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CONGRESSIONAL TESTIMONY

**Exploring the National Criminal
Justice Commission Act of 2009**

**Testimony before
the Subcommittee on Crime and Drugs
of the Committee on the Judiciary
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My name is Brian Walsh, and I am Senior Legal Research Fellow in The Heritage Foundation's Center for Legal and Judicial Studies. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.¹

Thank you Chairman Specter, Ranking Member Graham, and Members of the Committee for inviting me here today to address the principles and provisions of the National Criminal Justice Commission Act of 2009 (S. 714). Criminal justice reform is a central focus of my research and reform work at the Heritage Foundation. Over the past three years, I have worked with hundreds of individuals and scores of organizations across the political spectrum to build consensus for principled, non-partisan criminal justice reform. My colleagues, allies, and I have gathered substantial evidence that the criminal justice system is in great need of principled reform, particularly at the federal level, and that this reform should not be driven by partisan politics.

As Harvard law professor Herbert Wechsler reminded us half a century ago, criminal punishment is the greatest power that government routinely uses against its own citizens. Criminal justice thus is too important to allow it to fall subject to partisan political interests. Rather, it should be governed and, whenever necessary, reformed according to sound principles that are widely acknowledged and understood by the American people.

Criminal justice policy has become increasingly politicized over the past few decades, including in Congress. This has been caused by at least three major factors. First, the American people's strongly negative reaction to the increase in crime in the 1960s and 1970s made it politically popular to be "tough on crime," with harsher criminal offenses and greater punishment indicating an elected official's *bona fides*. On average, candidates for election and reelection who are "tough on crime" can be expected to fare better at the polls than those candidates who are (or who are perceived to be) "soft on crime."

Second, the efforts to combat this trend were in the past bogged down in constituent and interest-group politics, with those engaged in criminal-justice reform advocating for offenders who have committed certain categories of crime rather than for even-handed, across-the-board reforms that benefit all Americans. Some reform advocates and their constituents purposefully and consciously allied themselves with a political party.

Third, state and local law enforcement officials have increasingly become regular supplicants for funding from the federal government. This hunt for federal funding

¹ Sections of this testimony are incorporated in part from my previous work on the problems of overcriminalization affecting the federal criminal justice system that was published in the Federal Sentencing Reporter. See Brian W. Walsh, *Doing Violence to the Law: The Over-federalization of Crime*, 20 FED. SENT'G REP. 295 (2008). Members of the Committee may want to review this publication for a more complete discussion of the problems and possible solutions.

skews the priorities of state and local law enforcement officials and generally results in their emphasizing those issues that receive national attention rather than those that pose the greatest risks and problems to local communities.

My criminal-justice reform allies and I have found among members of both major political parties at the federal, state, and local levels a growing recognition of the need for reform that is both principled and non-partisan. Before the November election, for example, a coalition of groups spanning the political spectrum and working with key Members of the House of Representatives reached substantial consensus on pursuing hearings and reform proposals for federal criminal justice reform. I am hopeful that the non-partisan spirit in which we worked will establish a foundation for sound, lasting reform as well as for greater trust and cooperation among reform-minded advocates and elected officials.

It is also my hope that any commission put in place by the National Criminal Justice Commission Act will be designed and focused to ensure non-partisan conclusions and recommendations that incorporate the experience and best thinking of persons across the political spectrum. For that reason, reform experts who are serious about criminal-justice reform should draw encouragement from Senator Webb's efforts to date to reach out to elected officials on both sides of the aisle and to criminal-justice reform advocates across the conservative-to-liberal spectrum. I commend such bipartisan efforts for criminal-justice reform. And along with some concerns expressed below about the current version of the Act, I hope that its positive elements might serve as a foundation for shaping and establishing a commission that will represent the full range of interests in the criminal justice system and that will investigate and make reasonable recommendations on the full range of problems affecting, in particular, the federal criminal justice system.

SALUTARY FEATURES AND NEEDED IMPROVEMENTS

In addition to the bipartisan approach, the Act as drafted has laudable features. It seems tailored to allow the commission to study and offer solutions addressing, for example, the problems of crime committed by the mentally ill and alternatives to incarceration for some first-time, non-violent offenders. With its emphasis on reviewing national drug policy, the commission should be able to explore the benefits of the drug courts that various states have been using as an alternative to the traditional criminal justice system for non-violent drug offenders in possession of relatively small quantities of drugs. The commission should assess the effectiveness of the various drug-court models and report on what works and what does not work in the various states.

Similar systematic study is needed of the programs the states have employed to facilitate offenders' productive reentry into society after their release from incarceration and government supervision. I am not aware of any comprehensive study of these state

efforts since the enactment of the federal Second Chance Act,² and the commission should undertake to rectify that gap in data.

