

Testimony of

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on

“Criminal Code Reform”

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of

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Introduction

Chairman Sensenbrenner, Ranking Member Scott, and Members of the Task Force, I thank you for the kind invitation to participate in this hearing on “Criminal Code Reform.”

At the outset, I would like to voice my appreciation for the hard work and dedication of this Task Force. I was present at the markup when the Judiciary Committee established this Task Force and have been able to attend a number of its hearings. The members of this Task Force are exhibiting the kind of leadership and bipartisan cooperation necessary for the improvement of our nation’s criminal justice system.

I come to this topic as a former federal prosecutor who handled cases brought under the federal criminal code, as an attorney who also has defended individuals and corporations accused of violating statutes in the federal criminal code, and as a legal scholar who has dedicated much of his work to the improvement of our nation’s laws and justice system.

State of the Federal Criminal Code

Members of this Task Force have been instrumental in exposing and responding to the deficiencies of the federal criminal code. Of course, Chairman Sensenbrenner has introduced H.R. 1860, the Criminal Code Modernization and Simplification Act of 2013, the successor to his H.R. 1823, which was the subject of a hearing before the Subcommittee on Crime, Terrorism, and Homeland Security in December 2011.¹ In addition, when Mr. Scott was chairman of the Subcommittee on Crime, Terrorism, and Homeland Security, the Subcommittee held hearings during which he summarized the work that he and others had done to solicit the views and concerns of the legal and advocacy communities regarding the expansion and current state of the federal criminal code.²

My fellow panelist and esteemed colleague in the legal academy, Professor Julie O’Sullivan, has queried whether we can even characterize what we have as a “code” in the first

¹ See Criminal Code Modernization and Simplification Act of 2011, Hearing on H.R. 1823 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on Judiciary, 112th Cong. (2012).

² See Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on Judiciary, 111th Cong. (2010); see also Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on Judiciary, 111th Cong. (2010).

place.³ Professor O’Sullivan joins other well-respected commentators who have criticized the code for its excessive length, lack of organization, redundant provisions, and outdated offenses.⁴

Critics often point to the fact that the federal criminal code has expanded exponentially over the past several decades, ballooning to more than 4,000 offenses, although an exact figure proves difficult to discern.⁵ In addition, as expansive as Title 18 has become, even more offenses can be found in various other titles of the United States Code and in regulatory provisions.⁶

Others have cited the fact that Title 18 is organized in an arbitrary manner, with Chapters sequenced according to the alphabetization of subject matter headings.⁷ Furthermore, the number of criminal statutes has grown with little, if any, regard to how the new laws fit within the existing framework of criminal prohibitions. Given the lack of a coherent structure and piecemeal approach to the adoption of new offenses, there are many examples of criminal statutes that overlap with others at best, and, at worst, are wholly redundant.

In this ever-expanding “hodge-podge” of criminal statutes, it is not surprising that there are laws on the books that are perceived to have fallen into desuetude.⁸ Prohibitions and penalties that may have been appropriate in earlier eras still have the force of law and are unlikely ever to be repealed even if rarely enforced.

³ See Julie Rose O’Sullivan, *The Federal Criminal “Code”: Return of Overfederalization*, 37 HARV. J. L. & PUB. POL’Y 57, 57 (2014) (“The federal criminal ‘code’— to the extent one can call the United States’ sprawling and disorganized mass of criminal legislation and regulations a ‘code’—is a disgrace.”); see also Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. L. REV. 195, 195 (1997) (“Title 18 is a compilation, rather than a code.”)

⁴ See, e.g., Robert H. Joost, *Simplifying Federal Criminal Laws*, 14 PEPPERDINE L. REV. 1, 8-13 (1986).

⁵ See John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, FEDERALIST SOC’Y FOR LAW & PUB. POL’Y STUDIES 1 (2004); Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation’s Federal Criminal Laws*, WALL ST. J., July 23, 2011.

⁶ See O’Sullivan, *supra* note 3, at 57.

⁷ See, e.g., Joost, *Federal Criminal Code Reform*, *supra* note 3, at 195 n.4, 214. Unlike many state codes influenced by the Model Penal Code, Title 18 does not group related offenses in any systematic way. See Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 233-24 (1997).

