

**LEGISLATIVE TESTIMONY**

**The Crimes on the Books and Committee Jurisdiction**

**Testimony before the Committee on the Judiciary**

**U.S. House of Representatives**

**Task Force on Over-criminalization**

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Mr. Chairman, Mr. Ranking Member, and other Members of Congress:

Thank you for inviting me to return to testify before the Task Force. When I appeared before you on July 19, 2013, we discussed the fundamental principle of *mens rea*. On November 14, 2013, I returned to address possible ways to correct the danger of convicting innocent persons due to the absence, or the inadequacy, of a *mens rea*, especially in regulatory offenses. In today's hearing, I will address the issue of the continually growing number of federal crimes. Again, I applaud the House Judiciary Committee for creating the Task Force to study these issues.

My name is John Baker. I am a Visiting Professor at Georgetown Law School and Emeritus Professor at LSU Law School. In the past, I have been a consultant to the U.S. Senate Judiciary Committee's Subcommittee on Separation of Powers, and to the U.S. Department of Justice. Prior to teaching, I prosecuted criminal cases in New Orleans and have since been involved in the defense of a few federal criminal cases. I have written extensively on state and federal criminal law,<sup>1</sup> including a criminal law casebook.<sup>2</sup> I was a member of the ABA Task Force that issued the report "The Federalization of Crime" (1998).

### **The Number of Federal Crimes on the Books**

In my appearance before this Task Force, on November 14, 2013, I began by noting "[t]he tremendous number of federal crimes<sup>3</sup> and the astronomical and unknown number of federal regulatory offenses.<sup>4</sup>" That statement was based on earlier counts conducted first by the US Department of Justice and then two reports I published which built on the DOJ count. As of the last count, in 2008, the number of federal crimes – not counting regulatory offenses carrying criminal penalties – stood at 4,450. Now, as a result of a request from this Task Force, the Congressional Research Service has concluded a count from the beginning of 2008 through the

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<sup>1</sup> See, e.g., John S. Baker, Jr., *Mens Rea and State Crimes: 50 Years Post-Promulgation of the Model Penal Code*, 92 CRIM. L. REP. (BNA) 248 (Nov. 28, 2012); see also John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (2008), [http://s3.amazonaws.com/thf\\_media/2008/pdf/lm26.pdf](http://s3.amazonaws.com/thf_media/2008/pdf/lm26.pdf).

<sup>2</sup> John S. Baker, Jr., Daniel H. Benson, Robert Force, B.J. George, Jr., *HALL'S CRIMINAL LAW: CASES AND MATERIALS* (5th ed. 1993).

<sup>3</sup> See generally AM. BAR ASS'N TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, *THE FEDERALIZATION OF CRIME* (1998) (discussing the remarkable growth of federal criminal law since 1970).

<sup>4</sup> See 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) (estimating, as of 1991, over 300,000 regulatory offenses capable of being the basis of criminal prosecution).

end of 2013, which identified an additional 403 offenses carrying criminal penalties.<sup>5</sup> That addition means that the total number of criminal offenses is quickly approaching 5,000.

## Previous Counts

In the early eighties, the US Department of Justice conducted the most meticulous count of federal crimes because done by hand of every page in the US Code. The Department's Office of Legal Policy (OLP) undertook the count in early 1983 in connection with efforts to pass a comprehensive federal criminal code. Ronald Gainer, who oversaw the study, later published an article entitled "Report to the Attorney General on Federal Criminal Code Reform."<sup>6</sup> That article estimated the number at "approximately 3,000 federal crimes," a figure which has been much cited since. That number included all federal offenses in the U.S. Code carrying a criminal penalty enacted through early 1983. In a 1998 article, "Federal Criminal Code Reform: Past and Future," Gainer cited the figure of "approximately 3,300 *separate provisions* that carry criminal sanctions for their violation."<sup>7</sup> This number was based on a count done by the Buffalo Criminal Law Center "employing somewhat different measures" than the DOJ survey.<sup>8</sup> This survey apparently considered only "separate provisions" as constituting crimes, while the methodology used in the DOJ count often found more than one crime in a single provision.