While there is much positive in the Act's proposal, several features need improvement, notably:

1. As currently proposed, the composition of the commission would be too narrow, focusing too much on federal rather than state appointees to the commission as well as congressional rather than executive appointees, to address the full range of criminal justice issues that the Act proposes to be considered and that should be considered.
2. The Act as currently crafted is founded on unstated premises about the problems with—and lack of benefits from—current national policy on incarceration and drug enforcement; empirical data show that such premises are not well-founded.
3. While purporting to authorize a comprehensive review of American criminal justice, the Act has an undue emphasis on violent and drug offenders and fails to address the proliferation of offenses criminalizing socially and economically beneficial conduct, the federalization of truly local crime, the widespread elimination of criminal-intent requirements, and related problems that put at risk the rights and liberties of all Americans.

These necessary improvements will be addressed in sequence below.

COMPOSITION OF THE COMMISSION

For any national criminal justice commission to have a lasting, salutary impact on criminal justice policy, its membership must be broadly representative of the experts in the federal and state systems under inquiry. Otherwise, the commission's conclusions and recommendations are not likely to be widely respected or to stand the test of time. There are three problems with the composition of the commission as currently proposed by the Act that undermine the likelihood that the commission will be sufficiently broad. The Act makes insufficient provision to ensure that the views, backgrounds, and expertise represented among the commission's members will adequately cover each of the commission's areas of inquiry; that the 50 states have adequate representation to protect their sovereignty over criminal justice operations, a core state responsibility; and that the interests and expertise of the federal Executive Branch are adequately represented.

Broadening the Commission's Representation

Section 4 of the Act lays out an exceedingly broad scope of inquiry for the Commission, stating that it “shall undertake a comprehensive review of the criminal justice system,” including making findings related to both federal and state criminal justice policies and practices. Further, the Commission is directed to “make reform

² Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008).

recommendations for the President, Congress, and State governments” covering a broad range of criminal-justice topics. Section 6 sets forth a similarly broad range of topics for inquiry and recommendations. These include:

- incarceration policy;
- prison administration;
- prison violence;
- the treatment of mental illness;
- international and domestic gangs, cartels, and syndicates;
- the criminalization and punishment of illicit drug possession; and
- “the use of policies and practices proven effective throughout the spectrum of criminal behavior.”

Although this defined scope of inquiry does not encompass all areas of American criminal justice, it covers a broad swath. Yet the Act makes insufficient provision to ensure that the views, backgrounds, and expertise represented among the commission’s members will adequately cover each of these areas and provide well-supported and opposing perspectives on contentious issues. While it is helpful that both major political parties would appoint an almost equal number of commission members, the wide popularity of increased criminalization causes the interests of the two parties to converge in many critical areas of criminal-justice policy. In short, the politics at work on Capitol Hill make it difficult for Congress to view the criminal justice system objectively and resist the perpetual temptation to increase criminalization.³ Care must be taken to insulate the Commission from these forces, in part by including express language in the Act that will establish criteria ensuring that the expert practitioners and researchers chosen represent opposing, well-supported points of view.

The size of the commission may be slightly smaller than necessary to accommodate the requisite diversity of views, backgrounds, and expertise as well as the recommendations made below. The Act currently proposes 11 members for the commission, but this should be increased by 2 to 4 members to provide for a 13- or (at most) 15-member commission. The Act should also require a majority of the commission’s members to be present to constitute a quorum for any meeting.

Increasing Representation to Protect Constitutional Federalism

The Act is unabashed about asserting Congress’s review and oversight of State criminal justice systems and assigning that review to a national commission. Yet the Act’s rationale for doing so is weak: “the conditions under which Americans are incarcerated and the manner in which former inmates reenter society is a compelling national interest that potentially affects every American citizen and every locality in the

³ See CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION, REPORT ON THE FEDERALIZATION OF CRIMINAL LAW 2 (1998). The ABA Task Force was composed of 17 academics, former prosecutors, Justice Department officials who served in Republican and Democratic Administrations, and Members of Congress of both major parties. Its final report was unanimous.

country.” The same statement could be made about hundreds of areas of state government responsibility. Yet the federal government is a limited government of enumerated powers, and Congress must be careful not to dictate criminal-justice policy to the States, even through the use of the Spending Power. It is therefore of concern that only two members of the commission are to be appointed by non-federal officials, one by the chairman of the Democratic Governors Association and the other by the chairman of the Republican Governors Association.

