



**Written Statement of
Steven D. Benjamin
on behalf of
National Association of Criminal Defense Lawyers**

**Before the
House Committee on the Judiciary
Over-Criminalization Task Force**

Re: “The Crimes on the Books and Committee Jurisdiction”

July 25, 2014

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Mr. Benjamin is the founding partner of the Richmond, Virginia firm Benjamin & DesPortes. He also serves as Special Counsel to the Virginia Senate Courts of Justice (Judiciary) Committee, and is a member of the Virginia Indigent Defense Commission. He is a Fellow of the American Board of Criminal Lawyers, and a Past President of the Virginia Association of Criminal Defense Lawyers. Mr. Benjamin was counsel in the landmark Virginia Supreme Court decision recognizing a constitutional right to forensic expert assistance at state expense for indigent defendants. In other cases, he argued through the trial courts and on appeal that Virginia's mandatory fee caps on compensation for court-appointed counsel deprived indigent defendants of conflict-free representation, and he led the litigation and legislative effort to abolish those caps.

At the request of the Virginia Supreme Court, Mr. Benjamin helped establish and chair an annual Advanced Indigent Defense Training Seminar to draw top lecturers from across the country to train Virginia's defenders at no cost. With his law partner, he won the non-DNA exoneration and release of a man serving a life sentence for a murder he did not commit, and he argued in the United States Supreme Court that a Richmond trespassing policy violated the free speech rights of public housing residents. He assisted the State Crime Commission in the creation of Virginia's Writs of Actual Innocence, and after determining that criminal defendants throughout Virginia were routinely losing their appellate rights because of attorney error, he helped draft the procedure that was enacted by the Virginia General Assembly to restore those rights. When biological evidence was discovered in twenty years of old case files stored in Virginia's crime laboratories, he helped persuade state political leadership to order statewide DNA testing. When the pace of that testing stalled, he worked to obtain the passage of two successive bills mandating effective notification of interested parties that this new evidence had been discovered. He is a recipient of the Virginia State Bar's Lewis F. Powell Pro Bono Award in recognition of his years of indigent defense and efforts toward indigent defense reform. He is a frequent lecturer on criminal justice and defense issues.

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My name is Steve Benjamin, and I am the immediate Past-President of the National Association of Criminal Defense Lawyers (NACDL). On behalf of NACDL, I commend the House Judiciary Committee for the work the Overcriminalization Task Force has done in examining the problems and reviewing possible solutions to our country's serious problem of overcriminalization. As a practitioner from the Commonwealth of Virginia, I am personally grateful for the leadership and support of two members from my own Congressional delegation, Judiciary Committee Chair Goodlatte and Task Force Ranking Member Scott, whose work on this critical issue demonstrates, yet again, that the danger of overcriminalization transcends any ideological divide. NACDL urges the Members of this Task Force to continue their work on these critically important issues in the bipartisan spirit that has been the hallmark of their work thus far.

Overcriminalization in America has a direct impact on commerce, free enterprise, and innovation. It also erodes the public's confidence in a fair and just criminal justice system. It is present in policies and practices that affect every person in society. Thus, NACDL urges the Task Force to take advantage of this opportunity to consider major systemic reforms. The problems the Task Force has explored over a series of nine hearings are not abstract or theoretical—at this very moment we are all living with the consequences of a misguided public infatuation with the use of criminal law as a massive tool of social and economic control. That infatuation has left the United States with more prisoners than any other nation on earth, an estimated 65 million Americans marred by a criminal record, and billions of dollars unnecessarily diverted from core functions and responsibilities of government.

Introduction

The greatest power that any civilized government routinely uses against its own citizens is the power to prosecute and punish under criminal law. This power necessarily distinguishes the criminal law from all other areas of law and makes it uniquely susceptible to abuse and capable of inflicting injustice. More than any other area of law, criminal law, because its prohibitions and commands are enforced by the power to punish, must be firmly grounded in fundamental principles of justice. Such principles are expressed in both substantive and procedural protections.

