# CRIMINAL CODE MODERNIZATION AND SIMPLIFICATION ACT OF 2011

## HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

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# CONTENTS

DECEMBER 13, 2011


Page

OPENING STATEMENTS

The Honorable F. James Sensenbrenner, Jr., a Representative in Congress from the State of Wisconsin, and Chairman, Subcommittee on Crime, Terrorism, and Homeland Security ..... 1
The Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security ..... 3
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary ..... 4

WITNESSES

The Honorable Edwin Meese, III, Ronald Reagan Distinguished Fellow in Public Policy, Chairman of the Center for Legal and Judicial Studies, The Heritage Foundation
Oral Testimony ..... 8
Prepared Statement ..... 10
The Honorable Dick Thornburgh, Counsel, K&L Gates LLP
Oral Testimony ..... 28
Prepared Statement ..... 29
Tim Lynch, Director, Project on Criminal Justice, CATO Institute
Oral Testimony ..... 33
Prepared Statement ..... 35
Stephen Saltzburg, Wallace and Beverley Woodbury University Professor, George Washington University School of Law
Oral Testimony ..... 43
Prepared Statement ..... 45

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary ..... 5
Wall Street Journal article, "A Sewage Blunder Earns Engineer a Criminal Record," by Gary Fields and John R. Emshwiller ..... 60

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Letter from the American Civil Liberties Union (ACLU) to the Subcommittee on Crime, Terrorism, and Homeland Security ..... 79
Section-by-Section of H.R. 1823, the "Criminal Code Modernization and Simplification Act of 2011" ..... 83

# CRIMINAL CODE MODERNIZATION AND SIMPLIFICATION ACT OF 2011

**TUESDAY, DECEMBER 13, 2011**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to call, at 10 a.m., in room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Sensenbrenner, Gohmert, Goodlatte, Chaffetz, Scott, Conyers, Pierluisi, Chu, and Deutch.

Also Present: Representative Quigley.

Staff Present: (Majority) Caroline Lynch, Subcommittee Chief Counsel; Sam Ramer, Counsel; Lindsay Hamilton, Clerk; (Minority) Perry Apelbaum, Minority Staff Director and Chief Counsel; Bobby Vassar, Subcommittee Chief Counsel; Ron LeGrand, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. SENSENBRENNER. The Committee will come to order. Today we will have a hearing on H.R. 1823, the "Criminal Code Modernization and Simplification Act of 2011." I would like to welcome our witnesses today and thank them for coming, and also thank the Ranking Member, the gentleman from Virginia, Mr. Scott.

Today's hearing continues the Subcommittee's bipartisan review of overcriminalization and overfederalization that began last Congress. Hearings convened in the last Congress by my colleague, Mr. Scott, resurrected important policy discussions that had been dormant for over 2 decades about the breadth and scope of Federal criminal law. Today, the Subcommittee will examine legislation I have sponsored in this Congress and the preceding three Congresses to reform the Federal Criminal Code.

There are an estimated 4,500 Federal crimes in the U.S. Code today. According to a study by the Heritage Foundation, over the last 3 decades Congress has been averaging 500 new crimes per decade. It has been over 50 years since the Criminal Code was last revised. The existing Criminal Code is riddled with provisions that are either outdated or simply inconsistent with more recent modifications to reflect today's modern approach to criminal law.

H.R. 1823, the "Criminal Code Modernization and Simplification Act of 2011," reforms and codifies Title 18 of the U.S. Code. This is not a frivolous exercise. As my colleagues and our witnesses know, this effort to reform the Federal Criminal Code has resulted

in a bill that exceeds 1,200 pages in length. And this bill encompasses only part 1 of Title 18. If nothing else, the sheer volume of this bill brings into specific focus the breadth of the Criminal Code and the need to reform it.

Federal prosecutions constitute less than 10 percent of all criminal prosecutions nationwide. Congress must ensure that the Federal role in criminal prosecutions is properly limited to offenses within Federal jurisdiction and within the scope of constitutionally delegated Federal powers.

Through the years, the Criminal Code has grown more and more, with more and more criminal provisions, some of which are antiquated or redundant, some of which are poorly drafted, and some of which have not been used in the last 30 years, and some of which are unnecessary since the crime is already covered by other existing criminal provisions. The bill cuts more than a third of the existing Criminal Code, reorganizes it to make it more user friendly, and consolidates criminal offenses from other titles, in particular drug crimes from Title 21, and immigration crimes from Title 8, so that Title 18 includes all major criminal provisions.

The bill applies several drafting principles. First, it reorganizes the chapters to streamline the code and make it more user friendly for attorneys, judges, and Congress. In doing so, the bill joins similar offenses together within one chapter.

Additionally, in reviewing the code, there were instances where the same terms were defined differently. In most cases, there was no evident policy basis for the different definitions. To eliminate this problem, a common set of definitions is established in the first section of the revised Code.

The bill makes two broad changes to bring greater uniformity to the Code. First, it creates a general attempt statute and a general conspiracy statute that punish these offenses in the same manner as a completed offense unless otherwise provided for in the Code. Legal scholars may dispute whether inchoate crimes should be punished to the same degree as completed offenses, but the Model Penal Code instructs that, quote, "The objective of the criminal law would not be sufficiently served if the only action which could be taken against an attempt were an on the spot prevention of the crime on that particular occasion, for an attempt yields an indication that the actor is disposed toward such activity, not alone on this occasion, but on others," unquote.

Although other legislative bodies may choose to assign a lower punishment for attempts or conspiracies, Congress now routinely includes these offenses in new or amended criminal provisions. H.R. 1823 merely codifies what is now commonplace in modern day criminal Federal drafting, and uniformly applies it to all offenses in the revised Code.

The bill also seeks to bring uniformity to the Code by adopting a straightforward approach to the mens rea requirement. Where possible, the term "knowingly" is used to define the requisite intent for every crime except those criminal offenses that require some additional and more specific intent.

I believe that all proponents of overcriminalization reform support the proper use of mens rea and the need to expressly articulate it within the Code. Some may disagree, however, on which

mens rea is appropriate, urging the use of a willful standard in place of knowingly. The bill preserves the willful standard for a number of offenses in Title 18 that can be characterized as regulatory. But to quote Judge Learned Hand, who criticized the use of the term "willful," "It is an awful word. It is one of the most troublesome words in the statute that I know. If I were to have the index purged, 'willful' would lead all the rest in spite of its being at the end of the alphabet." Although a willful standard may have its place in certain offenses, particularly regulatory ones, where specific knowledge of the law should be proven, such a requirement should not extend to all offenses, especially malum in se offenses.

Again, as with the general attempt and conspiracy statutes, the bill's use of knowingly mens rea reflects modern day drafting practices, and brings a greater uniformity to a code riddled with a wide range of mens rea, or in some instances no articulated mens rea at all.

I wish to welcome our witnesses today, and thank you for participating in the hearing. I appreciate your comments and suggestions on the bill, and look forward to continuing the dialogue on Criminal Code modernization. It is now my pleasure to recognize for his opening statement the Ranking Member of the Subcommittee, the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I am pleased to join you for this hearing, and appreciate your interest in modernizing and simplifying the Federal Criminal Code. By introducing this bill, you have inspired continuing dialogue about the Criminal Code and the process for improving and revising it. Moving all Federal crimes into one title, Title 18 of the U.S. Code, makes tremendous sense. It organizes groups of crimes by category, and it enables judges, practitioners, and everybody else to more easily locate criminal statutes. The process of identifying and grouping crime statutes would also enable us to identify and eliminate redundancies, and also address conflicting or inconsistent statutes.

Mr. Chairman, I appreciate the steps you have taken in H.R. 1823 to clarify and remove inconsistencies in the mens rea requirement needed to hold someone criminally liable. I hope a significant focus is placed on this issue, particularly the idea of strict criminal liability and the effect that the nuanced difference between knowingly and willingly has.

As we reorganize the Federal Code, I also hope we will take the opportunity to address overfederalization by reducing the role and breadth of the Federal Government in crime, particularly in the prosecution of ordinary street crime, which should be prosecuted in State courts, and other crimes which do not seem to need a Federal response even though they may technically fall within Federal jurisdiction.

The task presented by H.R. 1823 is an enormous undertaking, and I look forward to working with you. The Code has grown dramatically since it was last recodified about 50 years ago. Some significant house cleaning and purging is obviously in order. There are statutes that are redundant, and some that never should have been enacted in the first place. It is also time to eliminate those provisions which have not been enforced or utilized by prosecutors for years. Doing it right and effectively will require a major com-

mitment of time and must involve participation and input not only from members of both parties in the House and the Senate, but also a diverse gathering of other interested parties, including, but not limited to judges, criminal law professors, prosecutors and defense counsel, the Federal law enforcement community, and representatives of the judiciary and U.S. Sentencing Commission and other interested officials.

Major recodification will be difficult, but it will obviously become impossible if we have to concurrently debate substantive changes in the law. I therefore thank you for your policy decision that there be no policy—that the changes will be policy neutral unless there is a clear consensus on changes. With the issue of, as you have indicated, attempts and conspiracies, I think this, we will have to look to see if this complies with that policy decision, because I think there may be some difference between two people who, on the way to robbing a bank decide it is not a good idea, turn around and go home; whether they should be punished the same as two people who go and actually rob the bank. But there are a number of other concerns with the bill, many of which I expect our witnesses to address.

But again, I appreciate your efforts to bring this issue before the Committee for discussion, Mr. Chairman. I am also pleased that you have a distinguished list of witnesses, all of whom have testified before on the issue of overcriminalization of conduct and overfederalization of criminal law. So I look forward to their testimony and look forward to working with you as we deal with this issue.

Mr. SENSENBRENNER. Thank you. The Chairman emeritus of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Sensenbrenner. This is an important hearing. I want to compare it with what I consider to be some of the most important issues the Judiciary has tackled in recent years, copyright reform, patent reform, and voter rights revision, which at least one, maybe two of these occurred during your chairmanship, Chairman Sensenbrenner. And that is why I was enthusiastically supporting your picture to be added to the walls of the House Judiciary Committee. Now I hope you will return the favor next year.

But the importance of those three items now almost seem small compared to the enormity of the task we are called upon to discuss today. And I am glad the Attorney General is here. We welcome him, and all the witnesses. And I think that the whole notion of putting the crimes under Title 18 is something that we ought to deal with today. We ought to get rid of the old myth that you are presumed to know the law. We have—how many agencies did you say—464 agencies who are writing the criminal law. I mean the whole idea that this is all going on without ever coming through either legislative body, especially not the Judiciary Committee of each House, which has the jurisdiction over the Criminal Code. And so this presumption, with exactly 4,450 Federal crimes that now exist, makes the mens rea requirement—well, sometimes they don't even require a mens rea requirement, they don't even need that.

And so I would like to add to the Chairman and the Ranking Member's excellent discussion introducing this subject. Why don't

we consider "purposefully" as a compromise between willfully and knowingly, both of which have been stretched out of recognition and real usefulness?

And so I think that this idea of modernizing and reforming the Federal Criminal Code is one that is going to go well into next year. Maybe it can't even be done in the 112th Congress. It is very important. And I support this fact, and I am very pleased with the witnesses that have been invited today. To have Meese and Thornburgh here with us I think reflects very significantly upon their activities and their continued concern about what and how we can make the law, the actual operation of the law fit with the constitutional descriptions of what a democratic society is all about.

I will put the rest of my statement in the record.

[The prepared statement of Mr. Conyers follows:]

**Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary**

For the past several decades, Congress has decided that the answer to most every problem is to create a new federal crime with stiff penalties.

I believe all agree that the Criminal Code is long-overdue to be modernized. Recodifying the Criminal Code and bringing all federal criminal laws into Title 18 makes sense. As we go about this task, however, we must make sure our actions clarify and address the Code's current shortcomings, without creating new problems and expanding prosecutorial discretion.

**To begin with**, the sheer volume of federal crimes is out of control. We now have *more than 4,450 federal crimes*—many of which lack any *mens rea* requirement. Not surprisingly, our Nation has the highest incarceration rate in the world.

While we're at it, let's also remember that there are an estimated 300,000 federal regulations that impose criminal penalties. This is the perfect opportunity to address and end the shift from Congressional responsibility to delegated Agency power.

Worse yet, the number and severity of these criminal punishments has grown over the years.

I believe any discussion of reform must also address sentencing and mandatary minimums which I am not sure has happened in this current bill.

But to get back to the point, no longer are regulations merely civil offenses with monetary penalties, but many regulatory infractions constitute felony crimes with significant prison exposure.

It should be noted that these regulations were neither subjected to scrutiny by this Committee nor any other Congressional committee. Rather, they were promulgated by unelected officials at various federal agencies.

Because of the fundamental rights implicated, criminal penalties should not be within the ambit of the Executive Branch.

And, given the incredibly vast number of regulatory crimes, it is absolutely unfair and unreasonable to adhere to the maxim that "ignorance of the law is no defense."

Who could possibly know about every single one of these provisions?

**Second**, these problematic trends in criminal law have been well-documented by our Committee. In prior Congresses, the Crime Subcommittee has conducted several hearings on the over-criminalization of conduct and the over-federalization of criminal law.

At these hearings, we received testimony documenting the rapid growth of actions penalized under the Federal Criminal Code and federal regulations.

Witnesses testified at these hearings that many of the 4,450 federal criminal offenses are poorly defined and lack the common law requirement of *mens rea,* or "guilty mind" that has long served an important role in ensuring that those who lacked intent would not be subject to criminal prosecution.

This is also true of the 300,000 federal regulations that impose criminal penalties.

We must stop passing laws that do not require a *mens rea,* but we also must be careful in not weakening a standard to open wide prosecutorial discretion.

I have concerns about this bill. I am concerned that eliminating the "willful" *mens rea* requirement, and applying a standard "knowing" intent may further increase incarceration rates. I am concerned about the proposal to expand both attempt and conspiracy, and apply them to every federal crime, rather than having them specifi-

cally mandated by Congress on the current statute-by-statute basis. To make matters worse, conviction under either of these proposed provisions would result in the same punishment as the completed offense. I also have concerns about any provisions that eliminate fines as a sentencing alternative.

**Which brings me to my final point**. Today's hearing on H.R. 1823, the "Criminal Code Modernization and Simplification Act of 2011," provides an opportunity for us to examine how we should best fashion a solution to this serious problem.

Indeed, the very length of this bill reflects the enormity of the challenge.

Our analysis, however, requires a prudent process hopefully conducted in a policy-neutral manner.

To that end, we will need to form a working group involving input from my colleagues from both parties in the House and the Senate, as well as a broad spectrum of experts, including representatives from the prosecutorial and defense bars, law professors, members of the judiciary, the ACLU, the ABA, the Heritage Foundation, the National Association of Criminal Defense Lawyers, CATO, the Sentencing Commission, and the Federalist Society, among others.

All of these groups already agree that the Federal Criminal Code is seriously in need of updating. All have agreed that over-criminalization and over-federalization are serious problems that need to be addressed. Their participation and input in the revising, reorganization, and recodification of the Criminal Code is essential if we are to be successful.

So let's all roll up our sleeves, bring in the experts, and get this job done.

As a first step, and as I mentioned previously, we need to consider the intent standard under H.R. 1823 that appears to replace "willfully" with "knowingly."

I have grave concerns that changing this standard is not as simple as replacing the word. We need experts to determine the following issues:

- Does this have the effect of weakening the *mens rea* elements for many crimes?
- If so, does it increase the possibility that some defendant will be convicted who would not be convicted under current law?
- Does the term "knowingly" provide greater clarity, or is it also subject to varied interpretations?

Accordingly, I appreciate my colleague's desire to address a long overdue opportunity to reform. I very much look forward to discussing these issues with our witnesses today, and I recommend that more hearings be held in order to have a more in-depth examination of the points I have mentioned as well as other issues.

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Mr. SENSENBRENNER. Without objection. And without objection, other Members' opening statements will be made a part of the record. Also, and without objection, the Chair will be authorized to declare recesses during votes on the House floor.

It is now my pleasure to introduce today's witnesses. Edwin Meese, III, holds the Ronald Reagan Chair in Public Policy at the Heritage Foundation. He is also the Chairman of the Heritage Center for Legal and Judicial Studies, and a Distinguished Visiting Fellow at the Hoover Institution at Stanford. Mr. Meese served as the 75th Attorney General of the United States from February 1985 to August 1988. January 1981 to February 1985, Mr. Meese held the position of counselor to the President, where he functioned as the President's Chief Policy Adviser. He also served as Chairman of the Domestic Policy Council and of the National Drug Policy Board. From 1977 to 1981, Mr. Meese was a Professor of Law at the University of San Diego, where he was also Director of the Center for Criminal Justice Policy and Management. He served as Governor Reagan's Executive Assistant and Chief of Staff in California from 1969 through 1974, and as Legal Affairs Secretary from 1967 through 1968. Before joining Governor Reagan's staff in 1967, he served as a Deputy District Attorney in Alameda County, California. He graduated from Yale University in 1953, and holds a law

degree from the University of California at Berkeley, and is a retired colonel in the Army Reserve.

The Honorable Dick Thornburgh is Counsel to the international law firm of K&L Gates, LLP, in Washington. Previously, he served as Under Secretary General at the United Nations from 1992 to 1993. He served as the 76th Attorney General of the United States from 1988 to 1991 in the Cabinets of Presidents Reagan and George H.W. Bush. Mr. Thornburgh served as Director of the Institute of Politics at the John F. Kennedy School of Government from 1987 to 1988. And previously, he was elected twice as Governor of Pennsylvania, and was Chair of the Republican Governors Association. He served as U.S. Attorney in Pittsburgh from 1969 through 1975, and as Assistant Attorney General in charge of the Criminal Division from 1975 through 1977. He received a bachelor's degree in engineering from Yale in 1954, and an LLB from the University of Pittsburgh Law School in 1957.

Mr. Tim Lynch is currently the Director of the Project on Criminal Justice at the Cato Institute. He has been with Cato since 1991. In 2000, he served on the National Committee to Prevent Wrongful Executions. He has filed several amicus briefs in the U.S. Supreme Court in cases involving constitutional rights. He is the Editor of In the Name of Justice: Leading Experts Reexamine the Classic Article "The Aims of Criminal Law," and After Prohibition: An Adult Approach to Drug Policies in the 21st Century. He earned his bachelor of arts and doctor from Marquette University.

Steven Saltzburg is currently a Wallace and Beverly Woodbury University Professor of Law, and co-director at the Litigation and Dispute Resolution Program at George Washington University School of Law. He joined GW Law in 1990. Before that, he taught at the University of Virginia Law School. In 1996, he founded and directed the masters program in litigation and dispute resolution at GW. The Chief Justice of the United States appointed him as reporter for, and then a member of, the Advisory Committee on the Federal Rules of Criminal Procedure, and as a member of the Advisory Committee on the Federal Rules of Evidence. Professor Saltzburg has had a variety of governmental positions, including Associate Independent Counsel in the Iran-Contra investigation, Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice, the Attorney General's ex officio representative on the U.S. Sentencing Commission, and Director of the U.S. Treasury Department's Tax Refund Fraud Task Force. He received his bachelor degree from Dickinson College, and his juris doctor from the University of Pennsylvania.

All of the witnesses' statements will be entered into the record in their entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. And we do have the lights in front of you to advise you how fast the clock is ticking. I will first recognize Mr. Meese for 5 minutes, and welcome.

**TESTIMONY OF THE HONORABLE EDWIN MEESE, III, RONALD REAGAN DISTINGUISHED FELLOW IN PUBLIC POLICY, CHAIRMAN OF THE CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION**

Mr. MEESE. Thank you, Mr. Chairman, Ranking Member Scott, Vice Chairman Gohmert, Members of the Committee. Thank you for the opportunity to appear before you and to comment on what has already been described accurately as a very important task which this Subcommittee has undertaken. I certainly commend you for this effort, which I think will benefit all those that are involved in the criminal justice system and the Federal system, as well as in the States, in view of some of the recommendations that have already been discussed by the Chairman, and I am sure many of us will concur, and that is to separate the Federal responsibilities and criminal prosecutions and investigations from those which are carried on very successfully by State and local governments.

It may be of interest to the Committee to note that this is a task that has been ongoing over many years. In cleaning out my basement a week ago, I happened to come across the Committee report from the late 1970's, when a commission under then-former Governor Pat Brown of California, chaired a commission in which they put together a volume of equal size to what is before the Committee today. Unfortunately, those efforts lapsed, and I think that this Subcommittee picking them up will make a very real contribution.

Let me first of all say that I think we have to look at the objectives of any revision of criminal laws. One of them, of course, is, as has just been suggested by the Chairman, to streamline the Code itself. Second, we would I think agree, should be increased visibility, fair warning to people of what it is that they could be in jeopardy of by certain types of behavior. And thirdly, as Mr. Scott has already in his chairmanship worked very hard on, and that is decreasing overcriminalization, reducing the Criminal Code to those types of behavior which actually are offenses against the public safety.

Four major areas are included in my written testimony, and I will comment briefly on each of them. Many of them have already been discussed by the Chairman in his opening remarks.

But the first is to consolidate criminal laws, all the Federal criminal laws into Title 18. It is important that these laws be readily available so that people know, as I mentioned earlier, what it is that is prohibited. And it would certainly be a great service.

It also would have one other added feature that I think is important, and that is that because of the jurisdiction of this Committee and the Judiciary Committee generally, it would mean that all laws carrying a criminal penalty would be subject to review by the Judiciary Committees of the two Houses. And this would mean that the expertise that is represented by both the Committee Members and its staff would be brought to bear on whether a particular subject matter should be subject to criminal penalties, and secondly, which would have a force, I believe, in making the penalties more proportionate and coordinated in their severity. So I think that would be an added benefit beside having all the laws in one place.

A second aspect is that there are, as has been pointed out, too many redundant, superfluous, and unnecessary criminal laws. Mr. Conyers mentioned 4,500 statutes, I believe, criminal statutes. This is in addition to over 300,000 other regulations that don't appear in the Federal codes but which nevertheless carry essentially criminal penalties, including imprisonment. So the vast array of traps for the unwary, you might say, that lurk out there in the Federal criminal law is more extensive than I think most people realize.

The third point is that it is important therefore that administrative agencies not be allowed to issue regulations that subject individuals to criminal penalties. If something is important to send a person to prison, the Congress itself should actually enact that as a statute.

And finally, as the Chairman mentioned, mens rea is a necessary revision to make sure that all laws carrying criminal penalties properly include the mental element that has been traditionally required of crime, and that is the so-called guilty mind, or mens rea. And that should be set forth in a way that clearly identifies willfully or purposefully, whatever the phrase is, but it ought to be defined as meaning that the person definitely intended to commit the crime and to violate the law.

Mr. Chairman, those are a brief summary of my suggestions. I think one thing the Committee will notice, each of us prepared our testimony separately. But when we exchanged them last night, there was a remarkable similarity which I think you will find as the other people testify this morning.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Meese follows:]

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*CONGRESSIONAL TESTIMONY*

# Principles For Revising the Criminal Code

**Testimony before**
**HOUSE JUDICIARY COMMITTEE,**
**SUBCOMMITTEE ON**
**CRIME, TERRORISM AND HOMELAND SECURITY**

**13 December 2011**

**Edwin Meese III**
**Chairman, Center for Legal and Judicial Studies**
**The Heritage Foundation**

Mr. Chairman, Vice-Chairman Gohmert, Ranking Member Scott, and Members of the Subcommittee. My name is Edwin Meese. I am the Chairman of the Center for Legal and Judicial Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation. Thank you for the opportunity to present my views concerning the extremely important task of reviewing, revising, and recodifying the federal criminal laws into Title 18 of the United States Code.

I also am pleased to be in such good company here today. I have worked with former Attorney General Dick Thornburg, Tim Lynch of the Cato Institute, and Professor Steve Saltzburg of George Washington University Law School in the past and appreciate the expertise they bring to this task.

My purpose today is to identify some broad principles and themes that I believe should be considered in the revision of Title 18. I also will suggest some solutions to the large-scale problems that exist.[1]

Title 18 has grown into a massive collection of criminal laws, resulting from a series of individual – often disparate – pieces of legislation, introduced

[1] For a lengthier statement of the position of The Heritage Foundation on the overcriminalization of the law, see Paul Rosenzweig & Brian W. Walsh, eds., *One Nation, Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty* (2010) (hereinafter *One Nation, Under Arrest*), and Brian M. Walsh & Tiffany M. Joslyn, The Heritage Foundation & The National Ass'n of Criminal Defense Lawyers, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (Apr. 2010).

by members of Congress across the political spectrum. Some statutes reflect the popular concerns of the moment, in many cases duplicating criminal laws enacted and vigorously enforced at the state level. Others reflect the objectives of specific interests and organizations, whose views seek to lend importance to their cause by attaching criminal penalties to behavior that would not usually be viewed as crimes.

This subcommittee has a great opportunity to take a fresh approach to the federal criminal law and develop a coordinated set of statutes that reflect the limited authority given to the national government by the Constitution and which recognize division of authority between federal and state governments.[2]

I will make the following four points today highlighting suggestions that would improve the sound enforcement of federal criminal law.

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[2] *See* Kevin McKenzie, The Commercial Appeal, "Law professor slams expansion of federal crimes": "[Law professor John S.] Baker blamed Republicans as well as Democrats for the trend, saying that both parties fuel it. One-third of about 4,200 federal crimes on the books have been passed since 1970 and Republican President Richard Nixon's 'war on crime,' he said." Available at http://www.commercialappeal.com/news/2011/oct/25/law-professor-slams-expansion-federal-crimes/ (Last viewed Oct. 26, 2011). The problem may be most acute during election years. As my colleague Dick Thornburg has explained: "A significant aspect of this increase in federal crimes over the past ten years, incidentally, is the wholly unsurprising fact that a disproportionate number of these criminal laws were passed in three election years, 1998, 2000, and 2002. The 'jail-centric' approach by the Congress, which is fueled by the almost reflexive notion that being 'tough on crime' is good fodder on the campaign trail while trolling for votes, has deep societal costs that are especially poignant in the regulatory and business arenas." Richard Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform – The Dilemma of Artificial Entities and Artificial Crimes,* 44 Am. Crim. L. Rev. 1279, 1282 (2007).

*First*: The federal criminal laws are scattered across the United States Code. This Subcommittee and ultimately the full Committee could improve this situation just by consolidating most federal criminal laws into Title 18. *Second*: The federal criminal code is overly extensive. There are more laws than are needed or could possibly be enforced. There are too many redundant, superfluous, and unnecessary criminal laws. They should be consolidated and/or eliminated. *Third*: The federal criminal code is littered with statutes that empower administrative agencies to issue regulations that subject individuals to criminal penalties. Offense definition should be a task for Congress, not for agency officials. Only officials accountable to the people should have the ability to create any form of positive law that can serve as a basis for a criminal conviction, let alone a term of imprisonment. *Fourth*: In too many cases the federal criminal code does not properly define the *mens rea* or "guilty mind" elements of federal crimes. It is possible today for an honest person, acting in good faith, to commit a felony without any knowledge that he or she is doing so. No one should be convicted – let alone imprisoned – in that circumstance.

Let me turn to my first point, that the collection of federal criminal laws is far larger than necessary.

**1. The Federal Criminal Laws Are Widely Scattered Across The U.S. Code And Should Be Consolidated Into One Title**

One of the problems with the federal criminal code today is that it is so large and so unruly that no one in fact knows just how big it is or what it contains. Title 18 may be the primary body of federal criminal laws, but there are scores of other criminal laws found all over the statute books. For example, Title 15 contains the Sherman Antitrust Act and the securities laws, which have both criminal and civil provisions. Title 21 contains the controlled substances laws. Title 26 contains the tax laws. Title 42 contains (some, but not all, of) the environmental criminal laws. And there are other Titles that also contain criminal statutes.

This Subcommittee could perform a great public service by consolidating all of the federal criminal laws into one coherent title. Bringing all of the federal criminal laws together in one title has the clear benefit of more easily ***identifying*** those laws. After all, a prerequisite for the legitimacy of the criminal law is that the law should be accessible to every interested person, not just to lawyers. Having a single set of federal criminal laws surely helps in that endeavor.

How, then, can you deal with this problem?

Direct the Justice Department to compile a list of all federal criminal statutes; consolidate those laws into Title 18; and then repeal any criminal law not specifically identified in that Title 18 list. That approach has the virtue of forcing the Executive Branch to identify every criminal law that it wishes to remain in "active duty status," if you will. In that process, the

Justice Department, of course, can draw on the assistance of other Cabinet-level and sub-Cabinet-level agencies to find and list those laws because it has the incentive to find every one or lose the ability to prosecute under it. In the process, it may even be the case that the Justice Department will decide that some of those laws can be "retired" because they are unimportant, they have been used only sporadically, they have been superseded by other newer statutes, or for some other reason.

But in order to encourage the Justice Department to make those decisions, I would require the Department to identify how many prosecutions it has brought under each federal criminal statute in the last 25 years. Some laws – for example, the mail fraud statute – will have been used often and clearly should be part of Title 18. But that is not true in every case. Federal law makes it a crime to engage in unauthorized use of the "Smokey the Bear" image or the slogan "Give a Hoot, Don't Pollute."[3] It is difficult to believe that we need to use the federal criminal law for that purpose.

**2. There Are Too Many Federal Criminal Laws, So Obsolete, Superfluous, And Unnecessary Ones Should be Repealed**

The last time the Congressional Research Service was asked to identify all of the federal criminal laws, including crimes established by regulations,

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[3] Gary Fields & John R. Emshwiller, "As Criminal Laws Proliferate, More Are Ensnared," Wall St. J. (July 23, 2011), available at http://online.wsj.com/article/SB10001424052748703749504576172714184601654.html (Last Viewed Nov. 14, 2011). On the provenance of use of the criminal law for the enforcement of small-scale infractions, see Francis Bowles Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933).

it could not do so. A 2008 study authored by Professor John Baker and published by The Heritage Foundation found there to be at least 4,450 statutory federal criminal laws, in addition to thousands of offenses defined in regulations.[4] This says a great deal about the state of federal criminal law: The body of federal criminal law has become obese.

Revision of Title 18 therefore should not be simply a means of giving new names to old statutes or of rearranging the components of Title 18 into an orderly arrangement. No, the criminal law needs to shrink. You should throw out whatever offenses no longer make sense in light of today's needs, whatever crimes should not be enforced through the criminal law, and whatever offenses impose more cost than benefit on America, its criminal justice system, and its people.

Take fraud as an example. Fraud is both unlawful and illegal conduct. – unlawful under the civil law, and illegal under the criminal law. Parties injured by fraud can seek relief under the common law of torts, contracts, and restitution,[5] as well as under state consumer protection statutes. Those private actions have benefits for the injured parties and have a deterrent

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[4] See John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum (June 16, 2008). See also, Dick Thornburgh, The Heritage Foundation, Heritage Lectures, *Overcriminalization: Sacrificing the Rule of Law in Pursuit of "Justice"* 3 (Mar. 1, 2011); *One Nation, Under Arrest* 131.

[5] See *Restatement (Second) of Torts* §§ 526-28, 530, 538 (1976); *Restatement (Second) of Contracts* §§ 159-62 (1979); *Restatement (Second) of Restitution* § 8 (1937).

effect that helps the public, too.[6] As far as the criminal law goes, fraud has been a crime at common law in some form or another for more than 300 years[7]. The states make fraud a crime[8] and numerous statutes make fraud a federal offense. In fact, two of the most widely-used federal criminal laws – the mail fraud and wire fraud acts[9] – deal specifically with this offense. But so, too, do numerous other federal laws.[10] We therefore are entitled to ask these questions: Why are there so many acts of Congress on this subject?

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[6] *Hudson v. United States*, 522 U.S. 93, 102 (1997) ("all civil penalties have some deterrent effect.").

[7] John Kaplan, et al., *Criminal Law: Cases and Materials* 861-66 (5th ed. 2004). Fraud originated in the doctrines of "cheats" (i.e., using a false token or weights and measures), obtaining property by false pretenses, and larceny by trick. See, *e.g.*, Sanford H. Kadish, et al., *Criminal Law and Its Processes: Cases and Materials* 956 (8th ed. 2007).