Criminal justice is at the very core of governmental powers and responsibilities that are predominately left to the states. The criminal justice burden borne by the 50 states dwarfs the burden undertaken by the federal government. In 2003, state and local governments were responsible for 96 percent of those under correctional supervision—i.e., in prison or jails, on probation or parole.⁴ Similarly, in 2004 just 1 percent of the over 10 million arrests made nationwide were for federal offenses.⁵ The enormously disproportionate responsibility for criminal law enforcement that the states fulfill is also reflected by the number of law enforcement officials in the two systems. Although the American justice system employed in aggregate nearly 2.3 million persons in 2001, only 9 percent were federal employees.⁶ The remaining 91 percent were employed by state and local governments.

Further, in repeatedly acknowledging that the federal government has no general or plenary police power, the Supreme Court has recognized that the power to punish crimes that do not implicate an enumerated power of the federal government belongs solely to the states.⁷ The Court’s holdings on the police power and scope of federal

⁴ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES 2003, 7 (July 2004), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus03.pdf>. In 2003, the federal government was responsible for 282,800 of those under correctional supervision, while state and local governments bore the burden of 6,607,000 of the total under correctional supervision. *Id.*

⁵ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2004, 17 (Dec. 2006), *available at* http://www.fbi.gov/ucr/cius_04/documents/CIUS_2004_Section4.pdf; *see also* FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 2004, 290–91 (2004), *available at* http://www.fbi.gov/ucr/cius_04/documents/CIUS_2004_Section4.pdf. Of the total number of arrests made in 2004 (10,047,256), 9,942,501 of those arrests were made by state or local agencies.

⁶ LYNN BAUER, BUREAU OF JUSTICE STATISTICS, JUSTICE, EXPENDITURE, & EMPLOYMENT IN THE U.S. 2001 (May 2004), *available at* <http://ojp.usdoj.gov/bjs/pub/ascii/jeeus01.txt>.

⁷ *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“[W]e preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. . . . Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”); *United States v. Lopez*, 514 U.S. 549, 566 (1996) (“[S]o long as Congress’ authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender ‘legal uncertainty.’ . . . The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation.”).

authority to criminalize are consistent with the views of those who crafted and ratified the Constitution.⁸

The states not only bear the vast majority of the burden for criminal law enforcement, but it is preferable that they do so. Among other reasons for this, what some refer to as the principle of subsidiarity holds that it is best for laws to be imposed and services to be provided by that level of government that is closest – and thus most responsive – to the individuals affected. Thus, criminal justice policy and priorities that do not fall squarely within the scope of a power the Constitution assigns to the national government should be set by state and local officials. State and local officials are in the best position to understand and respond to the needs and interests of the communities and individuals who are affected most by criminal law enforcement.

Official Washington has recently been demonstrating a willingness and propensity to drastically increase the scope and power of the federal government at the expense of the state sovereignty that is at the heart of the constitutional design. Particularly in this environment, Congress must be exceedingly careful about implying that state criminal justice systems are somehow subject to federal oversight. For this reason, at least one-half of the members of the commission should be members of non-federal organizations, some appointed by Congress and some by the executive branch. To protect our dual-sovereignty system of constitutional government,⁹ the commission's non-federal representatives should include several who are staunch and outspoken supporters of constitutional federalism.

Representation by Members Appointed by the Executive Branch

The only member of the commission that the Act as currently written would have appointed by the Executive Branch is the chairman, who would be appointed by the President. To better represent the interests and experience of the federal government as a whole, the commission should have an equal number of members appointed by the executive branch as the number appointed by Congress. This is not only a matter of fairness but of prudence, for it would allow the commission to draw upon the extensive expertise of the Department of Justice, Federal Bureau of Investigation, and other federal law enforcement agencies. This change would also afford the proper respect to a coequal branch of government, particularly in light of the fact that the commission seems designed to effect broad, sweeping recommendations for national criminal justice.

⁸ See THE FEDERALIST NO. 45 (James Madison) (Clinton Rossiter, ed., 1961) (“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. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. *The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.*” (emphasis added)); see also *id.* NO. 17 (Alexander Hamilton) (referring to the ordinary administration of criminal and civil justice as the “transcendent advantage [over the national government] belonging to the province of the State Governments”).

⁹ See *id.* NO. 51 (James Madison).

There seems to be little reason other than cost for limiting the number of commissioners to 11, and one of the purported reasons for this commission is to identify the best areas in which to find cost savings in the criminal justice system. If this premise of the Act is correct and the recommendations end up finding some cost savings, the commission might indirectly pay for itself even if it were to have 13 or 15 members.

ACT'S UNSTATED PREMISES REGARDING CRIMINAL PUNISHMENT

Despite the potential benefits of a non-partisan national commission on criminal justice reform, the Act's unstated premises must not be allowed to go unquestioned. Nor should these unstated premises be allowed to shape the focus and scope of the investigations conducted by a commission that purports to be designed to consider the entire criminal justice system. Instead, a commission with this broad scope should be designed and directed to be as objective as possible in its review.

