CONGRESSIONAL INQUIRY AND THE FEDERAL CRIMINAL LAW

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In recent years, the scope of federal criminal law has expanded to unprecedented levels in the United States. During this period, a number of problems have emerged in the federal criminal law regime, including overfederalization, weak limits on federal prosecutors, and the influence of ordinary politics on decisionmakers. Consequently, criminal law scholars and commentators have begun to demand significant reforms with regard to defining, prosecuting, and punishing federal crimes. This article supports constraint of the modern federal criminal law regime through greater attention to, and use of, congressional investigation and oversight powers. Through an analysis of the 2009 and 2010 United States House of Representatives hearings on overcriminalization, this article asserts that Congress has political and constitutional incentives to use its investigation and oversight powers to address these problems. Conventional wisdom asserts that political disincentives to reduce the federal criminal law regime and weaknesses in investigative and oversight powers limit congressional effectiveness. While recognizing the merits of the conventional wisdom, this article argues that it is overstated—that institutional powers and incentives for reform exist—and that constitutional government demands healthy conflict between the leg-

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islative and executive branches in this area. By seriously considering prudential and constitutional limits on the definition of criminal law and by exercising congressional prerogatives to counterbalance the executive branch's powerful role in shaping it, serious congressional inquiry of the federal criminal justice regime can help to restore a vigorous constitutional government in the United States.

I. INTRODUCTION

Hardly anyone, it seems, really believes that the scope of federal criminal law is just about right. Though academics and commentators across the spectrum of law and politics rarely find general agreement when it comes to federal power, there actually appears to be relatively broad agreement these days that some things about federal criminal law are *not* quite right. In particular, the issue has brought together minds from both the political left and the political right,[1] making criticism of federal criminal law one of the issues *du jour* among commentators struck by the marriage of these strange bedfellows. Indeed, although it is the conventional wisdom that conservatives have generally favored the government in criminal justice adjudication,[2] it is the most conservative members of the Supreme Court who have emerged as prominent champions of structural (and even some rights-based) limits on federal criminal justice powers, often siding with criminal defendants.[3] Whether the concern is "overfederalization"

1. *See* Adam Liptak, *Right and Left Join Forces on Criminal Justice*, N.Y. TIMES, Nov. 24, 2009, at A1; Ross Douthat, Op-Ed., *Prisons of Our Own Making*, N.Y. TIMES, (Dec. 3, 2009), http://www.nytimes.com/2009/12/14/opinion/14douthat.html. Notable conservative political leaders have even started a website dedicated to criminal justice reform. *See* RIGHTONCRIME, http://www.rightoncrime.com (last visited Dec. 10, 2011).

2. *See, e.g.*, Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 412 (1998) (addressing the traditional view of political conservatives on criminal law).

3. *See, e.g.,* Alderman v. United States, 131 S. Ct. 700, 700 (2011) (Thomas, J., dissenting) (arguing that in denying certiorari the Court has "tacitly accept[ed] the nullification of our recent Commerce Clause jurisprudence" that placed limits on federal commerce power); United States v. Comstock, 130 S. Ct. 1949, 1970 (2010) (Thomas, J., dissenting) (arguing that the Necessary and Proper Clause does not permit civil commitment of sex offenders released from federal custody because the law does not execute any enumerated power); United States v. Stevens, 130 S. Ct. 1577, 1582, 1592 (2010) (holding that federal law criminalizing depictions of animal cruelty violated the First Amendment); *see also* Bond v. United States, 131 S. Ct. 2355, 2359–60 (2011) (holding, in Justice Kennedy's opinion for the Court joined by all Court conservatives, that a criminal defendant could challenge a federal criminal statute on the grounds that it exceeded Congress's

and the exercise of congressional power beyond constitutional limits,[4] or the duplication of resources that occurs when state and federal crimes too often overlap,[5] or the danger that people of dubious culpability will be ensnared in a vast web of obscure federal laws about which they had no reason to know,[6] or the increasing severity of federal sentencing for crimes that cause comparatively little harm or that involve offenders who pose comparatively low risk to the community,[7] thoughtful minds across the political spectrum are bothered by the sheer scope of the federal government's power to prosecute and punish crimes, and the relative ease with which federal assertions of criminal law enforcement power occur.[8]

It is unclear, however, the extent to which Congress—the one body that could directly address the problem—shares these concerns. For all of the public criticism of federal criminal law, and the omnipartisan nature of the criticism, the growth of federal criminal law has continued unchecked. The American Bar Association's Task Force on the Federalization of Criminal Law indicated in a 1998 report that by the early 1980s, there were about 3000 federal crimes.[9] Another subsequent study, conducted by John Baker, then concluded that by the year 2000, there were about 4000 federal crimes.[10] Baker's most recent study places the total number of federal crimes at about 4450, with Congress cre-

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enumerated powers).

4. *See* Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 799–809 (1996).

5. *See* Sanford H. Kadish, Comment, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1248–49 (1995).

6. *See* HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT xxvi–xxxi (2009); Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* IN THE NAME OF JUSTICE 43–49 (Timothy Lynch ed., 2009); *see also* Gary Fields & John Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared,* WALL ST. J., July 23, 2011, at A1 (detailing examples of minor conduct subjected to federal criminal prosecution).

7. *See* David Gray & Jonathan Huber, *Retributivism for Progressives: A Response to Professor Flanders*, 70 MD. L. REV. 141, 145, 158 (2010).

8. *See generally* Ashdown, *supra* note, 4 at 791–94 (discussing the rapid expansion of federal criminal law in the twentieth century).

9. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 94 (1998).

10. JOHN BAKER, JR., FEDERALIST SOC'Y FOR LAW & PUB. POLICY, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 8 (2004); *see also* John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes,* 54 AM. U. L. REV. 545, 546, 549–54 (2005) [hereinafter Baker, *Strategies to Limit Expansion*] (further detailing the data).

ating 452 new crimes between 2000 and 2007—about 56 new crimes per year, and about 500 every decade since 1980.[11] Moreover, a recent report from the Administrative Office of United States Courts shows that criminal prosecutions again increased in the federal system in fiscal year 2010, and that a new record was set for the number of criminal defendants charged in federal court (100,366).[12] The report also shows that criminal appeals dropped by seven percent,[13] suggesting the possibility that many defendants are foregoing appellate rights in exchange for reduced charges or for recommendations of reduced sentences in plea agreements. If that hypothesis is accurate, it reaffirms the belief that federal prosecutors wield tremendous authority through their plea bargaining powers, authority that can shape the substantive criminal law.[14] Additionally, a recent study by Pew indicates that while the state prison populations have recently decreased, the federal prison population has actually continually increased.[15] Indeed, in light of the current public debate about federal spending, deficits, and the size of the federal government, one could plausibly argue that the federal prosecutorial and carceral regimes might be an excellent place to begin some trimming of the federal fat.

The national legislature, to be fair, has not been *entirely* deaf to the loud calls for reform. One congressional subcommittee has recently conducted hearings into many of the problems that scholars and commentators on both the left and the right have identified in the federal criminal law regime.[16] In July 2009, the

11. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, LEGAL MEMORANDUM (Heritage Found., Washington, D.C.), June 16, 2008, at 1, 1 [hereinafter Baker, *Revisiting Growth*].

12. Admin. Office of the U.S. Courts, *Filings in the Federal Judiciary Continued to Grow in Fiscal Year 2010*, UNITED STATES COURTS (Mar. 2011), http://www.uscourts.gov/News/NewsView/11-03-15/Filings_in_the_Federal_Judiciary_Continued_to_Grow_in_Fiscal_Year_2010.aspx.

13. *Id.*

14. *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 869, 871 (2009) (stating that federal prosecutors' charging and plea bargaining powers help make prosecutors more than mere enforcers; they are the "final adjudicators" in most cases); *see also* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548–50 (2004) [hereinafter Stuntz, *Plea Bargaining*] (arguing that plea bargains can dictate the terms of a prosecutor's menu of options under the substantive criminal law).

15. *See* PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 1, 5 (2010).

16. *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing*

House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security conducted a hearing entitled "Over-Criminalization of Conduct/Over-Federalization of Criminal Law."[17] The Subcommittee heard from former Attorney General Dick Thornburgh; Timothy Lynch of the CATO Institute; law professors Stephen Saltzburg and James Strazzella; and two impact witnesses, one whose husband was prosecuted for a low-level crime involving the filing of the wrong paperwork, and one who was prosecuted for mislabeling a shipment and for various environmental offenses.[18] The Subcommittee conducted a second hearing entitled "Reining in Overcriminalization: Assessing the Problem, Proposing Solutions," in September 2010.[19] The Subcommittee again heard the testimony of criminal law experts and victims of overcriminalization, including the president of the National Association of Criminal Defense Lawyers, Brian Walsh of the Heritage Foundation, law professors Stephen Smith and Ellen Podgor, and two more impact witnesses.[20] During each hearing, the Subcommittee received information about the dangers of unchecked prosecutorial discretion and of creating and enforcing such a vast body of criminal laws, many of which capture behavior that is insufficiently culpable to warrant criminal sanction.[21]

Yet those hearings have yielded no significant legislative movement on these issues to date, either by the Judiciary Committees in the House and Senate or by Congress as a whole. In fact, even during the 111th Congress, after receiving expert testimony on the dangers of such a far-reaching set of criminal laws,[22] Congress continued to propose and consider numerous pieces of legislation that would expand, not contract, the scope of federal criminal law.[23] Finally, in July 2010, the House passed a

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Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 1 (2009) [hereinafter *2009 Over-Criminalization Hearing*].

17. *Id.*

18. *Id.* at 5, 20, 33, 38–39, 43–45, 52, 65.

19. *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2010) [hereinafter *2010 Over-Criminalization Hearing*].

20. *Id.* at 11, 21, 35, 46, 62, 86.

21. *See generally 2010 Over-Criminalization Hearing*, *supra* note 19; *2009 Over-Criminalization Hearing*, *supra* note 16.

22. *See generally 2010 Over-Criminalization Hearing*, *supra* note 19; *2009 Over-Criminalization Hearing*, *supra* note 16.

23. *See, e.g.*, Fighting Gangs & Empowering Youth Act of 2010, S. 3695, 111th Cong. §§ 301–302 (2010) (creating new crimes related to participation in, and recruiting of per-

version of the National Criminal Justice Commission Act, first introduced in the Senate by Senator Jim Webb and reported favorably out of the Senate Judiciary Committee in early 2010.[24] This legislation was designed to address a range of federal criminal justice issues, including code reform through the appointment of a commission comprised of experts on criminal law, law enforcement, and criminal sentencing.[25] It did not survive the 111th Congress's expiration.[26]

These recent examples highlight a recurring problem on Capitol Hill, and one that goes far beyond the subject of federal criminal law: committee room rhetoric that yields no substantive legislation or reform. Every year, various congressional committees conduct fact-finding inquiries or legislative oversight on criminal justice matters.[27] Yet every year, the size of federal criminal power seems to increase.[28] So the problem is not new and not likely to

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sons to participate in, criminal street gangs); Fighting Gangs & Empowering Youth Act of 2010, H.R. 5969, 111th Cong. §§ 301–302 (2010) (same); Medicare Fraud Enforcement and Prevention Act of 2010, H.R. 5044, 111th Cong. § 2 (2010) (enhancing criminal penalties for Medicare and Medicaid fraud); Gun Trafficking Prevention Act of 2009, S. 2878, 111th Cong. § 3 (2009) (adding new crimes related to firearms trafficking); Gun Trafficking Prevention Act of 2009, H.R. 4298, 111th Cong. § 3 (2009) (same); One Strike Act, H.R. 1753, 111th Cong. (2009) (amending definition of aggravated felony in the Immigration and Nationality Act to include crime committed by illegal aliens); Child Gun Safety and Gun Access Prevention Act of 2009, H.R. 257, 111th Cong. §§ 5–6 (2009) (adding new crimes for death and injury to a child caused by child's access to firearms and for failing to ensure that a child is accompanied by an adult when a child attends a gun show).