[8] *Id.*

[9] 18 U.S.C. § 1341 (mail fraud) and § 1343 (wire fraud). For an explanation of the growth of those two statutes, see Anne S. Dudley & Daniel F. Schubert, *Mail and Wire Fraud*, 38 Am. Crim. L. Rev. 1025 (2001).

[10] Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* 152 (2006) ("Under American law, for example, there are now dozens of statutory provisions that criminalize offenses such as mail fraud, wire fraud, bank fraud, health care fraud, tax fraud, computer fraud, securities fraud, bankruptcy fraud, accounting fraud, and conspiracy to defraud the government.") (footnote omitted); *id.* at 152 n.23 (citing 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud), § 1344 (bank fraud), § 1347 (health care fraud), 26 U.S.C. §7201 (tax fraud), 18 U.S.C. § 1030 (computer fraud), 15 U.S.C. §§ 77x, 78ff (securities fraud), 18 U.S.C. § 157 (bankruptcy fraud), § 371 (conspiracy to commit fraud against the United States); Ellen S. Podgor, *Criminal Fraud*, 48 Am. U. L. Rev. 729, 730-31 (1999) ("Although fraud is not a crime in itself, fraud is an integral aspect of several criminal statutes. For example, one finds generic statutes such as mail fraud and conspiracy to defraud being applied to an ever-increasing spectrum of fraudulent conduct. In contrast, other fraud statutes, such as computer fraud and bank fraud, present limited applications that permit their use only with specified conduct. In recent years, criminal fraud statutes have multiplied, offering new laws that often match legislative or executive priorities.") (footnotes omitted); *id.* at 740 ("The terms 'fraud,' 'fraudulent,' 'fraudulently,' or 'defraud' appear within the text of a total of ninety-two substantive statutes in title 18 of the United States Code.").

What is the reason for more than one anti-fraud law? Are there so many varieties of fraud that we need a separate law for each one? Is it necessary for every regulatory scheme to have its own fraud statute? Will we, as a society, not be taken seriously about fighting fraud unless we double, triple, and quadruple the number of iterations of this crime? We should define the range of conduct that can constitute fraud, make a judgment about the seriousness of this crime, set a lower and upper limit to the penalty that can be imposed, and give the Sentencing Commission the task of identifying aggravating and mitigating factors for a judge to consider.

### 3. The Federal Criminal Law Includes Offense-Defining Regulations That Should Be Adopted By Congress, Rather Than Promulgated By Administrative Agencies

Let me now turn to my third point: The federal criminal law is littered with regulations that define the elements of a crime. In my view, that is a job for the Congress, not for administrative agencies.

As you know, federal criminal law is not defined only by acts of Congress. We live in an administrative state, and there are numerous agencies with the power to issue rules, regulations, and informal opinions that can have the same enforcement effect as an act of Congress. It is common for Congress to authorize a federal agency to promulgate regulations that define the meaning of statutory terms or that fill in the blanks of a regulatory scheme. If you count federal regulations that define the content of federal offenses, the number of potential federal offenses increases

logarithmically. Some have estimated that the addition of regulations into this mix increases the number of potentially relevant criminal provisions in excess of 300,000.[11]

Consider that number: more than 300,000 potentially relevant regulations that could result in a prison sentence. The late Harvard Law Professor William Stuntz once noted that American criminal law "covers far more conduct than any jurisdiction could possibly punish."[12] Professor Stuntz could have had regulatory crimes in mind when he reached that conclusion. The staggering number of regulations that can be used in federal prosecutions seems to be a perfect example of the overcriminalization of American law.

The number of potential federal crimes also puts the lie to the proposition that every person is presumed to know the law. At one time that presumption was a sensible one. The common law outlawed conduct that was inherently blameworthy, so no one would have been surprised to be charged with an offense. Because of that, the common law also did not require the government to prove that a person acted with the conscious purpose of

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[11] *One Nation, Under Arrest* xv-xvi, 218; cf. Gary Fields & John R. Emshwiller, "As Criminal Laws Proliferate, More Are Ensnared," Wall St. J. (July 23, 2011), available at http://online.wsj.com/article/SB10001424052748703749504576172714184601654.html (Last Viewed Nov. 14, 2011) ("Since its inception in 1970, the Environmental Protection Agency has grown to enforce some 25,000 pages of federal regulations, equivalent to about 15% of the entire body of federal rules. Many of the EPA rules carry potential criminal penalties.").

[12] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 507 (2001).

breaking the law. No longer can we assume that criminal defendants are willful lawbreakers. It is possible today to be charged with felonies as defined by regulatory schemes that do not involve blameworthy conduct. Thus, the axiom that every person is presumed to know the law cannot be reconciled with a just society. Indeed, today – with more than 4,000 federal criminal statutes and hundreds of thousands of potential federal offense-defining regulations on the books, it is difficult to defend the presumption that every person knows the law.

How do we deal with this problem? There are several options. You could adopt a statute providing that no regulation alone can be used as the basis for a criminal conviction and that crimes must be defined in a statute enacted by Congress. That would be the easiest and cleanest way to deal with this problem, but may be difficult to achieve for practical or political reasons. Exactly 100 years ago the Supreme Court held that Congress can authorize a federal agency to promulgate regulations whose violation can be prosecuted as a crime.[13] The Supreme Court has reaffirmed that decision since then,[14] and Congress has delegated to a host of federal agencies the power to define by regulation the elements of a broad range of different

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[13] See *United States v. Grimaud*, 220 U.S. 506 (1911).

[14] See, *e.g.*, *Yakus v. United States*, 321 U.S. 414 (1944) (upholding statute making it a crime to violate the Price Administrator's regulations); cf., *e.g.*, *United States v. Sharpnack*, 355 U.S. 286 (1958) (upholding the constitutionality of the Assimilative Crimes Act, 18 U.S.C. 13, which incorporates for federal enclaves state-law offenses and their sentences).

criminal laws. As the result, it may be too difficult to walk back from where we find ourselves now.

But there are at least two other options. You could adopt a statute requiring the federal government to give a party notice that he or she has violated a regulation and an opportunity to remedy the matter before criminal charges could be brought. Or you could adopt regulations into statute law by using a legislative procedure similar to the one that is used in connection with Congressional approval of trade agreements. Congress could require an agency to submit its regulations to Congress for an up-or-down vote on each of them in order to define a crime enacted in accordance with the Constitution. That would involve Congress in the lawmaking process without needing to use a legislative veto.[15]

**4. Congress Should Ensure That Every Federal Criminal Statute Requires Proof Of A Mens Rea Element Of The Offense, Ensuring That Only Blameworthy Persons Are Convicted**

That brings me to my final subject. The common law followed the rule that a crime required the union of act and intent,[16] and common law crimes were limited to morally blameworthy conduct. Murder, rape, robbery, burglary, theft – at common law all were crimes against God and man, so there was no risk that someone would not know that his conduct was both immoral and unlawful. But that is not the case today.

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[15] See *INS v. Chadha*, 462 U.S. 919 (1983).

[16] 4 William Blackstone, *Commentaries* * 358; *Morissette v. United States*, 342 U.S. 246, 251 (1952). The Latin phrase is "*Actus non facit reum nisi mens sit rea.*"

Federal criminal law is not limited to crimes that mirror any readily recognizable moral code.[17] Beginning in the last century, we have seen the development of what have been called "public welfare offenses."[18] Public welfare offenses are not the felonies of common law. These offenses dealt principally with a violation of a traffic, housing, safety, or health and welfare code. Public welfare offenses are often "strict liability" crimes. No proof of a guilty mind was necessary. But a conviction for such an offense did not carry with it any moral condemnation and could not result in imprisonment. The penalty imposed was only a fine.

But that is no longer true. Today, a person can be found guilty of violating a commercial, regulatory, or environmental law without proof of either of the following elements: (1) that he had a purpose of breaking the law or (2) that his conduct clearly was blameworthy. Both of those elements have been critical to the ability of the law to limit criminal punishments to those persons who deserve it. Common law crimes, such as murder,

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[17] Richard Thornburgh, 44 Am. Crim. L. Rev. at 1281; *One Nation, Under Arrest* xviii.

[18] *See* Graham Hughes, *Criminal Omissions*, 67 Yale L.J. 590, 595 (1958) ("For it was in the latter half of the nineteenth century that the great chain of regulatory statutes was initiated in England, which inaugurated a new era in the administration of the criminal law. Among them are the Food and Drugs Acts, the Licensing Acts, the Merchandise Marks Acts, the Weights and Measures Acts, the Public Health Acts and the Road Traffic Acts. With these statutes came a judicial readiness to abandon traditional concepts of *mens rea* and to base criminal liability on the doing of an act, or even upon the vicarious responsibility for another's act, in the absence of intent, recklessness or even negligence.") (footnotes omitted); Francis Bowles Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 63-69 (1933).

effectively had an element of blameworthiness built into the definition of the offense. Because everyone knew that murder was immoral, the common law did not require the prosecution independently to prove that a person knew that his conduct was unlawful and that he acted with the purpose of breaking the law. That built-in blameworthiness element of the criminal law was an enormously valuable feature. It helped keep morally blameless persons from being convicted or punished.

But today's criminal law lacks that protection. Regulatory offenses are crimes only because the Congress or a regulatory agency has outlawed the conduct at issue, not because that conduct is inherently wrongful. To use the terms of the common law, regulatory crimes are "*malum prohibitum* offenses," and common law crimes are "*malum in se* offenses." Regulatory crimes, such as commercial or environmental offenses, pose a substantial risk of convicting the innocent. To avoid that outcome, Congress should require proof that a person acted with the purpose of breaking the law whenever Congress adopts a criminal offense in a regulatory field.

It also matters greatly exactly what scienter element a statute contains. Let me give you an example of the importance that the proper definition of *mens rea* can play in the law. Consider the difference between the terms "willfully" and "intentionally" or "knowingly." The term "willful" often is used today to describe a state of mind characterized by an intentional

violation of a known legal duty.[19] Said differently, a person acts willfully when he consciously and purposefully breaks the law. Congress has often used this term in criminal provisions under the federal tax laws due to their complexity, and the Supreme Court has explained that use of the term willfully generally means that Congress sought to outlaw only purposeful illegality. Otherwise, the Supreme Court has explained, an innocent person can violate the criminal law without any purpose of doing so, even if he or she makes an innocent, good faith mistake when interpreting a complex area of law.[20]

By contrast, the terms "intentionally" and "knowingly" do not require proof that someone purposefully broke the law. Rather, the terms "intentionally" and "knowingly" require the government to prove only that a person intended to perform certain conduct (or to achieve a certain result) or that the individual knew that he or she was engaged in the conduct, the *actus reus*, constituting the offense. The terms intentionally" and "knowingly" include a far larger range of conduct than the term "willfully," and using the terms "intentionally" and "knowingly" in a regulatory field are dangerous. Perhaps, a person who was sleepwalking or unconscious could establish his or

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[19] See, *e.g.*, *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973).

[20] See, *e.g.*, *Bryan v. United States*, 524 U.S. 184, 191 (1998); *Ratzlaf v. United States*, 510 U.S. 135, 138 (1994); *Cheek v. United States*, 498 U.S. 192, 200 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973); *see generally Ratzlaf*, 510 U.S. at 138 (Blackmun, J., dissenting) (discussing the meaning of the term "willful" in modern-day federal criminal statutes).

her innocence under a knowledge standard. But a person could act "intentionally" or "knowingly" even if he or she lacked any knowledge of what the law prohibited, or even if he or she did not know that there was a law dealing with the conduct at issue. The only proof necessary is evidence showing knowledge of the facts constituting the offense, not the additional proof of knowledge that those acts are unlawful.[21]

There is a straightforward way to deal with this problem. In *malum prohibitum* offenses, Congress should require that a conviction must be based on proof that a person purposefully intended to break the law. A person should not be at risk of conviction and imprisonment for engaging in actions that are not inherently blameworthy unless he or she knew that the act involved was illegal. Proof of willfulness, therefore, should be required for all regulatory crimes. It should be noted that civil penalties or administrative sanctions are available for those who violate a regulation but do not meet the requirement for a criminal conviction.

Let me add one final point in this regard. The government often argues that we should not fear that the criminal law could be overbroad because, even if it is, we should trust government officials to make only reasonable decisions about what cases to prosecute. As a factual matter, that argument is unpersuasive. The Heritage Foundation has identified

[21] See, *e.g.*, *Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005); *Bryan v. United States*, 524 U.S. at 191; *Rodgers v. United States*, 522 U.S. 252, 254-55 (1998) (plurality opinion); *Staples v. United States*, 511 U.S. 600, 602 (1994); *United States v. Bailey*, 444 U.S. 394, 408 (1980).

numerous cases in which the federal government acted unreasonably in bringing criminal charges against someone.[22] In any event, a "trust us" argument is mistaken as a matter of law. Our legal system is based on the proposition that ours is "a government of laws, and not of men."[23] No one should be obliged to rely on prosecutorial discretion to avoid being charged with a crime.

* * * * *

Let me end where I began. I am honored to have been invited to speak at today's hearing. I see four areas of greatest need for your attention. *First*: The federal criminal laws should be consolidated into a single Title of the U.S. Code. *Second*: The federal criminal code needs to be shorn of redundant, superfluous, and unnecessary criminal laws. *Third*: Offense definition should be a task for the Congress, not for agency officials, because only Congress is accountable to the people. *And fourth*: The federal criminal code should be revised to ensure that the *mens rea* or "guilty mind" elements of federal crimes capture only blameworthy conduct.

Thank you once again for the opportunity to speak with you about this important subject today. I am happy to entertain any questions that you may have about my testimony

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[22] Those cases are discussed in *One Nation, Under Arrest.*

[23] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

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Mr. SENSENBRENNER. Thank you, General Meese. Well, I guess we must be starting out on the right track.

Mr. Thornburgh.

**TESTIMONY OF THE HONORABLE DICK THORNBURGH, COUNSEL, K&L GATES LLP**

Mr. THORNBURGH. Thank you, Mr. Chairman, Ranking Member Scott, other Members of the Subcommittee here present. I want to disclaim any conspiracy on the part of the four witnesses here. I remember in the antitrust law there was a theory known as conscious parallelism. It was ultimately held not to be violative of the antitrust laws, and I think that is what you are looking at here.

I appreciate the chance to appear before this Subcommittee this morning. I have not reviewed all 1,200 pages of H.R. 1823 line by line, but I would like to highlight today the phenomenon of overcriminalization, and to suggest that any reform legislation address solutions to the problems that this phenomenon has engendered. It may seem odd to some for me, as a former prosecutor, to focus on the perils of overcriminalization. We live in a time where concern remains high in our society about the problem of crime in general, and corporate crime in particular. But considerable misgiving about overcriminalization and the threat it poses to established institutions and ways of life have brought together a number of disparate public advocacy groups to deal with this problem and ensure that we have criminal statutes that punish actual criminal acts and do not seek to criminalize conduct that is better dealt with by the seeking of civil or regulatory remedies.

I have served on both sides of the aisle in criminal cases during my career, as a Federal prosecutor for many years, and most recently as a defense attorney involved in proceedings adverse to the U.S. Department of Justice. This I think balances my view of the issues that we are talking about today. I want to move from my prepared statement into the suggestions that I offer to you as steps to curb abuses in the area of overcriminalization. I have both long and short term suggestions.

First, I have advocated for many years that we adopt a true Federal Criminal Code. And I commend you, Mr. Chairman and your colleagues, for taking this issue up. While this may not be the first thing that comes to mind when people analyze issues of concern in the criminal justice system, it is an important one that should be undertaken without delay. The some 4,450 or more separate criminal offenses are a hodgepodge scattered throughout 50 different titles of the United States Code, without any coherent sense of organization. One commentator noted our failure to have in place even a modestly coherent code makes a mockery of the United States' much vaunted commitment to justice, the rule of law, and human rights.

This is not a new idea, of course. Congress did try nobly in the past to reform the Federal Criminal Code, most notably through the efforts of the Brown Commission, as noted, in the 1970's. I was Assistant Attorney General in charge of the Department of Justice Criminal Division at the time, and I well remember the disappointment felt among department leadership over the inability to focus

the attention of legislative leaders on this important issue. And thus, it has been ever since until you have taken up this cause.

Second, Congress needs to rein in the continuing proliferation of criminal regulatory offenses. Regulatory agencies routinely if not automatically promulgate rules imposing criminal penalties that have not been enacted by the Congress. Indeed, criminalization of new regulatory provisions has become seemingly mechanical. One estimate is there may be a staggering 300,000 criminal regulatory offenses created by U.S. Government agencies. This tendency, as pointed out, together with the lack of any congressional requirement that legislation pass through the Judiciary Committees, has led to an evolution of a whole new and troublesome catalogue of so-called criminal offenses. Congress should not delegate such an important function to the agencies.

In this area, one solution that a renowned expert and former colleague of Ed's and mine from the Department of Justice, Ronald Gainer, has advocated, is to enact a general statute providing administrative procedures and sanctions for all regulatory breaches. It would be accompanied by a general provision removing all present criminal penalties from regulatory violations, notwithstanding the language of the regulatory statutes themselves except in two instances. The first exception would encompass conduct involving significant harm to persons, property interests, and institutions designed to protect persons and property interests, the traditional reach of the criminal law. The second exception would permit criminal prosecution not for breach of the remaining regulatory provisions, but only for a pattern of intentional, repeated breaches.

My third suggestion is that the Congress should consider whether it is time to address the standards whereby companies are held criminally responsible for the acts of their employees. The Department of Justice has issued four separate memoranda from deputy attorneys general during the last dozen years or so to set forth ground rules when a corporation should be charged criminally for the act of its employees. It should be noted that in its most recent memorandum, the government stated it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee. A law is needed to ensure uniformity in this critical area.

I have set forth in my prepared statement some steps that I feel should be taken by the Department of Justice itself, and I would refer to those specifically, because the Department has a role, most important, to actively support as a matter of policy the effort to enact a true Criminal Code.

Thank you for your attention and the opportunity to speak.

[The prepared statement of Mr. Thornburgh follows:]

**Prepared Statement of the Honorable Dick Thornburgh, Counsel, K&L Gates LLP**

Chairman Sensenbrenner, Ranking Member Scott, and other Subcommittee members here present: Thank you for the opportunity to appear and testify before this Subcommittee. While I have not reviewed the 1,200 pages of H.R. 1823, line-by-line, I propose to address specifically today a subject that has commanded increasing attention here and in other countries around the world. My testimony today is intended to highlight the phenomenon of over-criminalization and to suggest that any reform legislation address solutions to the problems it has engendered.

I.

It may seem odd to some for me as a former prosecutor to focus on the perils of *over*-criminalization. We live in a time when concern remains high in our society about the problem of crime in general and corporate crime in particular. But considerable misgiving has developed about this subject and the threat it poses to established institutions and ways of life. This misgiving has brought together such disparate public advocacy groups as the American Bar Association, the National Association of Criminal Defense Lawyers, and the ACLU on the liberal side with the Heritage Foundation, the Washington Legal Foundation, and the Cato Institute on the more conservative end of the spectrum. However divergent the interests of these groups may be otherwise, they all share a common goal in this area: to have criminal statutes that punish *actual criminal acts* and do not seek to criminalize conduct that is better dealt with by the seeking of civil or regulatory remedies. This goal, as simple as it sounds conceptually, has turned out to be difficult to attain and needs to be addressed by this body.

I have served on both sides of the aisle in criminal cases during my career—as a federal prosecutor for many years and more recently as a defense attorney involved in proceedings adverse to the United States Department of Justice. This provides me, I believe, with a balanced view of the issues in today's criminal justice system. This testimony will suggest some thoughts as to how to deal with what I see as the growing challenge of over-criminalization.

First, let me refine that challenge.

By way of background, let me remind all of us of some basic fundamentals of the criminal law. Traditional criminal law encompasses various acts, which may or may not cause results, and mental states, which indicate volition or awareness on the part of the actor. These factors are commonly known as the requirements of *mens rea* and *actus reus,* Latin terms for an "evil-meaning mind [and] an evil-doing hand." Most efforts to codify the law of common-law jurisdictions employ a variety of requisite mental states—usually describing purpose, knowledge, reckless indifference to a consequence, and, in a few instances, negligent failure to appreciate a risk.

The criminal sanction is a unique one in American law, and the stigma, public condemnation and potential deprivation of liberty that go along with that sanction have traditionally demanded that it should be utilized only when identified mental states and behaviors are proven.

With respect to what has now become known as "over-criminalization," objections are focused on those offenses that go well beyond these traditional, fundamental principles and are grounded more on what were historically civil or regulatory offenses without the mental states required for criminal convictions. Without a clear *mens rea* requirement, citizens may not be able to govern themselves in a way that assures them of following the law and many actors may be held criminally responsible for actions that do not require a wrongful intent.

Such "strict" liability in a criminal action, incidentally, does have a long history—almost three thousand years ago, an Emperor of China is said to have decreed that it would be a criminal offense, punishable by death, for a governor of a province to permit the occurrence, within the province, of an earthquake. And man's inability to control earthquakes, we have been reminded recently, can have tragic consequences.

This is obviously an extreme, but our criminal justice system has not been entirely modest. Many scholars and the Department of Justice have tried to count the total number of federal crimes, but only rough estimates have emerged. The current "estimate" is a staggering 4,450 crimes on the books with a projected additional 500 per year in years to come. If legal scholars and researchers and the Department of Justice itself cannot accurately count the number of federal crimes, how do we expect ordinary American citizens to be able to be aware of them? Additionally, a recent report states that federal statutes provide for over 100 separate terms to denote the required mental state with which an offense may be committed, and another review observes that a number of the federal criminal offenses enacted in the last ten years *had no mens rea requirement at all.* Such trends cannot continue and suggested legislative reform in the nature of a default *mens rea* requirement when a statute does not require it is worthy of priority consideration. Moreover, a recent assessment of the new Dodd-Frank Wall Street Reform and Consumer Protection Act finds that it creates dozens of new federal criminal offenses, many lacking adequate criminal-intent requirements, which are ambiguous and duplicative of existing federal and state regulations.

II.

Make no mistake, when individuals commit crimes they should be held responsible and punished accordingly. The line has become blurred, however, on what conduct constitutes a crime, particularly in corporate criminal cases, and needs to be redrawn and re-clarified.

Since 1909, business entities have, with few limitations, routinely been held *criminally* liable for the acts of their employees. In recent history, one of the more significant cases involved the accounting firm of Arthur Andersen, a case of which you are no doubt aware, in which the company effectively received a "death sentence" based on the acts of isolated employees over a limited period of time. I gave a speech some time ago at the Georgetown Law Center in Washington regarding over-criminalization. I mentioned the Arthur Andersen case and referenced a political cartoon, published after the Supreme Court reversed the company's conviction, in which a man in a judicial robe was standing by the tombstone for Arthur Andersen and said: "***Oops. Sorry.***" That apology didn't put the tens of thousands of partners and employees of that entity back to work. This unjust result simply cannot be replicated, and reform is needed to make sure there are no such future miscarriages of justice.

Over-breadth in corporate criminal law, for example, can lead to a near-paranoid corporate culture that is constantly looking over its shoulder for the "long arm of the law" and wondering whether a good faith business decision will be interpreted by an ambitious prosecutor as a crime. Perhaps even more significant is the impact on corporate innovation—if an idea or concept is novel or beyond prior models, a corporation may stifle it out of concern about potential criminal penalties. This stifling may render some businesses unable to compete in a global marketplace just to ensure compliance with domestic laws. And that may mean fewer jobs and reduced economic growth in this country.

The unfortunate reality is that Congress has effectively delegated some of its important authority to regulate crime in this country to federal prosecutors, who are given an immense amount of latitude and discretion to construe federal crimes, and not always with the clearest motives or intentions.

A striking recent example of over-criminalization is the now-discredited "theft of honest services" provision of the mail and wire fraud statute, 18 U.S.C. § 1346, which was recently narrowed by the Supreme Court in the high-profile *United States v. Skilling* and *United States v. Black* decisions. The Court held that a criminal statute must clearly define the conduct it proscribes so as to give fair notice of the nature of the offense to those who might be charged. It was this statute, by the way, that formed the basis for the notorious prosecution of my client, Dr. Cyril Wecht, in my home state of Pennsylvania for felony counts relating, among other things, to his alleged use of the medical examiner's office fax machine and official vehicles for legitimate outside personal business activities. This statute was subject to scrutiny in the *Skilling* case because of its expansion from traditional public corruption cases to private acts in business or industry that are deemed to be criminal almost exclusively at the whim of the individual prosecutor who is investigating the case, becoming essentially a "moral compass" statute. The Supreme Court rejected the government's expansive view of the statute and returned the statute to its core purpose—prosecuting kickback and bribery schemes. Interestingly, the Court went a step further and specifically cautioned Congress regarding creating further honest services statutes, stating that "it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns." Another commendable decision came recently by a United States District Judge when he dismissed an indictment and reminded the government of the Court's purpose—*"[t]he Court is not an arbiter of morality, economics, or corporate conduct. Rather, it is an arbiter of the law."* That signals to me a welcome judicial return to the rule of law.

III.

What can be done to curb these abuses? I have both long and short term suggestions. First, I have advocated for many years that we adopt a true Federal Criminal Code. While this may not be the first thing that comes to mind when analyzing the issues of concern in the criminal justice system, it is an important one that should be undertaken without delay. As I mentioned, there are now some 4,450 or more separate criminal statutes—a hodgepodge scattered throughout 50 different titles of the United States Code without any coherent sense of organization. As one commentator noted: "Our failure to have in place even a modestly coherent code makes a mockery of the United States' much-vaunted commitments to justice, the rule of law, and human rights."

There is a template in existence, the Model Penal Code, which can act as a sensible start to an organized criminal code, and has formed the basis for many efforts to establish state criminal codes in this country. What is needed is a clear, integrated compendium of the totality of the federal criminal law, combining general provisions, all serious forms of penal offenses, and closely related administrative provisions into an orderly structure, which would be, in short, a *true* Federal Criminal Code.

This not a new idea—Congress has tried in the past to reform the federal criminal code, most notably through the efforts of the so-called "Brown Commission" in 1971. The legislative initiatives based on that Commission's work failed despite widespread recognition of their worth. As Assistant Attorney General in charge of the Department of Justice's Criminal Division at the time, I well remember the disappointment felt among Department leadership over the inability to focus the attention of legislative leaders on this important issue. And thus it has been ever since. It is therefore doubly incumbent on this Congress to seek to make sense out of our laws and make sure that average ordinary citizens can be familiar with what conduct actually constitutes a crime in this country.

Second, Congress needs to rein in the continuing proliferation of criminal regulatory offenses. Regulatory agencies routinely promulgate rules imposing criminal penalties that have not been enacted by Congress. Indeed, criminalization of new regulatory provisions has become seemingly mechanical. One estimate is that there may be a staggering 300,000 criminal regulatory offenses created by U.S. government agencies!

This tendency, together with the lack of any congressional requirement that the legislation pass through Judiciary Committees, has led to an evolution of a new and troublesome catalogue of criminal offenses. Congress should not delegate such an important function to agencies.

In this area, one solution that a renown expert and former colleague from the Department of Justice, Ronald Gainer, has advocated is to enact a general statute providing administrative procedures and sanctions for all regulatory breaches. It would be accompanied by a general provision removing all present criminal penalties from regulatory violations, notwithstanding the language of the regulatory statues, except in two instances. The first exception would encompass conduct involving significant harm to persons, property interests, and institutions designed to protect persons and property interests—the traditional reach of criminal law. The second exception would permit criminal prosecution, not for breach of the remaining regulatory provisions, but only for a pattern of intentional, repeated breaches. This relatively simple reform could provide a much sounder foundation for the American approach to regulatory crime than currently exists.

My third suggestion is that Congress should consider whether it is time to address the standards whereby companies are held criminally responsible for acts of their employees. The Department of Justice has issued four separate Memoranda from Deputy Attorneys General during the past ten years or so setting forth ground rules for when a corporation should be charged criminally for the acts of its employees. It should be noted that in the most recent memorandum, the government stated: *"[i]t may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee."* A law is needed to ensure uniformity in this critical area so that the guidelines and standards do not continue to change at the rate of four times in a decade. Indeed, if an employee is truly a "rogue" or acting in violation of corporate policies and procedures, Congress can protect a well-intentioned and otherwise law-abiding corporation by enacting a law that specifically holds the individual rather than the corporation responsible for the criminal conduct without subjecting the corporation to the whims of any particular federal prosecutor.

One other aspect of over-criminalization should not escape our notice. A former colleague of mine at the Justice Department noted that there is something self-defeating about a society that seeks to induce its members to abhor criminality, but simultaneously brands as "criminal" not only those engaged in murder, rape and arson, but also those who dress up as Woodsy Owl, sell mixtures of two kinds of turpentine, file forms in duplicate rather than triplicate or post company employment notices on the wrong bulletin boards. The stigma of criminal conviction is dissipated by such enactments and the law loses its capacity to reinforce moral precepts and to deter future misconduct. Our criminal sanctions should be reserved for only the most serious transgressions and to do otherwise, in fact, can cause disrespect for the law.

While nearly all of the remedies I have suggested today would require legislative action, there are some steps that could be taken by the Department of Justice itself to aid in the process of reducing over-criminalization. Let me mention just three.

First, the Department should require pre-clearance by senior officials of novel or imaginative prosecutions of high profile defendants. One of Justice Scalia's major objections to the "honest services" fraud theory, for example, was its propensity to enable "abuse by headline-grabbing prosecutors in pursuit of [those] who engage in any manner of unappealing or ethically questionable conduct." A second look before bringing any such proposed prosecutions would, I suggest, be very much in order.

Second, a revitalized Office of Professional Responsibility within the Department of Justice should help ensure that "rogue" prosecutors are sanctioned for overreaching in bringing charges that go well beyond the clear intent of the statute involved.

Finally, of course, the Department should actively support, as a matter of policy, the effort to enact a true criminal code.

These are changes that truly merit our attention if we are to remain a government of laws and not of men. And they merit attention by all three branches of government—the legislative, the executive and the judicial—if productive change is to be forthcoming.

Interestingly enough, this concern is not confined to the United States or our legal system alone. Because of recent abuses in the Russian Federation, a group of reformers is seeking to overhaul criminal laws and procedures in that country to combat over-criminalization as well. I have visited with these reformers, both here and in Moscow, and presented testimony before a round-table discussion in the Russian Duma, their legislature, sharing our experiences and suggestions for changes in our system. The primary focus of their examination is the abuse of criminal laws by business competitors to secure market advantages and efforts to deal with vaguely-worded statutes that purport to create criminal offenses to deal with "fraud" and "illegal entrepreneurship."

I also had occasion myself to appear recently as an expert witness in the Moscow Arbitrazh Court, Russia's commercial tribunal, in a case brought against a major U.S. bank to recover $22.5 *billion* in damages for alleged violations of the U.S. RICO statute. The case settled for a fraction of the amount sought without reaching the question of whether a U.S. statute predicated on violations of the U.S. criminal law can proceed in a Russian commercial court, but the mere filing of such a claim evidences the type of potential hazard U.S. companies face abroad.

With respect then to the problem of over-criminalization, let me summarize. Reform is needed. True crimes should be met with true punishment. While we must be "tough on crime," we must also be intellectually honest. Those acts that are not criminal should be countered with civil or administrative penalties to ensure that true criminality retains its importance and value in our legal system. And the Department of Justice must "police" those empowered to prosecute with greater vigor.

I hope and trust that you will include remedies to the challenge of over-criminalization in whatever modernization and simplification initiatives result from your present considerations.

Thank you for the opportunity to share these thoughts with you today.

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Mr. SENSENBRENNER. Thank you, General Thornburgh. Mr. Lynch.

**TESTIMONY OF TIM LYNCH, DIRECTOR, PROJECT ON CRIMINAL JUSTICE, CATO INSTITUTE**

Mr. LYNCH. Thank you, Mr. Chairman. I also appreciate the invitation to testify here today. Many excellent points have already been made. I think I will start off by highlighting why I think the subject of Federal Code reform has generated such interest from across the political spectrum.

