Written statement of

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to the

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OVER-CRIMINALIZATION TASK FORCE

hearing on
Over-federalization of Criminal Law
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I appreciate the Committee's invitation to testify on the important topic of the increasing federalization of substantive criminal law. I will be brief and confine myself here to only part of what might be said about this fundamental issue. These remarks focus on the increasing overlap of federal criminal law with traditionally state law concerning essentially local crime. In this area, serious trouble has arisen and continues to mount with the piece-by-piece accumulation of more and more federal criminal law directed at essentially local conduct.

I am not representing any group or organization in these remarks. My views have obviously been formed over many years, and in many experiences and discussions with others. This includes my work as a prosecutor and work with state court systems. It also includes my efforts with the American Bar Association Task Force on the Federalization of Criminal Law, for which I served as Reporter.[1] Nevertheless, I do not purport to speak for anyone other than myself today.

I acknowledge the importance of federal criminal law and the important sphere of federal law enforcement. Indeed, especially in an era of limited resources, as well as expanding national and international concerns, the resources of federal courts, agencies and other entities (including – if I may respectfully suggest it – the critical attention of important committees such as this) can best be focused on issues of truly national or international federal interest, not ones that appropriately belong with the state offense systems. I want to emphasize why this is so, largely because there are easily overlooked costs involved in the increasingly troubling federalization of conduct formerly left to the states. These often overlooked costs are serious, systematic, and practical. They stretch the basic fabric of our important and complex criminal law system.

The many public servant-oriented people who work in the field of criminal law for the benefit of our citizens deserve great respect, as does the law itself. As do others, I recognize the important role and power of the criminal law in general. It has great importance in maintaining a just society for our citizens and it has, as well, an awesome power that can be brought against the Nation's individuals. Such power needs to be as responsible, as principled, and as just as it can be.[2] Discerning the proper limits of the criminal law is a difficult task compounded by the state-

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[1] REPORT ON THE FEDERALIZATION OF CRIMINAL LAW (ABA 1998) (James Strazzella, Reporter). Unsurprisingly, my remarks at this hearing draw on what was written there (often in greater detail); references to "ABA REPORT" are to that publication.

The 17-member task force was bipartisan in nature. It was initiated by then ABA Criminal Justice Section leader William W. Taylor, III, and chaired by former Attorney General Edwin Meese III. The task force met over many months and was composed of federal and state prosecutors, legislators from both parties, state and federal judges, law enforcement representatives, and others with wide experience in the federal and state criminal law field.

[2] Professor Herbert Wechsler noted this point articulately:

Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which people place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in

federal system of our nation.

In its proper sphere, *federal* criminal law is important and occupies a vital place in our society.[3] In fact, precisely because federal law has such important work to do, it is essential that it not wander into unnecessary or improvident or diverting areas, including into areas that best reside with state law or areas best left to other restraining devices (civil remedies, regulatory systems, moral restraints, etc.).

A governmental system such as ours, one that affords a set of laws sides by side – federal and state – is already a delicate system. It is one that needs to be finely tuned, well-thought-out, and intently guarded. With the growth of federal law demonstratively covering more and more traditionally state-crime areas, a mounting and duplicating patchwork of crimes has grown up in the last few decades. In this area – whatever the theoretical jurisdictional hook on which Congress hangs its constitutional power to enact such legislation – the conduct involved is often, at its core, essentially local in nature (car-jacking or drive-by shootings, already crimes of robbery/assault in all states, are examples); it usually does not want for zealous prosecution by state agencies.

There is a widespread bipartisan belief that in many areas of traditional state crime, the impact of federalization continues to produce a worrisome effect on the American criminal justice system and it undermines its principled future. Beyond matters of principle, the practical effects can be griping and troubling. There has developed a widening, optionally-selected system of parallel legal consequences for essentially the same conduct.

Putting aside those federal crimes that sensibly worry about intrusions on federal functions, sites or agents, today it would be difficult to explain to the average citizen the line between many other federal and state crimes. No one would think it initially wise to set up a governmental system in which the same governmental state or nation was given the power to choose from two offense lists, charging either of two offenses for the same conduct (or indeed compounding/prosecuting both offenses), with the two parallel options providing

penalties of different severity range,
with different imprisonment systems,
tried in different court systems with different procedures and rights,
differently selected judges,

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jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be: Nowhere in the entire legal field is more at stake for the community or for the individual.

Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

[3] As the *Preface* to the ABA REPORT put it, "It is precisely because federal law enforcement is so necessary in dealing with indisputable federal interests that a legislative instruction to federal prosecutors to utilize their time and resources to prosecute relabeled common law crimes ought to be restrained." ABA REPORT, pp. 3-4.

before differently composed juries,
under different evidentiary rules,
and with other important different consequences

– the choice of option being left to the basically nonreviewable discretion of one side of the case. That, however, is the dual system that is more and more emerging as the federal overlap mounts. The ABA REPORT task force report articulated it this way: In many areas, the expanding federal criminal law "is moving the nation toward two broadly overlapping, parallel, and essentially redundant sets of criminal prohibitions, each filled with differing consequences for the same conduct. Such a system has little to commend it and much to condemn it."[4]

The amount of individual citizen conduct that is now potentially subject to federal criminal control has increased in startling proportions in the last several decades, beyond any understandable interest in dealing with federal programs, truly interstate issues, or international crime. The reasons for this growth have been extensively discussed elsewhere and are undoubtedly familiar to the Committee members. However, it seems safe to say that a major factor in this growth has been the pressure on Congress to "do something" (or appear to be doing something) about the subject of violent or highly visible crime. No one knows such pressures better than the Members of this Committee. Crime legislation certainly seems politically popular. I acknowledge the difficulty and challenge of resisting unwarranted legislation. But a just, rational, and sensible system is essential.

Of course, simply legislating a crime does not mean that it will be prosecuted or otherwise effectively enforced. In fact, limited resources on the investigative, prosecutorial and judicial sides will mandate that only a limited number of federal crimes will be enforced at any given time, in light of the selective prioritization that investigative agencies and federal prosecutors must necessarily employ. There are important down-sides to the increasing accumulation of federal law, so it is important to emphasize the easy-to-overlook reality that the enactment of such overlapping federal and state crime does has serious adverse consequences.

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[4] ABA REPORT, p. 55. (Professor Sara Sun Beale of Duke Law School has noted this phenomenon.) The ABA Report continued (id.):

> The principles of federalism and practical realities provide no justification for the duplication inherent in two criminal justice systems if they perform basically the same function in the same kinds of cases. There are no persuasive reasons why both federal and state police agencies should be authorized to investigate the same kind of offenses, federal and state prosecutors should be directed to prosecute the same kinds of offenses, and federal and state judges should be empowered to try essentially the same kind of criminal conduct. When the consequences of these parallel legal systems can be so different, increases in the scope of federal criminal law and the areas of concurrent jurisdiction over local crime make it increasingly difficult, if not impossible, to treat equally all persons who engaged in the same conduct and these increases multiply the difficulty of adequately regulating the discretion of federal prosecutors. Moreover, it makes little sense to invest scarce resources indiscriminately in a separate system of slender federal prosecutions rather than investing those resources in already existing state systems which bear the major burden in investigating and prosecuting crime.

Despite the tendency to think that enacting a new crime may be "cost-free," this is not the case. Some of the real costs are to our valued American governmental system and the criminal justice system as a whole; some are costs to the federal courts and other agencies; some are human tolls; some are financial.

To give a short list, one can borrow from the ABA REPORT'S crystalized list of these costs (p. 50) in underscoring the detrimental long-term effects of federalization where there is no important federal interest, only a view that the conduct is wrong and should be punished.
-Overall, inappropriate federalization constitutes an unwise allocation of scarce resources that are needed to meet the genuine issues of crime.
-Unwarranted federalization can undermine the delicate balance of federal and state systems and have a detrimental effect on *state* judicial, prosecutorial and investigative personnel, who bear the major responsibility for enforcement of criminal law; it can dissipate citizen power and move more decision-making to the federal level.
-Other important costs are placed upon federal judicial and law enforcement institutions: It throws more locally-oriented cases into the federal trial and appeal courts, jostling for already stretched federal court resources and potentially delaying other cases of a true federal interest (criminal or non-criminal); to some degree it adds these cases to the already expensive federal prison system; criminalizing conduct empowers agencies to investigate that conduct; it will either require more federal agencies or divert an existing agency's attention from working on more truly federal-interest crimes.
-Some of these costs are also real in terms of accused persons, whose fate and potential sentence will often unequally rest on a prosecutorial decision to select the same essential conduct for prosecution in federal or state court, or both.
-Of course, there is also an effect on the Legislative Branch, with the accumulation of a larger and larger body of law that requires more and more Congressional attention to monitoring and considering federal criminal statute amendments and implementation.

Thank you again for your invitation to make a few remarks on this complicated and difficult, but very important, issue. Our complex criminal justice system is valuable and worth constant improvement. It is also worth remembering that "In the important debate about how to curb crime, it is crucial that the American justice system not be harmed in the process" (as the ABA REPORT p. 56 put it). "The nation has long justifiably relied on a careful distribution of powers to the national government and to state governments. In the end, the ultimate safeguard for maintaining this valued constitutional system must be the principled recognition by Congress of the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization."

I would be pleased to answer the Committee members' questions.

JS. March 2014