New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
©2010 ALM
An ALM Publication
VOLUME 244—NO. 50
FRIDAY, SEPTEMBER 10, 2010

WHITE-COLLAR CRIME

Expert Analysis

Too Big to Fail: Is Federal Criminal System in Need of Overhaul?

By **Elkan Abramowitz**

And **Barry A. Bohrer**

The "overcriminalization" of federal law has generated much attention, as evidenced by the proliferation of books, articles, and Web sites devoted to decrying the continued expansion of federal criminal law. Though responsible for the trend, Congress has joined the chorus, holding hearings last year on the "Over-Criminalization of Conduct/Over-Federalization of Criminal Law."

Recently, Senator Jim Webb (D-Va.) has introduced legislation, entitled the National Criminal Justice Commission Act of 2010, calling for the creation of a "blue-ribbon, bipartisan commission of experts charged with undertaking an 18-month top-to-bottom review of the nation's criminal justice system and offering concrete recommendations for reform." The legislation has passed the U.S. House of Representatives and currently is before the Senate.[1] This article examines some of the issues and proposals for reform likely to be reviewed by such a commission should the legislation be enacted.

Federal Criminal Law

Despite the fact that the federal government lacks a "general police power," there are nearly 4,500 federal crimes. Studies estimate that Congress enacts more than 50 new crimes a year, an average of 500 new crimes per decade over the past three decades.[2] Corresponding with a rise in federal crimes is a rise in the number of federal prisoners and federal prosecutors. According to one report, in 1980 there were approximately 20,000 federal prisoners who had been prosecuted by the approximately 1,500 federal prosecutors. In October 2009, these numbers had increased to more than 200,000 federal prisoners and more than 7,500 federal prosecutors.[3]

Logically, the increase in federal prosecutions creates an increase in the nation's imprisoned population, which exceeds the total population of 15 of its states. One observer has written: "No other rich country is nearly as punitive as the Land of the Free. The rate of incarceration in the United States is much higher than that of comparative nations: England's is one-fifth of America's level, Germany's a ninth, and Japan's a twelfth."[4] The American Bar Association reports that the average length of a sentence of incarceration also has increased from about 18 months in the 1980s to an average of 5 years in the 1990s. Between 1982 and 2006, direct expenditures by federal, state and local governments on corrections jumped from $9 billion to $68.7 billion, more than 600 percent.[5]

> Studies estimate that Congress enacts more than 50 new crimes a year, an average of 500 new crimes per decade over the past three decades.

Although specific numbers do not exist, estimates based on Federal Bureau of Prisons statistics place the number of individuals convicted of white-collar crimes at approximately 5 to 10 percent of the total federal prison population, or approximately 10,000 to 20,000 white-collar criminals.[6] Further, many believe that federal prosecutors have brought white-collar prosecutions front and center "seeking scapegoats for an economic collapse for which the federal government is not going to want to take its fair (and rather large) share of the credit (or blame, as the case may be)."[7] Indeed, commentators argue that the federal criminal statutes, like the recently criticized honest services fraud statute, are so expansive and vague that "[t]he only thing that stands between almost any American and doing a stretch in federal prison is the choice of whom prosecutors will target."[8]

These statistics tell the impact of the "overcriminalization" of federal law. As related during the July 2009 congressional hearings, many believe that the federal criminal system faces a number of fundamental problems. Consistently, experts offering comments and proposals for legislative consideration noted the need for a cohesive set of criminal laws which would provide the average citizen with adequate notice of conduct deemed unlawful—presaging the Supreme Court's decisions in the area of honest services fraud this term.

Issue #1: The Lack of Mens Rea in Many Federal Crimes. At the July 2009 hearings, Representative Bobby Scott (D-Va), chairman of the House Subcommittee on Crime, Terrorism, and Homeland Security, noted a growing concern about "the disappearance of the common law requirement of mens rea, or guilty mind," which was intended to protect society from poorly crafted legislation and overzealous prosecutors.[9]

In April 2010, the Heritage Foundation, in conjunction with the National Association of Criminal Defense Lawyers, issued a report titled "Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law." The report begins by asserting that fundamental to the criminal justice system is the notion that individuals should not be subject to criminal prosecution and conviction unless they intentionally engage in inherently wrongful conduct that they know to be unlawful. The report concludes that Congress, in its increasing expansion of criminal statutes, has enacted "scores of laws with weak or no mens rea requirements" thereby eroding principles of fair notice and undermining confidence in the government.