We are talking about the rules by which people from our communities can be arrested, indicted, and sent to prison. Conscientious people in the criminal law field should not lose sight of the fact that even when somebody has not been convicted of a crime, their lives can be forever altered by the application of the criminal law. All it takes is a single raid, highly publicized, and a business can

go under. An arrest can end somebody's career. Even in situations where a person can actually win an acquittal at trial, the financial burden involved in mounting a legal defense these days can break most families.

Now, what is most disconcerting of all is that nowadays the scope of our Federal criminal law has been so expansive, as the other witnesses have said, that ordinary hardworking people can easily find themselves on the wrong side of the law without even knowing it. It is really time to take a fresh approach to the Federal Code.

And I also commend the Committee for taking this subject up. But not just reorganizing it, it needs to be scaled back. And we need to provide procedural safeguards for persons accused of wrongdoing. The bill under consideration here, H.R. 1823, identifies scores of provisions that are duplicative and unnecessary. But there are a few points that I wish to highlight because I wish the bill had gone further.

First, the bill does not do enough to shield ordinary people from the legal and regulatory minefield that presently exists. The criminal standard that presently exists in the tax area I think is the model to follow. We all know how complicated the Federal Tax Code is. So right now, to protect people who honestly try to get their tax returns right without accusations of tax evasion, prosecutors have to prove that the person willfully violated the tax law. In other words, the prosecutors have to show that the person knew what the law required, but went ahead and violated the law anyway. I think we need that willfulness standard in place for all regulations that cover conduct that is not intrinsically wrongful.

The second point I wish to highlight is that to protect citizens from situations where statutes have ambiguous terms, Congress should codify the rule of lenity across the board. Right now the rule of lenity is applied kind of sporadically by the courts. They do it no some areas of the law, but not in others. Congress should codify this rule of lenity across the board so that doubts will be resolved in the defendant's favor. Mr. Chairman, there is a principle in contracts law that says that when there are terms of a contract that are ambiguous, it will be resolved against the person or party or organization that drafted the contract. And the rationale there is that the person who drafted the contract was in a better position to resolve the ambiguity because they were drafting the language. It is a sensible rule. And if we have that rule in place in contracts, I think in the criminal law, where the stakes are even higher, that rule of lenity should be applied so that the law should be clearly written and ambiguities should be resolved in favor of people who are accused of crime, not in favor of the prosecution.

The third point that I wish to highlight, and has been made by the other witnesses, is that Congress needs to pull the plug on agency rulemaking. I know that Members of Congress are busy, I know that you are pulled in different directions all the time to go ahead and address different subjects. But aside from the decision to go to war, it is hard for me to think of a more important responsibility than attending to the legal rules by which people can be indicted and sent off to prison. I know certain agencies have developed certain expertise. I think we should let them make their recommendations to the Congress. But when it comes to rules that af-

fect people's liberty where they can be sent to prison, I think the agencies should send these recommendations over to the Congress where they can be voted upon by our elected Representatives.

I do have other comments and recommendations in my written testimony, and I would respectfully request they be made part of the record.

[The prepared statement of Mr. Lynch follows:]

**Prepared Statement of Tim Lynch, Director, Project on Criminal Justice, Cato Institute**

I. INTRODUCTION AND BACKGROUND

My name is Tim Lynch. I am the director of the Cato Institute's Project on Criminal Justice. I appreciate the invitation to testify this morning on H.R. 1823, which aims to modernize and simplify the federal criminal code. I am supportive of this undertaking because the federal code is a mess. As one writer has observed, the federal code is a

> loose assemblage of criminal law components that were built hastily to respond to perceptions of need and to perceptions of the popular will, and that were patterned more upon hindsight than foresight. Of the 3,000 provisions carrying criminal penalties, each was produced at a different time by different draftsmen with different conceptions of law, the English language, and common sense. Any relationship of one to another is more often than not accidental. The criminal statutes have never been subjected to a substantive reform, only a minor paring and partial rearrangement into a peculiar form of alphabetical order.[1]

Justice Antonin Scalia recently noted that Congress has unwisely expanded the federal criminal system in a manner that allows drug prosecutions to burden the judiciary.[2] In an attempt to address that burden, Congress expanded the number of federal judgeships, but that has resulted in a reduction in the quality of judicial appointments according to Justice Scalia.

I should note at the outset that since H.R. 1823 runs more than one thousand pages, I have not yet had sufficient time to study all of its provisions and thus all of the consequences (both intended and unintended). To assist the committee in its deliberations, however, I will first outline some general principles which I think ought to guide federal code reform. I will then offer a preliminary analysis of H.R. 1823. Last, if there are any questions that I am unable to answer today, I will endeavor to develop an answer following the hearing and respond with a letter to the committee.

II. PRINCIPLES TO GUIDE FEDERAL CODE REFORM

*A. Constitutional Basis for Federal Statutes*

The American Constitution created a federal government with limited powers. As James Madison noted in the Federalist no. 45, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Most of the federal government's "delegated powers" are specifically set forth in article I, section 8. The Tenth Amendment was appended to the Constitution to make it clear that the powers not delegated to the federal government "are reserved to the States respectively, or to the people."

Crime is a serious problem, but under the Constitution, it is a matter to be primarily handled by state and local government. Unfortunately, as the years passed, Congress eventually assumed the power to enact a vast number of criminal laws pursuant to its power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[3]

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[1] Ronald L. Gainer, "Report to the Attorney General on Federal Criminal Code Reform," *Criminal Law Forum* (1989).

[2] Mark Sherman, "Scalia: Judges 'Aint What They Used to Be,'" Associated Press, October 5, 2011.

[3] See Robert Suro, "Rehnquist: Too Many Offenses Are Becoming Federal Crimes," Washington Post, January 1, 1999. See also Timothy Lynch, "Dereliction of Duty: The Constitutional Record of President Clinton," Capital University Law Review 27 (1999): 783, 832–38.

In recent years, Congress has federalized the crimes of gun possession within a school zone, carjacking, wife beating, and church arsons. All of those crimes and more have been rationalized under the Commerce Clause.[4] In *United States v. Lopez,* the Supreme Court finally struck down a federal criminal law, the Gun-Free School Zone Act of 1990, because the connection between handgun possession and interstate commerce was simply too tenuous.[5] In a concurring opinion, Justice Clarence Thomas noted that if Congress had been given authority over matters that simply "affect" interstate commerce, much, if not all, of the enumerated powers set forth in article I, section 8 would be unnecessary. Indeed, it is difficult to dispute Justice Thomas' conclusion that an interpretation of the commerce power that "makes the rest of § 8 surplusage simply cannot be correct."[6]

Whether or not the Supreme Court adopts a more narrow interpretation of the Commerce Clause, Congress can and should acknowledge constitutional limits on federal jurisdiction and repeal federal statutes that merely duplicate local crimes.

*B. No Delegation of Lawmaking Power to Administrative Agencies*

Beyond the thousands of federal criminal statutes enacted by the Congress, there are also thousands of federal regulations that carry criminal penalties. (And what is worse is that some of those regulations contain vague terms; others carry inadequate *mens rea* terminology.) Members of Congress are busy, but it is their responsibility to carefully consider what infractions can result in a criminal conviction and prison time.

The case law that has thus far allowed delegation has drawn criticism. Federal Judge Roger Vinson, for example, has observed:

> A jurisprudence which allows Congress to impliedly delegate its criminal lawmaking authority to a regulatory agency such as the Army Corps—so long as Congress provides an "intelligible principle" to guide that agency—is enough to make any judge pause and question what has happened. Deferent and minimal judicial review of Congress' transfer of its criminal lawmaking function to other bodies, in other branches, calls into question the vitality of the tripartite system established by our Constitution. It also calls into question the nexus that must exist between the law so applied and simple logic and common sense. Yet that seems to be the state of the law. Since this court must apply the law as it exists, and cannot change it, there is nothing further that can be done at this level.[7]

As noted above, whether or not the Supreme Court chooses to revisit and restrict the ability of Congress, on constitutional grounds, to delegate the lawmaking power, Congress can and should recognize that federal law—especially federal *criminal* law—ought to be made by the people's elected representatives.[8]

*C. Ignorance of the Law is Now a Valid Excuse*

The sheer volume of modern law makes it impossible for an ordinary American household to stay informed. And yet, prosecutors vigorously defend the old legal maxim that "ignorance of the law is no excuse."[9] That maxim may have been appropriate for a society that simply criminalized inherently evil conduct, such as murder, rape, and theft, but it is wholly inappropriate in a labyrinthine regulatory regime that criminalizes activities that are morally neutral. As Professor Henry M. Hart opined, "In no respect is contemporary law subject to greater reproach than for its obtuseness to this fact."[10]

To illustrate the rank injustice that can and does occur, take the case of Carlton Wilson, who was prosecuted because he possessed a firearm. Wilson's purchase of the firearm was perfectly legal, but, years later, he didn't know that he had to give it up after a judge issued a restraining order during his divorce proceedings. When Wilson protested that the judge never informed him of that obligation and that the

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[4] See American Bar Association, The Federalization of Criminal Law (Chicago: American Bar Association, 1998); John S. Baker, Measuring the Explosive Growth of Federal Crime Legislation (Washington: The Federalist Society for Law and Public Policy Studies, 2005).

[5] *United States v. Lopez,* 514 U.S. 549 (1995).

[6] Ibid., pp. 657–58 (1995) (Thomas, J., concurring). See also John Baker, "National izing Criminal Law: Does Organized Crime Make It Necessary or Proper?" Rutgers Law Journal 16 (1985): 495.

[7] *United States v. Mills,* 817 F. Supp. 1546, 1555 (1993).

[8] Robert A. Anthony, "Unlegislated Compulsion: How Federal Agency Guidelines Threaten your Liberty," Cato Institute Policy Analysis, no. 312 (August 11, 1998).

[9] See Timothy Lynch, "Ignorance of the Law: Sometimes a Valid Defense," *Legal Times,* April 4, 1994.

[10] Henry Hart, "The Aims of the Criminal Law," reprinted in In the Name of Justice (Washington, D.C.: Cato Institute, 2009), p. 19.

restraining order itself said nothing about firearms, prosecutors shrugged, "ignorance of the law is no excuse."[11] Although the courts upheld Wilson's conviction, Judge Richard Posner filed a dissent: "We want people to familiarize themselves with the laws bearing on their activities. But a reasonable opportunity doesn't mean being able to go to the local law library and read Title 18. It would be preposterous to suppose that someone from Wilson's milieu is able to take advantage of such an opportunity."[12] Judge Posner noted that Wilson would serve more than three years in a federal penitentiary for an omission that he "could not have suspected was a crime or even a civil wrong."[13]

It is absurd and unjust for the government to impose a legal duty on every citizen to "know" all of the mind-boggling rules and regulations that have been promulgated over the years. Policymakers can and should discard the "ignorance-is-no-excuse" maxim by enacting a law that would require prosecutors to prove that regulatory violations are "willful" or, in the alternative, that would permit a good-faith belief in the legality of one's conduct to be pleaded and proved as a defense. The former rule is already in place for our complicated tax laws—but it should also shield unwary Americans from all of the laws and regulations as well.[14]

*D. Vague Statutes are Unacceptable*

Even if there were but a few crimes on the books, the terms of our criminal laws ought to be drafted with precision. There is precious little difference between a secret law and a published regulation that cannot be understood. History is filled with examples of oppressive governments that persecuted unpopular groups and innocent individuals by keeping the law's requirements from the people. For example, the Roman emperor Caligula posted new laws high on the columns of buildings so that ordinary citizens could not study the laws. Such abominable policies were discarded during the Age of Enlightenment, and a new set of principles—known generally as the "rule of law"—took hold. Those principles included the requirements of legality and specificity.

"Legality" means a regularized process by which crimes are designated and prosecuted by the government. The Enlightenment philosophy was expressed by the maxim *nullum crimen sine lege* (there is no crime without a law). In other words, people can be punished only for conduct previously prohibited by law. That principle is clearly enunciated in the ex post facto clause of the Constitution (article I, section 9). But the purpose of the ex post facto clause can be subverted if the legislature can enact a criminal law that condemns conduct in general terms, such as "dangerous and harmful" behavior. Such a law would not give people fair warning of the prohibited conduct. To guard against the risk of arbitrary enforcement, the Supreme Court has said that the law must be clear:

> A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, should be so clearly expressed that an ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.[15]

The principles of legality and specificity operate together to reduce the likelihood of arbitrary and discriminatory application of the law by keeping policy matters away from police officers, administrative bureaucrats, prosecutors, judges, and members of juries, who would have to resolve ambiguities on an ad hoc and subjective basis.

Although the legality and specificity requirements are supposed to be among the first principles of American criminal law, a "regulatory" exception has crept into modern jurisprudence. The Supreme Court has unfortunately allowed "greater leeway" in regulatory matters because the practicalities of modern governance supposedly limit "the specificity with which legislators can spell out prohibitions."[16]

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[11] *United States v. Wilson,* 159 F.3d 280 (1998).

[12] Ibid., p. 296 (Posner, J., dissenting).

[13] Ibid. The Wilson prosecution was *not* a case of one prosecutor using poor judgment and abusing his power. See, for example, *United States v. Emerson,* 46 F.Supp. 2d 598 (1999).

[14] See, generally, Ronald A. Cass, "Ignorance of the Law: A Maxim Reexamined," *William and Mary Law Review* 17 (1976): 671.

[15] *Connally v. General Construction Company,* 269 U.S. 385, 393 (1926) (internal quotation marks omitted).

[16] *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162–163 (1972).

During the past 50 years, fuzzy legal standards, such as "unreasonable," "unusual," and "excessive," have withstood constitutional challenge.

Justice Scalia recently acknowledged that this trend has gone too far and ought to be halted:

> We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt.[17]

The Framers of the American Constitution understood that democracy alone was no guarantor of justice. As James Madison noted, "It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow."[18]

The first step toward addressing the problem of vague and ambiguous criminal laws would be for the Congress to direct the courts to follow the rule of lenity in all criminal cases.[19] Legal uncertainties should be resolved in favor of private individuals and organizations, not the government.

*E. Abolish Strict Liability Offenses*

Two basic premises that undergird Anglo-American criminal law are the requirements of *mens rea* (guilty mind) and *actus reus* (guilty act).[20] The first requirement says that for an act to constitute a crime there must be "bad intent." Dean Roscoe Pound of Harvard Law School writes, "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong."[21] According to that view, a man could not be prosecuted for leaving an airport with the luggage of another if he mistakenly believed that he owned the luggage. As the Utah Supreme Court noted in *State v. Blue* (1898), *mens rea* was considered an indispensable element of a criminal offense. "To prevent the punishment of the innocent, there has been ingrafted into our system of jurisprudence, as presumably in every other, the principle that the wrongful or criminal intent is the essence of crime, without which it cannot exist."[22]

By the same token, bad thoughts alone do not constitute a crime if there is no "bad act." If a police officer discovers a diary that someone mistakenly left behind in a coffee shop, and the contents include references to wanting to steal the possessions of another, the author cannot be prosecuted for a crime. Even if an off-duty police officer overhears two men in a tavern discussing their hatred of the police and their desire to kill a cop, no lawful arrest can be made if the men do not take action to further their cop-killing scheme. The basic idea, of course, is that the government should not be in the business of punishing "bad thoughts."

When *mens rea* and *actus reus* were fundamental prerequisites for criminal activity, no person could be branded a "criminal" until a prosecutor could persuade a jury that the accused possessed "an evil-meaning mind with an evil-doing hand."[23] That understanding of crime—as a compound concept—was firmly entrenched in the English common law at the time of the American Revolution.

Over the years, however, the moral underpinnings of the Anglo-American view of criminal law fell into disfavor. The *mens rea* and *actus reus* requirements came to be viewed as burdensome restraints on well-meaning lawmakers who wanted to solve social problems through administrative regulations. As Professor Richard G.

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[17] *Sykes v. United States,* 131 S. Ct. 2267, 2284.

[18] James Madison, "Federalist Paper 62," in *The Federalist Papers,* ed. Clinton Rossiter (New York: New American Library, 1961), p. 381.

[19] Pennsylvania has protected its citizens from overzealous prosecutors with such a law for many years. See 1 Pa.C.S.A. 1208.

[20] Wayne R. LaFave and Austin W. Scott Jr., *Criminal Law,* 2nd. ed. (St. Paul, MN: West Publishing Co., 1986), pp. 193–94.

[21] Quoted in *Morissette v. United States,* 342 U.S. 246, 250 n. 4 (1952).

[22] *Utah v. Blue,* 53 Pac. 978, 980 (1898).

[23] *Morissette v. United States,* 342 U.S. 246, 251 (1952).

Singer has written, "Criminal law . . . has come to be seen as merely one more method used by society to achieve social control."[24]

The change began innocently enough. To protect young girls, statutory rape laws were enacted that flatly prohibited sex with girls under the age of legal consent. Those groundbreaking laws applied even if the girl lied about her age and consented to sex and if the man reasonably believed the girl to be over the age of consent. Once the courts accepted that exception to the *mens rea* principle, legislators began to identify other activities that had to be stamped out—even at the cost of convicting innocent-minded people.

The number of strict liability criminal offenses grew during the 20th century as legislators created scores of public welfare offenses relating to health and safety. Each time a person sought to prove an innocent state-of-mind, the Supreme Court responded that there is "wide latitude" in the legislative power to create offenses and "to exclude elements of knowledge and diligence from [their] definition."[25] Those strict liability rulings have been sharply criticized by legal commentators. Professor Herbert Packer argued that the creation of strict liability crimes was both inefficacious and unjust.

> It 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, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventative or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of mens rea.[26]

A dramatic illustration of the problem was presented in *Thorpe v. Florida* (1979).[27] John Thorpe was confronted by a thief who brandished a gun. Thorpe got into a scuffle with the thief and wrested the gun away from him. When the police arrived on the scene, Thorpe was arrested and prosecuted under a law that made it illegal for any felon to possess a firearm. Thorpe tried to challenge the application of that law by pointing to the extenuating circumstances of his case. The appellate court acknowledged the "harsh result," but noted that the law did not require a vicious will or criminal intent. Thus, self-defense was not "available as a defense to the crime."[28]

True, *Thorpe* was a state case from 1979. The point here is simply to show the drift of our law. As Judge Benjamin Cardozo once quipped, once a principle or precedent gets established, it is usually taken to the "limit of its logic." For a more recent federal case, consider what happened to Dane Allen Yirkovsky. Yirkovsky was convicted of possessing one round of .22 caliber ammunition and for that he received minimum mandatory *15-year sentence.*[29] Here are the reported circumstances surrounding his "crime."

> In late fall or early winter of 1998, Yirkovsky was living with Edith Turkington at her home in Cedar Rapids, Iowa. Instead of paying rent, Yirkovsky agreed to remodel a bathroom at the home and to lay new carpeting in the living room and hallway. While in the process of removing the old carpet, Yirkovsky found a Winchester .22 caliber, super x, round. Yirkovsky put the round in a small box and kept it in the room in which he was living in Turkington's house.
>
> Subsequently, Yirkovsky's ex-girlfriend filed a complaint alleging that Yirkovsky had [some of] her property in his possession. A police detective spoke to Yirkovsky regarding the ex-girlfriend's property, and Yirkovsky granted him permission to search his room in Turkington's house. During

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[24] Richard G. Singer, "The Resurgence of *Mens Rea:* III—The Rise and Fall of Strict Criminal Liability," *Boston College Law Review* 30 (1989): 337. See also *Special Report: Federal Erosion of Business Civil Liberties* (Washington: Washington Legal Foundation, 2008).

[25] *Lambert v. California,* 355 U.S. 225, 228 (1957).

[26] Herbert Packer, "Mens Rea and the Supreme Court," Supreme Court Review (1962): 109. See also Jeffrey S. Parker, "The Economics of Mens Rea," Virginia Law Review 79 (1993): 741; Craig S. Lerner and Moin A. Yahya, "'Left Behind' After Sarbanes-Oxley," American Criminal Law Review 44 (2007): 1383.

[27] *Thorpe v. Florida,* 377 So.2d 221 (1979).

[28] Ibid., p. 223.

[29] See *United States v. Yirkovsky,* 259 F.3d 704 (2001).

this search, the detective located the .22 round. Yirkovsky admitted to police that he had placed the round where it was found by the detective.[30]

The appellate court found the penalty to be "extreme," but affirmed Yirkovsky's sentence as consistent with existing law.[31]

Strict liability laws should be abolished because their very purpose is to divorce a person's intentions from his actions. But if the criminal sanction imports blame—and it does—it is a perversion to apply that sanction to self-defense and other acts that are not blameworthy. Our criminal law should reflect the old Latin maxim, *actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty).[32]

*F. Abolish Vicarious Liability Offenses*

Everyone agrees with the proposition that if a person commands, pays, or induces another to commit a crime on that person's behalf, the person should be treated as having committed the act.[33] Thus, if a husband hires a man to kill his wife, the husband is also guilty of murder. But it is another matter entirely to hold one person criminally responsible for the *unauthorized* acts of another. "Vicarious liability," the legal doctrine under which a person may be held responsible for the criminal acts of another, was once "repugnant to every instinct of the criminal jurist."[34] Alas, the modern trend in American criminal law is to embrace vicarious criminal liability.

Vicarious liability initially crept into regulations that were deemed necessary to control business enterprises. One of the key cases was *United States v. Park* (1975).[35] John Park was the president of Acme Markets Inc., a large national food chain. When the Food and Drug Administration found unsanitary conditions at a warehouse in April 1970, it sent Park a letter demanding corrective action. Park referred the matter to Acme's vice president for legal affairs. When Park was informed that the regional vice president was investigating the situation and would take corrective action, Park thought that was the end of the matter. But when unsanitary warehouse conditions were found on a subsequent inspection, prosecutors indicted both Acme and Park for violations of the Federal Food, Drug and Cosmetic Act.

An appellate court overturned Park's conviction because it found that the trial court's legal instructions could have "left the jury with the erroneous impression that [Park] could be found guilty in the absence of 'wrongful action' on his part" and that proof of that element was constitutionally mandated by due process.[36] The Supreme Court, however, reversed the appellate ruling. Chief Justice Warren Burger opined that the legislature could impose criminal liability on "those who voluntarily assume positions of authority in business enterprises" because such people have a duty "to devise whatever measures [are] necessary to ensure compliance" with regulations.[37] Thus, under the rationale of *Park,* an honest executive can be branded a criminal if a low-level employee in a different city disobeys a supervisor's instructions and violates a regulation—even if the violation causes no harm whatsoever.[38]

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[30] Ibid., pp. 705–706.

[31] In my view, Congress should not stand by secure in the knowledge that such precedents exist. Justice Anthony Kennedy has made this point quite well: "The legislative branch has the obligation to determine whether a policy is wise. It is a grave mistake to retain a policy just because a court finds it constitutional. . . . Few misconceptions about government are more mischievous than the idea that a policy is sound simply because a court finds it permissible. A court decision does not excuse the political branches or the public from the responsibility for unjust laws." Anthony M. Kennedy, "An Address to the American Bar Association Annual Meeting," reprinted in In the Name of Justice (Washington, D.C.: Cato Institute, 2009), p. 193.

[32] See Wayne R. LaFave and Austin W. Scott Jr., *Criminal Law,* 2nd. ed. (St. Paul, MN: West Publishing Co., 1986), p. 212.

[33] Francis Bowes Sayre, "Criminal Responsibility for the Acts of Another," Harvard Law Review 43 (1930): 689, 690.

[34] Ibid., p. 702.

[35] *United States v. Park,* 421 U.S. 658 (1975). Although many state courts have followed the reasoning of the *Park* decision with respect to their own state constitutions, some courts have recoiled from the far-reaching implications of vicarious criminal liability. For example, the Pennsylvania Supreme Court has held that "a man's liberty cannot rest on so frail a reed as whether his employee will commit a mistake in judgment." *Commonwealth v. Koczwara,* 155 A.2d 825, 830 (1959). That Pennsylvania ruling, it must be emphasized, is an aberration. It is a remnant of the common law tradition that virtually every other jurisdiction views as passe'.

[36] *United States v. Park,* 421 U.S. 658, 666 (1975).

[37] Ibid., p. 672.

[38] "[T]he willfulness or negligence of the actor [will] be imputed to him by virtue of his position of responsibility." *United States v. Brittain,* 931 F.2d 1413, 1419 (1991); *United States v. Johnson & Towers, Inc.,* 741 F.2d 662, 665 n. 3 (1984). See generally Joseph G. Block and Nancy A. Voisin, "The Responsible Corporate Officer Doctrine—Can You Go to Jail for What You *Don't* Know?" Environmental Law (Fall 1992).

In 1994, Edward Hanousek was employed as a roadmaster for a railroad company. In that capacity, Hanousek supervised a rock quarrying project near an Alaska river. During rock removal operations, a backhoe operator accidentally ruptured a pipeline—and that mistake led to an oil spill into the nearby river. Hanousek was prosecuted under the Clean Water Act even though he was off duty and at home when the accident occurred. The case prompted Justice Clarence Thomas to express alarm at the direction of the law: "I think we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations."[39]

Note that vicarious liability has *not* been confined to the commercial regulation context.[40] Pearlie Rucker was evicted from her apartment in a public housing complex because her daughter was involved with illicit drugs. To crack down on the drug trade, Congress enacted a law that was so strict that tenants could be evicted if one of their household members or guests used drugs. The eviction could proceed even if the drug activity took place outside the residence. Also under that federal law, it did not matter if the tenant was totally *unaware* of the drug activity.[41]

Vicarious liability laws are unjust and ought to be removed from the federal criminal code.

### III. H.R. 1823

One of the most serious problems with the current code is that there is no readily accessible list of federal crimes. Title 18 is a collection of criminal statutes, but it is not comprehensive. Scores of other federal crimes can be found in the other forty-nine titles of the U.S. Code. H.R. 1823 helps to bring some order to the haphazardness by grouping offenses into a more rational arrangement and pruning federal offenses that are duplicative and unnecessary. However, I do have reservations about several aspects of the bill that I will outline below.

A. H.R. 1823 does not improve procedural justice for persons facing federal criminal prosecution. The bill would retain those provisions in federal law that allow for the imposition of strict liability and vicarious liability. Further, H.R. 1823 does not codify the rule of lenity which could ameliorate the problem of vagueness in the statutes and regulations.

B. H.R. 1823 does not address the problem of agency rule-making, but retains the current arrangement where unelected officials can promulgate rules that would carry criminal penalties.

C. H.R. 1823 creates new federal offenses that are problematic. Take, for example, the new obstruction provision:

> Section 1135. Obstruction of Criminal Investigations
>
> Whoever, being an officer of a financial institution, with the intent to obstruct a judicial proceeding, notifies any other person about the existence or contents of a subpoena for records of that financial institution, or information that has been furnished in response to that subpoena, shall be imprisoned not more than 5 years.

This provision raises several questions, such as whether the financial institution may consult with legal counsel with regard to the content of the subpoena. The provision would nullify private contractual arrangements between customers and their financial institutions. And there is a basic issue of free speech here.[42] Moreover, if this provision is considered desirable, will a future Congress extend its logic beyond subpoenas to search warrants as well? How will Congress be able to exercise oversight when the organizations and persons affected cannot come forward freely? For these reasons, this provision should be removed.

Another problematic offense concerns the interference with federal employees:

> § 113. Interference with Federal officers and employees
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> Whoever interferes with any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official du-

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[39] *Hanousek v. United States,* 528 U.S. 1102 (2000) (Thomas, J., dissenting from the denial of certiorari).

[40] See Susan S. Kuo, "A Little Privacy, Please: Should We Punish Parents for Teenage Sex?" *Kentucky Law Journal* 89 (2000): 135.

[41] *Department of Housing and Urban Development v. Rucker,* 535 U.S. 125 (2002).

[42] See *Doe v. Ashcroft,* 334 F.Supp.2d 471 (2004).

> ties, or any individual assisting such an officer or employee in the performance of such duties or on account of that assistance while that person is engaged in, or on account of, the performance, official duties shall be imprisoned not more than one year.

Again, the sweeping language employed here—undefined "interference"—raises several questions. First, what problem is this provision seeking to address? Is it necessary to cover every employee of the federal government? If an employee at the Department of Labor is suspected of child abuse, for example, can the local child protective services people run afoul of this provision because they want to interview a reluctant and evasive suspect during work hours? What if the ex-spouse of a postal carrier confronts the employee about missing another pre-arranged drop-off of a child in a joint-custody situation? If the postal employee would rather not be bothered, is the brief confrontation a criminal offense? It is far from clear how far federal agents will interpret the "interference" term. For this reason, this provision should be dropped from the bill.

D. Some of the offenses that H.R. 1823 would eliminate ought to be retained. Here are three statutes concerning the execution of federal warrants.

> § 2234. Authority exceeded in executing warrant
>
> Whoever, in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity, shall be fined under this title or imprisoned not more than one year, or both.
>
> § 2235. Search warrant procured maliciously
>
> Whoever maliciously and without probable cause procures a search warrant to be issued and executed, shall be fined under this title or imprisoned not more than one year, or both.
>
> § 2236. Searches without warrant
>
> Whoever, being an officer, agent, or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States, searches any private dwelling used and occupied as such dwelling without a warrant directing such search, or maliciously and without reasonable cause searches any other building or property without a search warrant, shall be fined under this title for a first offense; and, for a subsequent offense, shall be fined under this title or imprisoned not more than one year, or both.

Since all three provisions limit the authority of federal agents, there is no problem with respect to a constitutional basis for congressional authority. And since all three provisions are statutes, there is no problem with respect to agency rule-making. These statutes do not duplicate state crimes and they advance an important interest—that abuses concerning the procurement and execution of warrants are not only unprofessional, but criminal.

E. In addition to substantive offense changes and reorganization, H.R. 1823 also seeks to make changes to federal sentencing. For example, the bill seeks to expand mandatory minimum sentencing in some areas while removing fines as a punishment option in other areas. These sentencing changes, whatever their respective merits may be, make an ambitious endeavor unnecessarily complex. Sentencing changes should be considered and scrutinized in a separate legislative proposal.

F. As previously noted, the U.S. Code is much too complex for the average person to understand. As a result, it is too often a trap for innocent persons. H.R. 1823 falls short with respect to addressing this serious problem. In fact, wherever the term "willfully" is replaced by the term "knowingly," the code is actually made worse.[43] Every federal regulation that entails conduct that is not intrinsically wrongful should include a willfulness element—and, crucially, "willfulness" must be explicitly defined so that it covers both the law and the facts. To reinforce that safeguard, federal law should also make two defenses available to all defendants in all cases: (1) a good faith belief in the legality of one's conduct; and (2) an inability to comply with any legal requirement. These safeguards exist with respect to our complicated tax code but they ought to be expanded to the rest of the U.S. Code as well.

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[43] See Brian W. Walsh and Tiffany M. Joslyn, Without Intent (April 2010), p. 43, note 77.

IV. CONCLUSION

The federal criminal code has become so voluminous that it not only bewilders the average citizen, but also the most able attorney. Our courthouses have become so clogged that there is no longer adequate time for trials. And our penitentiaries are now operating beyond their design capacity—many are simply overflowing with inmates. These developments evince a criminal law that is adrift. To get our federal system back "on track," Congress should take the following actions:

- Discard the old maxim that "ignorance of the law is no excuse." Given the enormous body of law presently on the books, this doctrine no longer makes any sense.
- Minimize the injustice of vaguely written rules by restoring traditional legal defenses such as diligence, good-faith, and actual knowledge.
- Restore the rule of lenity for criminal cases by enacting a statute that will explicitly provide for the "strict construction" of federal criminal laws.
- Abolish the doctrine of strict criminal liability as well as the doctrine of vicarious liability. Those theories of criminal liability are inconsistent with the Anglo-American tradition and have no place in a free society.

These reform measures should be only the beginning of a fundamental reexamination of the role of the federal government, as well as the role of the criminal sanction, in American law.

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Mr. SENSENBRENNER. Without objection. Professor Saltzburg.

**TESTIMONY OF STEPHEN SALTZBURG, WALLACE AND BEVERLEY WOODBURY UNIVERSITY PROFESSOR, GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW**

Mr. SALTZBURG. Mr. Chairman, Vice Chairman Gohmert, Ranking Member Scott.

Mr. SENSENBRENNER. Could you please push the mike button?