⁸ See *id.* at 199.

There also have been calls – including those made during hearings before this Task Force – for certain substantive changes to the federal criminal code, such as the bolstering of mens rea requirements, decriminalization of some regulatory and other offenses, and the reduction in the number of mandatory minimum sentences.

Many of these and other critiques are quite persuasive and there is little doubt that most observers – even those who differ as to the level of urgency and feasibility – would agree that the federal criminal code is in need of reform.⁹ Therefore, I will not dwell on the problems posed by the federal criminal code but, instead, will spend the time I have with you exploring some potential solutions.

Among the solutions the Task Force and Congress might consider are: (1) the establishment of a new commission to draft legislation or work with existing legislation, such as Chairman Sensenbrenner’s bill proposing a new criminal code; (2) partnering with an established and respected law reform entity such as the American Law Institute or American Bar Association Criminal Justice Section, using the technical assistance of members of the legal academy and experts in the criminal justice think tank community; and (3) the use of a permanent, professionally-staffed “criminal law revision commission” in Congress that can assist Members and Committees with the technical analysis regarding whether a contemplated new criminal law or penalty is actually needed and the design and drafting of statutes so that they are well-constructed and fit appropriately with the larger code. I will elaborate on each of these suggestions in turn and will discuss how criminal code reform might fit into a larger criminal justice reform agenda responsive to concerns about over-criminalization and mass incarceration.

History of Reform Efforts

However, before we contemplate how Congress might best streamline, reorganize, refine, and update the federal criminal code, it is essential to examine and draw lessons from past efforts to do the same.

A week from today will mark the 67th anniversary of a March 7, 1947 hearing that took place before “Subcommittee No.1” of the House Judiciary Committee of the Eightieth Congress. One of the bills being considered by the Subcommittee was H.R. 1600, “A Bill to Revise, Codify, and Enact Into Positive Law Title 18 of the United States Code, Entitled ‘Crimes and

⁹ Compare, e.g., Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1 (2012); Kathleen F. Brickey, *Federal Criminal Code Reform: Hidden Costs, Illusory Benefits*, 2 BUFF. CRIM. L. REV. 161 (1998), with O’Sullivan, *supra* note 3; Ellen S. Podgor, Foreword, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005).

Criminal Procedure.”¹⁰ The hearing record is replete with complaints about the state of post-World War II federal criminal law, including “ambiguities, uncertainties, duplication, redundancy, and conflict” and the need for “completeness and comprehensiveness, together with chapter and section arrangement which would disclose—not conceal—all vital provisions.”¹¹ The statement of Eugene J. Keogh, a member of the House of Representatives, decried the disparities in prescribed criminal penalties that had resulted from “piecemeal legislation enacted to take care of a present situation and in a wave of emotion.”¹²

In 1948, Congress passed the new Title 18, which, despite its shortcomings, was thought at the time to be a tremendous improvement over the previous state of affairs.¹³ However, the seeds of serious modern-day efforts at comprehensive federal criminal code reform were sown by the American Law Institute’s Model Penal Code project in the 1950s and early 1960s. The Model Penal Code, with its technical precision, elegant organization and draftsmanship, its attention to principles of culpability and mens rea, and its grounding in careful and serious

¹⁰ See A Bill to Revise, Codify, and Enact Into Positive Law Title 18 of the United States Code, Entitled “Crimes and Criminal Procedure”: Hearing on H.R. 1600 Before Subcomm. No 1 of the House Comm. on the Judiciary, 80th Cong. (1947) [hereinafter Title 18 Hearing Report].

¹¹ Title 18 Hearing Report, at 12.

¹² Title 18 Hearing Report, at 7. Mr. Keogh had been chairman of the Committee of Revision of the Laws which, in the Seventy-Ninth Congress, had taken up H.R. 2200, a bill almost identical to H.R. 1600 with regard to substantive crimes. In the interim, the Committee on Revision of the Laws had been shuttered and the House Judiciary Committee assumed jurisdiction over the efforts to revise the United States Code. See Title 18 Hearing Report, at 1-2.