24. *See* National Criminal Justice Commission Act of 2010, H.R. 5143, 111th Cong. (2010); Press Release, Office of Senator Jim Webb, Webb's Nat'l Criminal Justice Comm'n Wins Approval in House of Representatives: Senator Calls for Swift Passage in the Senate (July 28, 2010), *available at* http://webb.senate.gov/newsroom/pressreleases/07-28-2010-02.cfm. For the original bill proposed by Senator Webb, see National Criminal Justice Commission Act of 2009, S. 714, 111th Cong. (2009).

25. *See* H.R. 5143 §§ 3-4, 6(b); *see also* Press Release, Office of Sen. Jim Webb, Webb's National Criminal Justice Commission Wins Approval in House of Representatives; Senator Calls for Swift Passage in the Senate (July 28, 2010), *available at* http://webb.senate.gov/newsroom/pressreleases/07-28-2010-02.cfm.

26. Senator Webb reintroduced the bill in the 112th Congress. *See The National Criminal Justice Commission Act*, JIM WEBB: U.S. SENATOR FOR VIRGINIA, http://webb.senate.gov/issuesandlegislation/criminaljusticeandlawenforcement/Criminal_Justice_Banner.cfm (last visited Dec. 12, 2011).

27. *See, e.g.*, *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2011) (conducting oversight of the FBI); *Combating Organized Retail Crime—the Role of Federal Law Enforcement: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2009) (hearing testimony from representatives of four federal law enforcement agencies regarding theft from retail establishments); *Federal Bureau of Investigation: Hearing Before the H. Committee on the Judiciary*, 110th Cong. (2008) (conducting oversight of the FBI).

28. *See* Baker *Revisiting Growth*, *supra* note 11, at 1–2 (tracking the increase in

disappear. At least in the specific context of federal criminal law reform, it is fair to wonder just how serious the House and Senate are about "reining in" the problem.

Perhaps it is unsurprising, then, that scholars have generally not embraced congressional oversight and investigation as meaningful avenues of federal criminal law reform. In a 1984 article, Mathew McCubbins and Thomas Schwartz criticized the "widespread mistake" that Congress has neglected its oversight responsibilities.[29] The authors proposed a model of evaluating congressional oversight that distinguishes "police-patrol" oversight—in which Congress directly confronts, at its own initiation, an administrative or executive branch agency through a centralized process designed to detect and remedy violations of legislative preferences—from "fire-alarm" oversight, in which Congress establishes a decentralized system of rules and procedures by which citizens can complain of agency or executive branch conduct and seek a remedy.[30] They concluded that fire alarm oversight is Congress's preferred oversight method, so what appears to be congressional neglect is actually an effective tool for maintaining executive branch compliance.[31] That model is more difficult to assess, though, in the context of criminal law reform. The citizens who would be in a position to sound the alarm may not always be a desirable constituency for Congress to publicly rescue. And Congress may have little incentive for providing them with the kinds of remedies they would seek, as the executive branch officials of whom they complain (prosecutors and law enforcement agents) may be a far more sympathetic bunch. Indeed, recent commentary has described Congress as the "broken branch"[32] and has concluded that the institutional failure to conduct meaningful oversight is among the reasons for this lack of action.[33]

crime legislation); Barkow, *supra* note 14, at 870–71 (describing the increase in the prison population and the concomitant increase in prosecutorial powers).

29. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165, 176 (1984).

30. *Id.* at 165–66.

31. *Id.* at 176.

32. *See generally* THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2006).

33. *See* Douglas Kriner, *Can Enhanced Oversight Repair "The Broken Branch"?*, 89 B.U. L. REV. 765, 765–66 (2009). For some excellent thoughts on constitutional consciousness and congressional inability to assert its prerogatives, see Jeffrey K. Tulis, *On Con-*

Perhaps, then, as Rachel Barkow reasons, the realities of ordinary politics make criminal law reform politically undesirable, and for many of the same reasons, perhaps members of Congress do not want to be seen in the hearing room questioning the authority of law enforcement officials.[34] Daniel Richman's thoughtful work on Congress and criminal law has suggested that Congress can meet its enforcement preferences through the appointment process (hearings on nominees) and through congressional inquiries that can help to impose costs on the law enforcement community if it is functioning poorly.[35] Yet rather than explore the specific relationship between congressional inquiries more broadly and reform of the substantive criminal law, Richman focuses on the problem of delegating enforcement power to prosecutors, the nature of congressional interactions with the executive branch, and the "extent to which enforcers' decisions are likely to reflect legislative preferences."[36] Still, the executive branch (or more precisely, the Justice Department) will often resist congressional overtures toward reform,[37] and Congress will ultimately accede to the executive branch's wishes.[38] But even assuming this dynamic is true, there is still something valuable about the opportunity for conflict and its process—that is, the inquiry that implicitly asserts congressional prerogatives, the resistance that asserts executive prerogatives, and the opportunity for a congressional response that more aggressively asserts congressional prerogatives.

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gress and Constitutional Responsibility, 89 B.U. L. REV. 515, 517 (2009) (contrasting Congress's positive action during the financial crisis of 2008 with its more regular feebleness, and concluding that "[i]t is more accurate . . . to describe Congress today as in a state of decay, rather than in total constitutional dysfunction").

34. Barkow, *supra* note 14, at 911.

35. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 789–93 (1999) [hereinafter Richman, *Federal Criminal Law*].

36. *Id.* at 787–88. Richman's subsequent work has examined some of the same themes, noting the strategic use of oversight, as well as discussing some of the most recent examples of congressional efforts to control federal criminal law enforcement. *See* Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2108–16 (2009) [hereinafter Richman, *Political Control*]. In particular, Richman focuses on the decentralization and autonomy of local United States Attorneys Offices and notes the risks associated with congressional demands for greater centralization. *See id*. at 2093–94.

37. *See* Richman, *Federal Criminal Law*, *supra* note 35, at 791 (stating that "the solicitude that enforcers show to legislators is often limited to the duration of the hearing itself").

38. *Id*. at 806.

So *can* congressional inquiry—which I use here as an umbrella term to describe either fact-finding hearings relevant to a pending or contemplated piece of legislation, or direct legislative oversight of the executive branch—serve as a meaningful avenue for federal criminal law reform? That is the one topic this article explores, and one that has been undervalued in the existing literature on federal criminal law.[39] This article thus relies upon extant law and scholarship to explain the need for criminal law reform in the first instance, then explains why congressional inquiry should be a more prominent part of the conversation about achieving that reform, comparing this approach to the avenues of reform suggested by other scholars that have noted with concern the increased federalization of the criminal law and the sheer breadth and harshness of the federal enforcement regime. Using the 2009 and 2010 over-criminalization/over-federalization hearings as a case study, this paper shows that Congress has acknowledged many of the problems of federal criminal law, yet has failed to take additional necessary steps to curb it. Committee members may see no political upside to challenging the requests of Justice Department officials for enhanced prosecutorial tools or to reforming the substantive criminal law in ways that narrow federal prosecutorial power. And yet, senators and representatives could use the oversight process to develop viable political and constitutional arguments for limiting the scope of federal crime and to hold Justice Department officials publicly accountable for charging practices, pleas, and sentencing recommendations that contribute to the problem. Ordinary politics may determine whether investigation and oversight can produce reforms beyond hearing room rhetoric, but the marriage of left and right on the issue of federal criminal law reform has at least enhanced the prospects. Ultimately, this article advances the federal reform conversation by focusing upon whether the committee process can produce more robust constitutionalism and a healthy inter-branch conflict, where constitutional and institutional interests overcome (or at least coexist with) ordinary politics to improve the criminal law. By enabling sober and informed discourse about constitutional limits in defining the criminal law,

39. I briefly introduced this notion—albeit in a far less developed manner—in J. Richard Broughton, *Some Reflections on Conservative Politics and the Limits of the Criminal Sanction*, 4 CHARLESTON L. REV. 537, 563–64 (2010). My goal here is to further develop the idea and assess its potential.

and by asserting congressional prerogatives to hold executive branch actors accountable for their own roles in perpetuating the federal criminal law behemoth, robust congressional inquiry of the federal criminal justice regime can help to restore at least some of Congress's constitutional consciousness.

II. GROWTH OF THE FEDERAL CRIMINAL LAW REGIME

Our threshold question concerns the necessity of federal criminal law reform. After all, congressional hearings and congressional oversight would be superfluous if the state of federal criminal law was not problematic. But the research and literature overwhelmingly suggest that is not the case.

Substantial literature exists on *overcriminalization*, the idea that we have too many criminal sanctions for conduct,[40] and *overfederalization*, the idea that we have too many *federal* criminal laws, and, if many of these actions are to be criminalized at all, state criminal law is a more appropriate forum.[41] Some of the objections to federal criminal law are constitutional and jurisdictional. Many scholars have argued that the increasing breadth of the Commerce Clause beyond its proper boundaries has led Congress to adopt more and more criminal laws under the authority of that provision, and that this has had profound consequences for constitutional federalism.[42] Others ground their objections in

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40. *See generally* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748–49 (2005); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223–24 (2007); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offense*, 46 EMORY L.J. 1533, 1535–36 (1997); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 1958 LAW & CONTEMP. PROBS. 401, 417 (1958); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 158–59 (1967); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704–12 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) [hereinafter Stuntz, *Pathological Politics*].

41. *See generally* Ashdown, *supra* note 4, at 799–804; Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After* Lopez, 46 CASE W. RES. L. REV. 801, 839–40 (1996); Kadish, *supra* note 5, at 1247–50; Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 505–06 (1995). *But see* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J. L. & PUB. POL'Y 247, 249–50 (1997) (arguing that commentators complaining of overfederalization overlook federal government's steady decline in criminal law enforcement). For a different perspective on the federalism debate, see Peter J. Henning, *Misguided Federalism*, 68 MO. L. REV. 389, 418–27 (2003) (arguing against the contention that federal criminal legislation is subject to federalism challenge solely because of state criminal law on the same subject).

42. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American*

policy concerns. Some are concerned about enforcement and the idea that federal prosecutors wield a stick that is too large, which inevitably results in abuse and irresponsible prosecutorial decisionmaking.[43] Some are concerned that Congress (not unlike other legislatures) drafts criminal laws too broadly and too often fails to narrow the scope of federal criminal liability with, for example, mens rea elements that the government would otherwise have to prove beyond a reasonable doubt.[44] Still others fear the problem of punishment severity and mass incarceration, which are incident to the growth of federal criminal law and the resulting increase in prosecutions, convictions (and therefore more prisoners), and strained budgets and resources at a time of outrageous deficits and slow economic growth.[45]

The factors contributing to this metastasizing of federal criminal law are familiar and well-chronicled, but I will summarize the main considerations that may be relevant to an examination of congressional investigations and oversight, and I will describe how those considerations were at issue during the 2009 and 2010 overcriminalization/overfederalization hearings.

A. *Ever-Expanding Constitutional Authority to Define Crime*

First, constitutional authority to enact criminal laws has grown over the past century, and Congress has not foregone the opportunity to use that growth to criminalize a wide range of conduct.[46] The Supreme Court's expansive interpretation of the Commerce Clause is the most notable contributor to this phenomenon.[47] Every student of constitutional law knows that the Supreme Court's post-1937 approach to the commerce power left

Criminal Law, 46 HASTINGS L.J. 1135, 1172–73 (1995); Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1026–27 (1977).

43. *See* Barkow, *supra* note 14, at 874–87; Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 705–08 (1997).

