the federal statute prohibiting false statements (18 U.S.C. 1001) and the conspiracy statute. *See*, for example, U.S. Department of Justice Manual on Federal Prosecution of Election Offenses (encouraging the practice with respect to minor reporting violations of election laws). Section 371 does provide that if the underlying substantive offense of the conspiracy is a misdemeanor, then the conspiracy itself shall only be punishable as a misdemeanor. But using other federal statutes such as Section 1001 easily circumvents this requirement. *See* Abraham S. Goldstein, *Conspiracy To Defraud the United States*, 68 Yale L.J. 405, 409 (1959) (“‘Conspiracy’ has been a favorite of prosecutors for centuries.”).

By way of example, a defendant who is charged with and convicted of negligently causing an oil pipeline to leak a small amount of oil (by accidentally bumping it with a piece of machinery) under the Clean Water Act (a misdemeanor), and sentenced to six months in jail, could *additionally* be charged with conspiracy if there were evidence that a co-worker or employee had tried to conceal the leak (a violation of Section 1001) and circumstantial evidence of an agreement—thus escalating the possible sentence to 20 years under the proposed legislation. *See Hanousek v. United States*, 176 F.3d 1116 (9th Cir. 1999).