

Testimony of

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“Criminal Code Reform”

Before the Task Force on Over-Criminalization

The Judiciary Committee of the House of Representatives of the
Congress of the United States

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Chairman Sensenbrenner, Ranking Member Scott, and other Task Force members: Thank you for the opportunity to appear and testify before the Task Force.

Introduction

It is an honor for me to return to the Committee where I worked on staff for several years. I am very comfortable with addressing the Task Force Chair as “Mr. Chairman.”

It is also an honor to return to the Committee to appear before Ranking Member Scott, with whom I worked for many years on important criminal justice issues. I am sure the Committee and you miss our colleague Bobby Vassar, who contributed so much to the Committee’s work.

My years on the Judiciary Committee staff were the highlight of my professional career and I will always be grateful to the Committee for the opportunity to serve the public.

Federal Criminal Code Reform

Now, I welcome the opportunity to address the Task Force on the important issue of Federal Criminal Code Reform. This is an issue that is near and dear to my heart.

Mr. Chairman, you have led the charge on this issue by introducing, over the last four years, the Criminal Code Modernization and Simplification Act.

Having worked as a staff member on this important legislation, I know the effort that is required to introduce this bill each year. It is a Herculean task.

Your work represents an important bi-partisan invitation and challenge to enact meaningful federal criminal code reform.

I want to take a moment to commend your former Staff Director, Phil Kiko, and Legislative Counsel, Doug Bellis, who both devoted significant time to this effort, as well as your staff in the last three Congressional sessions.

The Federal Criminal Code is a Disaster

We all agree on one thing – the federal criminal code, if left unchecked, will continue to resemble the United States Tax Code. That is not a good thing – in fact, it threatens any hope we have of equal justice.

Each year, a new edition of the United States Criminal Code (or at least portions of it) is delivered to lawyers, Congressional staff and practitioners. Each year it accretes new crimes, resembling the old Yellow Pages, assuming anyone here remembers those days.

I am reminded of one of my favorite scenes from a Marx Brothers movie, “Duck Soup,” when Groucho Marx is the President of the mythical country Freedonia, and he is given a report by one of his ministers who asks Groucho if he understands the report.

Groucho replies, “Of course I understand the report. Why even a 4-year old child could understand this [report].” Groucho looks down at the report, starts to read, and then says, “Run out and get me a four year old child. I can’t make head or tail out of it.”

The same can be said about our federal criminal code. No one can make heads or tails of the code, except, possibly, prosecutors, judges and defense counsel. Our citizens have no idea the scope of federal crimes nor are they aware of the coverage of specific federal crimes.

The federal criminal code is unusable, unwieldy and a maze of federal criminal offenses, few of which are drafted consistently and even fewer of which provide clarity to law-abiding citizens on where the lines may be drawn on various complex crimes.

The danger of the federal criminal code is well-known to the Task Force as reflected in its title and charter: Over-Criminalization.

The federal criminal code gives federal prosecutors even more power and discretion to exercise against defendants. It enables them to manipulate the criminal justice system to charge similarly situated defendants with a variety of crimes. Prosecutors can exercise this power without violating the Double Jeopardy clause of our Constitution. This is inconsistent with our commitment to equal justice.

Our federal criminal code needs to reflect three clear principles:

First, it must be written clearly;

Second, it must be concise with a minimal use of clear and defined terms; and

Third, it must be accessible.

Right now, the federal criminal code sits as a monstrosity that no one has the time or the inclination to tackle, much less understand.

The issue of federal code reform is much more serious than references in criminal provisions to prevent improper use of “Smokey Bear” (Section 711); Woody Owl (Section 712); or protecting the emblem of the Swiss Confederation (Section 708).

As it now stands, the federal criminal code is littered with criminal offenses that are used in the criminal justice system to obtain desired results without regard to Congress’ intent.

The Over-Criminalization Task Force is at the right place and the right time to advance revision of the federal criminal code.

I urge the Task Force, as a former federal prosecutor and now a defense lawyer, to recommend that the federal criminal code be reviewed and

revised with the goal of providing clarity, applying consistent drafting principles, and reducing the number and reach of federal crimes in order to protect our constitutional system of justice and respect for federalism.