Incarceration

One of the Act's chief unstated premises may be the unfounded assumption that incarceration rates need to decrease across the board. Section 6 would direct the commission to make recommendations "to reduce the overall incarceration rate." While it may be true that some prison sentences, particularly those at the federal level, are longer than required to fulfill the needs of justice, a directive to decrease the overall incarceration rate strongly suggests that all prison sentences are too long. This is simply not borne out by the best available evidence. It should neither be overlooked nor minimized that nationwide rates for all categories of violent and property crimes are today at or near their lowest levels for the last fifteen years.¹⁰ This drop in the crime rates has coincided closely with the increased levels of incarceration that the Act apparently seeks to change.

Much has been said and written by those in advocacy organizations, professional research organizations, and the media who are broadly opposed to most incarceration suggesting that incarceration does not decrease crime rates. This not only defies common sense and is contrary to the considered opinion of the vast majority of law enforcement professionals, it is contrary to some of the best research. Texas is often held up as the poster child for unwarranted incarceration. Yet the rates of violent and property crime in Texas decreased substantially in the 1990s. And research that disaggregated Texas's incarceration rates from economic, demographic, and other law-enforcement factors concluded that "[v]irtually all the reduction in violent crime, and about half the reduction in property crime, can be attributed to an increase in jail and prison populations."¹¹

Incarceration has also been found to have a substantial deterrent effect on crime. One research study, for example, reviewed the deterrent effect of the longer sentences the

¹⁰ FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2007, Table 1 (Sep. 2008), available at http://www.fbi.gov/ucr/cius2007/data/table_01.html (2008).

¹¹ William Spelman, *Jobs or Jails? The Crime Drop in Texas*, 24 J. OF POLICY ANALYSIS & MANAGEMENT 133, 158 (2005).

people of California in 1982 imposed by popular referendum—i.e., Proposition 8—on repeat offenders. For anyone convicted of any “serious felony” after Proposition 8 took effect on June 9, 1992, the new sentencing provisions added five years to the length of the offender’s sentence for each “serious felony” of which he had been convicted in the past.¹² The study made good use of the insight that the deterrent effect of this new sentencing regime could be disaggregated from its incapacitative effect by looking at those convictions that would have been punished with incarceration both before and after the longer sentences took effect. The incapacitative effect could not come into play until a period longer than the sentences that would have been imposed before the new law. So the years immediately following Proposition 8’s enactment could be compared with the years before its enactment to see how much crime was deterred. The study found that, controlling for other factors, the rates of both violent crimes and property crimes decreased substantially in California even in the first three years after the new law took effect.¹³ Consistent with both common sense and economic research,¹⁴ the deterrent effect of the tougher sentencing law appears to be the best explanation for these drops in California’s violent and property crime rates. Experience, common sense, and scholarly research provide solid reasons to conclude that incarceration reduces crime.

Moreover, in addition to the factors above, the benefits of incapacitating violent and other criminals cannot be disputed. The safety of law-abiding citizens and their hard-earned property is increased when criminals who would otherwise commit additional crimes are held in jail or prison. Long terms of incarceration are particularly appropriate for those who have committed multiple violent felonies and, according to criminological research, are likely to do so again. Similarly, those who have committed multiple violent felonies and who intentionally purchase or possess a firearm in violation of criminal law pose a great risk of further violence. They, too, should be subject to substantial terms of incarceration.

This analysis counsels strongly in favor of any national commission on criminal justice engaging in careful study and deliberation when determining which prison sentences are warranted and should be maintained and which should be reduced. The analysis also counsels against the sort of wholesale reductions in prison populations invited and encouraged by the current version of the Act. Regardless of how much cost savings broad reductions in incarceration may generate in these challenging economic times or how politically popular such reductions may be, non-criminological factors such as these should not be allowed to trump public safety.

The Act therefore should be amended to clarify that the commission should carefully assess and report on the criminological effects of existing sentences before recommending any reductions. Further, the Act should direct the Commission to present the evidence “for” along with the evidence “against” the benefits of incarceration.

¹² See CAL. PENAL CODE §§ 667(a), 1192.7(c).

¹³ Daniel Kessler & Steven D. Levitt, *Using Sentence Enhancements to Distinguish between Deterrence and Incapacitation*, 42 J.L. & ECON. 343, 352-59 (1999).

¹⁴ See Gary Becker, *Crime and Punishment: An Economic Approach*, J. POL. ECON. 76, 169-217 (1968) (applying economic analysis to demonstrate the deterrent effect of increasing criminal punishment).