44. *See* Ellen S. Podgor, *Jose Padilla and Martha Stewart: Who Should Be Charged with Criminal Conduct?*, 109 PENN ST. L. REV. 1059, 1061–65 (2005).

45. *See* David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455, 457 (2001) (stating that "[t]here can be little doubt that the United States is a world leader in penal severity"); Michael A. Simons, *Sense and Sentencing: Our Imprisonment Epidemic*, 25 J. C.R. & ECON. DEV. 153, 155, 157–59 (2010) (attributing American mass incarceration in part to federal sentencing practice).

46. *See* Henning, *supra* note 41, at 418–27.

47. *See* Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 825–26, 832, 841–42 (2000); Henning, *supra* note 41, at 418–27; Mengler, *supra* note 41, at 511–12.

few meaningful limits on that authority.[48] But the commerce power accounts not just for federal regulation of the marketplace, but also for a substantial number of federal crimes, ranging from bank robbery and drug crimes to racketeering and firearms trafficking.[49]

The most significant modern case limiting congressional power under the Commerce Clause, *United States v. Lopez*, was a criminal case that invalidated the Gun Free Schools Zones Act, which prohibited knowing possession of a firearm in a school zone.[50] In *Lopez*, the Court clearly stated its view that not only does Congress lack a general police power, but the field of criminal justice is one that the Constitution leaves primarily to the states.[51] Yet even after *Lopez*, Congress simply followed the Court's formula and crafted a new statute with a jurisdictional element; indeed, the jurisdictional element is used in legislating many federal crimes as a way of demonstrating to courts that Congress is attempting to reach only those activities that fall within the reach of the Court's substantial effects doctrine, per *Lopez*.[52] Whatever the merits of *Lopez*, and the subsequent case attempting to amplify its underlying constitutional premise, *United States v. Morrison*,[53] these cases have not substantially deterred congressional

48. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241, 255 (1964); Katzenbach v. McClung, 379 U.S. 294, 302 (1964); Wickard v. Filburn, 317 U.S. 111, 124 (1942); United States v. Darby, 312 U.S. 100, 115 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

49. *See* NORMAN ABRAMS ET AL., FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 18–23, 41–42, 48, 54 (5th ed. 2010). For excellent perspective on the range of federal crimes enacted pursuant to Commerce Clause authority, see *id.* at 18–75.

50. 514 U.S. 549, 551 (1995).

51. *Id.* at 561 n.3, 566.

52. *See, e.g.*, 18 U.S.C. § 931(a) (2006) (making it a federal crime for a person with a prior violent felony conviction to purchase, use, or possess body armor, which is defined in 18 U.S.C. § 921(a)(35) as "any product sold, or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire"); *cf.* George D. Brown, *Constitutionalizing the Federal Criminal Law Debate*: Morrison, Jones, *and the ABA*, 2001 U. ILL. L. REV. 983, 1022–23 (stating that "left unaddressed, jurisdictional elements have the potential to undermine [*Lopez* and *Morrison*] entirely"); Clymer, *supra* note 43, at 656 (stating that federal courts have "broadly construed" jurisdictional elements).

53. 529 U.S. 598 (2000). It may be possible to add to this list of judicially enforced federalism cases the recent decision in *Bond v. United States*, 131 S. Ct. 2355 (2011). There the Court considered the case of a Pennsylvania woman, Carol Ann Bond, who, upon learning that another woman had become impregnated by Bond's husband placed caustic substances on objects the other woman was likely to touch. *Id.* at 2360. The victim suffered a minor burn. *Id.* Bond was prosecuted under a federal law that Congress enacted as part of an international chemical weapons treaty. *Id.* (citing 18 U.S.C. § 229 (2006)). She claimed the statute was beyond Congress's authority to enact, but the court of ap-

creation of criminal offenses. Moreover, the limits set forth in *Lopez* and *Morrison*, while still factoring in Commerce Clause analysis, have been undermined by *Gonzales v. Raich*, which permitted Congress to reach intrastate, noncommercial criminal activity—the cultivation and use of home-grown, locally consumed marijuana for medicinal use, which was lawful under California law but prohibited by the Federal Controlled Substances Act—based on the notion that Congress could have a rational basis for concluding that marijuana consumption could substantially affect the interstate market.[54] The *Raich* Court also repeated the proposition, stated in 1971 in *Perez v. United States* (a significant case for the expansion of federal criminal law), that a reviewing court cannot "excise, as trivial, individual instances" of a class of activity that otherwise falls within the scope of federal power, even if those particular instances are intrastate and noncommercial.[55] Even Justice Scalia, who joined the Court in limiting federal commerce power in *Lopez* and *Morrison*,[56] and who has generally been an aggressive supporter of judicially enforced federalism,[57] approved of the exercise of federal power in *Raich*.[58] In a concurring opinion, Justice Scalia separately concluded that the Necessary and Proper Clause provides an adequate source of constitutional authority where the regulation of even noneconomic, intrastate activity is essential to a broader scheme of economic regulation.[59]

peals said she lacked standing. *Id*. at 2360–61. The Supreme Court reversed on federalism grounds, holding that a defendant seeks to vindicate her own constitutional interests when asserting that a federal criminal statute exceeds congressional power and interferes with state prerogatives pursuant to the Tenth Amendment. *Id*. at 2363–64. The decision may be of limited significance to broader criminal jurisprudence, however, as the Court did not, and had no occasion to, hold that the statute was in fact unconstitutional. *Id*. at 2367.

54. Gonzales v. Raich, 545 U.S. 1, 19 (2005); *see also* George D. Brown, *Counterrevolution?—National Criminal Law After* Raich, 66 OHIO ST. L.J. 947, 948–49, 991 (2005) (arguing that *Raich* will contribute to the expansion of federal criminal law and break down the distinction between two levels of government and describing how *Raich* undermined *Lopez* and *Morrison*).

55. *Raich,* 545 U.S. at 23, 32–33 (quoting Perez v. United States, 402 U.S. 146, 154 (1971)) (internal quotation marks omitted).

56. United States v. Morrison, 529 U.S. 598, 600, 607–16 (2000); United States v. Lopez, 514 U.S. 549, 550, 556–62 (1995).

57. Justice Scalia wrote the Court's opinion in *Printz v. United States*, 521 U.S. 898, 902, 935 (1997), and joined the Court's federalism-protective decisions in, for example, *Alden v. Maine*, 527 U.S. 706, 710, 759 (1999), *City of Boerne v. Flores*, 521 U.S. 507, 509, 536 (1997), and *New York v. United States*, 505 U.S. 144, 147, 188 (1992).

58. *Raich*, 545 U.S. at 33, 41–42 (Scalia, J., concurring).

59. *Id*. at 38–42.

As for the Necessary and Proper Clause, the Court recently announced a broad understanding of that Clause as it applies to federal criminal justice.[60] Although the Supreme Court in *United States v. Comstock* upheld a civil commitment statute,[61] the Court's opinion plainly implicated the scope of federal crime-creation and sentencing authority, for it was the power to create the underlying federal crime that Congress was "carrying into [e]xecution" when it devised a civil commitment scheme for released federal prisoners.[62] The Court explained that while congressional power to criminalize conduct is not explicitly mentioned in the Constitution,[63] "Congress nonetheless possesses broad authority" to create crimes, punish offenders, and enact laws governing prisons and prisoners in the course of "carrying into [e]xecution" its enumerated powers.[64] In fact, the Court held that legislation may be constitutionally valid if it is more than one step removed from the enumerated power that it seeks to execute.[65]

B. *Ordinary Politics and the Race to Be "Tough"*

A second explanation, though one often buoyed by the anemic structural limits on congressional power, is ordinary politics. The empty "tough on crime" and "soft on crime" labels still reverberate in the world of politics, and the conventional wisdom is that office seekers assigned the latter label will typically fare worse among the voting public.[66] Consequently, politicians who restrict

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60. *See generally* United States v. Comstock, 130 S. Ct. 1949, 1965 (2010).

61. *Id.* at 1954 (citing 18 U.S.C. § 4248 (2006)).

62. *Id.* at 1954, 1958.

63. *Id.* On its face, this would seem to be a strange way of describing the constitutional text, which does, in fact, specifically empower Congress to criminalize some forms of conduct, including piracies and felonies committed on the high seas and offenses against the law of nations (which Congress may "define" as well as "punish"). U.S. CONST. art. I, § 8, cl. 10. The Constitution also specifically speaks of punishing counterfeiting and treason. *Id.* at cl. 6. The Fifth Amendment, which applies only to the federal government, also refers to "capital" crimes, indicating its understanding that Congress might create legislation targeting conduct that would be punishable by death. *Id.* amend. V. Yet Justice Breyer includes language elsewhere in his opinion which refers to these powers (though he does not refer to the Fifth Amendment). *Comstock,* 130 S. Ct. at 1957.

64. *Comstock*, 130 S. Ct. at 1958 (quoting U.S. CONST. art. I, § 8, cl. 18) (internal quotation marks omitted).

65. *Id.* at 1963–64.

66. *See* Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1277–78 (2005) (explaining that political dialogue about criminal punishment is irrational because "tough-on-crime" rhetoric has resulted in the movement of modern

the scope of a criminal sanction or who are seen as being uncooperative with, or unhelpful to, the law enforcement community could be subject to negative labeling. Moreover, the constituency for criminal law reform is unclear. Although all citizens could benefit from a federal criminal law that is leaner, more rational, more focused on highly culpable actors, and more consistent with a federal government of limited and enumerated powers, legislators may feel that the only real beneficiaries of reform are the "bad guys" or those with a propensity to commit crimes—hardly a constituency worth protecting, in the mind of the typical legislator. So legislators lack electoral incentives to reform criminal law in the direction of fewer crimes or reduced punishments.

Another phenomenon of criminal lawmaking is the immediate rush to create new criminal laws in the wake of some public tragedy or notorious crime.[67] Even if existing criminal laws are adequate, legislators perceive obvious political benefits that come from proposing new crimes.[68] This phenomenon is made more palatable by the availability (or at least the arguable availability) of constitutional power to expand the existing criminal code.[69] This is not to say that all legislative responses to high profile criminal episodes are illegitimate. Many of them are entirely appropriate and potentially necessary to protect vital national and public interests. These responses merely offer yet another explanation for congressional enlargement of the federal criminal law that stems from the perceived demands of ordinary politics.

Beyond these common explanations, Bill Stuntz offers a more nuanced view of the unique politics of *federal* criminal lawmak-

sentencing law in a single direction, and advocating shorter sentences or reform could result in the "soft on crime" label); Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1251 (2006) (stating that federal legislators have incentives to be "tough-on-crime," and this makes it unlikely that they will have much concern for state interests); Stuntz, *Pathological Politics, supra* note 40, at 509 ("Voters demand harsh treatment of criminals; politicians respond with tough sentences (overlapping crimes are one way to make sentences harsher) and more criminal prohibitions. This dynamic has been particularly powerful the last two decades, as both major parties have participated in a kind of bidding war to see who can appropriate the label—'tough on crime.'").

67. *See* Ann-Marie White, Comment, *A New Trend in Gun Control: Criminal Liability for the Negligent Storage of Firearms*, 30 HOUS. L. REV. 1389, 1419 (1993) ("One reason for [increasing prison populations] is a 'knee-jerk' reaction of legislators responding to well-publicized crimes, tragedies and public interest groups.").

68. *See* Stuntz, *Pathological Politics*, *supra* note 40, at 510.