One such fundamental principle is embodied in the doctrine of fair notice, which is a critical component of the Constitution's due process protection. The fair notice doctrine requires that, in order for a person to be punished criminally, the offense with which she is charged must provide adequate notice that the conduct in which she engaged was prohibited. In the words of the Supreme Court: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or

forbids.”¹ Due process therefore demands that a criminal law give “fair warning of the conduct that it makes a crime.”² Unfortunately, there are a number of systemic flaws in the federal criminal justice system that undermine this fundamental constitutional right to fair notice.

Congress has revised the federal criminal code a handful of times over the last century and a half, most recently in 1948. It is past time for another comprehensive revision. Whether that review and revision should be led by the Judiciary Committee or delegated, at least as an initial matter, to a Commission or other body of stakeholders, is a question beyond today’s hearing although we note the many practical and political obstacles that could potentially interfere with a fair and neutral rewrite of the federal code. Ideally, any such effort should focus on seven main goals : (1) reviewing the existence and placement of all federal criminal provisions, and revising or reorganizing the code to provide fair notice and avoid unnecessary duplication; (2) ensuring that the revised federal criminal code strikes a proper balance between federal and state criminal enforcement; (3) clearly defining the different levels of *mens rea* and applying those definitions in a fair and rational way to all federal offenses (both statutory and regulatory); (4) ameliorating the harm of regulatory overcriminalization and preventing future such instances; (5) establishing uniform rules of construction; (6) revising the counter-productive and unnecessarily harsh system of punishment that has produced an excessive federal prison population; and (7) addressing the many punitive collateral consequences of arrest or conviction that deny redemption, interfere with rehabilitation, and thwart productive reintegration with society

Proliferation of the Federal Criminal Code

In 1998, the American Bar Association’s Task Force on the Federalization of Crime described the federal criminal law as being so large that there existed “no conveniently accessible, complete list of federal crimes.” As of 2003, over 4,000 offenses carried criminal penalties in the United States Code.³ By 2008, that number had increased to over 4,450.⁴ And, most recently, the Congressional Research Service has estimated that since 2008, at least another

¹ *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (internal quotation marks omitted) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

² *Id.* at 350.

³ John S. Baker, Jr., The Federalist Soc’y for Law & Pub. Policy Studies, *Measuring the Explosive Growth of Federal Crime Legislation* (2004), at 3, available at http://www.fed-soc.org/doclib/20070404_crimreportfinal.pdf (last visited June 11, 2013).

⁴ John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation Legal Memorandum No. 26, June 16, 2008, available at <http://www.heritage.org/Research/LegalIssues/lm26.cfm> (last visited June 11, 2013).

439 criminal offenses have been enacted.⁵ Many scholars and even government officials have admitted that none of these counts can be deemed completely accurate, although just recently an anonymous Twitter account has started tweeting one federal crime each day and claims it will do so until all have been identified.⁶ In addition to federal statutory crimes, it is estimated that there are at least 10,000, but possibly as many as 300,000, federal regulations that *also* can be enforced criminally.⁷ Unfortunately, with this many criminal provisions scattered throughout the fifty-one titles of the U.S. federal statutory code and the fifty chapters of the Code of Federal Regulations (C.F.R.), neither criminal law professors nor lawyers who specialize in criminal law can know (or reasonably identify) *all* of the conduct that is criminalized. Average law-abiding individuals have no hope.

This proliferation of federal offenses has two main practical consequences. First, the sheer number of crimes, scattered throughout the Code and C.F.R., creates a notice problem. Justice Holmes said long ago that “fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”⁸ But with the statutory scheme that currently exists, “fair warning” is a fiction. If our legal system is going to presume that everyone knows the law—and if we wish to deter citizens from violating the law—we must make the law knowable. Second, the existence of multiple federal statutes that address similar conduct encourages federal prosecutors to overcharge. Pruning the federal criminal code should reduce this practice and help to ensure even-handed application of the law.

For example, as a previous witness of this Task Force explained,⁹ there are more than two dozen different false statement statutes in Chapter 47 of Title 18; there are seven different fraud statutes in Chapter 63 of Title 18; and 19 different obstruction offenses in Chapter 73 of Title 18. There are also other false statement, fraud, and obstruction offenses scattered throughout Title 18 and elsewhere that address the same conduct. Surely a comprehensive review of the federal criminal code would identify more such examples.