Focusing specifically on the 109th Congress (2005-2006) as an example, the report finds that Congress proposed 446 non-violent criminal offenses in that legislative year, 57 percent of which lacked an adequate mens rea requirement—23 of these proposed crimes were enacted into law. Although congressional expertise for drafting such laws resides with the House and Senate Judiciary Committees that have express jurisdiction over federal criminal law, the report states that more than half of the 446 proposed offenses were not sent to either committee for review and deliberation.

To remedy this issue, the report recommends that Congress alter the way it passes crime legislation. Specifically, it calls on Congress to

ELKAN ABRAMOWITZ *is a member of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer. He is a former chief of the criminal division in the U.S. Attorney's Office for the Southern District of New York.* BARRY A. BOHRER *is a member of Morvillo, Abramowitz and was formerly chief appellate attorney and chief of the major crimes unit in the Southern District U.S. Attorney's Office.* GRETCHAN R. OHLIG, *an attorney, assisted in the preparation of this article.*

require adequate judiciary committee oversight of every bill proposing criminal offenses or penalties, provide detailed written justification for and analysis of all new federal criminalization, and codify the rule of lenity in order to grant defendants the benefit of the doubt when Congress fails to legislate clearly.[10]

Issue #2: The Criminalization of Regulatory Violations. Notably, many of the crimes lacking a mens rea requirement are regulatory crimes. In his testimony before Congress, former U.S. Attorney General, Richard Thornburgh, observed that Congress needs to "rein in the continuing proliferation of criminal regulatory offenses," reporting that the number of regulatory offenses created without congressional review is estimated to be more than 300,000. Mr. Thornburgh urged Congress not to delegate such an important function to these agencies.

Instead, Mr. Thornburgh suggested that Congress adopts a general statute providing administrative procedures and sanctions for all regulatory breaches, removing any associated criminal penalties in all but two instances. The first exception would encompass conduct involving significant harm to persons, property interests, and institutions designed to protect persons and property interests. Mr. Thornburgh described this type of conduct to be within the "traditional reach of the criminal law." The second exception would permit criminal prosecution for violation of regulatory provisions not covered under the first exception only where there is a pattern of intentional or repeated breaches.

Implicit in the reform suggested by Mr. Thornburgh is the elimination of regulatory criminal "lawmakers" which has resulted in an amalgamation of crimes scattered throughout many of the 50 titles of the U.S. Code. Mr. Thornburgh stated, "What is needed is a clear, integrated compendium of the totality of the [f]ederal 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." Mr. Thornburgh noted that such an idea had been circulated in the 1970s, but failed to succeed. Without such an undertaking, Mr. Thornburgh asserted that average, ordinary citizens could not be expected to understand what conduct actually constitutes a crime in the United States.[11]

Issue #3: Over-Federalization—the States Already Have It Covered. In his opening statement, Representative Scott asked whether there is a valid purpose to be served by creating crime at the federal level that duplicates crime at the state level. He contended that Congress' continuous enactment of new federal crimes has served to "secur[e] a de facto federal police power under which virtually all criminal conduct can be federally regulated." Because many federal crimes overlap with already existing state crimes, he argued that the line between federal and state jurisdiction had been blurred.

James Strazzella, a law professor at Temple University Beasley School of Law, appeared before the Subcommittee to address this specific point. He stated:

> With the growth of federal law demonstratively covering more and more traditionally state-crime areas, a mounting and duplicating patchwork of crimes has grown up in the last few decades. In this area—whatever the theoretical jurisdictional hook on which Congress hangs its constitutional power to enact such legislation—the conduct involved is often, at its core, essentially local in nature (car-jacking or drive-by shootings, already crimes of robbery/assault in all states, are examples) and usually does not want for zealous prosecution by state agencies.