69. *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781–82 (2006).

ing. According to Stuntz, crime definition is relatively low-visibility work, typically with little political gain.[70] Congress, though, has an incentive to make symbolic statements through the criminal law, and can use its greater public visibility to add political value to those statements (which usually come in the form of efforts to address some outrageous conduct).[71] In addition, Congress passes laws that federal law enforcers want, and it regularly defers to the preferences of the Justice Department and federal law enforcement agencies because those agencies seem to carry considerable weight in the public conscience.[72] So when the Justice Department asks for some crime-fighting tool, the request has credibility, and Congress takes a political risk if its spurns the request.[73] Moreover, Stuntz's work concludes, legislators are almost always immune from any political backlash that may occur where they overcriminalize or overproscribe sentencing, so there is little reason *not* to make the criminal law as expansive as possible.[74]

C. *The Influence of Federal Prosecutors*

Finally, though we focus much of the overcriminalization spotlight on legislators, as Stuntz's work demonstrated persuasively for many years, legislators are often relegated to a less important substantive lawmaking role than prosecutors.[75] This view of the prosecutor as the real criminal lawmaker proceeds from the vast authority that prosecutors enjoy in selecting whom and what to charge, an authority emboldened by the power of plea bargaining and the concomitant costs to criminal defendants of a jury trial, as well as a body of constitutional law that leaves the exercise of prosecutorial discretion largely immune from judicial review except under the most extraordinary of circumstances.[76]

70. Stuntz, *Pathological Politics*, *supra* note 40, at 549.

71. *Id.* at 546.

72. *Id.* at 545–46.

73. *Id.* at 545.

74. *See* Stuntz, *Plea Bargaining*, *supra* note 14, at 2557–58; Stuntz, *Pathological Politics*, *supra* note 40, at 548.

75. *See* Stuntz, *Plea Bargaining*, *supra* note 14, at 2549; Stuntz, *Pathological Politics*, *supra* note 40, at 519; *see also* Barkow, *supra* note 14, at 876–79 (describing the dangers of such a powerful prosecutorial regime).

76. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Law*, 107 YALE L.J. 1, 4 (1997) [hereinafter Stuntz, *Uneasy Relationship*]. For

Even as Congress may impose procedural and investigative limits on federal law enforcement, it sometimes extends the scope of the substantive law.[77] As Stuntz has explained, Congress passes criminal statutes that "make proof of guilt easier, which converts otherwise contestable cases into guilty pleas, thereby avoiding most of the costs criminal procedure creates."[78] Consequently, much of the size of federal criminal law is not attributable to Congress or to federal judges (whose interpretations of the law often give Congress great lawmaking latitude) at all, but to federal prosecutors—or more precisely, prosecutors taking advantage of the sweeping tools that Congress gives them but who do not seem interested in restricting the application of the law.[79] Rachel Barkow refers to this state of affairs as the "[p]rosecutor as Leviathan."[80] Like Stuntz, she describes how Congress works within this framework: Congress enacts laws "with punishments greater than the facts of the offense would demand," so that prosecutors can use those statutes advantageously in the plea bargaining process.[81] Unfortunately, she argues, there is only the most minimal oversight of federal prosecutors.[82]

D. *The Congressional Hearings on the Federal Criminal Law Behemoth*

Many of these concerns were highlighted at the aforementioned 2009 and 2010 overcriminalization/overfederalization hearings.[83] At the outset of the 2009 hearing, Subcommittee Chairman Bobby Scott of Virginia noted the range of organizations across the political spectrum having an interest in this issue and explained that the concern was not just about the rate of growth but the ways in which Congress passes criminal legisla-

examples of the Court's deference to prosecutorial discretion, see *United States v. Armstrong*, 517 U.S. 456, 458, 470 (1996); *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978); and *Santobello v. New York*, 404 U.S. 257, 260–61 (1971).

77. *See* Richman, *Federal Criminal Law*, *supra* note 35, at 800.

78. Stuntz, *Uneasy Relationship*, *supra* note 76, at 56.

79. *See* Barkow, *supra* note 14, at 871–73.

80. *Id.* at 874.

81. *Id.* at 880.

82. *Id.* at 875, 885–86. Barkow notes that Congress seems to step in when "urged by a sufficiently powerful interest," identifying the number of high-status offenders in the federal system who have had difficulties with local U.S. Attorneys Offices. *Id.* at 917–18.

83. *See 2010 Over-Criminalization Hearing*, *supra* note 19, at 1; *2009 Over-Criminalization Hearing*, *supra* note 16, at 1.

tion, often using overbroad language and without the use of specific mens rea elements.[84] Similarly, at the opening of the 2010 hearing, Chairman Scott again noted "the disturbing disappearance of the common law requirement of mens rea," and stated that "[w]e can see the impact of unfair and vague legislation at the hands of overzealous prosecutors when we look at the prison population."[85] Representative Louie Gohmert of Texas, the ranking member on the Subcommittee, explained that the existing structure of federal criminal law had secured "a de facto [f]ederal police power under which virtually all criminal conduct can be federally regulated . . . . Part of this trend toward over-federalization and over-criminalization [was] the growing expectation that Congress is the arbiter of criminal conduct."[86] Representative Gohmert also noted the prevalence of regulatory crimes and the absence of criminal intent among many of those offenders.[87] In his opening statement at the 2010 hearing, Representative Ted Poe of Texas also lamented federal overcriminalization and focused on the case of Sholom Rubashkin, an Iowa kosher slaughterhouse operator who was sentenced to twenty-seven years in federal prison upon conviction for eighty-six counts of financial fraud.[88] Rubashkin was initially investigated for a number of immigration offenses, but the overwhelming number of charges against him were eventually dropped and prosecutors focused upon his financial crimes.[89] According to Poe, "[w]e proba-

84. *2009 Over-Criminalization Hearing*, *supra* note 16, at 1–2 (statement of Rep. Bobby Scott, Chairman, Subcomm. on Crimes, Terrorism, & Homeland Sec.).

85. *2010 Over-Criminalization Hearing*, *supra* note 19, at 2 (statement of Rep. Bobby Scott, Chairman, Subcomm. on Crime, Terrorism, & Homeland Sec.).

86. *2009 Over-Criminalization Hearing*, *supra* note 16, at 3 (statement of Rep. Louie Gohmert, Ranking Member, Subcomm. on Crime, Terrorism, & Homeland Sec.).

87. *Id.*

88. *2010 Over-Criminalization Hearing*, *supra* note 19, at 9 (statement of Rep. Ted Poe, Member, H. Comm. on the Judiciary) (describing the crime narrowly, as violating the Packers and Stockyard Act, which punishes failure to pay cattle suppliers within a day of cattle delivery (which Representative Poe facetiously described as a "dastardly deed")). *Id.* A jury ultimately convicted Rubashkin of bank, wire, and mail fraud; false statements; and money laundering. United States v. Rubashkin, 655 F.3d 849, 855 (8th Cir. 2011). The Rubashkin case received substantial public notoriety, much of it concerning what was viewed as a grossly disproportionate sentence; six former Attorneys General even complained of the sentence. *See* Caroline Black, *Is Life Sentence Kosher for Sholom Rubashkin, Jewish Slaughterhouse Boss Guilty of $26 Million Fraud?*, CBSNEWS.COM (Apr. 29, 2010), http://www.cbsnews.com/8301-504083_162-20003686-504083.html. Recently, the Eighth Circuit upheld the sentence noting the sentence was on the low end of the guidelines range and considering the damage caused to the victims of Rubashkin's crimes. *See Rubashkin*, 655 F.3d at 869.

89. *2010 Over-Criminalization Hearing*, *supra* note 19, at 9 (statement of Rep. Ted

bly need that [prison] space for somebody that's just really an outlaw."[90]

Former Attorney General Dick Thornburgh noted at the 2009 hearing the problem of federal prosecutor power, saying they "are given an immense amount of latitude and discretion to construe [f]ederal crimes and not always with the clearest motives or intentions."[91] To deal with the overfederalization problem, he advocated an integrated federal criminal code, reform of regulatory crimes by essentially eliminating them and replacing them with congressionally approved administrative procedures and sanctions for regulatory violations, and reform of corporate criminal law by mitigating *respondeat superior* liability.[92] Timothy Lynch followed this statement by repeating the refrain about the "truly immense" power of federal prosecutors and citing some specific problems of prosecutorial discretion related to the absence of criminal intent.[93] For example, Lynch told the story of one man who served three years in a federal prison because he was unaware that he had to surrender his firearm—purchased lawfully—once his wife obtained a restraining order during their divorce proceedings.[94] Lynch also described an Environmental Protection Agency ("EPA") hotline that was created for the Resource, Conservation, and Recovery Act.[95] The hotline was designed to assist people in obtaining information about the Act's application.[96] The EPA, however, refused to guarantee the accuracy of information on the hotline and federal prosecutors refused to allow reliance on incorrect information to be a defense in a prosecution for violating the Act.[97] His broader point was that Congress should essentially abolish the traditional mistake of law doctrine as well as codify the rule of lenity[98] because existing expansive theories of

Poe, Member, H. Comm. on the Judiciary).

90. *Id.* at 9–10.

91. *2009 Over-Criminalization Hearing*, *supra* note 16, at 6 (statement of Hon. Richard Thornburgh, former Att'y General of the United States).

92. *Id.* at 6–8.

93. *Id.* at 20–21 (statement of Timothy Lynch, CATO Institute).

94. *Id.*

95. *Id.* at 21.

96. *Id.*

97. *Id.*

98. *See id*. The rule of lenity provides that if all interpretive mechanisms have been exhausted and a criminal statute's meaning remains grievously uncertain or ambiguous, it should be read in a way that favors the defendant and does not impose criminal liability. *See* Muscarello v. United States, 524 U.S. 125, 138–39 (1998) (using one interpreta-

criminal liability are "inconsistent with the American legal tradition, and they hand too much power over to prosecutors, who can then coerce plea deals."[99] Finally, Professor James Strazzella explained that while there is a perception that voting for more federal crime bills is a cost-free exercise, it is not.[100] Strazzella then enumerated the costs of overcriminalization, including: the human cost (seen in the stories of the victim/impact witnesses); the enhanced power given to prosecutors, whose discretion is virtually unreviewable by the courts; and the burdens imposed on the federal judiciary, which must divert resources from criminal cases in which there are true federal interests.[101]

Much of the 2010 hearing focused upon the failures of legislative draftsmanship in Congress: vague or unclear prohibitions and, most prominently, the failure to attach meaningful mens rea elements to federal crimes.[102] Notably, the Subcommittee received a report prepared by the National Association of Criminal Defense Lawyers ("NACDL") and the Heritage Foundation that addressed the mens rea problem.[103] Representatives of both organizations—Jim Lavine of the NACDL and Brian Walsh of The Heritage Foundation—also testified at the hearing and discussed the study.[104] The report studied 446 non-violent, non-drug criminal offenses proposed in the 109th Congress and found that fifty-seven percent of those had either no, or only a very weak, mens rea requirement.[105] Only about eight percent had what the report described as "strong" mens rea requirements.[106] The report included this phenomenon as part of a larger problem of defining crime at the federal level that includes sloppy drafting, failure to

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tion of the rule of lenity). *But see* Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2420, 2423–24 (2006) (discussing evolving formulations of the rule of lenity).

99. *2009 Over-Criminalization Hearing*, *supra* note 16, at 22 (statement of Timothy Lynch, CATO Institute).

100. *Id.* at 5, 66 (statement of James A. Strazzella, Professor, Temple University, Beasley School of Law).

101. *See id.* at 66.

102. *2010 Over-Criminalization Hearing*, *supra* note 19, at 1–2 (statement of Rep. Robert C. Scott, Chairman, H. Subcomm. on Crime, Terrorism, and Homeland Sec.).

103. *Id.* at 2.

104. *Id.* at 11 (statement of Jim Lavine, President, National Association of Criminal Defense Lawyers); *id.* at 46 (statement of Brian W. Walsh, Senior Legal Research Fellow, The Heritage Foundation).