Retroactive reductions in sentences are particularly prone to abuse. Incarcerated offenders who waived their right to an expensive criminal trial and pled guilty to one charge often did so in exchange for other, greater charges being dropped. They may be serving a long sentence for a non-violent offense, but that is often the minimum sentence necessary to fulfill the needs of justice because they also committed a violent offense for which the maximum sentence was even longer. For these reasons, the Act should include language directing the commission not to recommend reducing sentences for incarcerated offenders who pled guilty to a lesser charge in exchange for a greater charge being dropped.

Drug Policy

As has been true with incarceration policy, the public discourse on national drug policy has been dominated in the past few years by those members of advocacy organizations, the research industry, and the media who are broadly opposed to enforcement and often favor drug decriminalization. As currently crafted, the Act appears to be premised on assumptions about drug enforcement policy that are one-sided and not entirely well-founded. Nothing in the Act mentions the successes the states and the federal government have had in the fight against drug abuse. Similarly, the Act's language ignores the fact that the national strategy against drug abuse already employs a three-part approach in which prevention, enforcement, and treatment all play a key role. While drug rehabilitation may bring about successful results for some drug offenders, few drug users voluntarily seek such treatment. It is often enforcement that compels them to obtain the help they need to end the damage that drug abuse causes to themselves and others. A rehabilitation-centric approach alone is, as Professor Henry Hart suggested in his classic essay on the purposes of the criminal law,¹⁵ an inadequate response to criminal problems, including those associated with drug abuse.

The discussion that follows in this section is by no means intended to be a full review or unequivocal defense of all current drug-enforcement policy. Rather, its purpose is to highlight a few of the many facts and research studies on national drug policy that have been largely ignored in the recent public discourse and that seem by default to have been largely ignored in the Act as well. This is the type of research and information on the destructive effects of drug abuse and successful results of the fight against it that any commission the Act creates must investigate thoroughly, weigh carefully, and report accurately if the commission's findings and recommendations are to be accorded substantial weight.

Section 2 of the Act emphasizes that a "significant percentage" of incarcerated drug offenders "have no history of violence or high-level drug selling activity." No mention is made, however, of the economic and human costs drug abuse imposes on individuals, families, communities, or employers. For example, one out of every 10 children in America under 18 years old lives with a parent who is substance-dependent or

¹⁵ See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 403-11 (1958).

substance-abusing, and the Department of Health and Human Services (HHS) reports that such living situations have a severe negative impact on children.¹⁶ As Eric Broderick, the acting administrator of HHS's Substance Abuse and Mental Health Administration has stated, "The chronic emotional stress in such an environment can damage [children's] social and emotional development and permanently impede healthy brain development, often resulting in mental and physical health problems across the lifespan." In short, personal drug abuse is far from a victimless crime.

Further, drug abuse correlates with the commission of crime. Forty-five percent of incarcerated federal offenders and 53 percent of incarcerated state offenders meet the criteria for drug abuse or dependence, and this dependence correlates with extensive criminal records.¹⁷ The same Bureau of Justice Statistics study reports that 18 percent of federal prisoners and 17 percent of state prisoners committed their offenses in order to get money to purchase drugs, and 15 percent reported that they used marijuana at the time of their criminal offense.¹⁸

Although such facts do not alone justify all current drug policy, such information about the national fight against drug abuse must be granted its full weight by the commission in order for any of its drug policy recommendations to be granted any weight or authority. As currently written, the Act does not invite such study and suggests that it is unnecessary. The Act should be changed to ensure that drug policy is addressed thoroughly, systematically, and in an unbiased manner and that the states' experience with drug courts for those charged with non-violent, low-level possessory offenses is fully explored.

Overcriminalization

A major omission of the Act is that it overemphasizes violent offenders and drug offenders. It does not address the problems presented by the proliferation of criminal offenses—particularly federal criminal offenses—involving conduct that should not even be criminalized at all. The rapid expansion of federal criminal law, beyond almost all prudential and constitutional limits, may not be the first thing to leap to mind when one thinks of key problems with American criminal law. But the existence now of over 4,450 federal criminal offenses¹⁹ is itself a problem that implicates the foundations of the criminal law. The number of federal offenses is too great for Americans to be familiar with all of the conduct that is criminal, and many of the offenses themselves are deeply flawed, omitting essential substantive elements necessary to protect the innocent. As a result of these flaws, the federal criminal code fails to serve what may be its most important function, which is not to expose and punish the relatively few persons who

¹⁶ See OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE AND MENTAL HEALTH ADMINISTRATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILDREN LIVING WITH SUBSTANCE-DEPENDENT OR SUBSTANCE-ABUSING PARENTS: 2002-2007 (Apr. 16, 2009).

¹⁷ BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, DEPARTMENT OF JUSTICE, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 5, Oct. 2006 (rev'd Jan. 2007).

