

WebMemo



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The Criminal Intent Report: Congress Must Justify New Criminalization

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The political pressure to criminalize innocent conduct has proved difficult for most Members of Congress, irrespective of party affiliation, to resist. As a result of these pressures, Congress often crafts criminal legislation that is “misguided, unnecessary, and even harmful.”¹ It is far too easy for a Member of Congress to score political points by casting himself as “tough on crime,” even when the conduct being criminalized and penalized is not inherently wrongful and poses no clear danger to anyone.

Counteracting this pressure is a non-partisan issue. Together, The Heritage Foundation and the National Association of Criminal Defense Lawyers (NACDL) released a major study last month with several concrete proposals for reform.² One reform would require Members of Congress to provide written analysis and justification for all new and modified federal criminal offenses and penalties. Additionally, this reform would require the two political branches of the federal government to produce a regular public report that includes information necessary to assess the purported justification, costs, and benefits of all new criminalization.

Criminalization Run Amok. Currently, there is no effective check on overcriminalization. With over 4,450 criminal offenses in the United States Code and up to 300,000 federal regulations that may be enforced with criminal penalties, it is a safe bet that Congress has already criminalized all inherently wrongful conduct (e.g., murder, rape, robbery, theft, arson, assault, and battery), often more than once. Yet Congress continues to create an average of

over 56 new crimes each year, that is, one new crime a week, every week of the year, even when Members are not in session.

Most people would agree with former Attorney General Dick Thornburgh that “[o]nly when conduct is sufficiently wrongful and severe, and the parameters or unlawful conduct are easily understood, should the government resort to the stigma, public condemnation, and potential deprivation of liberty that go along with the criminal sanction.”³ Americans are therefore generally surprised to learn that Congress regularly enacts offenses lacking a guilty-mind (“criminal-intent”) requirement that is adequate to protect the innocent from criminal punishment. *Without Intent*, the new report from The Heritage Foundation and NACDL, found that approximately 60 percent of the non-violent criminal offenses⁴ enacted in a single Congress (the 109th Congress) lacked such a guilty-mind requirement. Even worse, over 20 percent of the federal offenses enacted in 2005 and 2006 delegated away Congress’s authority to create criminal offenses and impose penalties, handing this power to unelected bureaucrats in the federal agencies. As another sign of its cavalier attitude toward criminalization, Congress regularly enacts new criminal

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offenses punishing conduct that is identical, or nearly so, to conduct that is already criminalized under federal law.

Requiring Justification, Increasing Accountability. To counter this trend, Congress should require reporting on criminalization in the two political branches. Similar to a bill Representative Don Manzullo (R-IL) introduced in 2001, this reform would help to provide much-needed accountability by requiring the federal government to perform basic but thorough reporting on the grounds and justification for all new and modified criminal offenses and penalties. Implementing this reform would require rule changes in both chambers of Congress and statutory reporting requirements governing the federal agencies that create and modify criminal offenses and penalties.

For every new or modified criminal offense or penalty that Congress passes, it should report:

- A description of the problem that the criminal offense or penalty is intended to redress, including an account of the perceived gaps in existing law, the wrongful conduct that is currently unpunished or under-punished, and any specific cases or concerns motivating the legislation;
 - A direct statement of the express constitutional authority under which the federal government purports to act;
 - An analysis of whether the criminal offenses or penalties are consistent with constitutional and prudential considerations of federalism;
 - A discussion of any overlap between the conduct to be criminalized and conduct already criminalized by existing federal and state law;
- A comparison of the new law's penalties with the penalties under existing federal and state laws for comparable conduct;
 - A summary of the impact on the federal budget and federal resources, including the judiciary, of enforcing the new offense and penalties to the degree required to solve the problem that the new criminalization purports to address;
 - A review of the resources that federal public defenders have available and need in order to adequately defend indigent defendants charged under the new law; and
 - An explanation of how the *mens rea* (i.e. criminal-intent or guilty-mind) requirement of each criminal offense should be interpreted and applied to each element of the offense.

Criminalization in the Executive Branch. Congress should also require the federal departments and agencies to collect and report similar information on criminalization in the executive branch. This information should be compiled and reported annually and, at minimum, should include:

- All new criminal offenses and penalties that federal agencies have added to federal regulations and an enumeration of the specific statutory authority supporting these regulations; and
- For each referral that a federal agency makes to the Justice Department for possible criminal prosecution, the provision of the United States Code and each federal regulation on which the referral is based, the number of counts alleged or ultimately charged under each statutory and regulatory provision, and the ultimate disposition of each count.

1. Criminal Justice Section, American Bar Association, "The Federalization of Criminal Law," 1998, at 2.
2. Brian W. Walsh & Tiffany M. Joslyn, "Without Intent: How Congress Is Undermining the Criminal Intent Requirement in Federal Law," The Heritage Foundation and the National Association of Criminal Defense Lawyers, April 2010, at <http://www.heritage.org/Research/Reports/2010/05/Without-Intent>.
3. Dick Thornburgh, "Federal Erosion of Business Civil Liberties," Introduction, 2nd ed., Washington Legal Foundation, 2010, at http://wlf.org/upload/competition/WLF_Spcl_Rprt_2010_Ed.pdf (June 9, 2010).
4. The report uses the term "non-violent offenses" as a shorthand for the offenses studied. Whereas all the offenses included in the study are non-violent, many other offenses proposed by the 109th Congress could also be described as non-violent. Specifically, the study did not include offenses criminalizing conduct involving firearms, drugs and drug trafficking, pornography, and immigration violations.

Congress should always be required to determine the true cost of new criminal offenses prior to enactment. The United States is already saddled with more than 4,400 federal statutory criminal offenses, tens of thousands of regulatory criminal offenses, an overworked federal judiciary with an ever-growing case load, and a crowded and expensive prison system. The federal government's failure to assess and justify the full costs of any new or modified criminal offenses or penalties is irresponsible.

Factual and Constitutional Justification Needed.

This reform proposal would require Congress to deliberate over and provide factual and constitutional justification for every expansion of the federal criminal law. In the 109th Congress alone, federal legislators introduced over 200 bills proposing new

or expanded non-violent criminal offenses, a number that does not include the bills proposing new or expanded criminalization concerning violence, firearms, drugs, pornography, or immigration violations. Many offenses in these bills would have duplicated existing federal criminal statutes or provided redundant penalties for crimes already punishable under state law.

As it stands today, there is no comprehensive process for Congress to determine whether these new offenses are necessary and appropriate. A strong reporting requirement reform would compel Congress to address such matters.

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