

Testimony of

Dick Thornburgh

Former Attorney General of the United States

Counsel, K&L Gates LLP

On H.R. 1823, the “Criminal Code Modernization and Simplification Act of 2011”

Before the Subcommittee on Crime, Terrorism and Homeland Security

of

The Judiciary Committee of the House of Representatives

of the Congress of the United States

10:00 a.m.

Tuesday, December 13, 2011

Rayburn House Office Building

Washington, D.C.

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 statutes, 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.