Mr. SALTZBURG. I am pushing it, but——

Mr. SENSENBRENNER. Could we get some of our technical gurus to—or Mr. Lynch, why don't you pass your mike over to Professor Saltzburg, and that will solve the problem.

Mr. SALTZBURG. Mr. Chairman, Vice Chairman Gohmert, Ranking Member Scott and Members of the Committee, I too am very happy to be here today. It is a special thrill for me to be here with two former Attorneys General whom I served. And I would like to say that I think it is a tribute to both of them that they pay close attention to issues of justice and come before you and speak so wisely based on their experience. And I agree with every word they said. And I agree with what Mr. Lynch said. In fact, I have testified before Congress many times. And this is the only time I can remember where I agree with everybody. And therefore, I don't want to repeat what they said, Mr. Chairman. What I would like to do is hit some points that I think are worth discussing.

You raised the issue of attempt and conspiracy, inchoate crimes. As you are well aware, the Model Penal Code takes one view. The States are basically divided in whether you should punish those crimes the same as completed offenses. I think some careful consideration needs to be given to that issue. It is not a simple one. After 200 years, we still have division about how best to treat it.

When it comes to mens rea, I think everyone on this panel is thrilled that for one of the rare times Congress is actually concerned about whether or not we are convicting people who are innocent, people who don't have fair warning about the law. In the

past, so often in hearings the attempt seems to have been made to scare people about crime. And instead of worrying about Americans who are prosecuted and whether they are prosecuted fairly, the effort was let's just be tough on crime. Now I think the Congress is being smart. It is looking at how to have a Criminal Code that will be streamlined, accessible, and will work. And I think that is one of the reasons we all applaud that. When it comes to the choice of mens rea, I think the truth is that "willfully" or "knowingly" are terms that can't work across the board. That knowingly is almost as construed in as many different ways as willfully is by the courts. And I think one of the things that the Committee should consider is whatever term you choose, and I recommended for serious crimes, the most serious crimes using the Model Penal Code purposely or purposefully. And I think that whatever term you choose or terms, and you may very well have more than one, it is important for you to define that term, and not to leave it for the courts to say this is our definition. It is clear, and it could be captured then by every Federal court in a simple jury instruction, and it would go a long way to simplifying Federal criminal law.

As the Committee goes about taking a look at the Federal Code, to me it makes a lot of sense, and I think this was mentioned by other speakers, not just to reorganize, but to take a hard look at the structure, a hard look at whether or not the ranking of offenses is right, whether or not the penalty structure remains the same. Because I think we could all honestly agree that over decades many Congresses have added statutes to the Criminal Code without going back and saying how do they compare to others? And in large measure, I think it has been left to the Sentencing Commission to try to figure out how to organize things in a way that makes sense. But that is a job for Congress in the first instance. It is not a job for just a Sentencing Commission. I think this is an opportunity to do that. And I am not urging any particular ranking at this moment or any particular penalty structure. I am just saying that this is something that would work well at a time when you are looking to reorganize the Code.

The other thing about this hearing I can't help but remark on is, Mr. Chairman, it is one of the rare times where the Chair of the Committee has actually said let's have a discussion. And I can't tell you how welcome that is to say let's talk about this. Let's get good minds together, experienced lawyers, and see if we can do something right for the American people, see if we can enact a statute or reform a code in a way that would make us proud. We have got a lot of models out there, not just the Model Penal Code, we have got a lot of work done by States. And if we took a careful look, if you took a careful look, I think the improvement in the Federal Criminal Code could be remarkable. And it is not, as I think we can tell, it is not a Democratic issue or Republican issue, it is not a liberal or conservative issue, it is an issue about fairness, about the structure of American law, about fair notice, about fair definitions of crime.

That is why I think I agree very much with Mr. Conyers. This is one of the most exciting hearings that I have had an opportunity to participate in. And Mr. Chairman, I think it is because you

started us down this road of this discussion, and I couldn't be happier to be a part of it. Thank you very much for having me.

[The prepared statement of Mr. Saltzburg follows:]

TESTIMONY OF STEPHEN A. SALTZBURG

Wallace and Beverley Woodbury University Professor
George Washington University Law School

**BEFORE THE HOUSE SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY**

**CRIMINAL CODE MODERNIZATION AND SIMPLIFICATION ACT OF 2011**

December 13, 2011

Chairman Sensenbrenner, Vice-Chairman Gohmert, Ranking Member Scott, and Members of the Committee, I thank you for inviting me to participate in this hearing on H.R. 1823, the "Criminal Code Modernization and Simplification Act of 2011." Like many lawyers who have worked with the federal criminal code over many years, I welcome the idea of seeing it better organized, simplified and generally made more accessible.

It is a special pleasure to appear as a witness with three others whose work I admire. I had the honor of being Deputy Assistant Attorney General in the Department of Justice Criminal Division under both Attorney General Meese and Attorney General Thornburgh and am delighted to be able to testify along with them. In the past Mr. Lynch and I have testified before the Subcommittee, and I always benefit from hearing his ideas.

I want to begin by complimenting the Chairman on the way the draft bill has been presented. The Chairman has indicated that his desire is to have a discussion on modernization and simplification of the federal criminal code: "Rep. Sensenbrenner is introducing this measure to continue the dialogue and process for rewriting the criminal code, with the hope that other Members, the Senate, the judiciary, the Justice Department, criminal law professors and other interested professionals will provide input and seek to develop a more comprehensive re-write." Introduction to the Section by Section Analysis of H.R. 23.

Anyone interested in federal criminal law should welcome an opportunity to discuss the code in its present state and how it could be improved. It is refreshing to have

presented a draft for discussion rather than a bill in final form that witnesses must either support or oppose.

I cannot claim to have read the entire draft bill with care or to have familiarity with each section of it. Careful study of the entire bill would be an enormous undertaking, deserving of much more time than I could commit this month.at this time. As a result of my being familiar with only some of the bill and not being in a position to comment on many provisions, I am limiting my testimony to some general principles that I support and to observations about some specific aspects of the bill that leaped out at me in my limited review of it.

There are three general principles that the bill seems to embrace that make good sense and should receive widespread support.

1. Moving all federal crimes into title 18 of the United States Code would make it easier for lawyers, judges, legislators and the general public to understand where to find federal crimes, how to count them, and how they are defined.
2. Reorganizing the code so that crimes of a similar character are grouped together complements the placement of them in title 18 and should also make it easier to find federal crimes and see how they relate to one another.
3. When two or more statutes punish exactly the same conduct, combining those statutes into a single crime (with lesser included offenses where appropriate) makes sense because it reduces the possibility that individuals will be convicted of different crimes for doing the same acts simply because of a prosecutor's choice among available statutes.

4. Strengthening and clarifying *mens rea* requirements should receive widespread support, provided that the *mens rea* terminology that is substituted does not actually result in a change in the law or a lessening of the government's burden of proof.
5. Eliminating statutes that are on the books but not actually used by federal prosecutors should reduce some of the clutter in the code, and might be an historic first step in deciding that eliminating crimes from a criminal code might be as much, if not more, in the public interest as adding new crimes.

It appears from my admittedly incomplete review of the draft bill that these general principles are drivers of the draft. If I were confident that the draft advanced these principles without actually making substantive changes in federal criminal law, I would be more comfortable with the draft in its current form. But even my limited review suggests that the draft, consciously or unconsciously, does things that are problematic.

My first concern arises from the proposal to replace "willfully" with "knowingly." I am not alone in believing that many federal crimes, especially those relating to paperwork and regulatory offenses, now contain *mens rea* elements that are insufficiently demanding. As a general matter, I am opposed to strict liability crimes, and would like to see them eliminated from federal criminal law. It is not surprising, therefore, that I applaud the addition of *mens rea* requirements in section 549.

But, replacement of "willfully" with "knowingly" is arbitrary and is not a neutral move. It actually weakens *mens rea* elements for some crimes and accordingly raises the possibility that people will be convicted who would not be convicted under current law.

It is also doubtful that the replacement will increase clarity given the fact that "knowingly" like "willfully" is subject to varied interpretations.

If one had to choose between the two terms, "willfully" would be the better choice, because it provides more (and appropriate) protection to the accused and avoids conviction of individuals who should be acquitted, because it requires that the prosecution demonstrate that an individual act both knowingly and with a bad purpose. The term "knowingly" standing alone weakens the *mens rea* requirement. This is most troublesome when an offense involves a broad range of conduct that is subject to a number of different interpretations.

As a general proposition it seems like a particularly bad idea to simply assume that everywhere in the criminal code where "willfully" is used, "knowingly" should be substituted. More care is required. It is essential that Congress make a careful, deliberate decision as to which *mens rea* requirement should be attached to which particular conduct in defining a federal crime. This is especially important when the conduct constituting a crime is broadly defined and statutory language may be subject to different interpretations.

Congress could consider using the term "purposely" as the *mens rea* requirement for many serious crimes and define it as it is defined in Section 2.02 (2) (a) of the Model Penal Code:

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

(i) If the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) If the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

Congress could also consider adopting a general provision like 2.02 (3) of the Model Penal Code which would assume a *mens rea* requirement for any statute not explicitly requiring one.

So that I am not misunderstood, I want to be clear that I am not suggesting that "knowingly" is always inappropriate as a *mens rea* requirement. That is not the case. "Knowingly" can be exactly the right *mens rea* provision with respect to a material element of an offense, but it is not necessarily the right *mens rea* provision for all material elements of all offenses. The important thing is that Congress decide for each crime what the right *mens rea* provision is, and that Congress recognize that it is not the same for all crimes.

It cannot be doubted, I think, that substituting "knowingly" for "willfully" will not only increase the probability of convicting people whose conduct should not be criminalized, but it also would change federal law in some instances in significant ways. Consider, for example, the United States Supreme Court decisions in *Ratzlaff v. United States*, 510 U.S. 135 (1994), and *Cheek v. United States*, 498 U.S. 192 (1991). In *Ratzlaff*, the Court addressed alleged violations of the Bank Secrecy Act and held that in order to establish, for purposes of 31 U.S.C. § 5322(a), that an accused "willfully"

violated § 5324(3), the prosecution must prove that the accused acted with knowledge that his conduct was unlawful in part because the willfulness requirement of § 5322(a), when applied to other provisions of the Bank Secrecy Act, consistently had been read to require both knowledge of the reporting requirement and a specific intent to commit the crime. In *Cheek*, the Supreme Court wrote that "[w]illfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." 498 U.S. at 201. Clearly, the substitution of "knowingly" in the relevant statutes would mark a clear change in the law. That is cause for concern.

My second concern relates to the crime of attempt. Under the current code, there is no general statute proscribing attempts to commit all of the substantive crimes found anywhere in the Code. Instead, attempt is a crime only when Congress has actually made it one in a specific statute. It would be a major change, not a neutral or minor one, to make an attempt to violate any statute a crime. At the moment, attempt is limited to statutes as to which Congress has decided that it is appropriate to punish not only a completed act but also an attempt to do the act. A universal decision to make attempt applicable to all crimes raises special concerns when regulatory crimes are at issue. If federal crimes were narrowly defined, a general provision making attempt applicable to all such crimes might make good sense. But, it seems that Congress has recognized, appropriately, that a criminal code as vast as the federal criminal code requires a more cautious approach to attempt.

It is also questionable that attempt should be punished the same as a completed act. In many states, attempt is punished much less severely (one half the punishment, for example) than a completed offense. Currently, the Federal Sentencing Guidelines recommend significantly decreasing the prison sentence for attempt unless the defendant committed, or would have committed but for interruption, all the acts necessary to complete the substantive offense. See Guidelines Manual §2X1.1(b)(1) (2011 Manual). The Model Penal Code (§ 5.505 (1)) does punish most attempts the same as completed crimes but contains an exception for the most serious crimes. This subject warrants more discussion and analysis.

Another reason to worry about the approach is that it would result in mandatory minimum sentences imposed on offenders who have not completed a crime.

A third concern relates to conspiracy. Just as there is reason to worry about punishing attempts the same as completed offenses, there is reason to worry about changing the penalty structure of the code so that a conviction for conspiracy will make the defendant subject to the same penalties as for the completed offense. This is a major change in the law that will result in increasingly harsh sentences for conspiracy. It is at odds with the judgments made by many states and, along with the approach to attempt, raises serious questions as to whether uncompleted offenses should be punished the same as completed offenses. Here too there is reason to worry that the approach would result in mandatory minimum sentences imposed on offenders who have not completed a crime.

I do applaud the removal of "conspiracy to defraud the United States" as an offense. It eliminates the current possibility where a defendant can be charged under 18 U.S.C. § 371 of a "conspiracy to defraud the United States" without the charge being

connected to any particular crime in the code. This change should promote clarity as to what is a federal crime. This is also true of chapter 3, section 5, which makes clear that an overt act is required to prove conspiracy.

My fourth concern is about probation and fines. If I read the draft bill correctly, sections 3551 and 3561 together would authorize probation for offenses below the class B felony level whether or not probation is specifically mentioned as a sentence option in a statute. I support this approach, recognizing that the federal sentencing guidelines, even though advisory, make probation unlikely for most crimes. Less clear is whether sections 3551 and 3571 make a fine a sentence option for a number of crimes where it is an option now. For example, section 1006 changes the possible penalty for 18 U.S.C. § 219 from fine and/or imprisonment to just imprisonment. This is also true of section 1007 and the change it makes to 18 U.S.C. § 224. Similar changes seem to be made in many places in the draft. Reducing the availability of sentencing options is a major substantive change, not a neutral rewrite.

One of the goals of the Sentencing Reform Act was to make fines a true alternative to incarceration, something that seems almost forgotten in the current era of mass incarceration. Consider this language, for example, from the Senate Report:

> Current law is not particularly flexible in providing the sentencing judge with a range of options from which to fashion an appropriate sentence. The result is that a term of imprisonment may be imposed in some cases in which it would not be imposed if better alternatives were available. In other cases, a judge might impose a longer term than would ordinarily be appropriate simply because there were no available alternatives that served the purposes he sought to achieve with a

> long sentence. For example, maximum fines in current law are generally too small to provide punishment and deterrence to major offenders. Frequently, a fine does not come close to the amount the defendant has gained by committing the offense. . . ..

S. Rep. No. 98-255, at 50 (footnote omitted). The draft bill appears to remove the flexibility that the Sentencing Reform Act intended to be part of a sentencing scheme.

A fifth concern is about changes to the controlled substance laws. Chapter 17 uses the term "imprisoned" instead of "sentenced to a term of imprisonment" when, for example, stating mandatory minimum terms. This may affect the calculation of good time credits. For example, section 403(a) which roughly corresponds to 21 U.S.C. §960(b) and sets out the basic punishment structure, states that if an offense involved a "large quantity of drugs" (elsewhere defined), "the offender shall be imprisoned not less than ten years," rather than "shall be sentenced to a term of imprisonment of not less than ten years."

The draft defines a "career offender" as "a person who is convicted under this chapter after two or more prior convictions for a felony drug offense" and imposes a sentence of life in prison for such career offenders. It does not require that the prior convictions "have become final" as current law does before triggering a life sentence for defendants who commit a drug offense with two priors.

Where current law mandates a 20 year minimum when "death or serious bodily injury results from the use of [an illegal] substance," the chapter would require the same mandatory minimums should death or serious bodily injury result "to any person from the

offense." For example, see section 403(a)(1), which addresses §960(b). This would appear to broaden the reach of the death results provision currently in the law.

A sixth concern is about substantive changes to sex offenses that are found in chapter 13. The chapter would make the death penalty available to less serious, more broadly defined, crimes than under current law. Currently, § 2245(a) mandates that a person who "murders" an individual in the course of an offense under chapter 109A or sections 1591, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425 shall be punished by death or imprisoned for any terms of years or life. The proposed bill replaces that with section 204, which reads: "Whoever, in the course of an offense under this subchapter, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life."

Chapter 13 does reduce or eliminate some mandatory minimum sentences -- which is something Congress almost never does. Just as eliminating some federal crimes makes good sense, reducing or eliminating mandatory minimum punishments that appear unnecessarily harsh also makes sense. An example of a reduction is found in section 212, which lowers a mandatory minimum penalty originally set at 10 years in §2422(b) (enticing a minor to engage in prostitution, etc.) to 5 years. A similar example is found in section 213, which lowers the mandatory minimum in §2423(a) (transportation of a minor with intent to engage in criminal sexual activity) from "not less than 10 years or for life" to "not less than 5 years and not more than 30 years." Section 221(e) completely eliminates a mandatory minimum for engaging in conduct outlined in the section "that results in the death of a person." The proposed new punishment is "death or imprisoned

for any term of years or for life." The current punishment identified in §2251(e) is "death or imprisoned for not less than 30 years or for life."

Finally, I question whether it makes sense to reform the code without examining the penalty structure currently in place. The federal prison population has grown appreciably as sentences are at historical highs. All reputable studies of penal policy show that longer sentences have no more deterrent impact than shorter sentences for many crimes. There are some offenders who should be locked away for substantial periods, even life, because they are a danger to society and will remain a danger. But, there is reason to believe that many sentences are higher than they need be. An inquiry into appropriate penalties would require an examination of mandatory minimum statutes, particularly those applicable in drug and gun cases, and how these statutes may have the effect of ratcheting up sentences for other crimes to a level that is higher than necessary and that results in incarcerating individuals longer than necessary. The fact that the proposed bill reduces mandatory minimum sentences for some sex crimes supports an examination of the ways in which these sentences have driven criminal sentences generally in an upward direction.

In conclusion, I support the effort to bring clarity and simplicity to the federal criminal code. I would go even further, however. I suggest it is time to take a hard look at the criminal justice system as a whole, including our corrections system. It is true that it is more than 50 years since an attempt was made to revise the criminal code. It is also true that as many years have passed since a serious effort to examine the criminal justice system more generally. An effort to reform the criminal code could be part of a more comprehensive look at criminal justice. The National Criminal Justice Commission Act

of 2011, co-sponsored by Senators of both political parties, would provide a vehicle for taking that look. I very much hope that the spirit of entering into a discussion about code reform could be extended to a discussion of all of the major criminal justice issues that have been neglected for many years.

Mr. SENSENBRENNER. Thank you very much, Professor Saltzburg. This is the first time I have been praised by a witness that has been called by my friends on the minority. So we really are off to a good start. I will yield myself 5 minutes.

Both General Meese and General Thornburgh have talked about the problem of having administrative regulations ending up having criminal penalties, and maybe not the criminal penalties that would have been thought about had this Committee gone through it. In yesterday's Wall Street Journal, they had a rather lengthy story, which I won't read, that the headline was, "A Sewage Blunder Earns Engineer a Criminal Record." And a man named Leonard Lewis was an engineer at a senior citizens home, where frequently the residents there flushed adult diapers down the toilet. And it was Mr. Lewis' job, basically, to unplug the sewage system. And when he did so, he put the backed up wastewater into something that he thought would end up in the sewage treatment plant, but actually ended up in Rock Creek. And the EPA came in and threw the book at him. And he ended up getting a $2,500 fine, and he ended up escaping prison because he didn't have a criminal record, and told that to the judge.

Now, this is an example of the civil-criminal penalty mix. Because he was subject to the same criminal law as somebody who knowingly and willingly dumped toxic materials into a navigable water of the United States. So I think we have got two problems with the penalties for violating administrative regulations, one of which is what the criminal penalties are. Because obviously there is no proportionality, because Mr. Lewis didn't have the mens rea that he was committing a crime. It ended up being a strict liability crime. And the other is definitional. Now, both of them are difficult to solve. But relatively speaking, I think it would be easier to classify crimes for administrative regulation violations by this Committee, and thus get jurisdiction over them. And maybe that can bootstrap us into the definitional ones, where we can look at crimes that require mens rea. Which I think unplugging the adult diapers from the toilets at the senior citizens residence is one that certainly should have a mens rea and those that shouldn't.

What is your reaction to that and how can we get to it? Either General Meese or General Thornburgh.

Mr. MEESE. Mr. Chairman, I think that one of the things that I used to teach when I was teaching criminal law, which admittedly was over 30 years ago, but at that time I used to start off the lecture on mens rea by saying there is no such thing—virtually no such thing in the criminal law as strict liability. And at that time it was true. This idea of strict liability as a part of the criminal law is a relatively recent feature, and has been mostly in the kinds of cases that you just cited, the environmental field, some of the business areas, that sort of thing. And I think it is a very dangerous idea to have strict liability where you remove entirely the intent of the individual to even commit a crime or to even do an act that would be criminal.

So I read that same Wall Street Journal article, and I think it was a graphic example of this problem. And I think that the various ideas that have been presented here, including the Judiciary Committee review of anything that carries a criminal penalty, the

review of whether something should be a crime or not, there are two other ways at least that can handle the situations which are not really criminal in nature, the kind of thing you are talking about here.

One, of course, is civil actions, which are readily available to in a sense recompense the community for the damage that was done. A second is, of course, some sort of administrative sanctions, calling them infractions or whatever the situation might be, but where there are several penalties of various sorts such as fines or that sort of thing rather than the potential for prison. So I think that would be one way, but particularly to remove this idea of strict liability from the criminal law.

Mr. SENSENBRENNER. Mr. Thornburgh, I have 9 seconds left. So anything you want to add to that?

Mr. THORNBURGH. Start the clock, Mr. Chairman. I agree with everything that my predecessor and friend and colleague Ed Meese said, and incorporate that in my testimony.

Mr. SENSENBRENNER. Okay. Thank you. Without objection, the Wall Street Journal article referred to by both General Meese and me will be included in the record. The gentleman from Virginia, Mr. Scott.

[The information referred to follows:]

# A Sewage Blunder Earns Engineer a Criminal Record



By GARY FIELDS And JOHN R. EMSHWILLER

There are more than 4,500 federal laws and regulations on the books. Lawrence Lewis was ensnared in one of them and now has a criminal record to show for it. All for a mistake he didn't even know he made. WSJ's Neil Hickey reports from Washington.

BOWIE, Md.—Lawrence Lewis was raised in the projects of Washington, D.C. By the time he was 20, all three of his older brothers had been murdered and his father was dead of a heart attack.

Seeking an escape, he took night classes while working as a janitor for the D.C. school system. He rose to become chief engineer at a military retirement home. He raised his two youngest daughters alone, determined to show them how to lead a crime-free life.

That goal was derailed by blocked toilets.

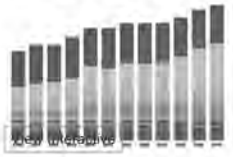
Lawrence Lewis: 'I got a criminal record from my job—when I thought I was doing the right thing?'

In 2007, Mr. Lewis and his staff diverted a backed-up sewage system into an outside storm drain—one they long believed was connected to the city's sewage-treatment system—to prevent flooding in an area where the sickest residents lived. In fact, the storm drain emptied into a creek that ultimately reaches the Potomac River.

Eight months later, Mr. Lewis pleaded guilty in federal court to violating the Clean Water Act. He was given one year's probation and placed under court-ordered supervision.

"I got a criminal record from my job—when I thought I was doing the right thing?" says Mr. Lewis, 60 years old.

Growth in Federal Criminal Sentences



More photos and interactive graphics

Mr. Lewis was caught in Washington's four-decade expansion of federal criminal law. Today, there are an estimated 4,500 federal crimes on the books, a significant increase from the three in the Constitution (treason, piracy and counterfeiting). There is an additional, and much larger, number of regulations written to enforce the laws. One of those regulations ensnared Mr. Lewis.

Many of these federal infractions are now easier to prosecute than in the past because of a weakening in a bedrock doctrine of Anglo-American jurisprudence: the principle of *mens rea*, or "guilty mind," which holds that a person shouldn't be convicted if he hasn't shown an intent to do something wrong. A law without a *mens rea* requirement tripped up Mr. Lewis.

Previously in the Federal Offenses Series

The Journal is examining the vastly expanding federal criminal law book and its

Nobody, including Mr. Lewis, argues that dumping waste into a creek is a good idea. However

Criminal Case Glut Impedes Civil Suits
11/10/2011
Motel Is Latest Stopover in Federal Forfeiture Battle 10/18/11
Hosts Liable for Visitors' Drug Use 10/18/11
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As Criminal Laws Proliferate, More Are Ensnared 07/25/11
Many Failed Efforts to Count Nation's Federal Criminal Laws 07/25/11

critics of the federal criminal justice system argue the government is criminalizing mistakes that might more appropriately be handled with civil fines or injunctions. In Mr. Lewis's case, a Justice Department court filing acknowledged he didn't realize the waste was going into the creek.

In fact, the building's manager and Mr. Lewis's then-supervisor, retired Navy Capt. Craig Sackett, says it was long standard practice at the home—predating Mr. Lewis's tenure—to divert overflow into nearby storm drains if a backup occurred. This prevented floods within the building itself. Like Mr. Lewis, Mr. Sackett says he thought the flow was going into the district's waste-treatment system.

He says he doesn't know why Mr. Lewis was the one prosecuted. "It was either him or me," Mr. Sackett says, "and they certainly talked to me."

Mr. Lewis was one of 788,517 people sentenced for federal crimes between 2000 and 2010. Most were hit with felonies, such as fraud or drug dealing, which can carry prison sentences reaching into the decades.

**788,517**
The number of people sentenced for federal crimes between 2000 and 2010

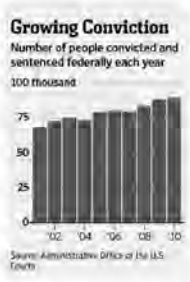
Tens of thousands were found guilty of misdemeanors, which typically carry jail terms of up to a year. Though less serious than felonies, the possible impact of a misdemeanor conviction on getting a job or a loan or other aspects of everyday life "can be quite grave," says Prof. Robert Boruchowitz of Seattle University law school, who has studied the issue.

"You have a large community of people who are not considered criminals in the traditional sense," living with

the consequences "for the rest of their lives," says Lisa Wayne, president of the National Association of Criminal Defense Lawyers.

Applications for jobs, loans and occupational licenses—ranging from auctioneers to plumbers—ask about a person's criminal history. While a conviction is rarely an automatic disqualification, it can often tip the balance against an applicant, observers say.

A misdemeanor conviction can restrict international travel and make joining the military harder. It "can be disqualifying" for anyone seeking federal employment, "though the decision is made on a case-by-case basis depending upon a number of factors," says Angela Bailey of the U.S. Office of Personnel Management.




As a teen, Mr. Lewis says, he was arrested for assault after getting into a fight, but was found not guilty. Bad tempers are a family inheritance, he says.

In 1969 his brother Warren was shot to death. His brother Nathan Jr. was gunned down in 1971. His father, Nathan Sr., had a fatal heart attack when told of his namesake's death. His third brother, Roy, was stabbed to death weeks later while in prison on an assault charge.

At first, Mr. Lewis was fatalistic. "We had the same life. We came out of the same womb. Why was I different? When was my time coming?" he recalls thinking.

To escape from the world that took his family, he started work as a janitor for the D.C. Education Department earning $1.80 an hour. He began taking facilities-management classes at night and learning about power plants, boiler rooms and maintenance. By the time he left

the Board of Education in 1993, after 24 years, he had risen to Facility Manager, making nearly $50,000 a year.

Eventually he moved on to the Knollwood military retirement center, a sprawling network of living facilities housing 300 veterans, their spouses and survivors on 16 acres in northwest Washington.

Sanford Morgan, Knollwood's engineer before Mr. Lewis, says sewage was a recurring problem. According to court documents, blockages were usually caused by elderly residents flushing adult diapers down the toilets. The backup would clog the pump that normally pushed waste to the appropriate disposal system.

Sewage went into Rock Creek, which feeds the Potomac.

"I made many attempts to correct it," says Mr. Morgan, who has known Mr. Lewis for more than 20 years and calls him "a straight-up guy."

At 7:30 a.m. on March 29, 2007, Mr. Lewis and his employees hooked up a hose to deal with the latest problem. They pumped sewage into the storm drain until 2:30 p.m., stopping only when authorities began arriving. A jogger in nearby Rock Creek Park had noticed the usually clear creek water was murky. The Park Police traced the source to Knollwood.

Mr. Sackett was at Arlington National Cemetery interring his father-in-law when he got the call. He recalled more emergency vehicles at Knollwood "than I'd seen in my entire life."

Rock Creek is a small tributary that flows from Maryland through Washington, D.C., and into the Potomac River. For most of its 12 miles, it isn't possible to put a boat into the water.

For decades, federal law only covered waters deemed navigable under the Rivers and Harbors Act of 1899.

navigable. In 1972 the Clean Water Act further broadened the law, as Congress became concerned about pollution and water quality, spurred by high-profile incidents such as the Cuyahoga River catching fire in 1969.

The Environmental Protection Agency and the U.S. Army Corps of Engineers, which had the job of writing regulations to enforce the 1972 law, expanded the "waters of the United States" definition to include tributaries such as Rock Creek. The argument was that pollution can move downstream to larger bodies of water, says David M. Uhlmann, director of the Environmental Law and Policy Program at the University of Michigan Law School.

Spurred by the 2007 raid, Knollwood solved its backup problem by cutting a new manhole and clearing a buildup of lime, grease and sludge. Mr. Lewis voluntarily attended EPA classes to learn more about procedures and regulations.

Mr. Lewis initially wanted to go to trial and fight the charges against him. He says he had served on many juries over the years and felt his peers would understand the difference between a criminal act, and a well-intentioned but mistaken act.

"I said, to hell with pleading guilty, I'm innocent," Mr. Lewis recalls.

But Mr. Lewis's lawyer, Barry Boss, told him his argument would be tough to make. (Knollwood paid for Mr. Boss to represent Mr. Lewis.)

In an interview, Mr. Boss said, "There was no fight to have. It was a strict liability case," meaning the government didn't have to prove Mr. Lewis knew he was doing anything wrong. "His good intentions did not matter." The lawyer told Mr. Lewis that, to be found guilty, prosecutors needed only to prove that he was aware that sewage was being pumped into the storm drain that led to the creek.

In court documents, the government argued that Mr. Lewis didn't ensure the storm drain fed into a waste-treatment facility rather than the creek. About 30% of the city's storm drains flow to a treatment plant, according to the D.C. Water and Sewer Authority. Plus, the government argued, Mr. Lewis was responsible for several prior discharges during his time at Knollwood.

Mr. Lewis decided to plead guilty, fearful he would lose his house if he fought the charge. He has legal custody of his two youngest children (he has four others). His mother, Nancy Lewis, 96, also lives with him.

He entered a guilty plea in December 2007. Prosecutors agreed probation and a $2,500 fine would be sufficient penalty.

The U.S. Attorney's Office declined to comment on Mr. Lewis's case or on whether it considered charging other individuals.

As the family drove to the courthouse for his sentencing, Mr. Lewis told his daughter Ijananya, then 16, she might have to drive home if he ended the day in prison.

A few weeks later, Mr. Boss, Mr. Lewis's attorney, took his client to the probation office for the first time and recalls him crestfallen. "He was telling me how he'd spent his adult life trying to show his daughters that not every African-American man is caught up in the criminal-justice system." Mr. Lewis says he regularly brings his children to the graveyard where his brothers are buried, or back to the projects, to show them the consequences of bad choices.

Bitter over his conviction, he left Knollwood. He filled out several job applications, all of which asked if he had ever been arrested or convicted. None of the potential employers ever called, he says.

Two months into his job search he filled out an application for a job at Gallaudet University in Washington. It asked if he had a felony record or a

misdemeanor conviction that required imprisonment—a question that allowed him to answer "no." He got hired.

He didn't volunteer any information about his guilty plea to his new employers. But his probation officers put him in an awkward position, Mr. Lewis says, by making regular spot checks at the university.

In one instance, Mr. Lewis's supervisor at Gallaudet noticed the officers and asked Mr. Lewis what they wanted. "I told him it was somebody I knew who had just stopped by to check on me," Mr. Lewis says.

The next time the probation officers came by, "I tried to explain it could create problems for me," Mr. Lewis says. "They were nice about it, but they said, 'We have to keep coming.'"

The probation office referred questions to the Administrative Office of the U.S. Courts, which wouldn't comment on Mr. Lewis's case.

Meloyde Batten-Mickens, executive director of facilities at Gallaudet, says Mr. Lewis had mentioned he had been in trouble, but didn't provide specifics until more recently, when he told her the full story. Knowing about his prior conviction makes no difference, Ms. Batten-Mickens says. "I trust him across the board."