The Task At Hand – Drafting a Basic Criminal Code As a Starting Point

I want to take a moment to outline some basic principles that I believe the Task Force should recommend to promote criminal code reform.

These principles will help to ensure that a bi-partisan, policy-neutral effort is achieved in order to bring about a good government solution – a clear, concise and accessible set of federal criminal statutes.

The Task Force should embrace the goal of creating a single document that compiles all of the federal criminal offenses in our system, including regulatory crimes. From this basic foundation document, policy changes, that is, changes to requisite intent, jurisdiction, punishment or other elements of the offense, can be accomplished with clarity and minimal drafting revisions.

Initial Principles for Revising the Criminal Code: Establishing a Consistent and Uniform Set of Terms and Definitions

Let me start with a profound grasp of the obvious – the drafting of a revised federal criminal code is not impossible. In fact, I believe that a basic criminal code for federal criminal offenses can be accomplished, despite Congress' prior failed attempts in the 1970s and 1980s to develop a federal criminal code. I recognize that Congress is not starting with a clean slate but has a historical legacy of fits and starts on this issue.¹

¹ In 1975, the first Senate bill was introduced in the 93d Congress as **S. 1**, 93d Cong., 1st Sess.(1973). In later congressional sessions, similar versions were introduced, see **S. 1437**, 95th Cong. 2d Sess. (1977), which passed the Senate in 1978 but failed in the House. In the 1980s

Perhaps I am naïve, but I am confident based on the bipartisan spirit of this Task Force, and under the leadership of Chairman Sensenbrenner and Ranking Member Scott, along with the support of Full Committee Chairman Goodlatte and Ranking Member Conyers, that the goal may be within reach.

The Task Force should consider soliciting detailed and specific recommendations on how to go about this process.

Once a basic and reformulated criminal code is created, the policy issues will quickly come into focus. The beauty of this process is that with a basic framework document, policy decisions can be implemented relatively easily and with minimal drafting.

A foundation criminal code should be based on the following principles:

1. Consolidation of Criminal Offenses in Title 18

Identify and consolidate all criminal laws in the United States Code in one Title under the jurisdiction of the House Judiciary Committee. There is no reason why criminal offenses should be spread throughout the United States Code; and there is every reason for a single committee, the House Judiciary Committee, to exercise consistent oversight of the criminal code, just like other statutory titles that are supervised by other Committees with primary jurisdiction.

It is entirely possible to gather and identify all of the federal criminal offenses, including regulatory crimes, without dedicating a SWAT team of lawyers, or invading regulatory agencies.

the steam went out of efforts to adopt a comprehensive criminal code. See Norman Abrahams, *Federal Criminal Law* 67 (1986); For a brief history of the failure of federal criminal law reform in the 1970s, see Louis B. Schwartz, *Criminal Law Reform*, 2 *Encyclopedia of Crime and Justice* 513, 515 (1983).

2. Use of Historical Prosecution Data

Review prosecution data to determine which statutes are being used and which statutes are not. A prior review of such data for a ten-year period revealed some shocking news – a large number of criminal offenses are not used by prosecutors because they are outdated, drafted poorly and/ or unnecessary.

3. Eliminate Duplicative Criminal Laws

The criminal code contains numerous provisions that apply to the same “crime.” There is no reason to expose a defendant to multiple counts of various crimes by charging multiple criminal offenses that are designed to deter and punish the same conduct.

4. Application of Consistent Terms and Definition

The criminal code is riddled with instances where the same term is defined differently, contains surplusage that has no meaning, or has been rationalized by judicial decisions akin to legislative harmonizing.

Willful: One Word with Many Meanings

Perhaps one of the best examples of the need for clarity and consistency centers on the use of the term “willful” to establish the requisite intent for a criminal act. In practice, the term “willful” has no consistent meaning and takes on a life of its own depending on the context in which it is used.

The Supreme Court has long recognized that willful "is a word of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497, 63 S.Ct. 364, 367, 87 L.Ed. 418 (U.S. 1943); *Ratzlaf v. United States*, 510 U.S. 135, 149 (U.S. 1994); *Bryan v. United States*, 524 U.S. 184, 186, (U.S. 1998).