⁵ Memorandum from Alison M. Smith and Richard M. Thompson II on Criminal Offenses Enacted from 2008 – 2013 to the Crime, Terrorism, Homeland Security & Investigations Subcomm. (H. Judiciary) 1 (June 23, 2014) (on file with Cong. Research Serv.).

⁶ A Crime a Day, <https://www.twitter.com/CrimeADay> (last visited July 23, 2014).

⁷ Task Force on Federalization of Criminal Law, Criminal Justice Section, Am. Bar Ass’n, *The Federalization of Criminal Law*, at 9 n.11, app. C (1998).

⁸ *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

⁹ *Hearing on Criminal Code Reform Before the Over-criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of John D. Cline, Law Office of John D. Cline, San Francisco, CA).

For these reasons, NACDL strongly recommends a review of the federal code to identify overlapping, duplicative statutes—some of which could be repealed and/or revised in order to achieve a uniform and clear statement of the law. The inquiry should explore whether a criminal sanction is necessary at all—as opposed to civil and administrative remedies—and, if so, whether existing federal criminal statutes suffice to punish the conduct at issue. And, while NACDL has not yet taken a position on the issue of whether all criminal statutes must be organized into a single title of the code, common sense would dictate that most criminal provisions should reside in Title 18 unless clear evidence existed that a particular criminal provision belonged elsewhere. For criminal laws to be effective and fair, they must be accessible, not only to laypersons, but also to lawyers whose job it is to identify the laws and advise their clients concerning them. Having fewer criminal offenses, organized in a meaningful way, is one step towards that goal.

Reform of the code affords another, closely related opportunity: to restore the balance between federal and state law enforcement. Our federalist system contemplated that law enforcement would be primarily a state function. Initially, there were only a few federal offenses, and those offenses focused on the protection of clearly federal interests. Although the Supreme Court has recognized the need to exercise caution in altering this traditional federal-state balance in law enforcement, federal criminal jurisdiction has expanded so immensely that now almost any culpable conduct can be brought within the federal purview.¹⁰ Certain witnesses have testified to this Task Force regarding which subject matters are appropriate for federal jurisdiction.¹¹ Regardless of how Congress ultimately strikes the federal-state balance in law enforcement, the issue deserves careful, systematic consideration. Reform of the federal criminal code affords that opportunity.

Enforcement of a monstrous criminal code has resulted in a backlogged judiciary, overflowing prisons, and the incarceration of innocent individuals who plead guilty to avoid the draconian sentences that prosecutors often seek when individuals assert their right to trial. Enforcement of this inefficient and ineffective scheme is at tremendous taxpayer expense.

¹⁰ *Bond v. United States*, 134 S. Ct. 2077 at *2 (2014) (“Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.”).

¹¹ E.g., *Hearing on Agency Perspectives Before the Over-criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (2014) 4 (statement of Judge Irene Keeley, Chair of the Comm. on Criminal Law, Judicial Conf. of the U.S.) (setting forth several broad areas it deems appropriate for federal jurisdiction). NACDL encourages more inquiry into the appropriately narrow scope of federal criminal jurisdiction.

The Absence of Meaningful Criminal Intent Requirements in Federal Statutes and Regulations

At the first hearing of the Task Force, and at almost every hearing since, there has been near unanimous agreement among the witnesses that, in addition to the overwhelming number of federal criminal offenses, the erosion of *mens rea* in these offenses is the most pressing aspect of the overcriminalization problem and that its restoration should be the top priority of this Task Force.

As a cornerstone of our criminal justice system since our nation's founding, the constitutionally-based principle of fair notice is embodied in the requirement that, with rare exceptions, the government must prove the defendant acted with criminal intent before subjecting her to criminal punishment. More specifically, no individual should be subjected to condemnation and prolonged deprivation of liberty, and the serious, life-altering collateral consequences that follow, unless she intentionally engages in inherently wrongful conduct or acts with knowledge that her conduct is unlawful. It is only in such circumstances that a person is truly blameworthy and thus deserving of criminal punishment.