On probation, Mr. Lewis had to fill out monthly cash-flow statements showing his salary and spending to prove he wasn't involved in any unusual activities. He had to hand over his .357-caliber revolver to a family member for the duration of his probation.

He also temporarily lost privacy protections, as he learned when probation officers made an unannounced 6 a.m. search of his home. They would tell him only that he'd had an unauthorized contact with police, a potential probation violation. Mr. Lewis says he assumes the officers were referring to a traffic stop he had recently been involved in—a stop that didn't produce a traffic ticket.

After searching his home for a couple of hours the officers left and never took any further action. "They went through everything," Mr. Lewis says. "You'd have thought I had killed somebody."

Today, Mr. Lewis's life is moving back to normal. He has a second job at the power plant run by the University of the District of Columbia, where he was hired after coming off probation.

For his family, the episode has left a strong impression. Mr. Lewis's youngest daughter Shirley, 16, a high-school junior with a 3.8 grade-point average, says her father's conviction and the circumstances surrounding it have "given me a firsthand look at what the world is like."

Mr. Lewis says his lowest point came around the time of his conviction when he went to the courthouse to be fingerprinted and have his mug shot taken.

"I was treated like everybody else, like I was a hardened criminal" he says. "Imagine what I looked like. 'What you in for? Backed up toilets.'"

Mr. SCOTT. Thank you, Mr. Chairman. Let me follow up on that. General Meese, you indicated the need to go through the Judiciary Committee because we have expertise on criminal law. But we do not have expertise on airline safety, mining safety, and food safety. From a procedural point of view, how would we coordinate with the other Committees in what should be a crime? And if someone knowingly, willfully, or purposefully violates a significant health standard, how would that become a crime?

Mr. MEESE. Mr. Scott, I believe the way to do it would be through sequential referral. Obviously, the subject matter would probably be initiated in the subject matter Committee which has jurisdiction over the particular area of human conduct. And I would think that then if it was deemed that it would be appropriate, or would be suggested by that Committee that there be a criminal penalty attached, that then it would be referred to the Judiciary Committee. This is often done now in various areas where the Congress acts. And I think that would be a way of having the benefit of both subject matter knowledge of the initial Committee and the overall criminal offense knowledge of the Judiciary Committee.

Mr. SCOTT. Now, would we have to—every time they change a regulation would you have to go through the same process?

Mr. MEESE. Well, one thing I would hope is that if this were done there would be a lot fewer individual regulations carrying criminal penalties, particularly if the subject matter that was discussed with the Chairman were carried through, and that a lot of things would not be subject to criminal penalty.

Mr. SCOTT. If there was something that was threatening food safety, you wouldn't want to have to wait to go through a sequential referral on both sides of the Capitol before the President could get a bill to protect public safety. A regulatory change could go into effect. If you violate the regulatory change, you committed a crime.

Mr. MEESE. Well, Mr. Scott, I believe that most of those areas are already covered.

Mr. SCOTT. That is what we are dealing with.

Mr. MEESE. But if there was an emergency, I would think that if there was something that required prompt action, there would be general agreement it could go through rather quickly. I don't see this as a barrier to quick action in the unusual case such as you cite. On the other hand, I think we are talking about something pretty serious in sending someone to prison, as the article referred to by the Chairman indicates. So I think the importance of a criminal penalty really requires action by and an informed action by the most expert Committee of the Congress that has this total matter of criminal offenses within its jurisdiction.

Mr. SCOTT. General Thornburgh, do you want to comment on that?

Mr. THORNBURGH. I think you really have to look, Mr. Scott, at two separate kinds of situations. One is the laws that are currently on the books. And I have suggested in my testimony that those could be dealt with by removing all criminal penalties except in cases where there is a repeat offender, or where there is a demonstrated harm, such as you suggest on food safety or the like. Prospectively, it seems to me that if you have a bill moving through

the substantive Committee that relates to incorporating a new criminal offense, not a regulatory or civil remedy, but a criminal offense, that a sequential referral would not only be in order, but would make for a much more orderly way to operate. Because that relationship between the Committees in question would develop and become more or less routine. I don't see it as a delaying or burdensome process.

Mr. SCOTT. Thank you. On the question of conspiracies and attempts being charged with and sentenced the same as a completed offense, it seems to me conspiracy, where the conspiracy—where people change their minds and do not commit an offense, and an attempt which is interrupted by a police action where they tried to commit a crime and police stopped them are two entirely different situations. How do we deal—is there a difference? And should this be statutory, or should the sentencing guidelines deal with it through the Sentencing Commission?

Mr. THORNBURGH. I would defer to Professor Saltzburg on that, because this is a field that he has looked at in great detail. My observations would be derivative from what I have learned from him.

Mr. SCOTT. Thank you. Professor?

Mr. SALTZBURG. I don't think there is an easy answer to that. I think that reasonable people could differ. And I think one could differ on whether conspiracy and attempt should be treated differently as a starting point, as they are in some States. But either approach could work. But I think it is important for this Committee to take a position on it being one or the other.

Mr. SENSENBRENNER. Thank you. The gentleman's time has expired. The gentleman from Texas, the Vice-Chairman of the Committee, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. And thank all of you for being here, for the work you have done on this issue. And I don't know, Professor Saltzburg, I have been here, this is finishing 7 years, and I am not sure it is good to say as long as this Committee takes a position on it, because I have seen some of our positions. But the last 4 years have seen some hearings that I will never forget, having people come in here, or in one case a man had had strokes in prison where there was no mens rea requirements in the offenses so-called. And just to see the damage to human life that this Congress has done by rushing forward and creating crimes just so that Congress could look tough without giving it thought, really reprehensible what has been to life.

So I really appreciate the work you have done. Any time the Heritage Foundation and ACLU get together and think something is a good idea it does deserve merit. And General Meese, General Thornburgh, it is great having you here with your expertise. General Meese, your friendship over the last 3 or 4 years has just really meant so much to me in getting your expertise.

With regard to strict liability, we know that that was something that was put in place as a cost shifting mechanism to handle damages from accidents. As a policy matter, some in power thought it would be good to have the deeper pockets responsible, so we just said strict liability. But can anybody think of anything that should be a crime, anything at all that would be okay to be absent a mens rea, a guilty conscience? Anybody think of anything?

Mr. MEESE. I would think the closest we would come to it would be something involving the use of a weapon of mass destruction, where there is pretty general knowledge that this is not a pleasant thing to do. And that is about as close as I can come to it. But other than that, I can't see offhand anything that would require strict liability in the criminal law sense.

Mr. GOHMERT. That is a good point. Mr. Lynch, you had mentioned we should follow the Tax Code example. Is willfulness, is that used in the Tax Code?

Mr. LYNCH. Yes, sir, it is used in the Tax Code. But what is important is that the courts have treated the term differently depending on the case and the area of law. With the Tax Code we have got precedents in place where the law is now clear where willfully is interpreted that it is not only that the person knew the legal provision he was violating and he knew the facts that were involved. So it applies to both the facts and the law. So it is a very tough standard. And that is in place for the Federal Tax Code for tax evasion cases. And but the willfulness term is interpreted differently in other areas of the law. That is why it is important I think for the Committee, in bills like this, to define it and to define it the same way we have it in the Tax Code.

Mr. GOHMERT. Do you think we need wilful in all cases instead of knowing? I mean, having been a judge and chief justice, I was always marveling at judges who had trouble figuring out what "knowing" meant or what "must" or "shall" meant or "what is" is.

But I am not sure if we are talking about murder or rape or something of that nature. Do you really need somebody to tell you in court that that is a crime, and do you really need the possibility of somebody going, oh, you mean I wasn't supposed to kill him? Oh, I am sorry, my bad. I didn't know there was a law against killing somebody.

Mr. LYNCH. Right, I think what—I will speak for myself, but I think what we are driving at from what I have gathered from the written testimony of the other witnesses is that we are talking about the malum prohibitum area of the law. That is where the standards need to be tightened, elevated from knowing to willfulness, when it comes to malum—offenses such as murder, rape, theft; the common law offenses, willfulness, that wouldn't apply in those situations.

Mr. GOHMERT. Thank you. My time runs out. I would ask you if you think of anything after the hearing that you think really would be okay to allow somebody who was not in Congress, some agency, to just come up with some crime, I would like to know what it is, because otherwise I think we ought to be voting on those.

Thank you, Mr. Chairman.

Mr. SENSENBRENNER. The gentleman's time has expired. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you. Professor Saltzburg and Attorney Lynch, where do we go from here? What are your recommendations in terms of how we take this proposal and move ahead?

Mr. SALTZBURG. Mr. Conyers, one of the things that I think came through from all the witnesses' testimony is none of us, I think, is claiming to be familiar intimately with every single line of this draft. It is a huge undertaking. And one of the possibilities would

be for the Committee to decide to take pieces of it, to have a hearing on pieces to see whether or not the mens rea provision, as applied to, for example, you could take the most common crimes that are prosecuted, you could take drug crimes, immigration crimes, and you could examine both the structure of what is being proposed, the penalty structure, to see whether or not the grading of the offenses seems right and whether the mens rea provisions seem like they are the right ones for those particular statutes.

And I suspect if you started out with the crimes that were prosecuted the most and were comfortable with what you were doing, the rest would tend to fall into place pretty nicely.

Mr. LYNCH. I would say that the bill, as it is presently drafted, it identifies scores of offenses that are duplicative and unnecessary. But, as I said, I think there are some—a few simple things that can be done that would greatly strengthen the bill.

Number one, apply this willfulness standard across the board for regulatory offenses. Secondly, you can codify the rule of lenity so that it applies across the Federal Criminal Code, which means where any of these regulations or laws that are ambiguous the ambiguity will be resolved in favor of the person on trial whose liberty is at stake. That is the way it ought to work.

To reinforce that standard, I think we should also, very simply, you can put in a provision that would allow all the defendants to be able to have an affirmative defense to say that a good-faith belief in the legality of their conduct can be pleaded and proved as a defense. That would reinforce, I think, the mens rea element.

It is so disconcerting to read some of this case law where a court will look and examine the law and say, well, good faith is not relevant here. And that should not be a part of our criminal justice system, in my view.

Mr. CONYERS. Let me ask you former Attorneys General about corporations being people. I have had trouble with that Supreme Court decision, but at the same time I support the notion that has been raised in this discussion about corporate criminal liability. Can we rationalize these, or maybe Supreme Court decisions get changed over the years too, but how do you see that this morning?

Mr. THORNBURGH. The doctrine of respondeat superior, of course, originally arose on the civil side to impose civil liability on corporations for acts of employees within the scope of their responsibility. In 1909, it was somehow transmitted in the criminal side that creates criminal liability for employees for actions taken on behalf of their employer.

I don't think we are wise to recommend that that be reversed, but I think that it is important to recognize that liability imposed upon the corporation affects not the wrongdoers, but the shareholders. And the viability of a company, look at the Arthur Andersen case, which, using the now discredited theft of honest services theory, destroyed a major institution in the American business world. And when the Supreme Court reversed it, there was no way to resurrect that organization or to reemploy the people who had been thrown out of work.

Mr. CONYERS. The harm had been done.

Mr. THORNBURGH. I beg pardon?

Mr. CONYERS. The harm had been done.

Mr. THORNBURGH. Yes, it had. So I think that what we really ought to do is take a look at how corporate liability is imposed. I would suggest that the observations made and that I cited in the Attorneys General guidelines, that corporations that have an effective, internal mechanism for dealing with wrongdoing, and apply and execute that, should be recognized as such. And, similarly, if an employee is a rogue employee, proceeding in an illegal, criminal act without any authorization or without even a nod to the rules of the company, should not impose criminal liability.

The particulars of that, Congressman Conyers, I would leave to the draftsmen, but I think the notion is that it is only in the most severe case where liability should be imposed upon the corporation.

Now, that is not going to be a popular cause because people think it is a good thing to sock the corporations these days, but in this case it has a negative effect that really requires a much tighter set of rules.

Mr. CONYERS. Chairman, can I get enough time for General Meese to respond?

Mr. SENSENBRENNER. Without objection.

Mr. MEESE. Thank you, Mr. Chairman, Mr. Conyers. I would agree entirely with Mr. Thornburgh on what he has said, but I also note that one other reason why this should be clarified is it can also go the other way, and that is the officers of the corporation will give up the corporation and allow it to plead guilty so that they can escape punishment themselves. And so that, I think, the whole issue should be clarified, remembering that a corporation can always be sued civilly in order to punish them in the only way that the criminal law could either, which is mainly by a large fine, but without the stigma of the indictment and the criminal accusation which, as Mr. Thornburgh properly points out, can kill a business organization, throwing out of work people who have absolutely no culpability whatsoever.

Mr. CONYERS. So maybe we should just forget about the criminal liability part as applies to corporations?

Mr. MEESE. I would suggest except in the case where the whole organization and methods of the corporation is a part of the whole corporate operation.

Mr. CONYERS. Thank you.

Mr. SENSENBRENNER. The gentleman from Puerto Rico, Mr. Pierluisi.

Mr. PIERLUISI. Thank you, Mr. Chairman, and thank you all for appearing.

In preparing for this hearing, I reviewed what Chief Justice Rehnquist had to say back in the 1990's regarding the criminal jurisdiction in general, and I noticed that when dealing with criminal activity his view was that Federal courts should concentrate their efforts in cases involving substantial multi-state or international aspects. And another thing he mentioned is that also he recognized that Federal courts had a role when dealing with complex commercial or institutional enterprises.

Then the thing that comes to my mind immediately when I hear this is all these drug cases that we have in Federal courts, particularly cases dealing with drug possession, as opposed to drug trafficking.

And I would like to hear from the former AGs their views on this, you know, limiting the role of Federal courts to fighting drug trafficking as opposed to simple drug possession or drug possession. Shouldn't that be left in the hands of the States?

Mr. MEESE. I would think that in general the answer is yes, but that we have to also be very careful in looking at the statistics, because in most, or I would say many, if not most of the drug cases, the possession charge is something that the defendant pleads to as a lesser-included offense as a way of settling a case, often in plea bargaining. But in cases where the only offense is possession, I think that in most cases this is properly left to the States.

Mr. THORNBURGH. When I served as a prosecutor and when I served as Attorney General, we made a point to go out of our way to avoid simple possession cases, only as a means of including an exit for someone who wanted to plead guilty rather than face the real charges that have been brought against them, and that was a way for us, regretfully, to have to handle the business because it was substantial.

But I think under every Attorney General that I have known or served with or under, the real concentration is on the international aspects and on the trafficking and those who make millions, if not billions of dollars out of dealing in these illegal substances.

Mr. PIERLUISI. Yes. I do wonder, though, why we have those statutes the way they are if we are not really enforcing them. But that is another matter.

Let me then address a question to Professor Saltzburg and Mr. Lynch. I, myself, am all for clarity and consistency in having the mens rea requirements imposed and so on. And then when I see the definition I get, or at least what is being done mostly when imposing the willfulness requirement, I see that it requires that the act be knowingly, that it be done knowingly. And as I view that is that it is voluntary, it is intentional.

And then it also requires a batting tent or purpose, and a side view that it requires that the person at least knows that what he or she is doing is wrong, not necessarily that it violates section such and such of Title 18.

Am I reading it well because, you know, and if that is what we are about to do I am all for it because we should be requiring both things, knowing this, knowingly, a knowing act, and also conscious, consciousness of the wrongness involved. Do you—would you like to comment?

Mr. SALTZBURG. Yes. In my written testimony I talk about that. I think most people would agree that willfully combines both.

Mr. PIERLUISI. Okay.

Mr. SALTZBURG. A knowing and a sense that what you are doing is violating the law. The knowingly standing alone does not always do that and sometimes courts interpret knowingly as having a bad purpose, but sometimes they don't.

Mr. PIERLUISI. Okay.

Mr. SALTZBURG. And so it is one of the reasons I said that it would be important to have a definition that was clear that worked across the board.

Mr. LYNCH. Yes, and the only thing I would add is it doesn't mean like—take the tax example, which I keep coming back to—

is a willful standard, doesn't mean that a tax, that a prosecutor would have to prove that the person knew he was violating in a specific subsection 4 of the Tax Code. The prosecutor would only have to prove that the person knew what he was doing was against the law and went ahead anyway. And I think that is what you put your finger on, is what the standard ought to be.

Mr. PIERLUISI. Mr. Chairman, can I have 15 more seconds, unanimous consent for 15 more seconds?

Mr. SENSENBRENNER. Without objection.

Mr. PIERLUISI. Thank you. Just one—I heard you say, Mr. Lynch, that you support having the defense of good faith belief that the conduct is legal, and I agree with that. But I wonder whether Professor Saltzburg also supports that.

Mr. SALTZBURG. Not in all cases. I think it has to be carefully—in many cases, I do agree, but I think in some cases it would reach unfortunate results.

Mr. SENSENBRENNER. The gentleman's time has expired. The gentleman from Florida, Mr. Deutch.

Mr. DEUTCH. Thank you. Thank you, Mr. Chairman.

I have some concerns about the section of H.R. 1823 as they apply to immigrants and in particular section 319.

It is my understanding that under current law a person who improperly enters or attempts to enter the U.S. can be fined or imprisoned for up to 6 months or both. This bill seems to end judicial discretion in this area of the law. Judges would no longer have discretion to impose a fine and, as I read the section, this would require judges to impose, as I understand it, this would require judges to actually impose a prison sentence.

I would like to understand, first, a sense from the panel, and I think, in particular, General Meese and Governor Thornburgh, your thoughts on this provision in particular, by removing the judicial discretion to impose fines I am concerned they were not only potentially exposing permanent resident immigrants who forget to travel with their papers when crossing the border to possible prison time, but hundreds of thousands of people who entered illegally in the past, which, if I understand this correctly, would be subject to 6 months immediately.

Am I reading that correctly? Is that your interpretation of this?

Mr. THORNBURGH. First of all, I have to compliment the Member on doing what I haven't done, and that is to read every section of this in search of these issues.

And I think what you have to incorporate into your query is the previous discussion that we've had with regard to the nature of a criminal offense. You refer to someone who forgot to take their papers with them when they are traveling. I don't think that would qualify as a criminal offense under the types of standards that we are talking about. The mens rea requirement would not be present.

On the other, the matter of discretion, I would have to defer to others who may have given the kind of scrutiny you have given to this section that I haven't frankly.

Mr. DEUTCH. General Meese, I am not sure if you have.

Mr. MEESE. Yes. I would suggest that for any offense or at least virtually any offense, certainly offenses of this nature, that fines and probation would be available to a judge. I think that a judge,

certainly, on all first offenses, with perhaps a few exceptions of very serious crimes, the judges need as much discretion as possible and so I would say taking away the fine aspect of it would probably not be in the best interests.

Mr. DEUTCH. Professor Saltzburg, do you have the same concern I do?

Mr. SALTZBURG. I do, and it is a concern in a number of provisions of the statute where under current law the judge has a choice, it is a fine, imprisonment or both. And it is not clear to me whether in the bill there is going to be a specific separate section on fines that authorizes them to be imposed. But right now the concern that you raise is a valid one. If you eliminate or find, you appear to be changing the law, changing sentencing and removing discretion that is now there, that seems to have worked pretty well.

Mr. DEUTCH. And, in fact, again, as I understand as I read this, anyone who is in this country having come here illegally, as defined by the statute, would be subject to an immediate prison sentence of 6 months, that would include—that would draw no distinction between someone who snuck in across the border last week——

Mr. SENSENBRENNER. Will the gentleman yield?

Mr. DEUTCH. I will, Mr. Chairman.

Mr. SENSENBRENNER. You know, I can say that in terms of how we intended to draft this legislation it would be to allow the judge to impose a fine and probation in lieu of a prison term. And if we need to correct that before we move forward in the bill, we will do that.

Mr. DEUTCH. I appreciate that, Mr. Chairman. And in reclaiming my time, my concern clearly is that as we have this broader immigration debate in our country, what this provision in the bill seems to say is that for the 11 million or so people who are here, having come under a variety of circumstances, that every one of them would be subject to an immediate 6-months prison term that, in fact, that would include——

Mr. SENSENBRENNER. If the gentleman will yield further, that is not the intent of the drafting of the bill.

Mr. DEUTCH. Then I, in which case, I thank the Chairman and look forward to making that clarification so that there is a recognition in this proposed statute in this bill that there are differences and that, for example, the valedictorian I recently met with from a local college, who would be subject to 6 months imprisonment immediately under this bill, that we would make amends so that there is some difference in the way that we treat individuals and that, in fact, we treat them as individuals, and I thank the Chairman and I will look forward to working with you.

Mr. SENSENBRENNER. The gentleman's time has expired. All Members who are present have had a chance to ask questions, and I would like to thank our witnesses, thank the Members who have attended.

General Thornburgh.

Mr. THORNBURGH. If I might offer a suggestion, Mr. Chairman, I received in the mail yesterday from the American Law Institute, of which I am a member, a letter from its directors setting forth what their new projects are that are being undertaken and encour-

aging members to come forward with other new projects. Absent from that list was any discussion of the kind of effort that you have embarked upon, and I would suggest that you or staff be in touch with the ALI, which as you know, drafted the original model penal codes and enlist their services in reviewing this from a technical point of view and I think it would be a useful thing to do and help to raise the profile of your efforts.

Mr. SENSENBRENNER. A very good suggestion. Thank you for giving it to us.

I would like to thank our witnesses for their testimony today.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward, and ask them to respond as promptly as they can so that their answers may be made a part of the record.

Also, without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, again, I thank the witnesses, and, without objection, this hearing is adjourned.

[Whereupon, at 11:21 a.m., the Subcommittee was adjourned.]

# APPENDIX

## MATERIAL SUBMITTED FOR THE HEARING RECORD


December 20, 2011

F. James Sensenbrenner, Jr.,
Chairman
House of Representatives
Committee on the Judiciary
Subcommittee on Crime,
Terrorism and Homeland Security
Rayburn Building
Washington, D.C. 20515

Robert "Bobby" C. Scott,
Ranking Member
House of Representatives
Committee on the Judiciary
Subcommittee on Crime,
Terrorism and Homeland Security
Rayburn Building
Washington, D.C. 20515

AMERICAN CIVIL
LIBERTIES UNION



**RE: The House Judiciary's Subcommittee on Crime, Terrorism and Homeland Security's hearing on December 13, 2011 on H.R. 1823, the Criminal Code Modernization and Simplification Act of 2011**

Dear Chairman Sensenbrenner and Ranking Member Scott:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of individual liberty and justice embodied in the U.S. Constitution, we are writing about the December 13 2011 hearing on H.R. 1823, the "Criminal Code Modernization and Simplification Act of 2011." We think that it is extremely important that the Crime Subcommittee is considering reorganizing and improving the federal criminal code. One critical task we hope the Subcommittee will take on is a review of all federal offenses to ensure each has a clear *mens rea* requirement.

The ACLU encourages the Subcommittee not only to consider reforms to the federal criminal code, but also to conduct a top to bottom review of the criminal justice system in this country. We think that such an evaluation should take place in a policy neutral manner, so that there can be thoughtful discussions about what policies and programs really work to reduce and prevent crime. Instead, while H.R. 1823 attempts to modernize the federal criminal code, it also includes controversial policy changes on issues such as abortion and immigration. We strongly disagree with such policy changes, but if those issues continue to be included as part of this package, there must also be a review of more fundamental problems with federal criminal justice system such as mandatory minimum sentences and federal drug conspiracy laws, which are discussed below.

One proposal that has been considered by Congress for the past few years is a comprehensive examination of the American criminal justice system included in Senator Jim Webb's (D-VA) legislation S. 306, the National Criminal Justice Commission Act of 2011. We strongly support this legislation, which would create a commission to conduct a thorough review of our justice system. Such a proposal would carve a path for reform without incorporating contentious issues that can doom legislation to failure even before it has been considered.

*The National Criminal Justice Commission Act of 2011*

Although there is no House companion bill, Senator Webb reintroduced S. 306, the National Criminal Justice Commission Act of 2011 with bipartisan support. The bill establishes an independent commission to undertake a comprehensive examination of America's criminal justice system and to make recommendations for fiscally responsible and effective reforms. The National Criminal Justice Commission would be the first time since the 1967 Commission on Law Enforcement and the Administration of Justice that there has been a comprehensive look at the criminal justice system in this country. It is clear that there is a need for a review of our justice system. At every stage of the criminal justice process – from the events preceding arrest to sentencing to the challenges facing those reentering the community after incarceration – serious problems undermine basic tenets of fairness and equity, as well as the public's expectations for safety. The result is an overburdened, expensive, and often ineffective criminal justice system.

The United States incarcerates more than 2.3 million of its people, a greater percentage than any other nation in the world. A 2007 Pew study found that when the number of Americans on probation or parole are included, the total number of people under criminal justice supervision exceeds 7.3 million (1 in 31 adults), costing taxpayers over $60 billion annually. In some states and local governments, criminal justice spending outpaces spending on education.

The National Criminal Justice Commission Act of 2011 creates a commission whose members would be appointed by the legislative and executive branch to address these concerns. The commission would be intergovernmental in nature, consisting of members from every level and facet of government—from mayors and county officials to Governors and state legislators. It would operate solely in an advisory capacity, charged with making non-binding findings and recommendations for governmental and intergovernmental reforms regarding crime prevention and deterrence strategies, cost effectiveness, and ensure the interests of justice at every step of the criminal justice system.

We hope House Judiciary Committee Members will consider supporting the approach taken by the National Criminal Justice Commission as a first step in developing evidence-based and cost-effective solutions to improving our criminal justice system and increasing public safety.

*Mandatory Minimum Sentences*

The ACLU supports the repeal or reform of mandatory minimum sentences because they generate unnecessarily harsh sentences, tie judges' hands in considering individual cases, create racial disparities in sentencing, and empower prosecutors to force defendants

to bargain away their constitutional rights. A recent study by the U.S. Sentencing Commission (USSC) found that people of color are sentenced to mandatory minimums for drug offenses far more often than their white counterparts[1]. Mandatory minimum sentences defeat the purposes of sentencing by taking discretion away from judges and giving it to prosecutors who use the threat of such lengthy sentences to frustrate defendants' asserting their constitutional rights.

In 1991, the USSC issued a report to Congress denouncing mandatory minimums and calling for their abolition. The report gathered widespread support from policymakers, judges and practitioners in the field of federal sentencing. But in the years since the report, Congress has increased the number and length of mandatory minimum sentences.

In October 2011, the USSC released its most recent report on mandatory minimum sentences. In this report, the Commission concluded that a strong and effective guideline system best serves the purposes of sentencing established by the Sentencing Reform Act of 1984, but recommends reform to mandatory sentencing. Although the Commission did not come to a consensus about mandatory minimum penalties as a whole, it unanimously agreed that certain mandatory minimum penalties apply too broadly, are excessively severe, and are applied inconsistently in the federal system.[2]

The Commission's report recommends Congress revisit certain statutory recidivist provisions in drug sentencing laws and consider reform that would allow for flexibility in sentencing low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties. Also, the report recommends that Congress reconsider so-called "stacking" (i.e. sentencing a person to consecutive mandatory sentences) of mandatory minimum penalties for some federal firearms crimes, because these penalties can be excessively severe and unjust.[3]

In addition, the Chair of the Sentencing Commission Judge Patti Saris acknowledges the mandatory minimum sentencing has contributed to federal prison overcrowding, with the federal Bureau of Prisons (BOP) currently over its capacity by 37 percent. The ACLU encourages the Subcommittee to consider the Sentencing Commission's recommendations regarding mandatory minimum sentences as a first step in an effort to reform the federal sentencing system.

*Drug Conspiracy Laws*

The ACLU also encourages Congress to amend federal drug conspiracy laws that often result in the sentencing of people with little knowledge or involvement in a drug operation to long terms in prison. Under current drug conspiracy laws, even those with little involvement in drug trafficking operations - often women in relationships with men involved in drug-related activities - are held liable for the entire quantity of drugs charged in connection with the conspiracy. For example, the girlfriend of a person involved in a drug conspiracy who answers the phone at her home or deposits money in a bank account

[1] U.S Sentencing Commission, Report *to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System,* October 2011, p. xxviii.

[2] *Id.* at 367-369
[3] *Id.*

could be held liable for the entire amount of drugs ever sold by the operation even if she never sold or saw any drugs. These laws disproportionately hurt those whose only crime was to be in the wrong place at the wrong time – oftentimes women.

In addition to catching many low-level offenders in the net of a drug conspiracy, these laws sometimes result in high-level drug dealers receiving lower sentences than the women who have little involvement in the drug trade. A high level organizer in a drug trade knows the information necessary to testify against people who are under him in the drug pyramid. When a high-level drug dealer faces a long sentence, he is able to offer "substantial assistance" to prosecutors and receive a reduction in his sentence. On the other hand, when a low-level offender is confronted with charges, but has no knowledge of the drug operation, such a person cannot offer information to prosecutors in exchange for a lower sentence. Therefore, we have urged Congress to consider amending the federal drug conspiracy laws to require more culpability by offenders as well as to expand the "safety valve" provision in the federal sentencing guidelines that permits judges to impose reduced sentences for low-level, first time drug offenders and allow for more people to benefit from reduced sentences under this policy.

We hope this is just the beginning of the Judiciary Committee's consideration of not only improvements to the federal criminal code, but reforms to the criminal justice system. The ACLU urges the Subcommittee to take the approach proposed in the National Criminal Justice Commission and create a commission to take a comprehensive look at the numerous problems in our criminal justice system.

Sincerely,

Laura W. Murphy,
Director
Washington Legislative Office

Jesselyn McCurdy
Senior Legislative Counsel
Washington Legislative Office

# H.R. 1823
# The Criminal Code Modernization and Simplification Act of 2011
# Section-by-Section

## CHAPTER 1 – DEFINITIONS

Sec. 1. Definitions. This section includes definitions for the title. They include: (1) agency; (2) bodily injury; (3) controlled substance; (4) court of the United States; (5) crime of violence; (6) department; (7) facility of interstate or foreign commerce; (8) Federal health care offense; (9) financial institution; (10) foreign commerce; (11) foreign government; (12) health care benefit program; (13) interstate commerce; (14) minor; (15) mortgage lending business; (16) national bank; (17) national of the United States; (18) obligation or other security of any foreign government; (19) organization; (20) person and whoever; (21) petty offense; (22) Postal Service; (23) serious bodily injury; (24) special maritime and territorial jurisdiction of the United States; (25) State; (26) substantial bodily injury; (27) United States; and (28) vessel of the United States.

## CHAPTER 3 – CRIMINAL RESPONSIBILITY

Sec. 2. Principals. This section defines principals in the same manner as Section 2 from the current criminal code with a slight modification for the intent in paragraph (b).

Sec. 3. Accessory After the Fact. This section defines accessory after the fact defines an accessory after the fact in the same manner as the current criminal code.

Sec. 4. Misprision of Felony. This section defines misprision of felony in the same manner as the current criminal code.

Sec. 5. Conspiracy. This section defines "conspiracy" for the code, unless otherwise provided in a specific provision, and requires the commission of an overt act.

Sec. 6. Attempt. This section defines "attempt" for the code, unless otherwise provided in a specific provision.

Sec. 7. Solicitation to commit a crime of violence. This section defines "solicitation to commit a crime of violence for the code.

## CHAPTER 5 – OTHER GENERAL PROVISIONS

### Subchapter A- Defenses

Sec. 21. Affirmative Defenses. This section establishes a general rule requiring a defendant to establish an affirmative defense.

Sec. 22. Insanity Defense. This section establishes a general rule for the affirmative defense of insanity.

**Subchapter B – General Rules Pertaining to Criminal Offenses**

Sec. 31. Non-Preemption. This section establishes a general rule against pre-emption of State or local criminal laws, unless specifically stated otherwise.

Sec. 32. Extraterritorial jurisdiction over derivative offenses. This section establishes a general rule for extraterritorial jurisdiction of derivative offenses arising under Chapter 3.