¹⁸ *Id.* at 2.

¹⁹ John S. Baker, Jr., "Revisiting the Explosive Growth of Federal Crimes," The Heritage Foundation Legal Memorandum No. 26, June 16, 2008, at 1.

consciously choose to engage in criminal conduct, but to inform citizens of the law's requirements, thereby equipping them to avoid the conduct deemed worthy of society's most severe penalty and moral censure.²⁰

The explosion of the federal criminal law—both in the number of offenses and their overall scope—demands that legal reformers revisit basic assumptions about what criminal law is and how best to rein in its actual and potential abuses. Over the last 40 to 50 years, government at all levels has succeeded in convincing Americans that the criminal law is whatever legislators define it to be. Ill-conceived new criminal offenses occasionally raise an eyebrow or two, but Americans generally accept their legitimacy. The result is that Americans have come to rely, consciously or not, on the good graces of prosecutors and the laws of probability to shield them from prosecution. When lightning does strike and an otherwise law-abiding citizen is charged and convicted for conduct that is not traditionally criminal or necessarily even wrongful, most Americans convince themselves that the accused must have done *something* to warrant the prosecutor's attention. Yet while Americans remain incredulous that improper criminal laws could be used to convict someone who had no intention of doing anything wrongful, the reality is otherwise.

“An unjust law is a code that is out of harmony with the moral law,” wrote Martin Luther King, Jr., who had no little experience with unjust law.²¹ Many federal criminal offenses fall far short of this standard because they do not require an inherently wrongful act, or even an act that is extraordinarily dangerous. In the days when average citizens were illiterate, they could still know and abide by the criminal law. At that point, most criminal offenses addressed conduct that was inherently wrongful—*malum in se*—such as murder, rape, and robbery. That is no longer the case. Many of today's federal offenses criminalize conduct that is wrongful only because it is prohibited—*malum prohibitum*.

Worse, many of these prohibitions are actually contrary to reason and experience, giving average Americans little notice of the content of the law. For example, few would imagine that it is a federal crime for a person to violate the terms of service of an online social networking site by registering with a fake name, as a recent federal indictment in Los Angeles alleged.²² Indeed, many Americans might instead expect such conduct to be protected, for it promotes the user's privacy and anonymity and, by extension, the personal safety of minors and other vulnerable users. Another example: Unauthorized use

²⁰ Although some treat enforcement of the law as if it were the only means of reducing crime, this ignores the role of moral censure and individual conscience and assumes that most Americans would violate the law without compunction if they could get away with it. But others argue persuasively that conscience, upon being conditioned by appropriate moral education, reduces more crime than is deterred by punishment. See, e.g., JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME & HUMAN NATURE* 494-95 (1985).

²¹ Martin Luther King, Jr., *Letter from Birmingham City Jail*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 293 (James Melvin Washington ed., 1986).

²² See *United States v. Lori Drew*, Case No. CR-08-0582-GW (C.D. Cal. May 15, 2008) (indictment), available at <http://online.wsj.com/public/resources/documents/Drew.pdf>.

of the 4-H organization's logo is a federal crime.²³ There are undoubtedly reasons that these laws are on the books, but they are not reasons that average law-abiding Americans would be likely to anticipate when trying to conform their conduct to the law's requirements.

Exacerbating the criminalization of an ever-increasing array of behavior that is not inherently wrongful is the crumbling of traditional protections in the law for Americans who act without wrongful intent. Historically, a criminal conviction required that a person:

1. committed an inherently wrongful act that constituted a serious threat to public order, and
2. acted with a guilty mind or criminal intent (that is, *mens rea*).

These two substantive components were essential for conviction in almost all criminal cases from the time of the American founding through the first decades of the 20th century.

But over the past few decades in particular, Congress has routinely enacted criminal laws that lack *mens rea* requirements or that include *mens rea* requirements that are so watered down as to provide little or no protection to the innocent.²⁴ As a result, honest men and women increasingly find themselves facing criminal convictions and prison time. This happens even when their "crimes" are inadvertent violations that occur in the course of otherwise lawful, and even beneficial, conduct.

Despite increasing attention to this problem in recent years, the trend is for fewer and weaker *mens rea* requirements. In a recent study, Professor John Baker found that 17 of the 91 federal criminal offenses enacted between 2000 and 2007 lacked any *mens rea* requirement whatsoever.²⁵ The Heritage Foundation and the National Association of Criminal Defense Lawyers will soon publish the results of their joint research into the *mens rea* provisions in bills introduced in the 109th Congress.²⁶ Preliminary findings reveal that the majority of the offenses studied lack a *mens rea* requirement sufficient to protect from federal conviction anyone who engaged in the prohibited conduct but who did so without the intent to do anything wrongful.²⁷

Many lawyers today accept uncritically the idea that any act made criminal by a legislature is, by that fact alone, a proper *actus reus*. But to accept that definition is to obliterate the deeper, more fundamental meaning of *actus reus* as a bad act (not merely something to be disincentivized), for it would be a mere synonym for "act that has been

²³ See 18 U.S.C. § 707.