The criminal intent requirement is not just a legal concept—it is the fundamental anchor of the criminal justice system. Absent a meaningful criminal intent requirement, an individual's other legal and constitutional rights cannot adequately protect that individual from unjust prosecution and punishment for honest mistakes or engaging in conduct that they had no reason to know was wrongful. Moreover, the inclusion of criminal intent requirements in criminal offenses serves the broad purpose of deterrence in the criminal justice system while acting as a safety valve against criminal punishment for innocent actors. Black's Law Dictionary defines deterrence as “[t]he act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of punishment.”¹² Deterrence of criminal conduct cannot be achieved in a system that punishes those who are not culpable. If a person is unaware of the prohibited nature of the conduct in which she is engaging, then the risk of criminal punishment simply cannot affect, let alone prevent, engagement in that conduct. This is especially the case with strict liability, which “is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future[.]”¹³

Whether the offense is relatively straightforward like homicide or a more complicated regulatory prohibition, careful consideration must always be given to the fundamental principles of culpability and fair notice when defining the guilty mind and guilty act that constitute the

¹² Black's Law Dictionary (rev. 9th ed. 2009).

¹³ Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 109.

crime. Furthermore, strict liability should only be employed in the criminal law after full deliberation. As the Supreme Court has recognized, “[a]ll are entitled to be informed as to what the State commands or forbids.”¹⁴ By its own terms, a criminal offense should prevent the conviction of an individual acting without intent to violate the law and knowledge that her conduct was unlawful or sufficiently wrongful so as to put her on notice of possible criminal liability. A person who acts without such intent and knowledge does not deserve the government’s greatest punishment or the extreme moral and societal censure such punishment carries.

Unfortunately, there is now a congressional practice of enacting criminal laws with weak, or inadequate, criminal intent requirements. Whether this is a product of careless draftsmanship or political expediency, the result is always the same—the loss of due process for the average person. This troubling trend was well-documented in NACDL’s ground-breaking joint report, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, released with the Heritage Foundation in May 2010 (hereinafter “*Without Intent Report*”), and can be seen in many pending and recently enacted laws.

Congress also frequently delegates its criminal lawmaking authority by passing a statute that establishes a criminal penalty for the violation of any regulation, rule, or order promulgated by an Executive Branch agency or an official acting on behalf of such an agency. This “regulatory overcriminalization” has a dramatic impact on individuals as well as businesses large and small. These regulatory crimes are especially pernicious because they rarely, if ever, receive careful scrutiny from Congress. In addition, many of these criminal regulations lack meaningful criminal intent requirements or apply vicarious criminal liability, which allow for criminal punishment absent blameworthiness. The oversight of compliance with complicated and extensive rules and regulations is no longer reserved for civil and regulatory enforcement agencies, but is also under the jurisdiction of federal prosecutors. Regulatory crimes represent a dangerous confluence of power: the Executive Branch that prosecutes crimes also creates and defines them.

The injury caused by the erosion of meaningful criminal intent requirements in federal statutes and federal regulations is not limited to the individual; it infects our entire criminal justice system and disrupts the rule of law in society as a whole. When Congress fails to ensure that its laws contain adequate criminal intent requirements, it effectively abdicates its power and responsibility by providing prosecutors with unbridled discretion and inviting judges to engage in lawmaking from the bench. Citizens rely on their constitutional rights, the separation of powers among the three branches of government, and the division of power between the state and national governments, to check otherwise unrestrained government power. The failure to adhere to these constitutional and prudential limits is a true abuse of our government’s greatest power.

¹⁴ *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

While the cause of these failures is not entirely clear, the solutions are. Going forward, Congress should approach new criminalization with caution and ensure that the drafting of all criminal statutes and regulations is done with deliberateness, precision, and by those with specialized expertise. Given the unique qualifications of the Judiciary Committees, which alone possess the special competence and broad perspective required to properly draft and design criminal laws, this Congressional evaluation should always include Judiciary Committee consideration prior to passage. This practice could be guaranteed by changing congressional rules to require every bill that would add or modify criminal offenses or penalties to be subject to automatic sequential referral to the relevant Judiciary Committee.¹⁵ The positive impact of such a practice was documented in the *Without Intent* Report, which found a statistically significant positive correlation between the strength of a *mens rea* provision and Judiciary Committee action on a bill containing such a provision.¹⁶ The Members of this Committee are far better suited to take on this critical role and to encourage other Members to always seek Judiciary Committee review of any bills containing new or modified criminal offenses. Hopefully, such oversight would stem the tide of criminalization, result in clearer, more specific and high quality criminal offenses with meaningful criminal intent requirements, and would reduce the number of times criminal law-making authority would be delegated to unelected regulators.