**CHAPTER 10 – VIOLENT CRIMES AGAINST PERSONS**

This chapter gathers all violent crimes against a person into a single chapter, other than terrorism offenses which has a separate subchapter. Chapter 7 (Assault), Chapter 18 (Congressional, Cabinet and Supreme Court Assassination, Kidnapping and Assault), Chapter 40 (Extortion and Threats), Chapter 41 (Extortionate Credit Transactions), Chapter 51 (Homicide), Chapter 55 (Kidnapping), Chapter 84 (Presidential and Presidential Staff Assassination, Kidnapping and Assault), Chapter 103 (Robbery and Burglary), and Domestic Violence and Stalking (Chapter 110A) were consolidated and simplified.

This chapter eliminates the following sections: Section 114 (Maiming within maritime and territorial jurisdiction); Section 116 (Female Genital Mutilation); Section 119 (Protection of individuals performing certain official duties); Section 871 (Threats against President and successors to the Presidency); Section 873 (Blackmail); Section 874 (Kickbacks from public works employees); Section 876 (Mailing threatening communications); Section 877 (Mailing threatening communications from foreign country); Section 878 (Threats and extortion against foreign officials, official guests, or internationally protected persons); Section 879 (Threats against former Presidents and other persons); Section 1122 (Protection against the Human Immunodeficiency Virus); Section 2114 (Mail, money, or other property of United States); Section 2115 (Post office); Section 2116 (Railway or steamboat post office); Section 2117 (Breaking or entering carrier facilities); Section 2118 (Robberies and burglaries involving controlled substances); Section 2119 (Motor vehicles); and Section 2264 (Restitution).

**Subchapter A – Homicide**

This subchapter simplifies existing law by establishing general principles of homicides (e.g. first degree murder, second degree murder, and voluntary and involuntary manslaughter; by defining specific offenses based on the location where the offense occurred or the offender's or victim's status (Section 102); and by establishing separate penalties sections (Section 103 and 104).

Sec. 101. Homicide. This section defines the categories of unlawful killings: first-degree premeditated and felony-murder, and second-degree murder.

Sec. 102. Federally Punishable Homicides. This section defines specific federal homicides based on the location of the offense (e.g. special maritime and territorial jurisdiction) or the victim (e.g.

(President, Congressional, Cabinet or Supreme Court Justice). This section consolidates existing sections covering these offenses.

Sec. 103. Penalties for Murder Punishable under Section 102, Attempts and Conspiracies. This section establishes a uniform penalty structure for first and second-degree murder, as well as attempt to or conspiracy to commit such murders.

Sec. 104. Penalties for Manslaughter Punishable under Section 102 and Attempts. This section establishes a uniform penalty structure for manslaughter and attempts to commit manslaughter.

Sec. 105. Misconduct or Neglect of Ship Officers. This section establishes a criminal offense for misconduct, negligence or inattention by a ship officer resulting in the loss of life. The section is the same as Section 1115 from the current criminal code.

**Subchapter B- Assault and Related Offenses**

This subchapter consolidates and simplifies all assault and related offenses from the existing code.

Sec. 111. Assault. This section defines the crime of assault and specific penalties depending on the intent, or the harm to the victim.

Sec. 112. Individuals federally protected from assault. This section defines the federally-protected persons from assault as the same individuals in section 102.

Sec. 113. Interference with Federal Officers and Employees. This section defines the crime of interference with federal officers and employees.

Sec. 114. Domestic Assault by an Habitual Offender. This section defines the crime of domestic assault by a habitual offender.

**Subchapter C – Kidnapping**

Sec. 121. Kidnapping. This section defines the federal crime of kidnapping (prior Section 1201)

Sec. 122. Ransom Money. This section defines the crime of receiving, possessing or disposing of ransom money (prior Section 1202).

Sec. 123. Hostage Taking. This section defines the crime of hostage taking (prior section 1203).

Sec. 124. International Parental Kidnapping. This section defines the crime of international parental kidnapping (prior section 1205).

**Subchapter D – Threats Against Specially Protected Persons**

Sec. 131. Threats against Officers or Employees of the United States and Other Specially Protected Persons. This section defines threats against individuals defined in section 102 and other protected persons.

**Subchapter E – Definitions and General Provisions for Subchapters A through D**

Sec. 136. This section defines terms used in Subchapters A through D: (1) family; (2) foreign government; (3) foreign official; (4) internationally protected person; (5) international organization; (6) official guest; and (7) President-elect and Vice President-elect.

Sec. 137. Special Rules Relating to Offenses against Certain Types of Victims. This section provides special rules governing extraterritorial jurisdiction for crimes in subchapters A through D involving the President, Members of Congress and internationally protected persons; use of the military with respect to certain offenses; and approvals required for certain offenses.

**Subchapter F – Robbery, Extortion and Related Threats**

Sec. 141. Robbery in Special Maritime and Territorial Jurisdiction. This section defines the crime of robbery in the special maritime and territorial jurisdiction.

Sec. 142. Robbery of Personal Property of United States. This section defines the crime of robbery of personal property of the United States.

Sec. 143. Bank Robbery and Incidental Crimes. This section defines the crime of bank robbery.

Sec. 144. Communication of Ransom Demands and Other Threatening Communications in or Affecting Commerce. This section defines the crimes of ransom demands and other threats.

Sec. 145. Extortion by Officers or Employees of the United States. This section defines the crime of extortion by officers or employees of the United States.

Sec. 146. Receiving the Proceeds of Extortion. This section defines the crime of receiving the proceeds of extortion.

**Subchapter G – Extortionate Credit Transactions**

Sec. 155. Making Extortionate Extensions of Credit. This section defines the crime of extortionate credit extensions.

Sec. 156. Financing Extortionate Extensions of Credit. This section defines the crime of financing an extortionate extension of credit.

Sec. 157. Collection of Extensions of Credit by Extortionate Means. This section defines the crime of collection of credit extensions by extortionate means.

Sec. 158. Definitions and Rules of Construction. This section provides definitions and rules of construction for this subchapter.

**Subchapter H – Domestic Violence**

Sec. 161. Interstate Domestic Violence; Interstate Stalking; Interstate Violations of Custody Orders. This section defines the offenses of interstate domestic violence, stalking and violation of custody orders.

Sec. 162. Pretrial Release. This section provides for pretrial release of defendants.

Sec. 163. Full Faith and Credit Given to Protection Orders. This section provides for full faith and credit for protection orders issued by a State or tribal court.

Sec. 164. Definitions. This section defines terms used in this subchapter.

Sec. 165. Repeat Offenders. This section defines enhanced punishment for repeat offenders.

**Subchapter I – Protection of Unborn Children**

Sec. 171. Protection of Unborn Children. This section defines the criminal offense for causing the death or injury to a child in utero.

Sec. 172. Partial-birth Abortions Prohibited. This section defines the crime of partial-birth abortion.

**CHAPTER 13 – SEX CRIMES**

This chapter combines and revises current provisions on sex crimes: Chapter 109A (Sexual Abuse); Chapter 110 (Sexual Exploitation of Children); and Chapter 117 (Transport for Illegal Sexual Activity).

The current provisions are duplicative, confusing and unwieldy. The revised section combines all the sex crimes into one chapter with separate subchapters for sexual abuse, transport for illegal sexual activity, sexual exploitation of children, sex offender registry and general definitions.

This chapter eliminates the following sections: Section 2247 (Repeat offenders); Section 2248 (Mandatory Restitution); Section 2252C (Misleading words or digital images on the Internet); Section 2257A (Recordkeeping requirements for simulated sexual conduct); Section 2259 (Mandatory Restitution); Section 2260 (Production of sexually explicit depictions of a minor for importation into the United States); Section 2260A (Penalties for registered sex offenders); Section 2424 (Filing factual statement about alien individual). Sections 2258A through 2258E are re-codified outside of Title 18.

**Subchapter A – Sexual Abuse**

Sec. 201. Sexual Abuse. This section combines existing sections 2241 (Aggravated Sexual Abuse), 2242 (Sexual Abuse), and 2243 (Sexual Abuse of a Minor or Ward).

Sec. 202. Abusive Sexual Contact. This section defines the crime of abusive sexual contact.

Sec. 203. Special Rules and Defenses. This section defines special rules governing proof of state of mind as to age, an affirmative defense and marriage in certain cases.

Sec. 204. Sexual Abuse Resulting in Death. This section punishes sexual abuse resulting in death.

Sec. 205. Definitions for subchapter. This section defines the terms "sexual act," "sexual contact," and "official detention."

**Subchapter B – Transport for Illegal Sexual Activity**

Sec. 211. Transportation Generally. This section defines the crime of transportation of an individual to engage in prostitution or any sexual activity.

Sec. 212. Coercion and Enticement. This section defines the crime of coercion and enticement.

Sec. 213. Transportation of Minors. This section defines the crimes of transportation with intent to engage in criminal sexual activity, travel with intent to engage in illicit sexual conduct, engaging in illicit sexual conduct in foreign places, and ancillary offenses.

Sec. 214. Use of Interstate Facilities to Transmit Information about a Minor. This section defines the crime of use of interstate facilities to transmit information about a child.

**Subchapter C – Sexual Exploitation of Children**

Sec. 221. Sexual Exploitation of Children. This section defines the offense of sexual exploitation of children.

Sec. 222. Selling or Buying Children. This section defines the offense of selling or buying children.

Sec. 223. Certain Activities Relating to Material Involving the Sexual Exploitation of Children and Child Pornography. This section combines existing sections 2252 and 2252A, and defines the crime of sexual exploitation of children and child pornography.

Sec. 224. Misleading Domain Names on the Internet. This section defines the crime of misleading domain names on the Internet.

Sec. 225. Definitions for subchapter. This section defines terms used in the subchapter.

Sec. 226. Record Keeping requirements. This section sets forth requirements for record keeping for producers of books, magazines, periodicals, films, videotapes, or other matter.

Sec. 227. Failure to Report Child Abuse. This section defines the crime of failure to report child abuse.

**Subchapter D – Sex Offender Registry**

Sec. 241. Failure to Register. This section defines the criminal offense for failing to register.

**Subchapter E - General Provisions and Definitions**

Sec. 255. Repeat Offenders. This sections sets out punishment for repeat offenders of subchapters A and B.

Sec. 256. Civil Remedy for Personal Injuries. This section creates civil remedies for personal injuries.

**CHAPTER 15 – NATIONAL SECURITY AND RELATED CRIMES**

This chapter consolidates terrorism crimes and other national security crimes: Chapter 113B (Terrorism); Chapter 115 (Treason, Sedition and Subversive Activities); Chapter 67 (Military and Navy); Chapter 12 (Civil Disorders); Chapter 102 (Riots); Chapter 37 (Espionage and Censorship). The chapter also creates a new subchapter for Immigration and Nationality crimes.

This chapter eliminates the following provisions: Section 792 (Harboring or Concealing Persons); Section 794 (Gathering or delivering defense information to aid foreign government), Section 795 (Photographing and Sketching Defense Installations); Section 796 (Use of Aircraft for Photographing Defense Installations); Section 797 (Publication and Sale of Photographs of Defense Installations); Section 798 (Disclosure of classified information), Section 798A (Temporary Extension of Section 794); Section 799 (Violation of Regulations of NASA); Section 1381 (Enticing Desertion and Harboring Deserters); Section 1384 (Prostitution Near Military and Naval Establishments); Section 1386 (Keys and Keyways Used in Security Applications by the Department of Defense); Section 1541 (Issuance without Authority); Section 1545 (Safe Conduct Violation); Section 2101 (Riots); Section 2102 (Definitions); Section 2386 (Registration of certain organizations); Section 2387(Activities Affecting Armed Forces Generally); Section 2388 (Activities Affecting Armed Forces During War); Section 2389 (Recruiting for Service Against United States); and Section 2390 (Enlistment to Serve Against United States).

**Subchapter A – Treason, Sedition and Subversive Activities**

Sec. 261. Treason. This section defines the criminal offense of treason. The section removes antiquated language requiring a fine of at least $10,000.

Sec. 262. Misprision of Treason. This section defines the criminal offense of misprision of treason.

Sec. 263. Rebellion or Insurrection. This section defines the criminal offense of rebellion or insurrection.

Sec. 264. Seditious Conspiracy. This section defines the criminal offense of seditious conspiracy.

Sec. 265. Advocating Overthrow of Government. This section defines the criminal offense of advocating overthrow of the government.

**Subchapter B – Terrorism**

Sec. 271. Weapons of Mass Destruction, and Explosives and other lethal devices. This section defines the criminal offense of weapons of mass destruction and explosives and other lethal devices. (Current section 831).

Sec. 272. Atomic Weapons. This section defines the criminal offense of development of atomic weapons.

Sec. 273. Acts of Terrorism Transcending National Boundaries. This section defines the criminal offense of terrorism acts transcending national boundaries.

Sec. 274. Financial Transactions. This section defines the criminal offense of prohibited financial transactions with a government of a country that supports international terrorism.

Sec. 275. Missile Systems Designed to Destroy Aircraft. This section defines the criminal offense of unlawful use of a missile system designed to destroy aircraft.

Sec. 276. Radiological Dispersal Devices. This section defines the criminal offense of unlawful use of radiological dispersal devices.

Sec. 277. Harboring or Concealing Terrorists. This section defines the criminal offense of harboring or concealing a terrorist.

Sec. 278. Providing Material Support to Terrorists. This section defines the criminal offense of providing material support to terrorists.

Sec. 279. Providing Material Support or Resources to Designated Foreign Terrorist Organizations. This section defines the criminal offense of providing material support or resources to designated foreign terrorist organizations.

Sec. 280. Prohibitions against the Financing of Terrorism. This section defines the criminal offense against financing of terrorism.

Sec. 281. Receiving Military-Type Training from a Foreign Terrorist Organization. This section defines the criminal offense of receiving military-type training from a foreign terrorist organization.

Sec. 282. Civil Remedies. This section provides civil remedies involving an act of international terrorism.

Sec. 283. Definitions for Subchapter. This section sets forth definitions of terms used in this subchapter.

**Subchapter C – Military and Navy**

Sec. 291. Entering Military, Naval, or Coast Guard Property. This section defines the criminal offense for entering military, naval or Coast Guard property.

Sec. 292. Use of Army and Air Force as Posse Comitatus. This section defines the criminal offense of unauthorized use of the Army and Air Force as posse comitatus.

Sec. 293. Prohibition on Disruptions of Funerals of Members or Former Members of the Armed Forces. This section defines the criminal offense for disrupting funerals for members or former members of the Armed Forces.

Sec. 294. Demonstrations at Cemeteries under the Control of the National Cemetery Administration and at Arlington National Cemetery. This section defines the criminal offense relating to demonstrations at certain cemeteries.

Sec. 295. Prohibition on attacks on United States servicemen on account of service. This section imposes penalties for attacks on U.S. servicemen.

**Subchapter D – Civil Disorders and Riots**

Sec. 296. Civil Disorders. This section defines the criminal offense of civil disorder.

**Subchapter E – Espionage and Censorship**

Sec. 301. General Provisions for Subchapter. This section sets out general provisions applicable to the subchapter.

Sec. 302. Gathering or Transmitting Defense Information. This section defines the criminal offense of gathering, transmitting or losing defense information.

Sec. 303. Losing Defense Information. This section defines the criminal offense of losing defense information.

Sec. 304. Disclosure of Classified and Other Similarly Protected Information. This section defines the criminal offense of disclosure of classified and similarly protected information.

**Subchapter F – Immigration and Nationality**

Sec. 311. False Statement in Application and Use of Passport. This sectioned fines the criminal offense of false statement in application and use of passport.

Sec. 312. Forgery or False Use of Passport. This section defines the criminal offense of forgery or false use of a passport.

Sec. 313. Misuse of Passport. This section defines the criminal offense of misuse of a passport.

Sec. 314. Fraud and Misuse of Visas, Permits, and other Documents. This section defines the criminal offense of fraud and misuse of visas, permits and other documents.

Sec. 315. Procurement of Citizenship or Naturalization Unlawfully. This section defines the criminal offense of unlawful procurement of citizenship or naturalization.

Sec. 316. Sale of Naturalization or Citizenship Papers. This section defines the criminal offense of the sale of naturalization or citizenship papers.

Sec. 317. Penalties Related to Removal. This section defines the criminal penalties for failure to depart, and failure to comply with terms of release under supervision. The section also defines civil penalties relating to vessels and aircrafts.

Sec. 318. Bringing In and Harboring Certain Aliens. This section defines the criminal offense of bringing in and harboring certain aliens.

Sec. 319. Entry of Alien at Improper Time or Place; Misrepresentation and Concealment of facts. This section defines the criminal offense of illegal entry of an alien, and misrepresentations and concealment of facts.

Sec. 320. Reentry of Removed Alien. This section defines the criminal offense of reentry of a removed alien.

Sec. 321. Aiding or Assisting Certain Aliens to Enter the United States. This section defines the criminal offense of aiding or assisting certain aliens to enter the United States.

Sec. 322. Increased Penalty for Certain Terrorism Related Offenses. This section enhances the criminal penalty for a violation of this subchapter that facilitates an act of international terrorism or a drug trafficking crime.

**CHAPTER 17 – DRUG CRIMES**

This chapter moves the criminal provisions from title 21 of the United States Code (Controlled Substances Act) to title 18, and makes significant revisions to the criminal provisions. In an effort to simplify a cumbersome set of criminal statutes, the criminal offenses have been classified through sections setting out the basic offense, punishment, offenses involving protected persons and protected places. No policy changes have been made.

Sec. 401. Definitions for chapter. This section sets out definitions used for drug crimes chapter.

Sec. 402. Basic Offenses. This section sets out the basic offense for a criminal violation under the Controlled Substances Act.

Sec. 403. Basic Punishment Structure. This section sets out the basic punishment structure depending on whether the violation involves "large quantities of a major drug" (10 year mandatory minimum), "substantial quantities of major drugs" (5 year mandatory minimum), "lesser quantities of major drugs and any quantity of certain other substances," "midlevel quantities of marihuana, larger quantities of hashish, and certain Schedule III substances," "Schedule IV substances," and "Schedule V substances".

Sec. 404. Offenses Involving Protected Persons. This section sets out criminal offenses involving protected persons.

Sec. 405. Enhancement for Offenses Involving Protected Places. This section sets out enhancements for offenses involving protected places.

Sec. 406. Maintaining Drug-Involved Premises. This section sets out the criminal offense of maintaining drug-involved premises.

Sec. 407. Distribution in or Near Schools. This section sets out the criminal offense of distribution in or near a school.

Sec. 408. Listed Chemicals. This section sets out the criminal offense involving possession or distribution of listed chemicals.

Sec. 409. Domestic Regulatory Offenses. This section sets out the criminal offense for domestic regulatory violations.

Sec. 410. Additional Domestic Regulatory Offenses. This section sets out the criminal offenses for additional domestic regulatory offenses.

Sec. 411. Penalty for Simple Possession. This section sets out the criminal offense for simple possession of a controlled substance or a listed chemical.

Sec. 412. Civil Penalty for Possession of Small Amounts of Certain Controlled Substances. This section sets out the civil penalty for possession of small amounts of certain controlled substances.

Sec. 413. Continuing Criminal Enterprise. This section sets out the criminal offense of continuing criminal enterprise.

Sec. 414. Drug Paraphernalia. This section sets out the criminal offense involving drug paraphernalia.

Sec. 415. Proceedings to Establish Prior Convictions. This section sets out the procedures for establishing prior convictions.

Sec. 416. Anhydrous Ammonia. This section sets out the criminal offense of anhydrous ammonia.

Sec. 417. Controlled Substances Import and Export Listed Chemical Offenses. This section sets out the criminal offense for the import and export of controlled substances and listed chemical offenses.

Sec. 418. Prohibited Acts Related to Foreign Terrorist Organizations or Terrorist Persons and Groups. This section defines the criminal offense of narco-terrorism.

Sec. 419. Offenses involving the Internet. This section sets out penalties for the sale of date rape drugs and other controlled substances via the Internet.

## CHAPTER 19 – ORGANIZED CRIME

This chapter combines existing chapters 95, 96 and 26. No sections were eliminated.

### Subchapter A – Racketeering

Sec. 501. Interference with Commerce by Threats or Violence. This section defines the criminal offense of interference with commerce by threats.

Sec. 502. Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises. This section defines the criminal offense of interstate and foreign travel or transportation in aid of racketing enterprises.

Sec. 503. Interstate Transportation of Wagering Paraphernalia. This section defines the criminal offense of interstate transportation of wagering paraphernalia.

Sec. 504. Offer Acceptance, or Solicitation to Influence Operations of Employee Benefit Plan. This section defines the criminal offense of offer, acceptance, or solicitation to influence operations of employee benefit plan.

Sec. 505. Prohibition of Illegal Gambling Businesses. This section defines the criminal offense prohibiting illegal gambling businesses.

Sec. 506. Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire. This section defines the criminal offense of use of interstate commerce facilities in the commission of murder-for-hire.

Sec. 507. Violent Crimes in Aid of Racketeering Activity. This section defines the criminal offense of violent crimes in aid of racketeering activity.

Sec. 508. Prohibition of Unlicensed Money Transmitting Businesses. This section defines the criminal offense of prohibition of unlicensed money transmitting businesses.

**Subchapter B – Racketeering Influenced and Corrupt Organizations**

Sec. 511. Definitions. This section sets out definitions for use in this chapter.

Sec. 512. Prohibited Activities. This section defines the prohibited activities related to racketeering influenced and corrupt organizations.

Sec. 513. Criminal Penalties. This section sets out the criminal penalties for a violation of section 512.

Sec. 514. Civil Remedies. This section sets out civil remedies for preventing and restraining violations of section 512.

Sec. 515. Venue and Process. This section sets out venue and process procedures for civil actions to prevent or restrain violations of section 512.

Sec. 516. Expedition of Actions. This section sets out procedures for expediting any civil action instituted under this subchapter.

Sec. 517. Evidence. This section sets out requirements for open or closed hearings for a civil action under this subchapter.

Sec. 518. Civil Investigative Demand. This section authorizes the Attorney general to issue civil investigative demands in a racketeering investigation.

**Subchapter C – Criminal Street Gangs**

Sec. 521. Criminal Street Gangs. This section defines the criminal offense of criminal street gangs.

## CHAPTER 21 – ARSON, FIREARMS, EXPLOSIVES AND WEAPONS CRIMES

This chapter combines existing chapters 5 (Arson), 10 (Biological Weapons) 11B (Chemical Weapons) 40 (Explosives) and 44 (Firearms). No changes were made to any of the firearms or explosives sections.

This chapter eliminates the following sections: Section 928 (Separability).

### Subchapter A – Arson

Sec. 571. Arson within Special Maritime and Territorial Jurisdiction. This section defines the criminal offense of arson within the special maritime and territorial jurisdiction.

### Subchapter B – Firearms

Sec. 581. Definitions. This section defines terms used in this subchapter.

Sec. 582. Unlawful Acts. This section defines the criminal unlawful acts relating to firearms.

Sec. 583. Licensing. This section sets out licensing requirements and procedures for federal firearms licensees.

Sec. 584. Penalties. This section defines the criminal penalties for criminal violations of firearms statutes.

Sec. 585. Exceptions; Relief from Disabilities. This section sets out exceptions to federal firearms laws and provides procedures for relief from disabilities.

Sec. 586. Remedy for Erroneous Denial of Firearm. This section sets out the remedies for the erroneous denial of a firearm.

Sec. 587. Rules and Regulations. This section authorizes the Attorney general to issues rules and regulations to carry out the provisions of this subchapter.

Sec. 588. Interstate Transportation of Firearms. This section sets out restrictions on interstate transportation of firearms.

Sec. 589. Carrying of Concealed Firearms by Qualified Law Enforcement Officers. This section authorizes qualified law enforcement officers to carry concealed firearms.

Sec. 590. Carrying of Concealed Firearms by Qualified Retired Law Enforcement Officers. This section authorizes qualified retired law enforcement officers to carry concealed firearms.

Sec. 591. Use of restricted Ammunition. This section provides restrictions on use of certain ammunition.

Sec. 592. Possession of Firearms and Dangerous Weapons in Federal Facilities. This section prohibits possession of firearms and dangerous weapons in Federal facilities.

Sec. 593. Prohibition on Purchase, Ownership, or Possession of Body Armor by Violent Felons. This section prohibits purchase, ownership or possession of body armor by violent felons.

**Subchapter C – Explosives**

Sec. 601. Prohibited Transactions involving Nuclear Materials. This section defines the criminal offense of prohibited transactions involving nuclear materials.

**Subchapter D – Importation, Manufacture, Distribution and Storage of Explosive Materials**

Sec. 611. Definitions. This section sets out definitions used in this subchapter.

Sec. 612. Unlawful Acts. This section defines unlawful acts relating to explosive materials.

Sec. 613. Licenses and User Permits. This section sets out procedures and standards for licenses and user permits.

Sec. 614. Penalties. This section defines criminal penalties for violations of this subchapter.

Sec. 615. Exceptions; Relief from Disabilities. This section sets out exceptions to the restrictions on use of explosives and procedures for relief from disabilities.

Sec. 616. Additional Powers of the Attorney General. This section provides additional authority to the Attorney General for inspections of sites where damage was caused by explosive materials.

Sec. 617. Rules and Regulations. This section authorizes the Attorney General to issue rules and regulations to administer this subchapter.

**Subchapter E – Biological Weapons**

Sec. 621. Prohibitions with respect to Biological Weapons. This section defines prohibitions relating to biological weapons.

Sec. 622. Requests for Military Assistance to Enforce Prohibition in Certain Emergencies. This section authorizes the Attorney General to request assistance from the Department of Defense relating to enforcement of section 621.

Sec. 623. Possession by Restricted Persons. This section defines persons restricted from possessing biological agents or toxins.

Sec. 624. Variola Virus. This section defines the criminal offense of unlawful conduct relating to the variola virus.

Sec. 625. Seizure, Forfeiture and Destruction. This section provides for the seizure, forfeiture and destruction of biological agents, toxins or delivery systems.

Sec. 626. Injunctions. This section authorizes the United States to obtain an injunction for a violation of section 621.

Sec. 627. Definitions. This section sets out definitions used in this subchapter.

**Subchapter F – Chemical Weapons**

Sec. 631. Prohibited Activities. This section prohibits activities relating to chemical weapons.

Sec. 632. Penalties. This section sets out criminal penalties for violations of section 631.

Sec. 633. Individual Self-Defense Devices. This section excludes pepper spray or chemical mace from the prohibition in section 631.

Sec. 634. Injunctions. This section authorizes the United States to obtain an injunction for a violation of sections 631, 674, or 675.

Sec. 635. Requests for Military Assistance to Enforce Prohibition in Certain Emergencies. This section authorizes the Attorney General to request assistance from the Department of Defense relating to enforcement of section 631.

Sec. 636. Definitions. This section sets out definitions used in this subchapter.

**CHAPTER 23 – THEFT AND RELATED CRIMES**

This section combines existing chapters 31 (Embezzlement and Theft), 113 (Stolen Property), and 25 (Counterfeiting and Forgery).

This chapter eliminates the following sections: Section 475 (Imitating Obligations or Securities; Advertisements); Section 482 (Foreign Bank Notes); Section 485 (Coins or Bars); Section 486 (Uttering Coins of Gold, Silver or Other Metal); Section 487 (Making or Possessing Counterfeit Dies for Coins); Section 488 (Making or Possessing Counterfeit Dies for Foreign Coins); Section 489 (Making or Possessing Likeness of Coins); Section 490 (Minor Coins); Section 494 (Contractors' Bonds, Bids and Public Records); Section 496 (Customs Matters); Section 497 (Letters Patent); Section 502 (Postage and Revenue Stamps of Foreign Governments); Section 503 (Postmarking Stamps); Section 507 (Ship's Papers); Section 508 (Transportation Requests of Government); Section 509 (Possessing and Making Plates or Stones for Government Transportation Requests); Section 511A (Unauthorized Application of Theft Prevention Decal or Device); Section 512 (Forfeiture of Certain Motor Vehicles and Motor Vehicle Parts); Section 642 (Tool and Materials for Counterfeiting); Section 644 (Banker Receiving Unauthorized

Deposit of Public Money); Section 645 (Court Officers Generally); Section 646 (Court Officers Depositing Registry Moneys); Section 647 (Receiving Loan from Court Officer); Section 648 (Custodians, Generally, Misusing Public Funds); Section 649 (Custodians Failing to Deposit Moneys; Persons Affected); Section 650 (Depositaries Failing to Safeguard Deposits); Section 651 (Disbursing Officer Falsely Certifying Full Payment); Section 652 (Disbursing Officer Paying Lesser in Lieu of Lawful Amount); Section 653 (Disbursing Officer Misusing Public Funds); Section 655 (Theft by Bank Examiner); Section 663 (Solicitation or Use of Gifts); Section 667 (Theft of Livestock); Section 2316 (Transportation of Livestock); 2317 (Sale or Receipt of Livestock)

**Subchapter A – Embezzlement and Theft**

Sec. 641. Public Money, Property or Records. This section defines the criminal offense of embezzlement and theft of public money, property or records.

Sec. 642. Accounting Generally for Public Money. This section defines the criminal offense for a United States employee's unauthorized retention of salaries.

Sec. 643. Officer or Employee of United States Converting Property of Another. This section defines the criminal offense of embezzling or stealing money or property of another which comes into his or her possession while executing his or her job.

Sec. 644. Theft, Embezzlement, or Misapplication by a Bank Officer or Employee. This section defines the criminal offense prohibiting bank officers or employees for the embezzlement or theft of bank funds.

Sec. 645. Lending, Credit and Insurance Institutions. This section defines the criminal offense prohibiting officers and employees of lending, credit and insurance institutions from embezzling or stealing money or other things of value from such institutions.

Sec. 646. Property Mortgaged or Pledged to Farm Credit Agencies. This section defines the criminal offense prohibits theft of certain property mortgaged or pledged to farm credit agencies.

Sec. 647. Interstate or Foreign Shipments by Carrier; State Prosecutions. This section defines the criminal offense prohibiting theft of goods or chattels shipped in interstate commerce.

Sec. 648. Carrier's Funds Derived from Commerce; State Prosecutions. This section creates a criminal offense for theft of funds derived by a common carrier engaged in interstate commerce.
Sec. 649. Within Special Maritime and Territorial Jurisdiction. This section defines the criminal offense of theft within the special maritime and territorial jurisdiction.

Sec. 650. Receiving Stolen Property Within Special Maritime and Territorial Jurisdiction. This section defines the criminal offense of receiving stolen property within the special maritime and territorial jurisdiction.

Sec. 651. Theft or Embezzlement from Employee Benefit Plan. This section creates the criminal offense prohibiting theft or embezzlement from an employee benefit plan.

Sec. 652. Theft or Embezzlement from Employment and Training Funds; Improper Inducement; Obstruction of Investigations. This section creates the criminal offense prohibiting theft or embezzlement from certain training funds, and inducement to give up any job training money or thing of value.

Sec. 653. Theft or Bribery Concerning Programs Receiving Federal Funds. This section creates the criminal offense prohibiting theft or bribery concerning programs receiving federal funds.

Sec. 654. Theft of Major Artwork. This section creates the criminal offense prohibiting theft of major artwork.

Sec. 655. Theft or Embezzlement in Connection with Health Care. This section defines the criminal offense of theft or embezzlement in connection with health care.

Sec. 656. Embezzlement of Labor Organization Assets. This section defines the criminal offense of embezzlement of labor organization assets.

**Subchapter B – Stolen Property**

Sec. 670. Definitions for Subchapter. This section sets forth definitions for use in this subchapter.

Sec. 671. Transportation of Stolen Vehicles. This section defines the criminal offense of transportation of stolen vehicles.

Sec. 672. Sale or Receipt of Stolen Vehicles. This section defines the criminal offense of sale or receipt of stolen vehicles.

Sec. 673. Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting. This section defines the criminal offense of transportation of stolen goods, securities, moneys, fraudulent state tax stamps or articles used in counterfeiting.

Sec. 674. Sale or Receipt of Stolen Goods, Securities, Moneys or Fraudulent State Tax Stamps. This section defines the criminal offense of sale or receipt of stolen goods, securities, moneys, fraudulent state tax stamps or articles used in counterfeiting.

Sec. 675. Trafficking in Counterfeit Labels, Illicit Labels, or Counterfeit Documentation or Packaging. This section defines the criminal offense of trafficking in counterfeit labels, illicit labels, or counterfeit documents or packaging.