In 1998, the American Bar Association's Task Force on the Federalization of Criminal Law, a group headed by former Attorney General Edwin Meese, which also included this author as a member, issued a report entitled "The Federalization of Criminal Law." This report, which was concerned with the growth of federal criminal law, faced the challenge of quantifying the growth in the number of federal crimes. The Task Force decided, however, not to "undertake a section by section review of every printed federal statutory section," which would have been too "massive" an undertaking for the Task Force's "limited purpose."<sup>9</sup> The ABA report did conclude that the 3,000 number was "surely outdated by the large number of new federal crimes enacted in the 16 or so years since its estimation."<sup>10</sup> The ABA report also drew the following dramatic conclusion from the available data:

The Task Force's research reveals a startling fact about the explosive growth of federal criminal law: *More than 40% of the federal provisions enacted since the Civil War have been enacted since 1970.*<sup>11</sup>

In the 16 years since the ABA Report, the percentage of all federal crimes enacted since 1970 has grown well beyond the 1998 figure of 40%.

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<sup>5</sup> Congressional Research Service, "Memorandum: Updated Criminal Offenses Enacted from 2008-2013." (July 7, 2014)

<sup>6</sup> Ronald Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIM. L.F. 99 (1989)

<sup>7</sup> Ronald Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 46, 55 n.8 (1998) (emphasis added).

<sup>8</sup> *Id.*

<sup>9</sup> ABA REPORT, *supra* note 3, at 92

<sup>10</sup> *Id.* at 94.

<sup>11</sup> *Id.* at 7

In a 2004 Federalist Society monograph, building on the DOJ and ABA reports, I produced a count of new federal crimes enacted following the point at which the ABA report finished its data collection at the close of 1996. As confirmed by the DOJ lawyer supervising the count in the early eighties, Ron Gainer, this report followed the same methodology used by DOJ.<sup>12</sup> My second report updated the total through 2007, finding to be at least 4,450 federal crimes

The growth of federal crimes has clearly continued unabated. The increase of 452 over the eight-year period between 2000 and 2007 represented an average of 56.5 new crimes per year—roughly the same rate at which Congress created new crimes in the 1980s and 1990s. In the six years covered by the CRS count, 2008 through 2013, the 403 new criminal offenses amounted to an average of 67.17 new crimes per year. The average for that period was somewhat skewed by the unusually high number of 195 new crimes in 2008.

## Conducting a Count

Counting the number of federal crimes might seem to be a rather straightforward matter: simply count all the statutes that Congress has designated as crimes. After all, unlike state law, federal law has never had a common law of crimes.<sup>13</sup> Locating purely common-law crimes requires consulting judicial opinions, and even then, determining what is and is not a common-law crime is problematic.<sup>14</sup> Given that federal courts lack common-law jurisdiction over crimes, all federal crimes must be statutory. So it would seem that counting statutes should be an easy task.

Making an accurate count is not as simple as counting the number of criminal statutes, however. As the American Bar Association's Task Force on the Federalization of Crime stated, "So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes."<sup>15</sup> Not only is the number of statutes large, but the statutes are scattered and complex.<sup>16</sup> The situation presents a two-fold challenge: (1) determining what statutes count as crimes and (2) determining whether, as to the different provisions within a section or subsection, there is more than a single crime, and if so, how many. The first difficulty is that federal law contains no general definition of the term "crime." Title 18 of the U.S. Code is designated "Crimes and Criminal Procedure," but it is not a comprehensive criminal code. Title 18 is simply a collection of statutes. It does not provide a definition of crime. Until repealed in 1984, however, Section 1 of Title 18 began by classifying offenses into felonies and misdemeanors, with a sub-class of misdemeanors denominated "petty offenses." Later amendments re-

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<sup>12</sup> Confirmed in a Telephone interview with Ronald Gainer (Dec. 29, 2003).

<sup>13</sup> *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

<sup>14</sup> See WAYNE R. LAFAYE, 1 SUBSTANTIVE CRIMINAL LAW § 2.1(e) (2003).

<sup>15</sup> ABA REPORT, *supra* note 3, at 9

<sup>16</sup> The ABA report explained:

[A]n exact count of the present "number" of federal crimes contained in the statutes (let alone those contained in administrative regulations) is difficult to achieve and the count subject to varying interpretations. In part, the reason is not only that the criminal provisions are now so numerous and their location in the books so scattered, but also that federal criminal statutes are often complex. One statutory section can comprehend a variety of actions, potentially multiplying the number of federal "crimes" that could be enumerated.... Depending on how all this subdivisible and dispersed law is counted, the true number of federal crimes multiplies.