¹³ See Act of June 25, 1948, c. 645, 62 Stat. 683. After the Civil War, Congress commissioned a compilation of federal statutes including criminal laws. See Act of June 27, 1866, ch. 140, § 2, 14 Stat. 75. This effort eventually culminated in the Revised Statutes of 1877, which were not revisited until just before the turn of the century when a much more ambitious project to codify, organize, and expand federal criminal laws was authorized by Congress. See Act of June 4, 1897, 30 Stat. 58; John L. McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663, 677-69. Congress subsequently passed the Criminal Code of 1909. See Act of March 4, 1909, ch. 321, 35 Stat. 1088; McClellan, *supra*, at 677-79. In 1926, Congress passed the first edition of the United States Code, consisting of 50 titles. Given the scope of the legislation, it was necessary to passage in both houses of Congress for the inclusion of a “savings clause” which made the U.S. Code “merely prima facie evidence of the statement of the law.” In 1942, the Committee on Revision of the Laws decided to seek to a permanent and definitive status for the United States Code, and resolved to propose revisions and enactment on a title-by-title basis in an effort to facilitate passage in both houses. The consideration of H.R. 1600 was part of this effort. See Title 18 Hearing Report, at 6.

criminological research and deliberation spurred many states to undertake significant revisions of their criminal codes.¹⁴

In 1965, President Lyndon Johnson's Commission on Law Enforcement and the Administration of Justice ("Johnson Crime Commission") began a comprehensive review of American criminal justice.¹⁵ The Johnson Crime Commission report, issued in 1967, "spanned twelve substantive chapters covering a snapshot of crime in America, juvenile delinquency and youth crime, police, courts, corrections, organized crime, narcotics and drug abuse, drunkenness, control of firearms, science and technology, research, and a national strategy on crime."¹⁶ Among the concerns arising from the work of the Johnson Crime Commission was the issue of "overcriminalization," particularly as it pertained to the expansion in the number of criminal statutes.¹⁷

In 1966, just after the Johnson Crime Commission had begun its work, Congress established the National Commission on the Reform of Federal Criminal Laws, which was chaired by Edmund Brown, Sr., a former governor of California.¹⁸ Among those serving on what was commonly referred to as the "Brown Commission" were six members of the United States House of Representatives, three United States Senators, and four federal judges.¹⁹ The Advisory Committee, which was chaired by recently-retired Associate Justice Tom C. Clark, included the likes of Patricia Roberts Harris, Louis Pollak, Cecil Poole, Elliot Richardson, and James Vorenberg.²⁰ The work of the Brown Commission was led by a staff and corps of

¹⁴ See Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 91-92 (1998); see also Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J. L., ECON. & POLICY 597, 603 (2011).

¹⁵ Fairfax, *supra* note 14, at 604.

¹⁶ Fairfax, *supra* note 14, at 605 (citing PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT 17-291 (1967) [hereinafter THE CHALLENGE OF CRIME IN A FREE SOCIETY]).

¹⁷ Fairfax, *supra* note 14, at 606 (citing Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967)).

¹⁸ See Pub. L. No. 89-801, 80 Stat. 1516 (1966).

¹⁹ See NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE (TITLE 18, UNITED STATES CODE) v (1971) [hereinafter BROWN COMMISSION REPORT].

²⁰ See BROWN COMMISSION REPORT vi.

consultants directed by Professor Louis Schwartz, a co-reporter for the American Law Institute's Model Penal Code project, and Richard Green, the director of the American Bar Association's Criminal Justice Standards project.²¹

Although the Brown Commission began with the broader mandate to review “substantive criminal law and the sentencing system” as well as “procedure and all other aspects of ‘the federal system of criminal justice,’” the decision was made to narrow the Commission’s focus to substantive federal criminal law.²² The Foreword to the Commission’s Final Report describes the process the Commission undertook to produce the proposed new Title 18 of the United States Code:

The Commission’s staff and consultants, working with law enforcement agencies, prepared preliminary drafts and supporting memoranda. These drew upon the reports of other bodies, such as the President’s Commission on Law Enforcement and the Administration of Justice, the National Commission on Causes and Prevention of Violence, the National Advisory Commission on Civil Disorders, the American Bar Association Project on Standards for Criminal Justice, the American Law Institute, the National Council on Crime and Delinquency and numerous state penal law revision commissions.²³