Sec. 676. Criminal Infringement of a Copyright. This section creates a new criminal offense (moved from Title 17) for criminal infringement of a copyright.

Sec. 677. Copyright Infringement. This section defines the criminal offense of copyright infringement.

Sec. 678. Unauthorized Fixation of and Trafficking in Sound Recordings and Music Videos of Live Musical Performances. This section defines the criminal offense of unauthorized fixation of and trafficking in sound recordings and music videos.

Sec. 679. Unauthorized Recording of Motion Pictures in a Motion Picture Exhibition Facility. This section defines the criminal offense of unauthorized recording of motion pictures in a motion picture exhibition facility.

Sec. 680. Trafficking in Counterfeit Goods or Services. This section defines the criminal offense of trafficking in counterfeit goods or services.

Sec. 681. Trafficking in Certain Motor Vehicles or Motor Vehicles Parts. This section defines the criminal offense of trafficking in certain motor vehicles or motor vehicle parts.

Sec. 682. Chop Shops. This section defines the criminal offense of chop shops.

**Subchapter C – Counterfeiting and Forgery**

Sec. 691. Counterfeit Acts Committed Outside the United States. This section defines the criminal offense of counterfeit acts committed outside the United States.

Sec. 692. Obligations or Securities of United States. This section defines the criminal offense of forgery of an obligation or other security.

Sec. 693. Uttering Counterfeit Obligations or Securities. This section defines the criminal offense of uttering counterfeit obligations or securities.

Sec. 694. Dealing in Counterfeit Obligations or Securities. This section defines the criminal offense of dealing in counterfeit obligations or securities.

Sec. 695. Plates, Stones, or Analog, Digital, or Electronic Images for Counterfeiting Obligations or Securities. This section defines the criminal offense of plates, stones, or analog, digital, or electronic images for counterfeiting obligations or securities.

Sec. 696. Deterrents to Counterfeiting of Obligations or Securities. This sectioned fines the criminal offense of deterrents to counterfeiting of obligations and securities.

Sec. 697. Taking Impressions of Tools Used for Obligations or Securities. This section defines the criminal offense of taking impressions of tools used for obligations or securities.

Sec. 698. Possessing or Selling Impressions of Tools Used for Obligations or Securities. This section defines the criminal offense of possessing or selling impressions of tools used for obligations or securities.

Sec. 699. Foreign Obligations or Securities. This section defines the criminal offense of making foreign obligations or securities.

Sec. 700. Uttering Counterfeit Foreign Obligations or Securities. This section defines the criminal offense of uttering foreign obligations or securities.

Sec. 701. Possessing Counterfeit Foreign Obligations or Securities. This section defines the criminal offense of possessing counterfeit foreign obligations or securities.

Sec. 702. Plates, Stones, or Analog, Digital, or Electronic Images for Counterfeiting Foreign Obligations or Securities. This section defines the criminal offense of plates, stones, or analog, digital, or electronic images for counterfeiting obligations or securities.

Sec. 703. Uttering Counterfeit Foreign Bank Notes. This section defines the criminal offense of uttering counterfeit foreign bank notes.

Sec. 704. Connecting Parts of Different Notes. This section defines the criminal offense of connecting parts of different notes.

Sec. 705. Tokens or Paper Used as Money. This section defines the criminal offense of counterfeiting of tokens or paper used as money.

Sec. 706. Forfeiture of counterfeit paraphernalia. This section allows for the forfeiture of counterfeit materials under this subchapter.

Sec. 707. Bonds and Obligations of Certain Lending Agencies. This section defines the criminal offense of counterfeiting of bonds and obligations of certain lending agencies.

Sec. 708. Contracts, Deeds, and Powers of Attorney. This section defines the criminal offense of counterfeiting contracts, deeds and powers of attorney.

Sec. 709. Military or Naval Discharge Certificates. This section defines the criminal offense of counterfeiting military or naval discharge certificates.

Sec. 710. Military, Naval, or Official Passes. This section defines the criminal offense of counterfeiting military, naval, or official passes.

Sec. 711. Money Orders. This section defines the criminal offense of counterfeiting money orders.

Sec. 712. Postage Stamps, Postage Meter Stamps, and Postal Cards. This section defines the criminal offense of counterfeiting postage stamps, postage meter stamps, and postal cards.

Sec. 713. Printing and Filming of United States and Foreign Obligations and Securities. This section defines the criminal offense of printing and filming of United States and foreign obligations and securities.

Sec. 714. Seals of Courts; Signatures of Judges or Court Officers. This section defines the criminal offense of forgery or counterfeits the seal of any court.

Sec. 715. Seals of Departments or Agencies. This section defines the criminal offense of forgery of seals of departments or agencies.

Sec. 716. Forging Endorsements on Treasury Checks or Bonds or Securities of the United States. This section defines the criminal offense of forgery of endorsements on Treasury Checks, Bonds or Securities of the United States.

Sec. 717. Altering or Removing Motor Vehicle Identification Numbers. This section defines the criminal offense of altering or removing motor vehicle identification numbers.

Sec. 718. Securities of the States and Private Entities. This section defines the criminal offense of counterfeiting securities of the States and private entities.

Sec. 719. Fictitious Obligations. This section defines the criminal offense of creating fictitious obligations.

## CHAPTER 25 – FRAUD AND FALSE STATEMENT CRIMES

This chapter combines the following existing chapters: 47 (Fraud and False Statements); and 63 (Mail Fraud).

The following sections were eliminated: Section 1002 (Possession of False Papers to Defraud United States); Section 1003 (Demands against the United States); Section 1004 (Certification of Checks); Section 1011 (Federal Land Bank Mortgage Transactions); Section 1016 (Acknowledgement of Appearance or Oath); Section 1017 (Government seals wrongfully used and instruments wrongfully sealed); Section 1018 (Official Certificates or Writings); Section 1019 (Certificates by Consular Officers); Section 1021 (Title Records); Section 1022 (Delivery of Certificate, Voucher, Receipt for Military or Naval Property); Section 1023 (Insufficient Delivery of Money or Property for Military or Naval Service); Section 1024 (Purchase or Receipt of Military, Naval or Veterans' Facilities Property); Section 1025 (False Pretenses on High Seas and Other Waters); Section 1026 (Compromise, Adjustment or Cancellation of Farm Indebtedness); Section 1040 (Fraud in connection with major disaster or emergency benefits); Section 1345 (Injunctions Against Fraud).

### Subchapter A – Fraud and False Statements

Sec. 771. Definitions. This section sets out definitions for this subchapter.

Sec. 772. Statements or Entries Generally. This section defines the criminal offense of false statements.

Sec. 773. Bank Entries, Reports and Transactions. This section defines the criminal offense of false bank entries, reports and transactions by an officer, director, agent or employee of a Federal Reserve bank.

Sec. 774. Federal Credit Institution Entries, Reports and Transactions. This section sets out the criminal offense of false entries, reports and transactions by an officer, director, agent or employee of a Federal Credit institution.

Sec. 775 . Federal Deposit Insurance Corporation Transactions. This section creates the criminal offense of using false or counterfeit statement or documents to influence the Federal Deposit insurance Corporation.

Sec. 776. Department of Housing and Urban Development and Federal Housing Administration Transactions. This section defines the criminal offense of false statements to the Department of Housing and Urban Development.

Sec. 777. Department of Housing and Urban Development Transactions. This section defines the criminal offense of making a false entry in any book of the Department of Housing and Urban Development.

Sec. 778. Farm Loan Bonds and Credit Bank Debentures. This section defines the criminal offense of fraud against the terms of a farm loan bond or coupon.

Sec. 779. Loan and Credit Applications Generally; Renewals and Discounts; Crop Insurance. This section defines the criminal offense of making a false statement or report, or knowingly overvaluing land, property or security to influence farm agencies.

Sec. 780. Naturalization, Citizenship or Alien Registry. This section defines the criminal offense of false statements relating to naturalization, citizenship or registry of aliens.

Sec. 781. Highway Projects. This section defines the criminal offense of false statements in highway projects.

Sec. 782. False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act of 1974. This section defines the criminal offense of False statements and concealment of facts with respect to Employee Retirement Income Security documents.

Sec. 783. Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information. This section defines the criminal offense of fraud relating to identification documents and authentication features.

Sec. 784. Aggravated Identity Theft. This section defines the criminal offense of aggravated identity theft.

Sec. 785. Fraudulent Use of a Credit Card. This section defines the criminal offense of fraudulent use of a credit card.

Sec. 786. Fraud and Related Activity in Connection with Access Devices. This section defines the criminal offense of fraud and related activity in relation to access devices.

Sec. 787. Fraud and Related Activity in Connection with Computers. This section defines the criminal offense of fraud and related activity in connection with computers.

Sec. 788. Major Fraud against the United States. This section defines the criminal offense of fraud against the United States.

Sec. 789. Concealment of Assets from Conservator, Receiver, or Liquidating Agent of Financial Institution. This section defines the criminal offense of concealment of assets from a conservator, receiver or liquidating agent.

Sec. 790. Crimes by or Affecting Persons Engaged in the Business of Insurance Whose Activities Affect Interstate Commerce. This section defines the criminal offense of false statements, embezzlement, false entries or obstruction relating to the business of insurance.

Sec. 791. Civil Penalties and Injunctions for Violations of Section 790. This section defines the Civil and equitable remedies for violations of section 790.

Sec. 792. False Statements Relating to Health Care Matters. This section defines the criminal offense of false statements relating to health care matters.

Sec. 793. Entry by False Pretenses to any Real Property, Vessel, or Aircraft of the United States or Secure Area of any Airport or Seaport. This section defines the criminal offense of entry by false pretenses to areas relating to air travel.

Sec. 794. Fraud and Related Activity in Connection with Electronic Mail. This section defines the criminal offense of fraud and related activity in connection with electronic mail.

Sec. 795. False Information and Hoaxes. This section defines the criminal offense of false information and hoaxes.

Sec. 796. Fraud and Related Activity in Connection with Obtaining Confidential Phone Records information of a Covered Entity. This section defines the criminal offense of fraud in obtaining confidential phone records.

**Subchapter B – Mail Fraud**

Sec. 801. Frauds and Swindles. This section defines the criminal offense of mail frauds and swindles.

Sec. 802. Fictitious Name or Address. This section defines the criminal offense of illegal use of a false name or address.

Sec. 803. Fraud by Wire, Radio or Television. This section defines the criminal offense of wire fraud.

Sec. 804. Bank Fraud. This section defines the criminal offense of bank fraud.

Sec. 805. Definition of "Scheme or Artifice to Defraud". This section defines the term "scheme or artifice to defraud".

Sec. 806. Health Care Fraud. This section defines the criminal offense of health care fraud.

Sec. 807. Securities and Commodities Fraud. This section defines the criminal offense of securities and commodities fraud.

Sec. 808. Failure of Corporate Officers to Certify Financial Reports. This section defines the criminal offense of a corporate officer's failure to certify a financial report.

**CHAPTER 27- CRIMES RELATED TO FEDERAL GOVERNMENT RESPONSIBILITIES**

This chapter combines the following existing chapters: 17 (Coins and Currency); 27 (Customs); 53 (Indians); 9 (Bankruptcy); 13 (Civil Rights); 45 (Foreign Relations); and 83 (Postal Service).

This chapter eliminates the following sections: Section 156 (Knowing Disregard of Bankruptcy Law or Rule); Section 158 (Designation of United States attorneys and agents of the Federal Bureau of Investigation to address abusive reaffirmations of debt and materially fraudulent statements in bankruptcy schedules); Section 332 (Debasement of Coins; Alteration of Official Scales, or Embezzlement of Metals); Section 334 (Issuance of Federal Reserve or National Bank Notes); Section 335 (Circulation of Obligations of Expired Corporations); Section 336 (Issuance of Circulating Obligations Less than $1); Section 337 (Coins as Security for Loans); Section 543 (Entry of Goods for Less than Legal Duty); Section 544 (Relanding of Goods); Section 547 (Depositing Goods in Buildings on Boundaries); Section 548 (Removing or Repacking Goods in Warehouses); Section 550 (False Claim for Refund of Duties); Section 551 (Concealing or Destroying Invoices or Other Papers); Section 552 (Officers Aiding Importation of Obscene or Treasonous Books and Articles); Section 953 (Private Correspondence with Foreign Governments); Section 955 (Financial Transactions with Foreign Governments); Section 957 (Possession of Property in Aid of Foreign Government); Section 958 (Commission to Serve Against Friendly Nation); Section 961 (Strengthening Armed vessel of Foreign Nation); Section 962 (Arming Vessel Against Friendly Nation); Section 964 (Delivering Armed vessel to

Belligerent Nation); Section 965 (Vessel Statements as Prerequisite to Vessel's Departure; Section 966 (Departure of vessel Forbidden for False Statements); Section 967 (Departure of Vessel Forbidden in Aid of Neutrality); Section 1154 (Intoxicants Dispensed in Indian Country); Section 1155 (Intoxicants Dispensed on School Site); Section 1156 (Intoxicants Passed Unlawfully); Section 1158 (Counterfeiting Indian Arts and Crafts Board Trade Mark); Section 1159 (Misrepresentation of Indian Produced Goods and Products); Section 1160 (Property Damaged in Committing Offense); Section 1161 (Application of Indian Liquor Laws); Section 1164 (Destroying Boundary and Warning Signs); Section 1165 (Hunting, Trapping, Or Fishing on Indian Land); Section 1166 (Gambling in Indian Country); Section 1691 (Laws Governing Postal Savings); Section 1692 (Foreign Mail as United States Mail); Section 1693 (Carriage of Mail Generally); Section 1694 (Carriage of Matter Out of Mail Over Post Routes); Section 1695 (Carriage of Matter Out of Mail on Vessels); Section 1696 (Private Express for Letters and Packets); Section 1697 (Transportation of Persons Acting as Private Express); Section 1698 (Prompt Delivery of Mail from Vessel); Section 1699 (Certification of Delivery from Vessel); Section 1700 (Desertion of Mails); Section 1706 (Injury to Mail Bags); Section 1710 (Theft of Newspapers); Section 1712 (Falsification of Postal Returns to Increase Compensation); Section 1713 (Issuance of Money Orders without Payment); Section 1715 (Firearms as Nonmailable; Regulations); 1716A (Nonmailable Locksmithing Devices and Motor Vehicle Master Keys); Section 1716B (Nonmailable Plants); Section 1716C (Forged Agricultural Certifications); Section 1717 (Letters and Writings as Nonmailable); Section 1720 (Canceled Stamps and Envelopes); Section 1721 ( Sale or Pledge of Stamps); Section 1722 (False Evidence to Secure Second-Class rate); Section 1723 (Avoidance of Postage by Using Lower Class Matter); Section 1724 (Postage on Mail Delivered by Foreign Vessel); Section 1725 (Postage Unpaid on Deposited Mail Matter); Section 1726 (Postage Collected Unlawfully); Section 1728 (Weight of Mail Increased Fraudulently); Section 1729 (Post Office Conducted without Authority); Section 1730 (Uniforms of Carriers); Section 1731 (Vehicles Falsely Labeled as Carriers); Section 1732 (Approval of Bond or Sureties by Postmaster); Section 1733 (Mailing Periodical Publications without Prepayment of Postage); Section 1734 (Editorials and Other Matter as "Advertisements"); Section 1735 (Sexually Oriented Advertisements); Section 1736 (Restrictive Use of Information); Section 1737 (Manufacturer of Sexually Related Mail Matter).

**Subchapter A- Coins and Currency**

Sec. 851. Mutilation, Diminution, and Falsification of Coins. This section defines the criminal offense of mutilation, diminution, and falsification of coins.

Sec. 852. Mutilation of National Bank Obligations. This section defines the criminal offense of mutilation with the intent to render a bank bill, draft, note or other evidence of debt unfit to be reissued.

**Subchapter B- Customs**

Sec. 861. Entry of Goods Falsely Classified. This section defines the criminal offense of knowingly falsely classifying goods

Sec. 862. Entry of Goods by Means of False Statements. This section defines the criminal offense of making false statements to import goods into the United States.

Sec. 863. Smuggling Goods into the United States. This section defines the criminal offense of smuggling goods into the United States.

Sec. 864. Smuggling Goods into Foreign Countries. This section defines the criminal offense of smuggling goods into foreign countries.

Sec. 865. Removing Goods from Customs Custody; Breaking Seals. This section defines the criminal offense of removing goods from customs custody; and breaking seals.

Sec. 866. Importation or exportation of stolen motor vehicles, off-highway mobile equipment, vessels, or aircraft. This section defines the criminal offense of importing or exporting stolen motor vehicles, off-highway mobile equipment, vessels, or aircraft.

Sec. 867. Smuggling Goods from the United States. This section defines the criminal offense of smuggling goods from the United States.

Sec. 868. Border Tunnels and Passages. This section defines the criminal offense of border tunnels and passages.

**Subchapter C - Indians**

Sec. 871. Indian Country Defined. This section defines Indian country.

Sec. 872. Laws Governing. This section defines laws governing Indian country.

Sec. 873. Offenses Committed within Indian Country. This section defines criminal offenses committed within Indian Country.

Sec. 874. State Jurisdiction Over Offenses Committed By or Against Indians in the Indian Country. This section defines the criminal offenses committed by or against Indians in the Indian Country which fall to state jurisdiction.

Sec.875. Embezzlement and Theft from Indian Tribal Organizations. This section defines the criminal offenses of embezzlement and theft from Indian Tribal Organizations.

Sec. 876. Theft from Gaming Establishments on Indian Lands. This section defines the criminal offense of theft from gaming establishments on Indian Lands.

Sec. 877. Theft by Officers or Employees of Gaming Establishments on Indian Lands. This section defines the criminal offense of theft by officers or employees of gaming establishments on Indian lands.

Sec. 878. Reporting of Child Abuse. This section defines who must report the abuse of a child.

Sec. 879. Illegal Trafficking in Native American Human Remains and Cultured Items. This section defines the criminal offense of illegal trafficking in Native American human remains and cultured items.

**Subchapter D- Bankruptcy**

Sec. 881. Concealment of Assets; False Oaths and Claims; Bribery. This section defines the criminal offense of knowingly concealing assets, making false oaths and claims, and bribery.

Sec. 882. Embezzlement against Estate. This section defines the criminal offense of embezzlement against estate.

Sec. 883. Adverse Interest and Conduct of Officers. This section defines the criminal offense of officers participating in adverse interests.

Sec. 884. Fee Agreements in Cases under Title 11 and Receiverships. This section defines the criminal offense of knowingly and corruptly entering into an agreement for the purpose of fixing the fees.

Sec. 885. Bankruptcy Fraud. This section defines the criminal offense of executing or concealing a scheme or artifice to defraud.

Sec. 886. Designation of United States Attorneys and Agents of the Federal Bureau of Investigation to Address Abusive Reaffirmations of Debt and Materially Fraudulent Statements in Bankruptcy Schedules. This section defines the designation of U.S. Attorneys and agents of the FBI to address abusive reaffirmations of debt and materially fraudulent statements in bankruptcy schedules.

Sec. 887. Definition. This section defines the term "debtor."

**Subchapter E- Civil Rights**

Sec. 891. Conspiracy against Rights. This section defines the criminal offense of conspiracy against rights of others.

Sec. 892. Deprivation of Rights under Color of Law. This section defines the criminal offense of knowingly depriving a person of their rights.

Sec. 893. Exclusion of Jurors on Account of Race or Color. This section defines the criminal offense of excluding jurors on account of their race or color.

Sec. 894. Discrimination Against Person Wearing Uniform of Armed Services. This section defines the criminal offense of discrimination against a person wearing a uniform of the armed services.

Sec. 895. Federally Protected Activities. This section defines federally protected activities.

Sec. 896. Deprivation of Relief Benefits. This section defines the criminal offense of depriving relief benefits to a person.

Sec. 897. Damage to Religious Property; Obstruction of Persons in the Free Exercise of Religious Beliefs. This section defines the criminal offense of damaging religious property and the criminal offense of obstructing persons in the free exercise of religious benefits.

Sec. 898. Freedom of Access to Clinic Entrances. This section defines the criminal offense of obstructing an entrance to a clinic.

Sec. 899. Voting Rights Act Violations. This section defines the criminal offense of violating the Voting Rights Act.

Sec. 900. Prevention of Intimidation in Fair Housing Cases. This section defines the criminal offense of intimidation in fair housing cases.

Sec. 901. Hate Crimes Act. This section defines the criminal offense of hate crimes.

**Subchapter F – Foreign Relations**

Sec. 921. Agents of Foreign Governments. This section defines the criminal offense of acting on behalf of a foreign government without prior notification to the U.S. Government.

Sec. 922. Diplomatic Codes and Correspondence. This section defines the criminal offense of sharing diplomatic codes and correspondence of the U.S. government with foreign governments.

Sec. 923. False Statements Influencing Foreign Government. This section defines the criminal offense of making false statements to influence a foreign government to the detriment of the United States.

Sec. 924. Conspiracy to Kill, Kidnap, Maim, or Injure Persons or Damage Property in a Foreign Country. This section defines the criminal offense of entering into a conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country under the jurisdiction of the United States.

Sec. 925. Enlistment in Foreign Service. This section defines the criminal offense of entering into service on behalf of a foreign entity.

Sec. 926. Expedition against Friendly Nation. This section defines the criminal offense of taking part in a military enterprise against a nation with who the United States is at peace.

Sec. 927. Detention of Armed Vessel. This section defines the criminal offense of detaining an armed vessel.

Sec. 928. Protection of Property Occupied by Foreign Governments. This section defines the criminal offense of knowingly damaging property located within the United States and belonging to a foreign entity.

**Subchapter G – Postal Service**

Sec. 941. Obstruction of Mails Generally. This section defines the criminal offense of obstructing mail.

Sec. 942. Obstruction of Correspondence. This section defines the criminal offense of obstructing correspondence.

Sec. 943. Delay or Destruction of Mail or Newspapers. This section defines the criminal offense of delaying or destructing mail or newspapers.

Sec. 944. Keys or Locks Stolen or Reproduced. This section defines the criminal offense of stealing or reproducing keys or locks.

Sec. 945. Destruction of Letter Boxes or Mail. This section defines the criminal offense of destructing letter boxes or mail.

Sec. 946. Theft of Property Used by Postal Service. This section defines the criminal offense of theft of property used by the Postal Service.

Sec. 947. Theft or Receipt of Stolen Mail Matter Generally. This section defines the criminal offense of theft or receipt of stolen mail.

Sec. 948. Theft of Mail Matter by Officer or Employee. This section defines the criminal offense of theft of mail by an officer or employee of the Postal Service.

Sec. 949. Misappropriation of Postal Funds. This section defines the criminal offense of knowingly misappropriating postal funds.

Sec. 950. Injurious Articles as Nonmailable. This section defines the criminal offense of mailing an article which could be injurious.

Sec. 951. Tobacco Products as Nonmailable. This section defines the criminal offense of mailing certain tobacco products.

Sec. 952. Franking Privilege. This section defines the criminal offense of using authorized franks privately.

**Subchapter H – Special Maritime and Territorial Jurisdiction of the United States**

Sec. 961. Laws of States Adopted for Areas Within Federal Jurisdiction. This section defines the criminal offenses in states with adopted areas of federal jurisdiction.

## CHAPTER 29- CRIMES RELATED TO PROTECTION OF GOVERNMENT FUNCTIONS AND INTEGRITY

This chapter combines the following existing chapters: 11 (Bribery, Graft and Conflicts of Interest); 15 (Claims and Services in Matters Affecting Government); 21 (Contempts); 29 (Elections and Political Activities); 33 (Emblems, Insignia and Names); 35 (Escape and Rescue); 43 (False Personation) 49 (Fugitives from Justice); 73 (Obstruction of Justice) 87 (Prisons); 93 (Public Officers and Employees); 101 (Records and Reports); 109 (Searches and Seizures); 65 (Malicious Mischief) and 91 (Public Lands).

This chapter eliminates the following existing sections: Section 214 (Offer for Procurement of Federal Reserve Bank Loan and Discount of Commercial Paper); Section 217 (Acceptance of Consideration for Adjustment of Farm Indebtedness); Section 227 (Wrongfully influencing a private entity's employment decisions by a member of Congress); Section 285 (Taking or Using Papers Relating to Claims); Section 286 (Conspiracy to defraud the Government with respect to claims); Section 288 (False Claims for Postal Losses); Section 289 (False Claims for Pensions); Section 290 (Discharge Papers Withheld by Claim Agent); Section 291 (Purchase of Claims for Fees by Court Officials); Section 292 (Solicitation of Employment and Receipt of Unapproved Fees Concerning Federal Employees' Compensation); Section 403 (Protection of the privacy of child victims and child witnesses); Section 592 Troops at Polls); Section 593 (Interference by Armed Forces); Section 595 (Interference by Administrative Employees of Federal, State, or Territorial Governments); Section 596 (Polling Armed Forces); Section 597 (Expenditures to Influence Voting); Section 598 (Coercion by Means of Relief Appropriations); Section 599 (Promise of Appointment by Candidate); Section 600 (Promise of Employment or Other Benefit for Political Activity); Section 603 (Making political Contributions); Section 604 (Solicitation from Persons on Relief); Section 605 (Disclosure of Names of Persons on Relief); Section 606 (Intimidation to Secure Political Contributions); Section 607 (Place of Solicitation); Section 608 (Absent Uniformed Services Voters and Overseas Voters); Section 609 (Use of Military Authority to Influence Member of Armed Forces); Section 703 (Uniform of Friendly Nation); Section 705 (Badge or Medal of Veterans' Organizations); Section 706 (Red Cross); Section 706A (Geneva Distinctive Emblems); Section 707 (4-H Club Emblem Fraudulently Used); Section 708 (Swiss Confederation Coat of Arms); Section 710 (Cremation Urns for Military Use); Section 711 (Smokey Bear Character or Name); Section 711A (Woodsy Owl Character, Name, or Slogan); Section 715 (The Golden Eagle Insignia); Section 753 (Rescue to prevent Execution); Section 756 (Internee of Belligerent Nation); Section 757 (Prisoners of War or Enemy Aliens); Section 914 (Creditors of the United States); Section 915 (Foreign Diplomats, Consuls or Officers); Section 916 (4-H Club Members or Agents); Section 917 (Red Cross Members or Agents); Section 1364 (Interference with Foreign Commerce by Violence); Section 1367 (Interference with the Operation of a Satellite); Section 1502 (Resistance to Extradition Agent); Section 1504 (Influencing Juror by Writing); Section 1506 (Theft or Alteration of Record or Process; False Bail); Section 1507 (Picketing or Parading); Section 1508 (Recording, Listening to, or Observing Proceedings of Grand or Petit Juries While Deliberating or Voting); Section 1516 (Obstruction of federal audit); Section 1517 (Obstructing examination of financial institution); Section 1518 (Obstruction of criminal investigations of health care offenses); Section 1519 (Destruction, alteration, or falsification of records in Federal investigations and

bankruptcy); Section 1521 (Retaliating against a Federal judge or Federal law enforcement officer by false claim or slander of title); Section 1851 (Coal Depredations); Section 1854 (Trees Boxed for Pitch or Turpentine); Section 1857 (Fences Destroyed; Livestock Entering); Section 1858 (Survey Marks Destroyed or Removed); Section 1859 (Surveys Interrupted); Section 1860 (Bids at Land Sales); Section 1861 (Deception of Prospective Purchasers); Section 1901 (Collecting or Disbursing Officer Trading in Public Property); Section 1902 (Disclosure of Crop Information and Speculation Thereon); Section 1903 (Speculation in Stocks or Commodities Affecting Crop Insurance); Section 1906 (Disclosure of Information from a Bank Examination Report); Section 1907 (Disclosure of Information by Farm Credit Examiner); Section 1909 (Examiner Performing Other Services); Section 1910 (Nepotism in Appointment of Receiver or Trustee); Section 1911 (Receiver Mismanaging Property); Section 1912 (Unauthorized Fees for Inspection of Vessels); Section 1913 (Lobbying with Appropriated Moneys); Section 1915 (Compromise of Customs Liabilities); Section 1916 (Unauthorized Employment and Disposition of Lapsed Appropriations); Section 1917 (Interference with Civil Service Examinations); Section 1918 (Disloyalty and Asserting the Right to Strike Against the Government); Section 1919 (False Statement to Obtain Unemployment Compensation for Federal Service); Section 1920 (False statement or fraud to obtain Federal employees' compensation); Section 1921 (Receiving Federal Employees' Compensation After Marriage); Section 1922 (False or Withheld Report Concerning Federal Employees' Compensation); Section 1923 (Fraudulent Receipt of Payments of Missing Persons); Section 1924 (Unauthorized removal and retention of classified documents or material); Section 2072 (False Crop Reports); Section 2074 (False Weather Reports); Section 2075 (Officer Failing to Make Returns or Reports); Section 2076 (Clerk of United States District Court); Section 2231 (Assault or Resistance); Section 2234 (Authority Exceeded in Executing Warrant); Section 2235 (Search Warrant procured Maliciously); Section 2236 (Searches without Warrant); Section 2237 (Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information).

**Subchapter A- Bribery, Graft and Conflicts of Interest**

Sec. 991. Bribery of Public Officials and Witnesses. This section defines the criminal offense of bribing public officials and witnesses.

Sec. 992. Definitions for Certain Sections. This section defines terms used in sections 993, 995, 997, 998, and 999.

Sec. 993. Compensation to Members of Congress, Officers, and Others in Matters Affecting the Government. This section defines the criminal offense of compensation to Members of Congress, officers, and others in matters affecting the government.

Sec. 994. Practice in United States Court of Federal Claims or the United States Court of Appeals for the Federal Circuit by Members of Congress. This section defines that Members of Congress are subject to the penalties set forth in section 1004 of this title.

Sec. 995. Activities of Officers and Employees in Claims against and Other Matters Affecting the Government. This section defines acceptable activities of officers and employees in claims against and other matters affecting the government.

Sec. 996. Exemption of Retired Officers of the Uniformed Services. This section defines that section 993 and 995 do not apply to retired officers of the uniformed services.

Sec. 997. Restrictions on Former Officers, Employees, and Elected Officials of the Executive and Legislative Branches. This section defines the restrictions on former officers, employees, and elected officials of the executive and legislative branches.

Sec. 998. Acts Affecting a Personal Financial Interest. This section defines the criminal offense of a government employee acting in personal financial interest.

Sec. 999. Salary of Government Officials and Employees Payable Only by United States. This section defines the criminal offense of a government official or employee who receives monetary compensation from a source other than the Government of the United States.

Sec. 1000. Offer to Procure Appointive Public Office. This section defines the criminal offense of offering or promising money or things of value to a person with the intent to influence the procurement of an office or place under the United States.

Sec. 1001. Acceptance or Solicitation to Obtain Appointive Public Office. This section defines the criminal offense of soliciting to obtain an appointed public office.

Sec. 1002. Offer or Acceptance of Loan or Gratuity by Financial Institution Examiner. This section defines the criminal offense of accepting a loan while acting in the capacity of being a financial institution examiner.

Sec. 1003. Receipt of Commissions or Gifts for Procuring Loans. This section defines the criminal offense of receiving commissions or gifts for procuring loans.

Sec. 1004. Penalties and Injunctions. This section defines the penalties and injunctions for an offense under sections 993, 994, 995, 997, 998, or 999.

Sec. 1005. Voiding Transactions in Violation of Subchapter; Recovery by the United States. This section defines who may void transactions in violation of this chapter.

Sec. 1006. Officers and Employees Acting as Agents of Foreign Principles. This section defines the criminal offense of a public official acting as an agent of a foreign principle without registering under the Foreign Agents Registration Act of 1938.

Sec. 1007. Bribery in Sporting Contests. This section defines the criminal offense of engaging in bribery which would affect interstate or foreign commerce to influence a sporting contest.

Sec. 1008. Continuing Financial Crimes Enterprise. This section defines the criminal offense of continuing a financial crimes enterprise.

**Subchapter B – Claims and Services in Matters Affecting Government**

Sec. 1017. False, Fictitious or Fraudulent Claims. This section defines the criminal offense of making false, fictitious, or fraudulent claims.