105. BRIAN W. WALSH & TIFFANY M. JOSLYN, THE HERITAGE FOUND. & NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW ix, 12 (2010).

106. *Id.* at 12.

report proposed criminal offenses to the committees with expertise (the Judiciary Committee in each chamber), and delegation to executive agencies of responsibility to criminalize certain conduct.[107] The report ultimately recommended, among other things, that Congress enact default rules that require proof of mens rea where such an element is lacking and codify the rule of lenity and that the Judiciary Committees in the House and Senate oversee every proposed federal crime.[108]

The 2010 hearing made prosecutorial discretion a prominent topic as well. During one exchange, Representative Gohmert discussed one of the cases before the Committee—Abner Shoenwetter's conviction and eight-year sentence for purchasing lobster tails that violated Honduran administrative regulations, despite the fact that Honduran legal authorities objected to the prosecution and asserted the invalidity of their own regulations—and expressed "shock" that an American prosecutor would even charge such a case.[109] "[N]o good prosecutor would take a case like that," Representative Gohmert asserted.[110] During a dialogue about the conviction of Bobby Unser for wandering unknowingly into a wilderness area on a snowmobile during a blizzard, Professor Smith took the discussion a step further:

> Well, that is what overcriminalization fundamentally is about. It is about giving prosecutors, the executive branch, absolute power.
>
> And it is not just the executive branch, it is each and every prosecutor. The hundreds of prosecutors across this country all have absolute power in their own areas. So any prosecutor with an ounce of sense, maybe even a half an ounce, would not have charged Mr. Unser with this offense, but he was still charged and convicted.
>
> And these two examples here are examples of how prosecutorial discretion fails. And I think it is important for the Congress to realize it fails quite a lot.[111]

Smith went on to explain that prosecutorial speculation about persons they "know [are] up to no good" often drives charging decisions that are virtually unreviewable, thus leading to the ac-

107. *Id.* at 24–26.

108. *Id.* at 27–32.

109. *2010 Over-Criminalization Hearing*, *supra* note 19, at 3, 105 (statement of Rep. Louie Gohmert, Ranking Member, Subcomm. on Crime, Terrorism & Homeland Sec.).

110. *Id.*

111. *Id.* at 106–07 (statement of Stephen F. Smith, Professor of Law, University of Notre Dame Law School).

cumulation of absolute prosecutorial power.[112] "That," he said, "is what overcriminalization does."[113]

Although both hearings and the *Without Intent* report that occupied a prominent place at the 2010 hearing focused upon non-violent and non-drug crimes,[114] many of the problems that the hearings identified could also apply to more serious crimes, including those typically considered *malum in se*. Former federal prosecutor Andrew Weismann noted the breadth of the problem and gave the example of the federal child pornography laws that do not require any mens rea regarding whether the viewer knows the persons shown in a visual depiction of sex are minors.[115] Rather, he explained, the statute as written simply requires that the viewer know that what he has received is a visual depiction, enabling the Government to obtain a conviction even if the viewer did not know he was seeing a depiction of a minor engaged in sex.[116] Weismann described this as "insane," and elaborated upon the example this way:

> [T]he point is simply to illustrate, again, the limitations of prosecutorial discretion and also to see that even when we are talking about real crimes, malum in se real crimes, crimes that should be punished, there, too, you have problems with crime definition.
>
> So it is not just the technical regulatory offenses, it is all crimes. That is how deep and corrosive the problem of overcriminalization is.[117]

Both the 2009 and 2010 hearings, then, provide a useful window into the nature of the existing federal criminal law problem. Buoyed by a constitutional doctrine of congressional power that enforces few structural limits, as well as a mix of ordinary poli-

112. *See id.* at 107–08 (discussing the "absolute power" exercised by federal prosecutors).

113. *Id.* at 108.

114. *See id.* at 46–47 (statement of Brian W. Walsh, Senior Legal Research Fellow, The Heritage Foundation); *2009 Over-Criminalization Hearing*, *supra* note 16, at 1–2, 33 (statements of Robert C. Scott, Chairman, H. Subcomm. on Crime, Terrorism, and Homeland Sec., and Kathy Norris); WALSH & JOSLYN, *supra* note 105, at ix–x.

115. *2010 Over-Criminalization Hearings*, *supra* note 19, at 95–96, 109 (statement of Andrew Weismann, Partner, Jenner & Block, LLP).

116. *See id.* at 109. To correct this problem, the Supreme Court has held that the word "knowingly" in the relevant statute, 18 U.S.C. § 2252, must be read as applying to both the age of the performers and the sexually explicit nature of the material viewed. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (citing 18 U.S.C. § 2252 (1977)).

117. *2010 Over-Criminalization Hearings*, *supra* note 19, at 109 (statement of Andrew Weismann, Partner, Jenner & Block, LLP).

tics that countenances broadly crafted criminal legislation and is naturally protective of law enforcement forces, the legislative branch has created a massive body of criminal laws with the potential to capture a wide range of conduct. Indeed, so broad is the federal criminal law that it often captures conduct of minimal, even questionable, culpability. The problem then goes beyond congressional crime-definition, implicating the exercise of prosecutorial discretion and the purposes of criminal punishment. But is this problem one that Congress can actively police and correct?

III. A MORE ROBUST CONGRESSIONAL INQUIRY

Having established a problem with the scope of federal criminal law, can the federal government do anything about it? The dominant scholarship on federal criminal law reform tends to focus on the judiciary and executive branches, urging more robust judicial review or internal reform in federal prosecutor's offices.[118] While some scholars urge statutory reform by Congress, the tendency among scholars more generally is to view congressional oversight and investigation as either too weak or as a limited auxiliary constraint on federal prosecutions.[119] The conventional wisdom, then, seems to be that congressional oversight and investigation is available as an alternative, but likely ineffective, as legislators have little incentive to reduce the scope of the criminal law or to resist requests of law enforcement officials in the field who claim to need additional crime-fighting tools.[120] My purpose here is to suggest that the congressional committee structure requires fresh thinking as a place where real criminal law reform can at least begin, and that the 2009 and 2010 House hearings serve as a reminder of both the virtues and vices of committee oversight and investigation, offering lessons as to how comprehensive federal criminal law reform *could* proceed. This

118. *See, e.g.*, Barkow, *supra* note 14, at 907 (referring to federal court oversight as "[p]erhaps the most common suggestion for controlling prosecutorial abuse"); Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167, 196 (2004) (suggesting various improvements to judicial review of violations of DOJ guidelines).

119. *Compare* Barkow, *supra* note 14, at 911, (recognizing the difficulties of implementary and administering any potential oversight over prosecutors), *with* Podgor, *supra* note 118, at 198–200 (suggesting that congressional oversight could be used to police the Justice Department's compliance with its own internal guidelines).

120. *See* Barkow, *supra* note 12, at 911; Stuntz, *Pathological Politics*, *supra* note 40, at 545.

section therefore discusses the nature and virtues of congressional inquiries (both fact finding for legislation, as well as oversight), places them in the context of federal criminal law reform, and examines how the 2009 and 2010 hearings succeeded and failed.

A. *Fresh Thoughts About Congressional Inquiry and the Federal Criminal Law*

Scholars have had comparatively little to say (and especially little good to say) about congressional oversight and investigations and their relationship to the federal criminal law. It is easy to see why.

Not all investigation and oversight is the same, nor is it usually attractive. Christopher Schroeder has described the difference between programmatic oversight (hearings designed to focus on the legitimate end of reviewing agency performance) and vendetta oversight (hearings conducted to harass or embarrass the President or a member of his administration).[121] And Ted Olsen rightly noted that oversight is "not a sport for the faint-hearted," explaining the ways that power is exercised in Washington and noting that the rough-and-tumble world of oversight is especially severe when the White House and Congress are controlled by different parties.[122] Moreover, congressional hearings can result in members grandstanding, speaking mainly to the C-SPAN cameras, or engaging in the "party line" oversight hearing—where members of the President's party ask questions that are designed to paint the administration's position and its representative in the most positive light, while members of the opposing party ask more difficult and probing questions designed to highlight the administration's shortcomings or cast the administration's position as flawed.

This critique of committee room inadequacies is compelling and has substantial merit. Still, the view of the relative uselessness of congressional investigation and oversight, while certainly true in specific cases, is overstated.

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121. *See* Symposium, *Reforming Government Through Oversight: A Good or Bad Idea?*, 13 J.L. & POL. 557, 563–65 (1997).

122. *Id.* at 567.

1. The Nature and Scope of Congressional Investigative Power

First, the nature of congressional investigative power is sufficient to meaningfully attack the problem of the federal criminal law behemoth. Although the Constitution does not specifically enumerate the investigative power of Congress, legislative tradition and judicial precedent have established that it is an incident of Congress's constitutional legislative authority.[123] Congress must be able to find facts and to develop evidence in order to carry out its enumerated legislative powers.[124] Moreover, the Supreme Court has explained that Congress's investigative power is not only "inherent in the legislative process," but

> [t]hat power is [also] broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.[125]

Still, the power is "not unlimited" and any inquiry "must be related to, and in furtherance of, a legitimate task of the Congress."[126]

In addition, the hearing offers a chance for expert dialogue and fact finding in ways that floor debate does not. As the 2009 and 2010 hearings demonstrate, the committee inquiry allows the members to hear from experts in the field, who can offer legal and historical perspectives that would assist members in deciding whether reducing the size of the criminal law is a worthy priority.[127] As discussed above, these hearings showed how members can obtain facts and perspectives from citizens affected by the federal prosecutorial regime.[128] Although all of this testimony can be recounted on the House and Senate floors, floor debate is a

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123. *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504–05 (1975); *see also* LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 3–25 (2004) (describing the early history of congressional investigative powers and clashes with the executive branch).

124. *See* McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

125. Watkins v. United States, 354 U.S. 178, 187 (1957).

126. *Id.*

127. *See, e.g.*, *2010 Over-Criminalization Hearing*, *supra* note 19, at 11–13, 46–48, 62–63, 86–87, 95–97; *2009 Over-Criminalization Hearing*, *supra* note 16, at 5–8, 20–22, 52–53, 55–67.

128. *See, e.g.*, *2010 Over-Criminalization Hearing*, *supra* note 19, at 21–25, 35–38; *2009 Over-Criminalization Hearing*, *supra* note 16, at 33–36, 43–45.

less optimal forum. In committee, unlike on the floor, members can interact with the witnesses, probe their remarks, and ask questions. Witnesses can also file documents with the committee, which enhances the fact-finding process. There is thus greater opportunity for developing facts and arguments through a committee inquiry. Of course, members can take to the floor during consideration of the legislation and recount what the committee inquiry uncovered, but only after first subjecting the views of experts and other witnesses to a rigorous examination in committee. Moreover, congressional inquiry carries with it the subpoena power to aid in fact finding[129] and the power of contempt to help ensure compliance with congressional requests and procedures.[130] The nature of congressional inquiry, then, provides a useful starting point for making this process a more visible part of federal criminal law reform.

2. Rethinking Ordinary Politics

Ordinary politics will almost always drive a congressional inquiry to some meaningful degree.[131] Just as ordinary politics—the electoral benefits of appearing "tough on crime" and the lack of an identifiable constituency worthy of protection that would benefit from reform—have shaped substantive federal crime legislation, so, too, should we expect it to influence congressional investigations and congressional oversight of the Justice Department. Ordinary politics can influence the choice of topic for a fact-finding hearing, just as it can influence whether an oversight hearing focuses simply on agency performance or descends into an effort to embarrass the President or a member of his administration (the programmatic oversight versus vendetta oversight described earlier, which sometimes can merge into one another during a given hearing). Moreover, however weak the institutional incentives are to conduct robust oversight of the Executive, the political incentives become stronger if the congressional

129. *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 206, 226–30 (1821); *see also* FISHER, *supra* note 123, at 91–109 (describing some historical instances of congressional use of its subpoena power).

