

Commentary: The Overcriminalization of Federal Law

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*Editor's note: The following guest commentary is from Rep. **Robert C. Scott** (D-Va.), chairman of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security.*

Federal criminal law has dramatically expanded in size and scope over the past few decades, and a growing number of reform-minded individuals and organizations have criticized the dangers of this overcriminalization. At present, there are approximately 4,500 federal crimes in the U.S. Code, and one legal scholar has reported estimates that up to 300,000 federal regulations can be enforced with criminal penalties. Critics point out that the latter offenses have been created without the benefit of express congressional review or approval. They also note that many federal criminal offenses lack adequate criminal-intent (guilty-mind or *mens rea*) requirements to protect the innocent. With so many criminal laws on the books, it is virtually impossible for anyone to know when they may or may not be committing a crime. Yet from 2000 through 2007, Congress created an average of over 56 new federal crimes each year.

On September 28, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, which I chair, held its second bipartisan hearing on the problems of overcriminalization of conduct and over-federalization of criminal law. The first hearing in July 2009 was the culmination of a series of meetings that Ranking Member **Louie Gohmert** (R-Texas) and I held with an array of individuals and organizations spanning the political and ideological spectrums. The organizations include the American Bar Association, American Civil Liberties Union, Cato Institute, Constitution Project, Families Against Mandatory Minimums, Federalist Society, The Heritage Foundation, National Association of Criminal Defense Lawyers (NACDL), and Washington Legal Foundation. The latter hearing was supported by a similarly broad range of organizations.

One focus of the hearing was the findings and recommendations of a joint study by NACDL and The Heritage Foundation, "Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law." "Without Intent" is an impressive, non-partisan report that can serve as a road map towards better criminal-law legislation. The study raises important questions about the proper role of federal criminal law, the appropriate drafting of criminal statutes and regulations, and the growing trend of criminalization by administrative agencies. It also documents problems I noted at last year's hearing: the deterioration of specificity in criminal law standards and a shocking disappearance of the common-law requirement of *mens rea*. Through an analysis of the criminal legislation introduced and passed in a single Congress, the report quantifies how Congress's legislative process regularly leads to the enactment of vague, overbroad criminal offenses that lack adequate *mens rea*, or guilty-mind, requirements.

Under historical principles of justice, a person has committed a crime only if he intentionally did a wrongful act with wrongful intent. In other words, there is a crucial difference between a mere accident and a crime. Historically, a *mens rea* element, such as specific intent, willful intent, and knowledge of the specific facts constituting an offense, was a part of almost every common-law crime.

More and more, however, modern criminal law has forsaken the guilty-mind requirement. This is a dangerous and alarming trend. *Mens rea* plays an important role in protecting those who do not intend to commit wrongful or criminal acts from conviction and punishment. Without its safeguards, honest citizens are at risk of falling into traps and being victimized and criminalized by poorly crafted legislation and overzealous prosecutors.

The hearing also examined specific reforms recommended by the broad coalition, starting with the recommendation that Congress provide written analysis of and justification for all new or modified criminal offenses and penalties. With so wide a range of federal criminal offenses already on the books, many new laws are duplicative of existing federal or state law.

In order to avoid adding to the problems of overcriminalization, Congress should ask hard questions before enacting new criminal laws. Do we need to enact more laws at the Federal level for a particular type of conduct? Is there a valid purpose to be served by creating criminal law at the federal level when it duplicates an existing state-level statute? Would it be a better use of resources for the federal government to supplement state enforcement of criminal laws rather than replicating their efforts? In fact, Congress should be asking these very same questions about the thousands of laws already on the books.

I also believe that Congress should focus more on helping victims of crime, taxpayers, young people and society at large avoid the impact of crime as opposed to putting all of our emphasis on addressing crime after it occurs with more and more federal criminal provisions and more and more incarceration. A recent Pew Center on the States report indicates that our incarceration rate is already so high that it is *counterproductive* – we incarcerate at such a high rate that it is now contributing to further crime. At the same time, there are now reams of research and evidence to show that through evidence-based strategies we can drastically reduce crime and expenditures for it by getting children at risk of becoming involved in crime on the right track and keeping them on it until they complete college or comprehensive job training. The "Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support and Education (PROMISE) Act" would provide communities with a vehicle to effectively implement such strategies, and it is pending passage in the House and Senate at this time.

The purpose of the September 28 hearing was to better inform Congress and the American people about the overarching problems of over-criminalization. It also provided Democrats and Republicans alike with an effective road map for principled reform of the federal criminal law. The serious deterioration of the quality of federal criminal law endangers Americans' civil liberties, and that is something on which everyone can agree.

Rep. Robert C. Scott is chairman of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security. The views expressed are his own.

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