However, because an intention to do better is not enough to address the current situation, Congress should also explore solutions to the existing problem, including enacting a statutory law establishing a default criminal intent requirement to be read into any criminal offense that currently lacks one. As discussed in greater detail by other witnesses who have testified before this Task Force, this requirement should be protective enough to prevent unfair prosecutions and should apply retroactively to all, or nearly all, existing laws. Although it is usually unwise to do so, Congress could draft the legislation to allow for the enactment of, or continuing existence of, certain strict liability offenses. NACDL urges that strict liability not be imposed in the criminal law as a general matter. Where strict liability is deemed necessary, NACDL cautions this body to employ it only after full deliberation and then only if explicit in the statute. Invocation should be a true rarity, as even the Supreme Court has cautioned against the imposition of strict liability in the criminal law and has stated that all but minor penalties may be constitutionally impermissible without any intent requirement.¹⁷

¹⁵ Sequential referral is the practice of sending a bill to multiple congressional committees. In practice, this first committee has exclusive control over the bill until it reports the bill out or the time limit for its consideration expires, at which point the bill moves to the second committee in the sequence, in the same manner.

¹⁶ See *Without Intent* Report at 20-21.

¹⁷ In *Morissette v. United States*, the Supreme Court held that, as a general matter, the penalties imposed for public welfare offenses for which the imposition of strict liability is permitted “commonly are relatively small, and conviction does not grave damage to an offender’s reputation.” 342 U.S. 246, 256 (1952). The Court was clear about why the imposition of strict liability in the criminal law is traditionally disfavored:

As for addressing the current problems caused by a massive, and yet uncountable number of criminal federal regulations, a number of potential reforms have been proposed or referenced during testimony before this Task Force. These reforms range from a total ban on regulatory criminal law-making, to “sun-setting” provisions that would phase out criminal (but not civil) enforcement of existing regulations, to a requirement that all agencies publicly identify all regulations that authorize criminal enforcement and how frequently they are invoked, to a requirement that regulatory provisions only be eligible for criminal enforcement after a second offense, among others. NACDL encourages the Task Force to continue to explore these and other potential reforms.

Ultimately, if Congress determines that the time has finally come for a comprehensive overhaul of the federal criminal code, that process would afford an ideal opportunity to do what has not yet been done on the federal level—to establish uniform terminology for different levels of *mens rea* and to assign to each offense in a revised federal criminal code an appropriate level of *mens rea*.¹⁸ Wholesale reform of the federal criminal code would afford the opportunity to decide, in a reasoned and systematic way, when knowledge of illegality should be required and how specific that knowledge must be—something that is very much needed in federal jurisprudence.

Beneficial Rules of Construction

Courts have adopted certain rules of construction to interpret criminal statutes, the most prominent of which is the rule of lenity. Because these rules are judge-made, however, their application can seem random. And they may conflict with other rules of construction, such as the admonition in the RICO statute that its terms are to be liberally construed to affect its remedial purposes. Reform of the federal criminal code would afford an opportunity to establish uniform rules that courts can apply in construing federal criminal statutes. Two such rules are worth highlighting here.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child’s familiar exculpatory “But I didn’t mean to,” and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Id. at 250-51 (citations omitted).

¹⁸ Sections 2.02 through 2.05 of the Model Penal Code represent an effort to establish and define a hierarchy of mens rea requirements. The MPC mens rea provisions may work well for a typical state criminal code, but they are inadequate for the more complex offenses that appear in the federal code. Among other deficiencies, the MPC does not adequately address the need for proof of knowledge of illegality in the context of broadly worded federal offenses.

First, as discussed many times throughout the Task Force’s hearing, the rule of lenity—a rule requiring that any doubts about the scope of a criminal statute should be resolved in the defendant's favor—should be codified and made applicable to all federal crimes. The rule of lenity, especially in conjunction with a strong *mens rea* requirement, meaningfully fulfills the basic constitutional requirement of “fair warning.”