After review of these preliminary materials by Advisory Committee and Commission members, the Commission produced a Study Draft in June of 1970. This Study Draft was disseminated widely – “to all federal agencies, members of Congress, staff of the pertinent Congressional committees, federal judges, state attorneys general, chief justices, metropolitan district attorneys and numerous law schools, law professors, bar and professional associations, research bodies and private attorneys.”²⁴ The Commission received substantial feedback on the Study Draft from government agencies, the U.S. Judicial Conference, prosecutors, and private attorneys, and was able to incorporate that feedback into its revision.²⁵

²¹ *See id.* at vii; Gainer, *supra* note 14, at 97.

²² *See* BROWN COMMISSION REPORT xi.

²³ *Id.* at xi.

²⁴ *Id.* at xii n.2.

²⁵ *See id.* at xii.

The Final Report of the Brown Commission was transmitted to the President and Congress on January 7, 1971.²⁶ The Commission's proposed new Title 18 was a comprehensive collection of all federal felony offenses. The proposed Code "codifie[d] common [common law] defenses" and "establishe[d] standard principles of criminal liability and standard meanings for terms employed in the definitions of offenses and defenses."²⁷ The proposed Title 18 also set out clear standards and bases for the exercise of federal jurisdiction over criminal conduct, separated from the core elements of defined offenses.²⁸ Perhaps the most striking improvement of the proposed Code was that it was an "integrated system,"²⁹ adopting: a general part setting out the aforementioned definitions, principles for liability, and bases for the exercise of federal jurisdiction (Part A); a special part defining all federal offenses (Part B); and a part outlining a sentencing system (Part C).

Despite the Brown Commission's Herculean efforts, the proposed comprehensive federal criminal code never was enacted into law. Over a period of almost twelve years after the Brown Commission, the adoption of a comprehensive federal criminal code "was a major focus of the Senate Judiciary Committee, was twice before the full Senate for consideration, and was the subject of a shorter but intense period of drafting and debate within the House Judiciary Committee."³⁰ However, for various reasons, the legislative efforts in both houses were unsuccessful.³¹

Is it Time to Try Again on Federal Criminal Code Reform?

It may be time to revisit federal criminal code reform. However, one must ask whether another attempt at comprehensive federal criminal code reform would be quixotic? After all,

²⁶ *See id.* at i.

²⁷ *Id.* at xii.

²⁸ *See id.* at xii; *see also id.* at 11-26 (proposed Chapter 2, "Federal Penal Jurisdiction," §§ 201-219).

²⁹ *Id.* at xiii.

³⁰ *See Gainer, supra* note 14, at 111; *see also id.* at 111-129 (cataloguing the various federal criminal code reform bills and hearings in the House and Senate between 1971 and 1982).

³¹ *See Joost, Federal Criminal Code Reform, supra* note 3, at 203-209. One commentator close to the process has attributed the legislative failure, in part, to intense public criticism sometimes borne of misinformation about the implications of the proposed code for federal jurisdiction, civil liberties, and public morals. *See Gainer, supra* note 14, at 129-135.

very capable men and women with unmatched intellect and dedication were unsuccessful in their efforts forty years ago. Nevertheless, I believe that, by taking lessons from the past and building upon the work of the Brown Commission, we have an opportunity for meaningful reform.³²

To be sure, many of the challenges that faced Congress after the Brown Commission remain with us. There are the same structural and institutional capacity constraints that make it difficult to pass such a sweeping revision of federal criminal law in the lifespan of any one Congress. As in the 1970s and 1980s, the passage of a comprehensive federal crime code revision would require close cooperation and, in some circumstances, near-synchronization among the leadership and relevant committees of both houses of Congress.³³

Furthermore, as in the past, there would need to be a substantial degree of consensus among the Congress, the Administration, and the relevant stakeholders in the bench and bar as to the means and the ends of comprehensive federal criminal code reform.³⁴ Finally, as was the case forty years ago, this unity of mind would need to be accompanied by the political will to make the case to the general public that not only is federal criminal code reform a worthwhile endeavor and respectful of our cherished traditions, but that the short-term inconvenience of transitioning to a new Code would be justified by the long-term improvements to the law and the administration of criminal justice.³⁵

However, there are some significant differences between the post-Brown Commission era and today. Whatever criticisms have been leveled at the partisan nature of our politics today,³⁶ crime policy recently has emerged as a welcome exception. A strong, bipartisan consensus has been developing around the idea that while we should be tough on crime, we should also be *smart* on crime.³⁷ As I have written, “[f]or the first time in more than a generation, political

³² See Joost, *Federal Criminal Code Reform*, *supra* note 3, at 213.