. See generally Note, An Analysis of the Term "Willful" in Federal

Criminal Statutes, 51 Notre Dame L.Rev. 786, 786-87 (1976).

The use of the term “willful” in a federal criminal statute often leads to legal challenges over whether Congress intended to require proof that a defendant violated a known legal duty. See, e.g., *Bryan v. United States*, 524 U.S. 184, 196 (U.S. 1998) (the term “willfully” in 18 U.S.C. § 924(a)(1)(D) does not require proof that defendant actually knew of a federal licensing requirement); *Ratzlaf v. United States*, 510 U.S. 135, 149 (U.S. 1994) (holding that Congress intended, in 31 U.S.C. § 5322(a), that a jury must conclude that defendant knew that structuring currency transactions was prohibited by law before a conviction for a “willful” violation may occur).

The term “willful” is not the only criminal intent terms subject to consistent criticism. The terms “specific intent” and “general intent” create similar confusion. See *Liparota v. United States*, 471 U.S. 419, 433 n.16 (U.S. 1985) (commenting that a “useful” jury instruction might “eschew use of difficult legal concepts like ‘specific intent’ and ‘general intent’”); accord *Staples v. United States*, 511 U.S. 600 (U.S. 1994) (Stevens and Blackmun, dissenting, disagree with Majority’s interpretation of the application of *Liparota* principles to present case).

It is no accident that drafters of the Model Penal Code got it right by banishing the terms “willfully,” “specific intent,” and “general intent.” See *Dixon v. United States*, 548 U.S. 1, 16 (U.S. 2006) (noting that Section 2.02(2) of the Model Penal Code does not embrace the term “willfully” but instead defines “purposely,” “knowingly,” “recklessly,” and “negligently”).

As Judge Learned Hand, in an exchange with Professor Herbert Wechsler (the reporter for the Model Penal Code), put it: “[Willfully is] an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, ‘willful’ would lead all the rest in spite of its being at the end of the alphabet.” *United*

States v. Aversa, 984 F.2d 493 (1st. Cir. 1993), *vacated sub nom. Donovan v. United States*, 510 U.S. 1069 (U.S. 1994) (quoting American Law Institute, Model Penal Code § 2.20, at 249 n. 47 (1985)).

Courts have applied at least four different definitions of willful. The first defines “willful” as “knowing” (i.e., so long as the defendant is aware of his conduct and the nature of his circumstances); see, e.g., *United States v. McCalvin*, 608 F.2d 1167, 1171 (8th Cir.1979) (“knowingly and willingly” defined as “voluntarily and intentionally”); see also American Law Institute, Model Penal Code § 2.02(8) (1985).

The second definition of willful grew up in criminal tax cases – which equates willfulness with the violation of a known legal duty. See, e.g., *Cheek v. United States*, 498 U.S. 192, 200, (1991) (cited by both majority and dissenting opinion in *Ratzlaf v. United States*, 510 U.S. 135, 149, 156, (U.S. 1994)).

The two remaining definitions depend on the context in which the term is used, requiring a hybrid approach of defining willful as requiring an act with a bad purpose and permitting or barring a mistake of law defense. Compare, e.g., *Brown*, 954 F.2d 1563, 1568 (11th Cir. 1992) (ruling that knowledge of the antistructuring law was not required to ground a structuring conviction) and *Scanio*, 900 F.2d 485, 490 (2nd Cir. 1990) (same) with, e.g., *United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir.1984) (upholding mistake-of-law defense for currency import and export violations) and *United States v. Dichne*, 612 F.2d 632, 636 (2d Cir.1979) (similar), cert. denied, 445 U.S. 928, 100 S.Ct. 1314, 63 L.Ed.2d 760 (1980). See also *United States v. Dashney*, 937 F.2d at 532, 539-40 (10th Cir. 1991) (declaring mistake of law to be a defense in respect to violations of currency import and export regulations but not in respect to structuring offenses).

Conclusion

It has been 65 years since Congress enacted a revision of the federal criminal code.

The Task Force has an opportunity to recommend important steps to begin a meaningful rewrite of the federal criminal code.

Under the bipartisan leadership of this Task Force I am confident that you will take all necessary actions to promote and ensure meaningful criminal code reform.

Thank you for the opportunity to testify today.