Second, courts often struggle to determine the reach of a criminal provision’s *mens rea* element. Does the requirement that the defendant act "knowingly," for example, extend to all aspects of the conduct that makes up the offense? Does it extend to jurisdictional elements, such as the use of interstate commerce? Does it extend to circumstances that make the conduct criminal, such as the age of a victim of sexual misconduct? Does it extend to elements that affect punishment, such as the quantity of drugs involved? Many of these difficult questions of interpretation can be resolved with a simple, generally applicable rule that the specified *mens rea* applies to all elements of the offense unless the statute creating the offense specifically provides otherwise. Or, Congress might adopt something akin to the Model Penal Code’s rule that a *mens rea* term applies to all “material elements” of an offense.¹⁹ These and possibly other straightforward rules of construction will increase uniformity—and thus fairness—in the interpretation of federal criminal statutes. They will also conserve judicial resources that are now devoted to interpreting federal criminal statutes on a case-by-case, ad hoc basis.

Effective, Not Overly Harsh, Punishment

Revision of the federal criminal code also affords an opportunity to rethink punishment. Most significantly, the use of mandatory minimum sentences should be carefully reviewed and abandoned or at least greatly restricted. Mandatory minimum sentences are a harsh, blunt tool that has led to the prolonged incarceration of many men and women who could be appropriately punished and returned to society through less draconian means. Other means of reducing the bloated federal prison population without diminishing deterrence or jeopardizing public safety should be considered as well

The same can be said for U.S. Sentencing Guidelines that continue to recommend disproportionately high sentences across a broad spectrum of criminal offenses. The problems created by overcriminalization are exacerbated by sentences that fail to account for the individual circumstances of particular conduct. While a potential sentence of 30 years may serve to deter a person from intentionally violating the law, such a sentence can have no deterrent effect where a person had no intention to commit a wrong or had every reason to believe his or her conduct was lawful. Rather, the combination of such high sentences with overly broad criminal offenses that lack meaningful criminal intent requirements often results in the incarceration of innocent

¹⁹ Model Penal Code § 2.02(4).

people. Unfettered prosecutorial discretion and draconian sentences are responsible for what is known as the “trial penalty,” which chills exercise of the right to trial in federal court. Few people would risk going to trial, facing possible incarceration of 10 or 20 years, when the plea offer is “only” 15 months. A genuine lack of blameworthiness is no match for this risk.

Other witnesses have testified that among the other possible reforms worth considering are the reinstatement of federal parole, the expansion of the amount of "good time" a federal prisoner can earn, and an increase in the power of federal judges to reduce or alter the conditions of federal prison terms in light of certain hardships. Through these means or others, federal prisoners who have received just punishment and present no danger can return to their families and become productive members of society, rather than a burden on taxpayers.

The Importance of the Restoration of Rights²⁰

As discussed during the last hearing, Congress must do its part to promote a change in the national mindset to embrace the concepts of redemption and forgiveness, including a public education campaign to combat erroneous and harmful stereotypes and labels applied to individuals who have had an encounter with law enforcement and the criminal justice system. As a cornerstone of this movement, the United States should establish a “National Restoration of Rights Day” to recognize the need to give individuals who have successfully fulfilled the terms of a criminal sentence the opportunity to move on with their lives.

First, mandatory consequences must be repealed, and discretionary disqualifications should be limited based on relevancy and risk factors. Legislatures should not impose a mandatory collateral consequence unless it has a proven, evidence-based public safety benefit that substantially outweighs any burden it places on an individual’s ability to reintegrate into the community.