³³ See Gainer, *supra* note 14, at 147-150.

³⁴ See *id.* at 141-151.

³⁵ See *id.* at 140-141. Federal criminal code reform would not be without its costs, including the transition period during which the legal system with need to grapple with questions related to jury instructions, interpretive appellate precedent, and settled expectations of judges, prosecutors, and defense attorneys who work with the current federal criminal code. See Gainer, *supra* note 14, at 157 n.198; Joost, *Federal Criminal Code Reform*, *supra* note 3, at 218-219; Brickey, *supra* note 9, at 176-177.

³⁶ See, e.g., Brickey, *supra* note 9, at 188-189.

³⁷ See Roger A. Fairfax, Jr., *The “Smart on Crime” Prosecutor*, 25 GEO. J. L. ETHICS 905, 907-908 (2012).

leaders have shown a willingness to move away from the ‘soft-on-crime’ and ‘tough-on-crime’ binary and take a hard look at whether we are receiving a proper return on the tremendous societal investment in our criminal justice policies.”³⁸ Given the current receptivity to innovation in criminal justice policy, the time may be ripe for reconsideration of federal criminal code reform.

Potential Solutions

Below are a number of suggestions for consideration if the Congress contemplates embarking on an effort to reform the federal criminal code. I cannot claim to have originated these ideas, many of which are borrowed from those who have been involved in this work for decades – people such as Ronald Gainer, Professor Paul Robinson, Robert Joost, and the late Professor Kathleen Brickey. However, I do find them compelling and wish to offer them to you this morning as part of a broader plan to achieve criminal code reform.

Establishment of a New Commission to Reform the Federal Criminal Code

Based on the experience with federal criminal code reform in the 1960s and 1970s, I believe that a code reform commission can be a valuable asset. Although I do not necessarily believe that a commission is indispensable (as I explain below), it does provide the opportunity for broad participation of stakeholders at an early stage in drafting. Some observers of the Brown Commission have asserted that the engagement (and buy-in) of the various constituents in the legislative and executive branches as well as in the bar and practice community is essential to achieving federal code reform.³⁹

A Commission would also provide legislators consistent access to technical expertise and the focused engagement of staff and consultants during the drafting period. Although the relevant committees in the House and Senate have very able and committed staff, these staffers have other duties and the Members for whom they work have other priorities to which they must attend. A Commission staff would be in a position to devote full attention to the task of working with the Commission and stakeholders to draft a proposed federal criminal code.

With regard to the makeup of a modern-day federal criminal code commission, there is no need to reinvent the wheel. Although it may be helpful to look to the experiences of states

³⁸ Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2319-2320 (2013).

³⁹ See, e.g., Joost, *Federal Criminal Code Reform*, *supra* note 3, at 213, 217.

that have successfully engaged in code reform,⁴⁰ the structure and balance of representation on the Brown Commission would still be largely appropriate today. However, I do believe that it is essential to include among the Commissioners and Advisory Committee membership greater representation from the career and political ranks of the Department of Justice. Again, such early engagement among key stakeholders – such as House and Senate leadership, the Administration and the Department of Justice, and the practice community – increases the chances that a singular bill could emerge as the vehicle for federal criminal code reform.⁴¹

Another aspect of a Commission’s work that could help to achieve legislative success for its recommendations would be a strict focus on policy-neutral revisions to the federal criminal code.⁴² The Commission could determine that such neutrality was possible in a sweeping, comprehensive revision, or it might conclude instead that it should focus on the low-hanging fruit, severing any controversial revisions for later deliberation. However, to the extent that matters of controversy must be taken up in the process of revising the federal criminal code, it is preferable to have them debated and potentially resolved during Commission deliberations than for the first time in the subsequent legislative debate.⁴³

Partnership with Non-Partisan Law Reform Groups

An alternative to a criminal code revision commission might be a partnership with a capable and respected non-partisan law reform entity. Such an entity could provide technical and drafting assistance, and could help with the research of difficult legal issues confronting the drafters of the revised criminal code. I would reiterate a suggestion made by former Attorney General Richard Thornburgh when he testified before Chairman Sensenbrenner’s Subcommittee

⁴⁰ See, e.g., Robinson, *supra* note 7, at 225; Joost, *Federal Criminal Code Reform*, *supra* note 3, at 206-208.