130. *See Anderson*, 19 U.S. (6 Wheat.) at 226–30; *see also* FISHER, *supra* note 123, at 111–34 (describing historical uses of the contempt power).

131. *See* Kriner, *supra* note 33, at 782.

committee conducting the oversight is controlled by a party that is not the President's.[132]

Both the 2009 and 2010 subcommittee hearings demonstrate that congressional inquiry can offer ordinary politics a dose of what politicians seem to crave: real stories from American citizens that politicians can use to put a citizen's face onto a political issue or solution; here, citizens affected by the scope of federal prosecutorial power.[133]

For example, racing legend Bobby Unser testified at the 2010 hearing concerning his prosecution for violating a regulatory provision that made it a strict liability crime to snowmobile in National Forest Wilderness.[134] Unser and a friend were snowmobiling in the mountains between Colorado and New Mexico when they encountered a ground blizzard.[135] They wandered into a national wilderness area, which according to Unser was unmarked, and were forced to abandon Unser's snowmobile once it broke down in the blizzard.[136] Unser explained that they suffered from exhaustion, hunger, hypothermia, and frostbite as they tried to find shelter from the storm.[137] When he later reached out to the Forest Service for help in recovering his snowmobile, he learned that he was being investigated and that he would be charged with a crime under the federal regulations.[138]

Kathy Norris testified at the 2009 hearing about her husband George's prosecution related to his importation of orchids from South America.[139] He was charged with making false statements and conspiracy arising from the mislabeled shipment of orchids for his flower business, some of which were not approved for export under the Convention on International Trade in Endangered Species.[140] Kathy Norris described her shock and amazement as

132. *See id.* at 791 ("[O]nly in divided government do partisan incentives reinforce the weak institutional incentives driving legislators to oversee the executive aggressively.").

133. *See, e.g.*, *2010 Over-Criminalization Hearing*, *supra* note 19, at 21–25, 35–38; *2009 Over-Criminalization Hearing*, *supra* note 16, at 33–36, 43–45.

134. *2010 Over-Criminalization Hearing*, *supra* note 19, at 22 (statement of Bobby Unser).

135. *Id.*

136. *Id.*

137. *Id.* at 23.

138. *Id.* at 23–24; *see also* Fields & Emshwiller, *supra* note 6 (describing Unser's case).

139. *2009 Over-Criminalization Hearing*, *supra* note 16, at 33–34 (statement of Kathy Norris).

140. *Id.* at 33–34, 39.

federal agents ransacked her home, giving no explanation whatsoever for their presence; the agents eventually returned eight of thirty-seven boxes of documents taken from the house and broke Norris's computer.[141] George Norris's prosecution has received substantial publicity as an example of federal criminal justice and prosecutorial discretion gone awry,[142] and Kathy Norris's testimony highlighted the breadth and depth of harm that can occur when law enforcement officials exercise poor judgment in using their enforcement discretion.[143]

For another example, Krister Evertson, an Alaskan inventor working on developing clean energy fuel cells, testified about his prosecution for failing to place a mandatory sticker on a lawful UPS shipment.[144] In his initial prosecution, the jury acquitted.[145] But while he was in jail on the labeling charges, the EPA opened the storage tanks and declared them to contain hazardous materials.[146] Naturally, the Justice Department sought additional charges in a separate prosecution claiming that Evertson improperly stored hazardous waste, and that he illegally transported the waste when he drove it a half mile from his home to his storage facility.[147] He was convicted and sent to federal prison.[148]

Perhaps this story is a version of the "fire-alarm" oversight that McCubbins and Schwartz describe, but one that results in a public complaint at a congressional hearing rather than resolution within the agency or through some other congressional constituent service.[149] The hearings showed Congress is capable of locating a constituency that would represent the broader benefits of reform and could prove sympathetic to the broader public. Ra-

141. *Id.* at 33.

142. *See, e.g.*, *2010 Over-Criminalization Hearing*, *supra* note 19, at 46 (statement of Brian W. Walsh, Senior Legal Research Fellow, The Heritage Foundation) (describing the Norris Case); *Too Many Laws, Too Many Prisoners*, ECONOMIST, July 24, 2010, at 26 (reporting on the Norris Case).

143. *2009 Over-Criminalization Hearing*, *supra* note 16, at 35–36 (statement of Kathy Norris).

144. *Id.* at 44 (statement of Krister Evertson).

145. *Id.*

146. *Id.*

147. *Id.* at 44–45, 49.

148. *Id.* at 45; *see also* Quin Hillyer, Editorial, *Part Two: Woe to the Man Who Beats Federal Prosecutors*, WASH. EXAMINER (Jan. 22, 2009, 1:00 AM), http://washingtonexaminer.com/opinion/2009/01/part-two-use-man-who-beats-federal-prosecutors (describing Evertson's case).

149. *See* McCubbins & Schwartz, *supra* note 29, at 166.

ther than relying upon violent criminals, drug traffickers, or other unsympathetic figures, the House gathered low-level offenders with innocuous backgrounds to demonstrate the need for certain reforms, such as heightened mens rea requirements.[150] These low-level offenders helped to make a broader political point about reform: the federal criminal law is so vast in its scope and offers such ineffective protection for conduct the actor believes to be innocent that anyone, even a citizen with no intention of committing a crime and no proclivities to do so, can be ensnared in the federal prosecutorial web.

3. Rethinking Committees and Constitutional Dialogue

Congressional inquiries can also become important moments of constitutionalism. Too often in modern American politics, official rhetoric focuses on the immediate appeal of shallow talking points to a mass audience. In doing so, it tends to become unhinged from institutional and constitutional concerns. Congressional inquiry is an ideal place to rethink rhetorical governance and restore constitutional dialogue. In that setting, committee members can hear a variety of perspectives from legal experts and then probe those perspectives through a rigorous set of questions, taking advice from their own counsel and soberly deliberating on constitutional interpretation. Constitutional dialogue would be enhanced to an even greater degree during oversight hearings with the Justice Department, where members could speak with Justice Department officials about the department's understanding of its constitutional authority, and that of Congress. This same kind of dialogue has occurred with the Justice Department in other contexts,[151] and there is no reason that it

150. *See, e.g.*, *2010 Over-Criminalization Hearing*, *supra* note 19, at 3, 46–47 (statements of Rep. Louie Gohmert, Ranking Member, Subcomm. on Crime, Terrorism & Homeland Sec., and Brian Walsh, Senior Legal Research Fellow, The Heritage Foundation).

151. *See, e.g.*, *Voter Suppression: Hearing before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 6–8 (2008) (statement of Asheesh Agarwal, Deputy Assistant Att'y Gen.); *Justice Department's Office of Legal Counsel: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 5–7 (2008) (statement of Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Department of Justice); *Constitutional Limitations on Domestic Surveillance: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 7–9 (2007) (statement of Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Department of Justice).

cannot be equally useful in the context of studying the scope of the federal criminal law.

Because of its overlap with important constitutional issues related to both structure and rights, federal criminal law reform offers an ideal opportunity for this kind of constitutionalism to flourish. A more aggressive congressional inquiry in this area would thus contribute to a broader goal of engaging in constitutional dialogue, with itself and with the executive branch. Members could speak to one another about such matters as the scope of the Commerce Clause or the Necessary and Proper Clause. As I have demonstrated, a chief argument against the current scope of federal criminal law is that much of it is not constitutionally authorized. Of course, this proposition is debatable depending upon one's approach to constitutional interpretation and adjudication, but it is a debate worth having, not just in the courts or in the law reviews, but in Congress. Members of Congress have a constitutional duty to support the Constitution and should consider the enumerated constitutional powers they exercise whenever they propose and enact legislation. Unfortunately, the 2009 and 2010 hearings did not devote substantial time to a discussion of Congress's constitutional authority to define crimes, although it is fair to conclude that the discussions about vagueness and overbreadth of the federal criminal law implicate potential due process problems, as well as statutory drafting problems.[152]

Perhaps one primary reason for the relative inattention to structural constitutional authority at the hearings is this: members of Congress may not want to interpret their constitutional authority in restrictive ways, or may not want do so publicly for fear that any future legislation may reveal interpretive hypocrisy. This is a reasonable concern, but one that is overstated and overlooks the relevance of rethinking ordinary politics in this context. Indeed, constitutionalism in the congressional inquiry on federal criminal law can simultaneously appeal to and transcend ordinary politics. The scope of federal constitutional authority occupies a prominent place today in American political debate. Some representatives and senators may garner measurable polit-

152. *See 2010 Over-Criminalization Hearing*, *supra* note 19, at 1–2 (statement of Rep. Robert C. Scott, Chairman, H. Subcomm. on Crime, Terrorism, & Homeland Sec.); *2009 Over-Criminalization Hearing*, *supra* note 16, at 1 (statement of Rep. Robert Scott, Chairman, H. Subcomm. on Crime, Terrorism, & Homeland Sec.).

ical gains from engaging this issue publicly, as many have done recently in other areas of federal legislation.[153] Of course, the political upside may wax and wane: legislators will likely feel more comfortable engaging in this kind of constitutional dialogue when the nation is in a mood (as it arguably is today)[154] that is skeptical of federal power, when the representative or senator is elected from a safely conservative district or state, or where the member of Congress has made federalism and the growth of federal power a campaign issue. A member who questions the scope of federal criminal law in this way can always rebut any "soft on crime" allegations by arguing that he or she is merely trying to safeguard constitutional boundaries while allowing certain socially harmful conduct to still be punishable under *state* criminal law (where the constitutional limit at issue is a structural one). Yet regardless of the political upside to the constitutionalist critique of federal criminal law, institutions and the political system would benefit from constitutionalizing the debate and rhetoric that accompanies it.

153. *See, e.g.*, *Constitutionality of the Individual Mandate: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 4 (2011) (statement of Lamar Smith, Chairman, H. Comm. on the Judiciary) (expressing doubts about the federal government's power to impose a mandate that all Americans purchase health insurance); Press Release, Office of Congressman Ted Poe, Statement on Health Care Ruling (Mar. 3, 2011), *available at* http://poe.house.gov/News/DocumentSingle.aspx?DocumentID=227204 (asserting that federal health care legislation is unconstitutional).

154. A recent edition of *Publius* offers several excellent analyses of public opinion concerning the distribution of governmental power in America, and of criminal law enforcement specifically. One study shows considerable support for the notion that state and local governments should "take the lead" in dealing broadly with crime (although federal and state/local preferences seem to be more equal on matters of controlling illegal firearms and narcotics). *See* Saundra K. Schneider et al., *Public Opinion Toward Intergovernmental Policy Responsibilities*, 41 PUBLIUS 1, 8 (Winter 2011); *see also* John Kincaid & Richard L. Cole, *Citizen Attitudes Toward Issues of Federalism in Canada, Mexico, and the United States*, 41 PUBLIUS 53, 71 (Winter 2011) (concluding that the research showed "Americans and Canadians expressed the least trust in their federal governments and the most trust in their local governments" and that respondents in each country "agreed that their federal government has too much power"). *But see* Lemos, *supra* note 66, at 1251 (arguing that "[f]ederalism-based arguments do not resonate well with voters, who tend to focus on political outcomes rather than the reasons for them"). Lemos wrote in 2006, and one may wonder whether the current political mood of voters concerning the scope of federal power might change Lemos's view.