Second, existing legal mechanisms that restore rights and opportunities must be reinvigorated and new ones established. Congress should provide individuals with federal convictions with meaningful opportunities to regain rights and status. Congress should also provide individuals with state convictions the effective mechanisms needed to avoid collateral consequences imposed by federal law. The federal criminal justice system lacks viable mechanisms for relief from a federal conviction. Individuals with federal, military and District of Columbia Code convictions have even more severely limited access to relief from collateral consequences than do individuals with state convictions. Unlike many state systems, there is no expungement, sealing, or certificate of relief from disabilities for federal convictions, or even for non-conviction records. The only avenue for someone with a federal conviction, a petition for

²⁰ See NACDL’s report, *Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime: A Roadmap to Restore Rights and Status After Arrest or Conviction*, available at: www.nacdl.org/restoration/roadmapreport.

presidential pardon, unfortunately, rarely leads to relief. Countering this deficit of federal relief options requires a two-pronged approach. First, the pardon process must be reinvigorated. Congress can expand opportunities for relief and restoration by giving sentencing judges the power to relieve collateral consequences at sentencing. Additionally, Congress should create a federal certificate of relief from disabilities. Certificates should be available for all federal convictions pursuant to clear, objective eligibility standards.

Third, non-conviction dispositions must be expanded and utilized. To avoid harmful and unnecessary collateral consequences, diversion and deferred adjudication should be available for all but the most serious crimes, and prosecutors and courts should be encouraged to use these alternatives. Fourth, incentives must be created to encourage employers, landlords and other decision-makers to consider individuals with convictions for certain opportunities.

Finally, access to criminal history records for non-law enforcement purposes must be subject to reasonable limitations. Government entities that collect criminal records should have set mechanisms for ensuring that official records are complete and accurate and must facilitate opportunities for individuals to correct any inaccuracies or omissions in their own records. Criminal records that do not result in a conviction should be automatically sealed or expunged, at no cost to their subject. The federal government must develop policies that limit access to and the use of criminal history records for non-law enforcement purposes in a manner that balances the public's right of access to information against the government's interest in encouraging successful reintegration of individuals with records and privacy interests. The federal and state systems must never sell criminal records, and the federal government should strictly regulate private companies that collect and sell records.

Conclusion

No matter which form it takes, overcriminalization results in the abuse of the criminal law and facilitates and encourages the executive branch, rather than the legislative branch, to define the criminal law. Not only are prosecutors given unlimited charging discretion with broad undefined laws at their disposal, but regulatory agencies are empowered to unilaterally enact massive criminal provisions with little oversight. As a result, the legislative branch has not only ceded control of the criminal law, but also the ability to limit the weighty economic, social, and individual costs of the entire criminal justice system. This abdication of Congress' criminal lawmaking has additional unintended consequences.

First, the poorly written laws and weak intent standards create an environment that is ripe for selective, and sometimes political, prosecution. Second, poorly drafted laws create too high of a risk to exercise the constitutional right to a trial. The right to have a neutral, third party review the evidence and facts is fundamental to the foundation of our criminal justice system. And, yet, even if an accused person has minimal culpability or a strong defense, when faced with

a sentence of 20, 30, or more years, he or she will often forego the right to a trial. Unlimited discretion over charging decisions, along with the power of mandatory minimum sentences and disproportionately high Sentencing Guidelines, afford prosecutors the power to deter the accused from exercising their right to a fair trial or from challenging the constitutionality of a federal statute. Lastly, overly broad laws combined with inadequate criminal intent requirements allow the criminal law to be improperly used as a tool to pursue civil claims. Both government and corporate entities resort to the threat of a criminal sanction to extract civil judgments and forfeitures, eliminate competitors, and improperly control behavior. Unfortunately, it is not uncommon for companies to provoke government criminal enforcement against each other to obtain corporate advantages and as a way to maintain control over the marketplace.

Our nation's criminal justice system should not be used as a pawn between competing mega-corporations, as a career ladder for an ambitious prosecutor, as a political device, or as a blank canvas for unelected bureaucrats to expand their regulatory jurisdiction. It is the sacred and solemn duty of Members of Congress to create and define our nation's laws in a careful and thoughtful manner to prevent such abuses.

NACDL is grateful for the opportunity to share our expertise and perspective with the Task Force and commends the efforts of the Task Force to address the problem of overcriminalization and to work towards reform. The bipartisan approach to this problem, especially in the current political climate, is meaningful and important. As you know, NACDL and its partners from across the political spectrum have highlighted the problem of overcriminalization for several years. NACDL believes that the solutions outlined above constitute meaningful, important, and achievable remedial steps that will garner broad support. We continue to be inspired by your willingness to tackle this problem and stand ready to assist in every way possible.

Respectfully,

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