⁴¹ See Joost, *Federal Criminal Code Reform*, *supra* note 3, at 222-223.

⁴² See Gainer, *supra* note 14, at 156; Joost, *Federal Criminal Code Reform*, *supra* note 3, at 206, 208; *but see* Brickey, *supra* note 9, at 179-184 (questioning whether policy neutrality in criminal code reform is achievable).

⁴³ Other suggestions for facilitating legislative success on federal criminal code reform include the maintenance of the Commission throughout the pendency of the legislative process so that it might provide drafting or technical support to the Congress, *see* Joost, *Federal Criminal Code Reform*, *supra* note 3, at 220; Gainer, *supra* note 14, at 154-155 n. 197, the adoption of “fast-track” rules to enhance the chances of having a bill debated and passed within the span of one Congress, *see* Joost, *Federal Criminal Code Reform*, *supra* note 3, at 221, and agreements limiting amendments. *See* Gainer, *supra* note 14, at 155.

on Crime, Terrorism, and Homeland Security in December 2011.⁴⁴ General Thornburgh joined others who have suggested that perhaps the American Law Institute would be an appropriate partner to the Congress in pursuing the sort of ambitious criminal code reform that might be contemplated.⁴⁵ The ALI's experience with the Model Penal Code and its influence on the criminal code revision efforts of many states makes the ALI an ideal confederate in a federal criminal code revision effort. Although I am a member of the ALI, I am not on the governing Council and do not purport to speak for the Institute, but it certainly may be worth exploring this idea with them or some other potential partner, such as the Criminal Justice Section of the American Bar Association, which has long been a leader in criminal law reform efforts.

Permanent Criminal Law Revision Commission

Regardless of the vehicle used to revise and modernize the federal criminal code, Congress might consider establishing a dedicated, non-partisan, and professionally-staffed "criminal law revision commission" charged with assisting in the analysis and drafting of all proposed new criminal laws.⁴⁶ Such a commission could function like the Congressional Budget Office, providing impact assessments of proposed criminal laws and penalties, evaluating the need for new laws and noting potential redundancies, assisting with the technical drafting of the mens rea and other elements of the proposed laws, and identifying where the new criminal statutes best fit within the framework and organization of the larger criminal code. This sort of guidance could help to avoid what happened following earlier attempts at federal criminal code reform when decades of piecemeal criminal legislation essentially reverted the Title 18 to its pre-revision state.⁴⁷

⁴⁴ See Criminal Code Modernization and Simplification Act of 2011, Hearing on H.R. 1823 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on Judiciary, 112th Cong. (2012), at 76-77.

⁴⁵ See *id.*; Gainer, *supra* note 14, at 153-154 (suggesting the involvement of laws schools and the American Law Institute).

⁴⁶ See Gainer, *supra* note 14, at 158; Joost, *Federal Criminal Code Reform, supra* note 3, at 213.

⁴⁷ A variation on this idea is the requirement of "sequential referral," whereby the Judiciary Committees of Congress would have joint jurisdiction over any legislation imposing a criminal penalty. See BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND., WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 28-30 (2010).

Conclusion

As I conclude, I would be remiss if I did not acknowledge how federal criminal code reform relates to the other opportunities for progress in criminal justice reform. I understand that the agenda of this Task Force includes an examination of our nation's sentencing policies – policies that have contributed to an incarceration explosion, with over 2 million currently behind bars.