²⁴ See, e.g., John S. Baker, Jr., "Revisiting the Explosive Growth of Federal Crimes," The Heritage Foundation Legal Memorandum No. 26, June 16, 2008, at 7.

²⁵ *Id.*

²⁶ The research is limited to non-violent criminal offenses that do not involve drugs or firearms.

²⁷ The Heritage Foundation & National Association of Criminal Defense Lawyers, Report on Overcriminalization in the 109th Congress (forthcoming).

made criminal.” The problem may be best illustrated using some of the “criminal” laws made and enforced by totalitarian regimes. For example, under some communist regimes it was deemed a “criminal” act for relatives of politically or religiously persecuted persons to discuss their relative’s persecution, even in private and even with other family members. In some regimes, any type of unauthorized communication with a foreigner was deemed a “crime.” Regardless of any elaborate (or convoluted) logic and rhetoric that may be used to justify the prohibited conduct, it is evident that there is no proper *actus reus* in these so-called crimes.

Similarly, but to a lesser extreme, when Congress makes it a federal crime to violate any foreign nation’s laws or regulations governing fish and wildlife—as it has done in the Lacey Act²⁸—many violations will end up being deemed “crimes” despite including no genuinely bad act. Some foreign fish and wildlife regulations may be nothing more than protectionist measures designed to favor the foreign nation’s local business interests. For example, the fishing regulations of a Central American nation might require fishermen to package their catch in cardboard, perhaps only in order to provide a stimulus to business for a domestic cardboard manufacturer. If a fisherman then packs his catch taken in that nation’s waters in plastic rather than cardboard and imports it into the United States—in violation of the express language of no federal or state law of the United States other than the Lacey Act—is there a proper *actus reus*?²⁹ Answering ‘yes’ leads to the absurd conclusion that Congress could, with a single sentence in a single legislative act, make it a crime to violate any and every law of every nation on earth—and that every such offense thereby includes a genuinely bad act. Such may be positive law, but they are not “crimes” in the truest sense of the word; they are merely legislatively enacted offenses that are unworthy of the criminal justice system of any free nation.

The size of the federal criminal law compounds these problems and undermines other protections. The principle of legality, for example, holds that “conduct is not criminal unless forbidden by law [that] gives advance warning that such conduct is criminal.”³⁰ The sheer number and disorganization of federal criminal statutes ensures that no one could ever know all of the conduct that constitutes federal crimes. Those who have tried merely to count all federal offenses—including both Professor Baker and the Department of Justice itself—have been able to provide only rough estimates. The task proves impossible because offenses are scattered throughout the tens of thousands of

²⁸ 16 U.S.C. § 3371 *et seq.*

²⁹ This is no academic question. Although the reasons behind the Honduran regulation requiring cardboard packaging are unclear, U.S. federal prosecutors charged Honduran lobster fisherman David McNab and three Americans with whom he did business with alleged violations of the Lacey Act based in significant part on McNab’s having packed his catch in clear plastic. McNab recently completed, and two of his three business associates are still finishing, an eight-year federal prison term despite the fact that the Honduran government certified to the U.S. Department of Justice, and also informed the federal court of appeals in an amicus brief, that the regulations in question were not in force at the time of McNab’s alleged violations. *See, e.g.,* United States v. McNab, 331 F.3d 1228 (11th Cir. 2003); Tony Mauro, *Lawyers See Red over Lobster Case*, LEGAL TIMES, Feb. 18, 2004, available at <http://www.law.com/jsp/article.jsp?id=1076428337070>.

³⁰ WAYNE R. LAFAVE, CRIMINAL LAW 11 (4th ed. 2003).

pages of the United States Code (not to mention the nearly 150,000 pages of the Code of Federal Regulations).³¹ If criminal-law experts and the Justice Department itself cannot even count them, the average American has no chance of knowing what she must do to avoid violating federal criminal law.

Threat to Liberty

Perhaps the central question that the Framers of the Constitution and the Bill of Rights debated, and to which they gave painstaking consideration, was how best to protect individuals from the unfettered power of government. They were well-acquainted with abuses of the criminal law and criminal process and so endeavored to place in our founding documents significant safeguards against unjust criminal prosecution, conviction, and punishment. In fact, they understood so well the nature of criminal law and the natural tendency of government to abuse it, that two centuries later, the most important procedural protections against unjust criminal punishment are derived directly or indirectly from the Constitution itself, specifically the Fourth, Fifth, Sixth, and Eighth Amendments.