4. Justice Department Oversight

Direct oversight of the Justice Department (the kind of police patrol oversight that McCubbins and Schwartz distinguish)[155] of course differs from a fact-finding investigation designed to adduce information from experts and from citizens relevant to pending or contemplated legislation, but it can have many of the same effects in terms of controlling both the content of the law as well the manner in which it is applied.[156] Justice Department oversight allows Congress an opportunity to ask specific questions of Justice Department leaders in a public, often widely broadcast, setting. Sometimes the oversight hearing may focus only upon the wisdom of a particular piece of crime legislation, often with the federal government's representative advocating the new criminal law tool, whether it be a new criminal statute, some procedural mechanism for law enforcement, or continued congressional funding for programmatic activities.[157] But even this kind of setting enables members of Congress to rigorously challenge department leaders on the necessity for any given expansion of the federal prosecutorial regime. The downside is that committee members may fail to do this, instead passively accepting, or merely giving deference to, the Justice Department's assessments of its prosecutorial and enforcement needs.[158]

Especially notable in the direct oversight context is the substantial criticism leveled against the Justice Department's exercise of prosecutorial discretion during the aforementioned 2009 and 2010 hearings.[159] In light of this exercise, future oversight hearings could ask the department to publicly account for its charging practices, plea bargaining practices, or sentencing recommendations in general, or perhaps even in particular cases

155. *See* McCubbins & Schwartz, *supra* note 24, at 165–66.

156. *See* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 125–27 (2006) (noting that oversight is an example of how Congress informally controls law execution and using as an example congressional oversight of Justice Department criminal investigations and prosecutions).

157. *See, e.g.*, *Federal Bureau of Investigation (Part II): Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 36 (2008) (statement of Robert S. Mueller, Director, Federal Bureau of Investigation) (asking for congressional assistance in supporting violent crime initiatives).

158. *See* Stuntz, *Pathological Politics*, *supra* note 40, at 545 (explaining the political incentives to defer to the Justice Department's preferences).

159. *See supra* Part II.D. and accompanying notes.

(though not in open investigations and not in ways that attempt to apply political pressure on Justice Department officials to make particular prosecutorial decisions).[160] This setting offers the most dramatic opportunities for conflict, because the department can typically refuse to disclose any information that would reveal the deliberative processes by which such decisions were made or information that would compromise the secrecy of grand jury proceedings; or it may invoke other recognized privileges, thus setting up a potential congressional-executive dispute over access to information and documents.[161] Most requests for information from the department do not result in much controversy and are handled through negotiation, accommodation, and compromise.[162] But even if the separation of powers permits the Justice Department to assert its own prerogatives against Congress (as I believe it does), or arguably permits the Justice Department to withhold some information from Congress (as I believe it does), Congress nevertheless has some of its own institutional muscle by which it can at least seek access to some useful information. Indeed, it has done so successfully in recent years—for example, during its 2007 investigation of the Bush administration's firing of several United States Attorneys,[163] or its investigation into FBI corruption in Boston in connection with access to organized crime inform-

160. *See* Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1376–79 (2002).

161. *See* Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559, 1570–98 (2002); Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 632, 649–50 (1997); Peterson, *supra* note 159, at 1378; *see also* Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 719 (1993); Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 WM. & MARY BILL RTS. J. 583, 584 (2000). For the separation of powers implications of such an inquiry, see *infra* Part III.C.

162. *See* Iraola, *supra* note 161, at 1586.

163. *See, e.g.*, *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearings Before the S. Comm. on the Judiciary*, 110th Cong. (2007). Richman explains that this is one area in which Congress "woke up" to take on the Administration. *See* Richman, *Political Control*, *supra* note 36, at 2107–08. But Richman also notes that, simultaneously, Congress sought to protect assertions of the attorney-client privilege in corporate criminal investigations, even more so than the Justice Department had chosen to do pursuant to the McNulty Memorandum (which required the Main Justice's authorization prior to seeking waivers of attorney-client privilege by corporate counsel). *Id.* at 2108–12. Richman characterizes this as the "normal" state of congressional-executive relations in criminal enforcement matters: Congress prefers decentralized enforcement authority unless this generalized interest is trumped by a special policy preference. *Id.* at 2115–16.

ants.[164] Again, in light of the criticism of prosecutorial discretion that emerged from the hearings (especially Stephen Smith's compelling observation that absolute power in prosecutors is a direct consequence of overcriminalization),[165] and in light of the weak external constraints on such discretion, this topic could bring to bear some of the most useful information that Congress could potentially find about how to rethink the state of federal criminal law. This topic would thus follow naturally from the process that the 2009 and 2010 hearings began.

Once the Crime Subcommittee heard the stories of citizens like George and Kathy Norris,[166] Krister Evertson,[167] Bobby Unser,[168] and Abner Schoenwetter,[169] the subcommittee could have convened a separate hearing to ask Justice Department officials how its prosecutors can justify prosecuting these or similar acts, or why it might recommend lengthy sentences for offenders who do minimal personal and social harm and represent no real danger to the community. The relevant committees could have convened separate hearings on new legislation to codify the rule of lenity, as was suggested at each hearing,[170] or to expand the mistake of law doctrine, at least in cases that are less serious and do not involve violence, and then asked a representative of the Justice Department to offer its views on such legislation. The committees could alternatively have convened oversight hearings in which the Justice Department would be asked about the circumstances under which it would use its discretion to decline prosecution of a

164. *See Investigation into Allegations of Justice Department Misconduct in New England—Vol. 1: Hearing Before the H. Comm. on Gov't Reform*, 107th Cong. 2–3, 330 (2001-02) (statement of Dan Burton, Chairman, H. Comm. on Gov't Reform) (discussing the FBI investigation and conviction of Joseph Salvati under J. Edgar Hoover over thirty years prior and the difficulty Congress had in overcoming executive privilege to obtain information from the FBI regarding the case); *see also* Fisher, *supra* note 123, at 91–109 (discussing various examples of Congressional access to Justice Department information).

165. *2010 Over-Criminalization Hearing*, *supra* note 19, at 107 (statement of Steven F. Smith, Professor of Law, University of Notre Dame Law School).

166. *2009 Over-Criminalization Hearing*, *supra* note 16, at 33 (statement of Kathy Norris).

167. *Id*. at 43 (statement of Krister Everston).

168. *2010 Over-Criminalization Hearing*, *supra* note 19, at 21 (statement of Robert Unser).

169. *Id*. at 35 (Statement of Abner Schoenwetter).

170. *See 2010 Over-Criminalization Hearing*, *supra* note 19, at 47 (statement of Brian Walsh, Senior Legal Research Fellow, The Heritage Foundation); *2009 Over-Criminalization Hearings*, *supra* note 16, at 22 (statement of Timothy Lynch, CATO Institute).

defendant who violated an obscure federal law of which a reasonable person would not be expected to know, and did so with no significant mens rea and no knowledge of the law, and who represents no danger to the community or threat of future violations once on notice of the provision he or she violated. The committees could also ask the department when a defendant like this should simply be notified that he or she has violated a criminal law, warned of what the law proscribes, and then assured of prosecution in the event of a future violation. These types of hearings would not interfere with the exercise of discretion, nor apply any political pressure, in any case. Rather, they would provide Congress with information that might allow it to better construct ameliorative legislation. The failure to do so was a missed opportunity by the 111th Congress and the subcommittee, an opportunity to demonstrate its concerns about specific cases but also an opportunity to use its institutional powers to challenge the federal prosecutorial regime directly and aggressively.

B. *Alternatives (or Supplements) to Congressional Inquiry*

Some recent cases suggest a more aggressive judicial review of the federal criminal law and prosecutorial regimes. This review includes not just traditional review of the scope of statutes and their constitutionality, but also of prosecutorial discretion and plea bargaining.

Indeed, these recent cases, and some members of the Supreme Court, endeavor to limit federal criminal law on both constitutional and statutory interpretation grounds, suggesting that judicial review offers some hope for reining in the federal criminal law.[171] The examples are many, but a few will suffice here. In *Carr v. United States*, the Court narrowly read the federal Sex Offender Registration and Notification Act ("SORNA") to apply only to travel for interstate commerce that occurred after the date of SORNA's enactment, thus preventing Congress from

171. *See, e.g.*, Carr v. United States, 130 S. Ct. 2229, 2232–35 (2010) (citing 18 U.S.C. § 2250(a) (2006)) (limiting § 2250(a)); Flores-Figueroa v. United States, 129 S. Ct. 1886, 1888–89, 1892, 1894 (2009) (citing 18 U.S.C. § 1028A(a)(1) (2006)) (concluding that § 1028A(a)(1) requires the government to prove an element of knowledge); Staples v. United States, 511 U.S. 600, 602 (1994) (citing National Firearms Act, 26 U.S.C. §§ 5801–5872 (1988 & Supp. V 1994)) (concluding that the National Firearms Act requires the government to prove an element of knowledge).

reaching backward in time to punish failures to register as a sex offender.[172] In *Staples v. United States*, the Court, in an opinion by Justice Thomas, refused to interpret a provision of the National Firearms Act as a strict liability offense, thus requiring the Government to prove a mens rea element before imposing criminal liability for failure to register certain firearms.[173] And in *Flores-Figueroa v. United States*, the Court found that the federal aggravated identify theft statute required the Government to show that the perpetrator knew he or she was transferring, using, or possessing the identification of another person.[174] Yet whatever value these cases have as a method for controlling federal prosecutorial power under the substantive criminal law, that value is limited in statutory interpretation matters because Congress could always amend the statutes at issue, or create new ones, to resolve the interpretive problem in the government's favor. For example, Congress could always insert legislative history to show that its use of the term "travels" applies retrospectively, or that a particular offense was meant to be one of strict liability, thus absolving prosecutors of the need to prove any mens rea.

Constitutional grounds would clearly form the more compelling basis for controlling the scope of federal criminal law through judicial oversight. But this, too, has its limits. As I explained in Part II, although the Court has placed some structural constraints on congressional exercises of the Commerce Clause, after *Raich*, the *Lopez-Morrison* limits seem relatively anemic.[175] *Comstock* granted the government broad power pursuant to the Necessary and Proper Clause,[176] and the congressional spending power continues to be governed by case law that is highly protective of congressional prerogatives.[177] Moreover, the Court can always refuse certiorari in any meritorious cases that could create judicial opportunities to limit federal criminal lawmaking power pursuant to relevant constitutional limits.[178] Additionally, the Court

172. 130 S. Ct. at 2232–33, 2236 (citing 18 U.S.C. § 2250(a)).

173. 511 U.S. at 602 (citing National Firearms Act, 26 U.S. §§ 5801–5872).

174. 129 S. Ct. at 1888–89, 1894 (2009) (citing 18 U.S.C. § 028A(a)(1)).

175. *See supra* Part II.

176. United States v. Comstock, 130 S. Ct. 1949, 1954 (2010) (citing U.S. CONST. art. I, § 8, cl. 18).

177. *See* South Dakota v. Dole, 483 U.S. 203, 207–11 (1987).

178. *See, e.g.*, Alderman v. United States, 131 S. Ct. 700, 700 (2011) (Thomas, J., dissenting) (citing 18 U.S.C. § 931(a) (2006)) (explaining the problems with the majority's denial of certiorari for a challenge to the constitutionality of James Guelff and Chris

has taken a decidedly *laissez faire* view of prosecutorial discretion and plea bargaining.[179] So while some constitutional bases exist for restraining Congress in its definition of the criminal law—aside from *Lopez*'s understanding of the commerce power, First Amendment[180] and Sixth Amendment[181] doctrine have been the most robust restraints on the substantive criminal law)—judicial enforcement of those limits is not always reliable. Moreover, where such limits exist, Congress (as I explain further below) should be the first to enforce them.