I know that Representative Labrador and Ranking Member Scott and some of the other members of the Task Force have worked across the aisle and with on the Smarter Sentencing Act of 2013,⁴⁸ which is a companion to the bi-partisan Smarter Sentencing Act of 2013 in the Senate.⁴⁹ The chair of of the U.S. Sentencing Commission has been supportive of this and other bi-partisan sentencing reform legislation being considered.⁵⁰

The executive branch has also been working on new approaches to criminal justice policy, with the Department of Justice recently making policy pronouncements regarding reforms relating to ex-offender re-entry and mandatory minimum sentences.⁵¹ Indeed, earlier this month, I attended a criminal justice reform roundtable at which Attorney General Eric Holder shared the stage with Ranking Member Scott, Senator Rand Paul, Senator Mike Lee, and Senator Sheldon Whitehouse, all of whom are co-sponsors of the Smarter Sentencing Act legislation in either the House or Senate.⁵² Although these public servants fall at different places along the political spectrum, they all spoke with one voice on the need for criminal justice reform and the opportunities before us.

Also, as we sit here, many states – with governors and legislative majorities of both political parties – are implementing bipartisan, evidence-based criminal justice reforms and are beginning to reap the benefits in the form of lower incarceration and recidivism rates and savings

⁴⁸ See Smarter Sentencing Act of 2013, H.R. 3382, 113th Cong. (2013).

⁴⁹ See Smarter Sentencing Act of 2013, S. 1410, 113th Cong. (2013).

⁵⁰ See Statement of Judge Patti B. Saris, Chair, United States Sentencing Commission, For the Hearing on “Reevaluating the Effectiveness of Federal Mandatory Minimums” Before the Committee on the Judiciary, United States Senate, September 18, 2013.

⁵¹ See Remarks of Attorney General Eric Holder, Annual Meeting of the American Bar Association House of Delegates, August 12, 2013.

⁵² See Mary Crowley, *AG Holder Makes News at Vera-Leadership Conference Event on Bipartisan Criminal Justice Reform*, Vera Inst. Of Justice, (Feb. 14, 2014), <http://www.vera.org/blog>.

of taxpayer resources for other important societal investments such as education and infrastructure in what is a difficult budgetary environment in many jurisdictions.⁵³

In addition to the bipartisan cooperation taking place in government, private entities from across the political spectrum – groups like Heritage, Cato, Justice Fellowship, ALEC, Right on Crime, ACLU, NAACP, Sentencing Project, NAACP Legal Defense and Educational Fund, NACDL, Leadership Conference on Human and Civil Rights, and Justice Roundtable – have been working hand-in-hand on criminal justice reform.⁵⁴ Furthermore, many non-partisan bar and law reform entities such as the American Bar Association and the American Law Institute, and religious communities have made criminal justice reform a priority.

These criminal justice reform efforts have benefited from research, technical assistance, and data collection and analysis from think tanks and research centers such as Vera Institute for Justice, the Joint Center for Political and Economic Studies, the Charles Hamilton Houston Institute, the Brennan Center, Pew Charitable Trusts, and the Urban Institute.

Ultimately, data-driven, evidence-based policies that help make our communities safer, reduce crime and recidivism, promote justice and fairness, and save taxpayer dollars represent a win-win-win. Such policies represent not a Republican victory or a Democratic victory, but an American victory.

There are those who say it cannot be done; that the politics of crime are much too divisive to permit bi-partisan cooperation on meaningful criminal justice reform. Those naysayers are wrong. It can be done. The Fair Sentencing Act of 2010 is but one example; this very Task Force assembled here this morning is another.

I firmly believe that we are in the midst of a special moment in criminal justice reform. The work of this Task Force on federal criminal code reform and the other issues on its agenda will help to ensure this historic opportunity is not lost.

So, again, thank you all for your leadership and attention, and thank you again Mr. Chairman for the invitation to speak with the Task Force this morning.

⁵³ See, e.g., AMERICAN CIVIL LIBERTIES UNION, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES (2011).

⁵⁴ See, e.g., Laura W. Murphy (ACLU) & Grover Norquist (Americans for Tax Reform), *Congress Must Act to Finish Job on Criminal Justice Reform* (August 20, 2013), <http://www.aclu.org/blog> (joint statement urging passage of bi-partisan Smarter Sentencing Act and Justice Safety Valve Act of 2013, H.R. 1695 and S. 619).