**Subchapter C - Contempts**

Sec. 1021. Power of Court. This section defines the power of a court of the United States to punish.

Sec. 1022. Contempts Constituting Claims. This section defines the criminal offense of being in contempt of court.

**Subchapter D – Elections and Political Activities**

Sec. 1031. Intimidation of Voters. This section defines the criminal offense of intimidating voters.

Sec. 1032. Deprivation of Employment or Other Benefit for Political Contribution. This section defines the criminal offense of depriving employment or other benefits for purposes of political contribution.

Sec. 1033. Solicitation of Political Contributions. This section defines the criminal offense of soliciting political contributions.

Sec. 1034. Coercion of Political Activity. This section defines the criminal offense of coercion of political activity.

Sec. 1035. Voting by Aliens. This section defines the criminal offense of voting by aliens.

**Subchapter E – Emblems, Insignia and Names**

Sec. 1051. Desecration of the Flag of the United States; Penalties. This section defines the criminal offense of desecrating the flag of the United States and penalties for doing so.

Sec. 1052. Official Badges, Identification Cards, Other Insignia. This section defines the criminal offense for misusing official badges, identification cards, and other insignia.

Sec. 1053. Uniform of Armed Forces and Public Health Service. This section defines the criminal offense of the use of the uniform of the armed forces and public health service without authority.

Sec. 1054. Military Medals or Decorations. This section defines the criminal offense of the use of military medals or decorations without authority.

Sec. 1055. False Advertising or Misuse of Names to Indicate Federal Agency. This section defines the criminal offense of the use of false advertising or misuse of names to indicate a federal agency.

Sec. 1056. Misuse of Names, Words, Emblems, or Insignia. This section defines the criminal offense of the misuse of names, words, emblems, or insignia.

Sec. 1057. Use of Likenesses of the Great Seal of the United States, the Seals of the President and Vice President, the Seal of the United States Senate, the Seal of the United States House of Representatives, and the Seal of the United States Congress. This section defines the criminal offense of the misuse of the likenesses of the listed seals.

Sec. 1058. Public Employee Insignia and Uniform. This section defines the use of public employee insignia and uniform without authority.

**Subchapter F – Escape and Rescue**

Sec. 1071. Prisoners in Custody of Institution or Officer. This section defines the criminal offense of escaping or attempting to escape from the custody of the Attorney General or his authorized representative.

Sec. 1072. Instigating or Assisting Escape. This section defines the criminal offense of instigating or assisting the escape of a person in custody.

Sec. 1073. Officer Permitting Escape. This section defines the criminal offense of an officer permitting the escape of a person in custody.

Sec. 1074. High Speed Flight from Immigration Checkpoint. This section defines the criminal offense of fleeing or evading a checkpoint operated by a Federal law enforcement agency.

Sec. 1075. Escape From Hospitalization. This section defines the criminal offense of escaping or attempting to escape custody from a facility to which a person is confined pursuant to this section 1826 of title 28, or section 4243 of this title.

**Subchapter G – False Personation**

Sec. 1091. Citizen of the United States. This section defines the criminal offense of falsely representing oneself to be a citizen of the United States.

Sec. 1092. Officer or Employee of the United States. This section defines the criminal offense of falsely representing oneself to be an officer acting under the authority of the United States.

Sec. 1093. Impersonator Making Arrest or Search. This section defines the criminal offense of falsely representing oneself to have the authority of the United States to make an arrest or conduct a search.

**Subchapter H – Fugitives from Justice**

Sec. 1101. Concealing Person from Arrest. This section defines the criminal offense of concealing a person from arrest.

Sec. 1102. Concealing Escaped Prisoner. This section defines the criminal offense of concealing an escaped prisoner.

Sec. 1103. Flight to Avoid Prosecution or Giving Testimony. This section defines the criminal offense of flight to avoid prosecution or giving testimony.

Sec. 1104. Flight to Avoid Prosecution for Damaging or Destroying Any Building or Other Real or Personal Property. This section defines the criminal offense of flight to avoid prosecution for damaging or destroying any building or other real or personal property.

**Subchapter I- Obstruction of Justice**

Sec. 1131. Assault on Process Server. This section defines the criminal offense of an assault on a process server.

Sec. 1132. Influencing or Injuring Officer or Juror Generally. This section defines the criminal offense of influencing or injuring an officer or a juror, in general.

Sec. 1133. Obstruction of Proceedings before Departments, Agencies, and Committees. This section defines the criminal offense of obstructing proceedings before United States departments, agencies, and committees.

Sec. 1134. Obstruction of Court Orders. This section defines the criminal offense of obstructing court orders.

Sec. 1135. Obstruction of Criminal Investigations. This section defines the criminal offense of obstructing criminal investigations.

Sec. 1136. Obstruction of State or Local Law Enforcement with Regard to Illegal Gambling Business. This section defines the criminal offense of obstructing state or local law enforcement with regards to an illegal gambling business.

Sec. 1137. Tampering with a Witness, Victim, or an Informant. This section defines the criminal offense of tampering with a witness, victim, or an informant.

Sec. 1138. Retaliating Against a Witness, Victim, or an Informant. This section defines the criminal offense of retaliating against a witness, victim, or an informant.

Sec. 1139. Civil Action to Restrain Harassment of a Victim or Witness. This section defines the guidelines for temporary restraining orders.

Sec. 1140. Civil Action to Protect Against Retaliation in Fraud Cases. This section defines the guidelines for receiving protection against retaliation in fraud cases.

Sec. 1141. Definitions for Certain Provisions; General Provision. This section defines certain provisions and general provisions.

Sec. 1142. Destruction of Corporate Audit Records. This section defines the guidelines for the destruction of corporate audit records and the criminal offense of a violation thereof.

**Subchapter J- Prisons**

Sec. 1161. Providing or Possessing Contraband in Prison. This section defines the criminal offense of providing or possessing contraband in prison.

Sec. 1162. Mutiny and Riot Prohibited. This section defines the criminal offense of instigating, conducting, or conspiring to cause a mutiny or riot at any Federal detention facility.

Sec. 1163. Trespass on Bureau of Prisons Reservations and Land. This section defines the criminal offense of trespassing on Bureau of Prisons Reservations and land.

**Subchapter K – Public Officers and Employees**

Sec. 1171. Disclosure of Confidential Information Generally. This section defines the criminal offense of disclosing confidential information without authority.

**Subchapter L – Records and Reports**

Sec. 1181. Concealment, Removal, or Mutilation Generally. This section defines the criminal offense of concealing, removing, or mutilating records or reports.

Sec. 1182. False Entries and Reports of Moneys or Securities. This section defines the criminal offense of making false entries and reports of moneys or securities.

**Subchapter M – Searches and Seizures**

Sec. 1191. Destruction or Removal of Property to Prevent Seizure. This section defines the criminal offense of the destruction or removal of property to prevent seizure.

Sec. 1192. Rescue of Seized Property. This section defines the criminal offense of rescuing seized property.

**Subchapter N – Malicious Mischief**

Sec. 1201. Government Property or Contracts. This section defines the criminal offense of committing any depredation against any property of the United States.

Sec. 1202. Communication Lines, Stations or Systems. This section defines the criminal offense of injuring or destroying communication lines, stations, or systems knowingly, and without authority.

Sec. 1203. Buildings or Property within Special Maritime and Territorial Jurisdiction. This section defines the criminal offense of injuring or destroying buildings or properties within special maritime and territorial jurisdictions.

Sec. 1204. Tampering with Consumer Products. This section defines the criminal offense of knowingly tampering with consumer products.

Sec. 1205. Destruction of an Energy Facility. This section defines the criminal offense of destructing an energy facility.

Sec. 1206. Harming Animals Used in Law Enforcement. This section defines the criminal offense of harming an animal used in law enforcement.

Sec. 1207. Destruction of Veterans' Memorials. This section defines the criminal offense of destructing veterans' memorials.

**Subchapter O – Public Lands**

Sec. 1211. Timber Removed or Transported. This section defines the criminal offense of removing or transporting timber from public lands.

Sec. 1212. Trees Cut or Injured. This section defines the criminal offense of cutting or injuring trees on public lands.

Sec. 1213. Timber Set Afire. This section defines the criminal offense of setting timber on fire on public lands.

Sec. 1214. Fires Left Unattended and Unextinguished. This section defines the criminal offense of leaving fires unattended and/or unextinguished on public lands.

Sec. 1215. Trespass on National Forest Lands. This section defines the criminal offense of trespassing on National Forest lands.

Sec. 1216. Hazardous or Injurious Devices on Federal Lands. This section defines the criminal offense of having hazardous or injurious devices on Federal lands.

**Subchapter P – Restricted Building or Grounds**

Sec. 1221. Restricted Building or Grounds. This section defines the criminal offense of entering or remaining in a restricted building or grounds.

## CHAPTER 31- INTERNATIONAL LAW CRIMES

This chapter consolidates the following existing chapters: 81 (Piracy and Privateering); 77 (Peonage, Slavery and Trafficking in Persons); 50A (Genocide); 113C (Torture); and 118 (War Crimes).

The chapter eliminates the following existing sections: Section 1092 (Exclusive remedies); Section 1582 (Vessel for Slave Trade); Section 1583 (Enticement into Slavery); Section 1585 (Seizure, Detention, Transportation or Sale of Slaves); Section 1586 (Service on Vessels in Slave Trade); Section 1587 (Possession of Slaves Aboard Vessel); Section 1588 (Transportation of Slaves from United States); Section 1593 (Mandatory restitution); Section 1594 (General provisions); Section 1596 (Additional jurisdiction in certain trafficking offenses); Section 1652 (Citizens as Pirates); Section 1653 (Aliens as Pirates); Section 1654 (Arming or Serving on Privateers); Section 1655 (Assault on Commander as Piracy); Section 1656 (Conversion or Surrender of Vessel); Section 1657 (Corruption of Seamen and Confederating with Pirates); Section 1658 (Plunder of Distressed Vessel); Section 1659 (Attack to Plunder Vessel); Section 1660 (Receipt of Pirate Property); Section 1661 (Robbery Ashore); Section 2340B (Exclusive remedies).

### Subchapter A- Piracy and Privateering

Sec. 1251. Piracy under Law of Nations. This section defines the criminal offense of piracy.

### Subchapter B- Peonage, Slavery and Trafficking in Persons

Sec. 1261. Peonage. This section defines the criminal offense of peonage.

Sec. 1262. Sale into Voluntary Servitude. This section defines the criminal offense of selling a person into voluntary servitude.

Sec. 1263. Forced Labor. This section defines the criminal offense of forced labor.

Sec. 1264. Trafficking with Respect to Peonage, Slavery, Involuntary Servitude, or Forced Labor. This section defines the criminal offense of trafficking persons with respect to peonage, slavery, involuntary servitude, or forced labor.

Sec. 1265. Sex Trafficking of Children or By Force, Fraud, or Coercion. This section defines the criminal offense of sex trafficking of children by force, fraud, or coercion.

Sec. 1266. Unlawful Conduct With Respect to Documents in Furtherance of Trafficking, Peonage, Slavery, Involuntary Servitude, or Forced Labor. This section defines the criminal offense of unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.

Sec. 1267. Civil Remedy. This section defines the conditions to bring about a civil remedy with regards to peonage, slavery, and trafficking.

**Subchapter C - Genocide**

Sec. 1281. Genocide. This section defines the criminal offense of genocide.

Sec. 1282. Definitions. This section defines terms used in subchapter C.

**Subchapter D - Torture**

Sec. 1291. Torture. This section defines the criminal offense of torture.

Sec. 1292. Definitions. This section defines terms used in subchapter D.

**Subchapter E – War Crimes**

Sec. 1296. War Crimes. This section defines the criminal offense of committing war crimes.

Sec. 1297. Recruitment or Use of Child Soldiers. This section defines the criminal offense of recruiting or using children under the age of 15 in an armed force or group, or to actively participate in hostilities.

**CHAPTER 33- TRANSPORTATION RELATED CRIMES**

This chapter consolidates the following existing chapters: 2 (Aircraft and Motor Vehicles); 97 (Railroad Carriers and Mass Transportation Systems on Land, On Water, Or through the Air); 107 (Seamen and Stowaways); 111 (Shipping)

This chapter eliminates the following existing sections: Section 36 (Drive-by Shooting); Section 39 (Traffic signal preemption transmitters); Section 40 (Commercial motor vehicles required to stop for inspections); Section 1991 (Entering Train to Commit Crime); Section 2191 (Cruelty to Seamen); Section 2192 (Incitation of Seamen to Revolt or Mutiny); Section 2193 (Revolt or Mutiny of Seamen); Section 2194 (Shanghaiing Sailors); Section 2195 (Abandonment of Sailors); Section 2271 (Conspiracy to Destroy Vessels); Section 2272 (Destruction of Vessel by Owner); Section 2273 (Destruction of Vessel by Nonowner); Section 2274 (Destruction or Misuse of Vessel by Person in Charge); Section 2275 (Firing or Tampering with Vessel); Section 2276 (Breaking and Entering Vessel); Section 2277 (Explosives or Dangerous Weapons Aboard Vessels); Section 2278 (explosives on Vessels Carrying Steerage Passengers); Section 2279 (Boarding Vessels Before Arrival); Section 2281 (Violence Against Maritime Fixed Platform).

**Subchapter A – Aircraft and Motor Vehicles**

Sec. 1301. Destruction of Aircraft or Aircraft Facilities. This section defines the criminal offense of destructing an aircraft or aircraft facilities.

Sec. 1302. Destruction of Motor Vehicles or Motor Vehicle Facilities. This section defines the criminal offense of destructing motor vehicles of motor vehicle facilities.

Sec. 1303. Penalty When Death Results. This section defines the criminal penalty for actions listed in this subchapter which result in death.

Sec. 1304. Imparting or Conveying False Information. This section defines the criminal offense of imparting or conveying false information.

Sec. 1305. Violence at International Airports. This section defines the criminal offense of violence at international airports.

Sec. 1306. Fraud Involving Aircraft or Space Vehicle Parts in Interstate or Foreign Commerce. This section defines the criminal offense of fraud involving aircraft or space vehicle parts in interstate or foreign commerce.

Sec. 1307. Aircraft Piracy. This section defines the criminal offense of aircraft piracy.

Sec. 1308. Interference with Flight Crew Members and Attendants. This section defines the criminal offense of interfering with flight crew members and attendants.

Sec. 1309. Carrying a Weapon or Explosive on an Aircraft. This section defines the criminal offense carrying a weapon or explosive on an aircraft.

Sec. 1310. Application of Certain Criminal Laws to Acts on Aircraft. This section defines the application of certain criminal laws to acts on aircraft.

Sec. 1311. Definitions. This section defines terms used in sections 1301-1307.

**Subchapter B - Railroads**

Sec. 1331. Terrorist Attacks and Other Violence against Railroad Carriers and Against Mass Transportation Systems on Land, on Water, or Through the Air. This section defines the criminal offense of terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air.

**Subchapter C – Seamen and Stowaways**

Sec. 1341. Drunkenness or Neglect of Duty by Seamen. This section defines the criminal offense of drunkenness or neglect of duty by seamen.

Sec. 1342. Misuse of Federal Certificate, License or Document. This section defines the criminal offense of misuse of a federal certificate, license, or document.

Sec. 1343. Stowaways on Vessels or Aircraft. This section defines the criminal offense of becoming a stowaway on a vessel or aircraft without authority to do so.

**Subchapter D - Shipping**

Sec. 1345. Violence against Maritime Navigation. This section defines the criminal offense of violence against a maritime navigation.

Sec. 1346. Devices or Dangerous Substances in Waters of the United States Likely to Destroy or Damage Ships or to Interfere with Maritime Commerce. This section defines the crime of placing a device or dangerous substance in navigable waters of the United States.

Sec. 1347. Violence against Aids to Maritime Navigation. This section defines the crime of damaging aids to maritime navigation.

Sec. 1348. Transportation of Explosive, Biological, Chemical or Radioactive or Nuclear Materials. This section defines the crime of transporting on a vessel any explosive, biological agent, chemical weapon or radioactive or nuclear material.

Sec. 1349. Transportation of Terrorists. This section defines the crime of transporting a terrorist.

Sec. 1350. Operation of Submersible or Semi-submersible Vessel without Nationality. This section defines the crime of operating a submersible or semi-submersible vessel without nationality.

**Subchapter E – Destruction of, or Interference with, Vessels or Maritime Facilities**

Sec. 1351. Jurisdiction and Scope. This section defines the jurisdiction and scope of the criminal offenses in this subchapter.

Sec. 1352. Destruction of Vessel or Maritime Facility. This section defines the crime of destruction of vessel or maritime facility.

Sec. 1353. Imparting or Conveying False Information. This section defines the crime of imparting or conveying false information.

Sec. 1354. Bar to Prosecution. This section defines the bar to certain prosecutions under section 1352 and 1353.

Sec. 1355. Bribery Affecting Port Security. This section defines the crime of bribery affecting Prot Security.

**CHAPTER 35- REGULATORY CRIMES**

This chapter consolidates the following existing chapters: 3 (Animals, Birds, Fish and Plants); 11A (Child Support); 50 (Gambling); 90 (Protection of Trade Secrets); 114 (Trafficking in Contraband Cigarettes and Smokeless Tobacco); 71 (Obscenity). It also adds a new subchapter on money laundering.

The chapter eliminates the following sections: Section 46 (Transportation of Water Hyacinths); Section 1082 (Gambling Ships); Section 1083 (Transportation Between Shore and Ship; Penalties); Section 1460 (Possession with Intent to See, and Sale, of Obscene Matter on Federal Property); Section 1463 (Mailing Indecent Matter on Wrappers or Envelopes); Section 1464 (Broadcasting Obscene Language); Section 1468 (Distributing obscene material by cable or subscription television); Section 1834 (Criminal Forfeiture); Section 2345 (Effect on State and local law).

**Subchapter A – Animals, Birds, Fish, and Plants**

Sec. 1371. Hunting, Fishing, Trapping; Disturbance or Injury on Wildlife Refuges. This section defines the criminal offense of non-compliance with rules and regulations regarding hunting, fishing, trapping; or disturbance or injury on wildlife refuges.

Sec. 1372. Importation or Shipment of Injurious Mammals, Birds, Fish (Including Mollusks and Crustacea), Amphibia, and Reptiles; Permits, Specimens for Museums; Regulations. This section defines the criminal offense of importation or shipment of injurious mammals, birds, fish (including mollusks and crustacean), amphibian, and reptiles; violations of permits, specimens for museums, and regulations.

Sec. 1373. Force, Violence and Threats Involving Animal Enterprises. This section defines the criminal offense of causing damage to or interfering with the operation of an animal enterprise.

Sec. 1374. Use of Aircraft or Motor Vehicles to Hunt Certain Wild Horses or Burros; Pollution of Watering Holes. This section defines the criminal offense of using aircraft or motor vehicles to hunt certain wild horses or burros or pollutes a watering hole for the purpose thereof.

Sec. 1375. Animal Crush Videos. This section defines the criminal offense of creating or distributing an animal crush video.

Sec. 1376. Enforcement of Animal Fighting Prohibition. This section defines the crime of animal fighting.

**Subchapter B - Gambling**

Sec. 1381. Transmission of Wagering Information; Penalties. This section defines the criminal offense of the transmission of wagering information penalties.

Sec. 1382. Definitions. This section defines the terms used in subchapter B.

**Subchapter C – Protection of Trade Secrets**

Sec. 1391. Economic Espionage. This section defines the criminal offense of economic espionage.

Sec. 1392. Theft of Trade Secrets. This section defines the criminal offense of theft of trade secrets.

Sec. 1393. Exceptions to Prohibitions. This section defines the exceptions to prohibitions.

Sec. 1394. Orders to Preserve Confidentiality. This section defines the orders to preserve confidentiality.

Sec. 1395. Civil Proceedings to Enjoin Violations. This section defines the civil proceedings to enjoin violations.

Sec. 1396. Applicability to Conduct outside the United States. This section defines that conditions to which subchapter C is applicable outside of the United States.

Sec. 1397. Definitions. This section defines the terms used in this subchapter.

**Subchapter D – Trafficking in contraband Cigarettes**

Sec.1411. Definitions. This section defines terms used in this chapter.

Sec. 1412. Unlawful Acts. This section defines unlawful acts.

Sec. 1413. Recordkeeping, Reporting, and Inspection. This section defines recordkeeping, reporting, and inspection.

Sec. 1414. Penalties. This section defines penalties for violations.

Sec. 1415. Effect on State and Local Law. This section defines the effect of this chapter in conjunction with state and local law.

Sec. 1416. Enforcement and Regulations. This section defines the enforcement and regulations in this subchapter.

**Subchapter E – Child Support**

Sec. 1431. Failure to Pay Legal Child Support Obligations. This section defines the criminal offense of failure to pay legal child support obligations.

**Subchapter F - Obscenity**

Sec. 1441. Mailing Obscene or Crime-Inciting Matter. This section defines the criminal offense of mailing obscene or crime-inciting matter.

Sec. 1442. Importation or Transportation of Obscene Matters. This section defines the criminal offense of importation or transportation of obscene matters.

Sec. 1443. Production and Transportation of Obscene Matters for Sale or Distribution. This section defines the criminal offense of transportation of obscene matters for sale or distribution.

Sec. 1444. Engaging in the Business of Selling or Transferring Obscene Matter. This section defines the criminal offense of engaging in the business of selling or transferring obscene matter.

Sec. 1445. Obscene Visual Representations of the Sexual Abuse of Children. This section defines the criminal offense of producing, distributing, receiving, or possesses with intent to do any of these things, the obscene visual representations of the sexual abuse of children.

Sec. 1446. Presumptions. This section defines the presumptions with regards to subchapter F.

Sec. 1447. Transfer of Obscene Material to Minors. This section defines the criminal offense of transference of obscene material to minors.

**Subchapter G – Money Laundering**

Sec. 1451. Laundering of Monetary Instruments. This section defines the criminal offense of laundering of monetary instruments.

Sec. 1452. Engaging in Monetary Transactions in Property Derived From Specified Unlawful Activity. This section defines the criminal offense of engaging in monetary transactions in property derived from specified unlawful activity.

Sec. 1453. Structuring Transactions to Evade Reporting Requirement Prohibited. This section defines the criminal offense of structuring transactions to evade reporting requirement.

Sec. 1454. Bulk Cash Smuggling Into or Out of the United States. This section defines the criminal offense of bulk cash smuggling into or out of the United States.

**CHAPTER 37- PRIVACY**

This chapter consolidates four existing chapters: 88 (Privacy); 119 (Wire and Electronic Communications Interception and Interception of Oral Communications); 121 (Stored Wire and Electronic Communications and Transactional Records Access); and 123 (Prohibition on Release and Use of Certain Personal Information from State Motor vehicle Records). It also adds a new subchapter for Identity Theft. The chapter does not eliminate any existing sections.

**Subchapter A - Privacy**

Sec. 1481. Video Voyeurism. This section defines the criminal offense of video voyeurism.

**Subchapter B – Wire and Electronic Communications Interception and Interception of Oral Communications**

Sec. 1491. Definitions. This section defines terms used in this subchapter.

Sec. 1492. Interception and Disclosure of Wire, Oral or Electronic Communications Prohibited. This section defines the criminal offense of intercepting or disclosing wire, oral, or electronic communications.

Sec. 1493. Manufacture, Distribution, Possession, and Advertising of Wire, Oral, or Electronic Communication Intercepting Devices Prohibited. This section defines the criminal offense of manufacturing, distributing, possessing, and advertising or wire, oral, or electronic communication intercepting devices.

Sec. 1494. Confiscation of Wire, Oral, or Electronic Communication Intercepting Devices. This section states that wire, oral, or electronic communication intercepting devices may be confiscated.

**Snbchapter C – Stored Wire and Electronic Communications and Transactional Records Access**

Sec. 1521. Unlawful Access to Stored Communications. This section defines the criminal offense of unlawful access to stored communications.

Sec. 1522. Definitions. This section states that a term defined in Chapter 206B shall have the same meaning in Subchapter C.

**Subchapter D – Prohibition on Release and Use of Certain Personal Information from State Motor Vehicle Records**

Sec. 1541. Prohibition on Release and Use of Certain Personal Information from State Motor Vehicle Records. This section defines the prohibition on release and use of certain personal information from state motor vehicle records.

Sec. 1542. Additional Unlawful Acts. This section defines additional unlawful acts pertaining to subchapter D.

Sec. 1543. Penalties. This section defines penalties for unlawful acts in relation to subchapter D.

Sec. 1544. Civil Action. This section defines civil action for offenses under subchapter D.

Sec. 1545. Definitions. This section defines terms used in subchapter D.

**Subchapter E – Identity Theft**

Sec. 1551. Obtaining Information under False Pretenses. This section defines the criminal offense of obtaining information under false pretenses.

Sec. 1552. Unauthorized Disclosures by Officers or Employees. This section defines the criminal offense of unauthorized disclosures by officers or employees.

Sec. 1553. Definitions for Subchapter. This section defines terms used in subchapter E.

**CHAPTER 50- FORFEITURE**

This chapter consolidates all of the civil and criminal forfeiture provisions in the existing title 18. Many criminal provisions include specific forfeiture language applicable to the defined crime. These provisions overlap with the general provisions, and the bill streamlines and consolidates existing provisions.

**Subchapter A- Property Subject to Forfeiture**

Sec. 2501. Forfeitable Property. This section defines forfeitable property.

**Subchapter B – Civil Forfeiture**

Sec. 2551. Offenses Giving Rise to Civil Forfeiture. This section defines criminal offenses giving rise to civil forfeiture.

Sec. 2552. Procedure Generally. This section defines the general procedure related to forfeiture and seizure.

Sec. 2553. General Rules for Civil Forfeiture Proceedings. This section defines the general rules for civil forfeiture proceedings.

Sec. 2554. Civil Forfeiture of Fungible Property. This section defines the general procedure of civil forfeiture of fungible property.

Sec. 2555. Civil Forfeiture of Real Property. This section defines the general procedure of civil forfeiture of real property.

Sec. 2556. Subpoenas for Bank Records. This section defines the general procedure of obtaining a subpoena for bank records.

Sec. 2557. Anti-Terrorist Forfeiture Protection. This section defines the general procedures for civil forfeiture when the defendant is alleged to have committed an act of international terrorism.

**Subchapter C – Criminal Forfeiture**

Sec. 2561. Offenses Giving Rise to Criminal Forfeiture. This section defines the criminal offenses which give rise to criminal forfeiture.

Sec. 2562. Procedures for Criminal Forfeiture. This section defines the procedures for criminal forfeiture.

**Elimination of Other Existing Chapters in Title 18**

In addition to the consolidation of many existing chapters in the criminal code, the bill eliminates several chapters in their entirety: Chapter 23, Sections 431-443 (Contracts); Chapter 57, Section 1231 (Labor); Chapter 59, Sections 1261-1265 (Liquor Traffic); Chapter 61, Sections 1301-1307 (Lotteries); Chapter 85, Sections 1761-1762 (Prison-Made Goods); Chapter 89, Section 1821 (Professions and Occupations); Chapter 102, Sections 2101-2102 (Riots).

**Conforming Repeals**

Section 3 includes conforming repeals for the Controlled Substances Act, Import and Export Act, and the Atomic Energy Act of 1954. The Attorney General is directed to submit to Congress, within 180 days of enactment, proposed legislation repealing additional provisions of law that have been rendered superfluous.

**Cross References**

Section 4 directs the Attorney General to submit to Congress, within 180 days of enactment, proposed legislation correcting cross references in other laws to provisions of law that have been amended or repealed by this Act.

**Sunset of Provision Relation to Foreign Intelligence Surveillance Act of 1978**

Section 5 contains a conforming amendment to comply with the sunset provision of the FISA Amendments Act of 2008.

**Reenactment Outside Title 18 of Former Section 2258A (Relating to Reporting Requirements of Electronic Communication Service Providers and Remote Computing Service Providers).**

Section 6 removes from title 18 regulatory provisions regarding reporting of child pornography to the National Center for Missing and Exploited Children (NCMEC) CypberTipline.

**Reenactment Outside Title 18 of Former Section 2258B (Relating to Limited Liability for Electronic Communication Service Providers, Remote Computing Service Providers, or Domain Name Registrar).**

Section 7 removes from title 18 regulatory provisions regarding limited liability of certain providers as it relates to reporting to the NCMEC CyberTipline

**Reenactment Outside Title 18 of Former Section 2258C (Relating to Use to Combat Child Pornography of Technical Elements Relating to Images Reported to the CyberTipline).**

Section 8 removes from title 18 regulatory provisions regarding NCMEC's authority to provide elements relating to any apparent child pornography image to an electronic communication service provider for the purpose of stopping the further transmission of images.

**Reenactment Outside Title 18 of Former Section 2258D (Relating to Limited Liability for the National Center for Missing and Exploited Children).**

Section 9 removes from title 18 regulatory provisions providing limited liability to NCMEC arising from the performance of CyberTipline.

**Reenactment Outside Title 18 of Formers Section 2258E (Relating to Definitions).**

Section 10 removes from title 18 a provision providing definitions used in sections 6 through 9.

**Transfer to Part II of Title 18, United States Code, of Certain Procedural and Related Provisions.**

Section 11 transfers the provisions pertaining to the interception of wire and electronic communications from Part I (General Provisions and Offenses) to Part II (Criminal Procedure).

**CHAPTER 206A—PROCEDURAL AND RELATED PROVISIONS PERTAINING TO INTERCEPTION OF COMMUNICATIONS**

Sec. 3119. Prohibition of Use as Evidence of Intercepted Wire or Oral Communications. This section explains the prohibition of use as evidence of intercepted wire or oral communications.

Sec. 3119A. Authorization for Interception of Wire, Oral, or Electronic Communications. This section defines the authorization for interception of wire, oral or electronic communications.

Sec. 3119B. Authorization for Disclosure and Use of Intercepted Wire, Oral, or Electronic Communications. This section defines the authorization for disclosure and use of intercepted wire, oral, or electronic communications.

Sec. 3119C. Procedure for Interception of Wire, Oral, or Electronic Communications. This section defines the procedure for interception of wire, oral, or electronic communications.

Sec. 3119D. Reports Concerning Intercepted Wire, Oral, or Electronic Communications. This section defines the reports concerning intercepted wire, oral or electronic communications.

Sec. 3119E. Recovery of Civil Damages Authorized. This section defines the authorization of recovery of civil damages.

Sec. 3119F. Injunction against Illegal Interception. This section defines that the Attorney General may initiate a civil action in a district court of the United States.

Sec. 3119G. Enforcement of the Communications Assistance for Law Enforcement Act. This section defines the enforcement of the Communications Assistance for Law Enforcement Act.

Sec. 3119H. Definitions. This section states that the terms defined in Chapter 37 (Privacy) subchapter B (Interception of Wire and Electronic Communications) shall have the same meanings in this chapter.

**CHAPTER 206B—PROCEDURAL AND RELATED PROVISIONS PERTAINING TO STORED COMMUNICATIONS**

Sec. 3120. Voluntary Disclosure of Customer Communications or Records. This section defines the voluntary disclosure of customer communications or records.

Sec. 3120A. Required Disclosure of Customer Communications or Records. This section defines the required disclosure of customer communications or records.

Sec. 3120B. Backup Preservation. This section defines the guidelines regarding backup preservation.

Sec. 3120C. Delayed Notice. This section defines the guidelines regarding delayed notice.

Sec. 3120D. Cost Reimbursement. This section defines cost reimbursement.

Sec. 3120E. Civil Action. This section defines guidelines regarding civil action.

Sec. 3120F. Exclusivity of Remedies. This section states that only the remedies and sanctions described in subchapter C are the only judicial remedies and sanctions for non-constitutional violations of this subchapter.

Sec. 3120G. Counterintelligence Access to Telephone Toll and Transactional Records. This section defines guidelines for counterintelligence access to telephone toll and transactional records.

Sec. 3120H. Wrongful Disclosure of Video Tape Rental or Sale Records. This section defines the criminal offense of wrongly disclosing video tape rental or sale records.

Sec. 3120I. Definitions for Chapter. This section defines terms used in Chapter 206B.

Sec. 3120J. Civil Actions against the United States. This section defines civil actions against the United States pertaining to Chapter 206B.