But despite these protections, the wholesale expansion of federal criminal law—both as to the number of offenses and the subject matter they cover—is a major threat to Americans’ civil liberties. Each time Congress crafts a criminal law covering a new subject matter, it effectively expands the power of the federal government. And the types of crimes that Congress now often creates—lacking a proper *actus reus* or a meaningful *mens rea* requirement—can effectively circumvent the Bill of Rights’ procedural protections. It is little or no help to have the right to legal representation, indictment by a grand jury, or trial by a jury of your peers if the conduct you are charged with is not truly wrongful according to any reasonable definition of that word or if it matters not that you acted with no intention of doing anything unlawful or otherwise wrongful.

Of similar concern, criminal offenses that exceed the limits of Congress’s limited, enumerated power are breaches of one of the primary structural limitations that constitutional federalism imposes on the federal government. After countenancing for decades Congress’s almost unlimited criminalization of conduct that is inherently local in nature (as long as, that is, the Constitution’s Commerce Clause was invoked to justify the assertion of congressional authority) the Supreme Court rediscovered constitutional limits in *United States v. Lopez*³² and *United States v. Morrison*.³³ In both of these cases, the Court explained that such limits on federal commerce power are consistent with and flow from the fact that Congress is a body of limited, enumerated powers.³⁴

³¹ CLYDE WAYNE CREWS, *COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS 2007*, at 13 (2007), available at <http://cei.org/pdf/6018.pdf>.

³² 514 U.S. 549 (1995).

³³ 529 U.S. 598 (2000).

³⁴ Some commentators have called into question the viability of *Lopez* and *Morrison* after the Supreme Court held in *Gonzales v. Raich* that the federal Controlled Substances Act (CSA) preempted California’s so-called medical marijuana law. 545 U.S. 1, 32-33 (2005). But the *Raich* majority expressly distinguished its two earlier precedents, repeatedly emphasizing that the statutory scheme at issue in *Raich* (which includes the CSA as well as the Comprehensive Drug Abuse Prevention and Control Act, of which

The federal offense of carjacking is a prototypical example of Congress's overreaching assertions of federal criminal jurisdiction. The federal carjacking offense is currently defined as taking a motor vehicle "from the person or presence of another by force and violence or by intimidation."³⁵ The federal jurisdictional "hook" for this carjacking offense is that the vehicle must have been "transported, shipped, or received in interstate or foreign commerce," but how many vehicles have not? Actual commissions of carjackings take place almost uniformly within a single locale of a single state,³⁶ yet federal criminal law now purports to authorize federal prosecutors to be the ones to charge and prosecute local carjackings.

Such breaches of constitutional federalism are not mere breaches of technical and theoretical niceties, for the power to criminalize is the power to coerce and control. James Madison rightly characterized constitutional federalism as a "double security . . . on the rights of the people,"³⁷ and it is akin to the purpose of limited government itself: to guard against accumulation of power by a single sovereign—that is, the federal government. In sum, without constitutional boundaries on Congress's power to criminalize, there would be no limits on the power of the federal government to coerce and control Americans.

With these considerations firmly in mind, and in order to ensure that the commission can function as a principled, non-partisan body, the Act should be amended to expand the scope of the inquiry to include the problems of overcriminalization. Otherwise, the commission will be focusing on a select class of offenders and overlooking the dire threats the criminal justice system poses to Americans who never intended to engage in conduct that is unlawful or otherwise wrongful. This sort of constituent-based approach will politicize the commission and make it unnecessarily controversial, thus undermining its effectiveness. A principled, non-partisan approach presents the best opportunity for the commission to undertake a thorough and comprehensive review of the criminal justice in America and the federal criminal justice system in particular.

Conclusion

Thank you again, Mr. Chairman, Ranking Member Graham, and Members of the Committee for this opportunity to address the National Criminal Justice Commission Act of 2009 (S. 714). I look forward to providing additional information and answering any questions you may have.

the CSA is a part) is highly comprehensive and regulates actual commerce, specifically commerce in controlled substances. *See id.* at 13, 23-28.

³⁵ 18 U.S.C. § 2119.

³⁶ The wanton, fatal 1992 carjacking Congress used as justification for asserting federal criminal jurisdiction over almost all carjackings took place wholly within suburban Maryland. *See* Graciela Sevilla, *Basu's Slayer Sentenced to Life Without Parole*, WASHINGTON POST, Aug. 19, 1993, at B1.

³⁷ THE FEDERALIST No. 51, at 270 (James Madison) (George W. Carey & James McClellan eds., 2001).

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