Indeed, a 1998 report from the American Bar Association on the Federalization of Criminal Law found that in many areas of criminal law, the nation is rapidly progressing toward "two broadly overlapping, parallel, and essentially redundant sets of criminal prohibitions, each filled with differing consequences for the same conduct." The ABA Report concluded that "[s]uch a system has little to commend it and much to condemn it."

Mr. Strazzella suggested that the federalization of criminal law has occurred because Congress felt pressured by the American public to "do something" in response to an increase in violent crime. He noted, however, that merely legislating crime does not mean it will be effectively enforced and actually may impair the American criminal justice system in the sense that it expends limited resources on issues that are not truly of a national or federal concern.[12]

Issue #4: Tenability of Vicarious Liability. An issue related to the lack of mens rea element in many federal crimes is the role of vicarious criminal liability. Mr. Thornburgh and others urged the abolition of such liability.[13] Speaking specifically of its application to corporations, Mr. Thornburgh asked Congress to reconsider "whether respondeat superior should be the standard for holding companies criminally responsible for acts of its employees."

During his testimony, Mr. Thornburgh maintained that the definition of what conduct constitutes a crime has become particularly blurred in corporate criminal cases. Citing broad prosecutorial discretion and overzealousness, in conjunction with overbreadth in statutes like honest services fraud, Mr. Thornburgh made reference 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."

Mr. Thornburgh stated that under current corporate liability, a corporation—an entity separate and distinct from the human beings who perform its functions—can be ruined because of corporate prosecution, in the manner of Arthur Andersen, also destroying many innocent employees' lives in the process. Instead, Mr. Thornburgh proposed a uniform law regarding corporate liability, rejecting the current piecemeal standards issued by the Department of Justice over the past decade. According to Mr. Thornburgh, such a law should not hold a "well-intentioned and otherwise law abiding corporation" criminally liable for the actions of a truly "rogue" employee or one who acts in violation of corporate policies and procedures.

Conclusion

The issues highlighted during the congressional hearings are the result of the seemingly unchecked expansion of federal criminal law in recent decades. As indicated by the various proposals presented, the creation of a set of federal criminal laws, centrally located and clearly defined without significant overlap with state jurisdiction, would be a huge undertaking and is, perhaps, a goal beyond reach. Congress must nonetheless tackle the issue of enacting a comprehensive but cohesive statutory scheme to address the increasingly complex problems posed by a new generation of financial transactions, state-of-the-art technology, and international finance.

1. Press Release, Senator Jim Webb, "Webb's National Criminal Justice Commission Act Wins Approval in House of Representatives" (July 29, 2010).
2. Opening Statement of Representative Judge Louie Gohmert (R-Tex.) at Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives on "Over-Criminalization of Conduct/Over-Federalization of Criminal Law," (July 22, 2009) (hereinafter "Hearing Transcript") at p. 3.
3. William L. Anderson, "Federal Crimes and the Destruction of Law," Regulation (Winter 2009-2010).
4. "Rough Justice: America Locks Up Too Many People, Some for Acts That Should Not Even Be Criminal," The Economist (July 22, 2010).
5. Testimony of Stephen A. Saltzburg, Hearing Transcript at p. 57.
6. William L. Anderson, "Federal Crimes and the Destruction of Law," Regulation (Winter 2009-2010).
7. Harvey A. Silverglate, "Three Felonies a Day," Encounter Books (2009).
8. William L. Anderson, "Federal Crimes and the Destruction of Law," Regulation (Winter 2009-2010).
9. Opening Statement of Representative Bobby Scott (D-Va.), Hearing Transcript at pp. 1-2.
10. Brian M. Walsh and Tiffany M. Joslyn, "Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law" at p. ix, Fact Sheet, (April 2010).
11. Testimony of the Honorable Richard Thornburgh, Hearing Transcript at pp. 7-8.
12. Written Statement of James A. Strazzella, Hearing Transcript at p. 70.
13. Statement of Timothy Lynch, Hearing Transcript at pp. 23-32.