*Id.* at 93.

introduced classifications elsewhere in Title 18.<sup>17</sup> The repeal and later amendments, however, were tied to the creation of the United States Sentencing Commission, and this new focus on sentencing has done nothing to solve—and probably has exacerbated—the problem of determining just what should be counted as “crimes.” That issue is particularly pertinent for offenses not listed in Title 18. Title 18 does contain many, but not all, of the federal crimes. Other offenses carrying criminal penalties are distributed throughout the other 49 titles of the U.S. Code. These scattered criminal provisions are usually regulatory or tort-like, sometimes making them difficult to identify.

The second problem is that, whether it is codified in Title 18 or some other title, one statute does not necessarily equal one crime. Often, a single statute contains several crimes. Determining the number of crimes contained within a single statute is a matter of judgment. Different people may make different judgments about the number of crimes contained in each statute, depending on the criteria they employ. In the absence of a definition of crime, it is incumbent upon the compiler to explain the criteria employed in making the count. As previously noted, my counts have followed the methodology by the Department of Justice in its 1983 count.

### **Significance of the Numbers**

As practitioners in the field know well, the number of criminal statutes does not tell the whole story. Measuring the rate of growth certainly confirms that Congress continues to enact criminal statutes at a brisk pace. But no matter how many crimes Congress enacts, it remains for federal prosecutors to decide which statutes to utilize when seeking an indictment. Federal prosecutors have certain favorites, notably mail and wire fraud statutes,<sup>18</sup> which they use even when other statutes might be more appropriate. That, however, does not mean that the addition of little-used crimes is unimportant. 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 can be used to establish the necessary probable cause that a crime has been committed and, therefore, to authorize a search and seizure.

The availability of ever more crimes – some lacking a *mens rea* -- also exaggerates a prosecutor’s discretion in charging and leverage in forcing a plea from defendants. Against more counts in an indictment a defendant will have to expend more money defending the case, which can dissuade even innocent defendants from fighting the charges. Against numerous, vague, and sometimes strict liability charges, even innocent defendants can usually be “clipped” for something

Moreover, the expansion of federal crimes – retroactively -- continues to occur even without new legislation. Federal prosecutors regularly stretch the theories of existing statutes. What Judge John Noonan wrote in 1984 about the retroactive application of federal criminal law with regard to bribery and public corruption continues to be generally true, namely that federal prosecutors

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<sup>17</sup> See 18 U.S.C. § 3581 (classification of felonies, misdemeanor and infraction in terms of sentencing); 18 U.S.C. § 3156(3) (definition of “felony” for purposes of release and detention).

<sup>18</sup> 18 U.S.C. §§ 1341, 1343 (mail fraud and wire fraud, respectively).

and federal judges have been effectively creating a common law of crimes through expansive interpretations.<sup>19</sup>

Ultimately, the reason the ABA report and my counts track the increase of federal crimes is to provide some measure of the extent to which federal criminal law and its enforcement are overreaching constitutional limits. The Supreme Court has admonished Congress twice within recent years, when it declared federal statutes unconstitutional, that it lacks a “plenary police power.”<sup>20</sup> The statistical measures in this and the ABA report indicate that those cases have not dissuaded Congress from continuing to pass criminal laws at the same pace.

## Conclusion

Federal law does not provide a clear definition of crime which would allow us to make distinctions among separate criminal acts. As a result, any count can be subject to some dispute. At the very least, however, the CRS Memorandum allows us to conclude that since the DOJ count in the early 1980s 1) the rate at which Congress passes new crimes has continued at least at the same pace and -- based on the higher, yearly average rate reflected in the CRS Memorandum -- may be increasing and 2) that the United States Code today includes at least 4,803 offenses which carry a criminal penalty.

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<sup>19</sup> See JOHN NOONAN, BRIBES (1984) at 585–86, 620

<sup>20</sup> United States v. Lopez, 514 U.S. 549, 566 (1995); United States v. Morrison, 529 U.S. 598, 618 (2000).