Others have suggested structural reform within the Justice Department.[182] Barkow has thoughtfully explained that, to avoid the combination of legislative and executive powers that has emerged in the Justice Department, the department should use "[i]nternal [s]eparation" modeled on administrative law to check prosecutorial conduct.[183] This design would divide those in the prosecutor's offices by function, separating investigative and advocacy decisionmakers from adjudicative decisionmakers—those who would make decisions about charge selection, plea acceptance, and motions for substantial assistance from cooperating defendants.[184] Barkow's proposal would complement, and not conflict with, the more aggressive congressional oversight that I advocate. Barkow considers this possibility, and does not deny that greater legislative oversight could be asserted, but she finds this unrealistic because "[t]he political process overwhelmingly

McCurly Body Armor Act of 2002, which made it a crime for a person with a previous conviction for a violent felony to purchase, own, or possess body armor).

179. *See* United States v. Armstrong, 517 U.S. 456, 458 (1996); Bordenkircher v. Hayes, 434 U.S. 357, 358, 361–62, 365 (1978); Santobello v. New York, 404 U.S. 257, 262–63 (1971).

180. *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1582, 1592 (2010) (citing 18 U.S.C. § 48 (2006)) (holding that federal law criminalizing depictions of animal cruelty violates the First Amendment); Virginia v. Black, 538 U.S. 343, 347–48 (2003) (citing VA. CODE ANN. § 18.2-423 (Repl. Vol. 1996 & Cum. Supp. 2002)) (holding that state criminal law banning cross burning with intent to intimidate violated the Free Speech Clause, where the statute treated all cross burning as prima facie evidence of intent); Reno v. ACLU, 521 U.S. 844, 849, 858 (1997) (citing Communications Decency Act of 1996, 47 U.S.C. §§ 223(a)–(e), 230 (1994 & Supp. II 1997)) (invalidating criminal provisions of the Communications Decency Act as violating the Free Speech Clause).

181. *See, e.g.*, United States v. Booker, 543 U.S. 220, 226–28, 245–46 (2005) (citing 18 U.S.C. §§ 3553(b)(1), 3742(e) (2000)) (invalidating mandatory aspects of the Federal Sentencing Guidelines under the right to trial by jury, but holding that the guidelines may continue to be employed in lower court's discretion).

182. *See, e.g.*, Barkow, *supra* note 14, at 896–906.

183. *Id.* at 869, 871 & n.9, 888–89, 895.

184. *Id.* at 896–98.

favors prosecutors," and any oversight would ultimately attempt to ensure that prosecutors were being "sufficiently tough."[185] I think Barkow's instincts about the political process are sound, and her description of historical practices is accurate. What I have endeavored to demonstrate here, however, is that there are prospects for meaningful congressional oversight that can serve important constitutional values and survive the conventional wisdom about ordinary politics that Barkow finds prohibitive.

Meanwhile, for another example, Angela Davis has noted the troubling "'hands-off' approach" to the American prosecutor taken by judges, legislatures, and the public, and has suggested a two-pronged approach that would apply at both the federal and state levels.[186] First, she advocates creating public information departments to educate the public about the role and the function of the prosecutor's office.[187] Second, she advocates creation of prosecution review boards to conduct random assessments of the prosecutor's office as well as review and manage specific complaints brought by the public.[188] The review board would file a public report when its work was completed, and the report would refer to specific practices that violated ABA standards for prosecutors and make recommendations for internal or external discipline.[189] Again, Davis's proposal would not displace congressional oversight; indeed, assuming the creation of these boards is done legislatively, it would function as a form of it. One significant downside to her proposal is that depending upon how the board's members are selected and subject to removal, the proposal could raise separation of powers concerns with regard to appointment and/or removal authority.[190]

Finally, John Baker has noticed a curious practice that, in his view, inspires much mischief in federal criminal law. Baker tackles the problem of Justice Department lawyers who are detailed to congressional committees and serve for a short time as counsel

185. *Id.* at 911.

186. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 462, 464 (2001).

187. *Id.* at 462.

188. *Id.* at 462–63.

189. *Id.* at 463–64.

190. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147, 3163–64 (2010) (holding that dual for-cause removal limits violated separation of powers, but vesting appointment of the board in Securities and Exchange Commission Commissioners did not violate the Appointments Clause); *see also* U.S. CONST. art. 2, § 2, cl. 2.

to representatives and senators.[191] According to Baker, this practice creates a "symbiosis between the [Justice Department] and the Senate Judiciary Committee" that has contributed significantly to the expansion of federal criminal law.[192] Just as we would never tolerate a practice in which the Justice Department detailed a lawyer to a federal judge's chambers as a law clerk and allowed that lawyer to handle criminal cases (in which the department necessarily appears before the court), neither should we tolerate a practice of allowing the department to detail attorneys to the Judiciary Committees and draft criminal legislation, in which the department has an obvious interest.[193] Baker concludes the detailing practice may or may not be an affront to due process, but it is an affront to the separation of powers.[194]

Of course, the primary and most obvious tool is ordinary legislation, or perhaps adoption of a single comprehensive federal criminal code (as Attorney General Thornburgh suggested at the 2009 hearing),[195] rather than a patchwork of criminal statutes scattered throughout the United States Code. But Congress seems averse to this. As I describe here, however, Congress could overcome its aversion with better fact finding about the problems of the existing criminal law regime. In a world without such reform (or, perhaps, even in a world *with* such reform), each of these aforementioned recommendations has merit. My object here has not been to offer a critique of all of these alternatives to direct code reform or to suggest that they are misguided. Rather, my effort has been to draw greater attention to the congressional inquiry as an undervalued and underexplored mechanism for achieving the ultimate goal of a leaner and more constitutionally compatible federal criminal law. In short, meaningful code reform must necessarily follow a meaningful series of investigative and oversight hearings.

191. *See* Baker, *Strategies to Limit Expansion*, *supra* note 10, at 571.
192. *Id.* at 573.
193. *Id.* at 576–77.
194. *Id.*
195. *See 2009 Over-Criminalization Hearing*, *supra* note 16, at 6 (statement of Hon. Richard Thornburgh, former Att'y General of the United States).

C. *The Virtues of Confrontation and Conflict*

This article's proposal does *not* advance the simple and naïve view that legislators and executive branch officials should just all work together for the common criminal law good. Rather, the proposal here invites, indeed encourages, *conflict* between the political branches. To the extent that I urge cooperation, I urge *not* interbranch cooperation, but cooperation between members of the same political institution—representatives defending the prerogatives of the House, senators defending the prerogatives of the Senate, and the President and his administration defending the prerogatives of the executive branch. Moreover, Congress should not fear conflict with the Executive in this area, just as I am certain the Executive does not fear Congress. Rather, Congress should embrace that conflict. Particularly in light of the weaknesses of judicial review as to both structural constitutional limits and judicially enforced limits on prosecutorial charging practices and plea bargaining, the congressional inquiry process offers perhaps the most forceful and useful method for addressing the mutual responsibility of Congress and the Justice Department for the troubling state of federal criminal justice. But, as Jeffrey Tulis has explained, although hearings and investigations represent ways that Congress can assert its prerogatives and defend its place in the constitutional order, "[t]he modern Congress is unwilling to stand up for itself."[196]

The Constitution contemplates conflict, even stalemates, between the political branches.[197] It is unconcerned with problem solving or efficiency as ultimate ends, favoring safety instead, recognizing the propensity for encroachments and the aggrandizement of power among men,[198] and not just any men, but *ambitious* ones. As Madison famously described it, "[a]mbition must be made to counteract ambition,"[199] and each branch is provided

196. Tulis, *supra* note 33, at 523–24.

197. *See* J. Richard Broughton, *The Inaugural Address as Constitutional Statesmanship*, 28 QUINNIPIAC L. REV. 265, 283 (2010); *see also* Orrin G. Hatch, *Avoidance of Constitutional Conflicts*, 48 U. PITT. L. REV. 1025, 1030 (1987) (explaining that "interbranch conflicts are in part a product of design, in part a product of necessity").

198. *See* HARVEY C. MANSFIELD, JR., AMERICA'S CONSTITUTIONAL SOUL 122 (1991) (explaining Madison's approach to the separation of powers and the view that each branch must have "means of self-defense to ward off encroachment").

199. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

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with tools and institutional structure to help it fulfill its constitutional roles and resist encroachments.[200] There is little constitutional value, then, when one political branch deliberately lays down its institutional weapons in acquiescence to, or fear of, the other (absent some greater national interest). Congress retains sufficient institutional weapons—the power of inquiry, among them—to challenge the Executive's criminal law preferences. Congressional inquiry challenging the preferences and prosecutorial practices of the Justice Department—whether indirectly through fact finding that produces positive legislation or directly through aggressive oversight—is, in short, a method of ambition counteracting ambition; it is a proper channeling of the ambition that the constitutional design assumes in its political leaders. But its effectiveness may well depend upon representatives and senators giving greater weight to institutional interests than to political affiliation.[201]

There is, of course, some constitutional risk here and it demands a sober effort to strike an admittedly difficult constitutional balance. While constitutional conflict is desirable, it also necessarily implicates concerns about the separation of powers. And when it is Congress asserting authority, one must be mindful of Madison's observations that in republican government, the legislative authority necessarily predominates[202] and "is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."[203] So one caveat is that Congress should tread carefully and avoid any effort to dictate how the executive branch executes the law pursuant to the President's constitutional role under the Take Care Clause.[204] Oversight does not imply legislative *control* over the Executive, and congressional

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200. *Id.* at 318–19.

201. Although Fisher and I disagree about the precise scope of congressional power, Fisher makes a similar point with which I agree. *See* FISHER, *supra* note 123, at 257 ("To do [congressional investigation] well, lawmakers have to think of themselves as belonging to an *institution* rather than to a composite of local interests."). Jeffrey Tulis has also made thoughtful observations about the state of constitutional culture and consciousness in Congress and the inability of Congress to defend itself despite the tools at its disposal; the instant article is an effort to suggest how Congress might recapture at least some of that consciousness. *See* Tulis, *supra* note 33, at 516–17, 520. Tulis, for instance, describes the late Senator Robert Byrd of West Virginia as an "anachronism," for he was an example of one who regularly defended the prerogatives of his institution first. *Id.* at 520.

202. THE FEDERALIST NO. 49, at 312 (James Madison) (Clinton Rossiter ed., 2003).

203. THE FEDERALIST NO. 48, at 306 (James Madison) (Clinton Rossiter ed., 2003).

204. *See* U.S. CONST. art. II, § 3.

committees should be careful not to exert such control or to exercise a "quintessentially executive function,"[205] such as the prosecution of crimes or the selection of criminal charges.[206] Nor should Congress attempt to interfere with decisionmaking in an ongoing investigation.[207] So rather than attempt to control the exercise of discretion by dictating charging decisions in specific cases (which would raise serious separation of powers concerns), the committee could explore charging and plea bargaining practices as a way of judging what the scope of a substantive criminal sanction should be—a subject well within the scope of legislative power and thus a legitimate topic for oversight. The committee could also use the topics of charging, plea bargaining, and sentencing recommendation practices to discover whether prosecutors are abusing their power, a problem which Congress could address, again, through redefining the substantive criminal law. Asserting legitimate constitutional prerogatives in ways that result in conflict between the legislature and the Executive, then, must be distinguished from assertions of authority that would accumulate powers in a single department.

The other related problem concerns access to information. Much has been written about congressional-executive access disputes in the context of oversight and executive privilege battles, and I need not recount the discussion here.[208] It suffices to say that congressional requests for information will not, and need not, necessarily result in obtaining it. As this area, however, is one where courts have scarcely ventured and which typically is resolved through a process of political negotiation and accommo-

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205. Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting); *see* FISHER, *supra* note 123, at 5, 92.

206. *See* Heckler v. Chaney, 470 U.S. 821, 831–32 (1985) (describing a prosecutor's decision not to indict as the "special province of the Executive Branch").

207. *See* Peterson, *supra* note 160, at 1378.

208. *See generally*, *e.g.*, FISHER, *supra* note 123, at xv; Emily Berman, *Executive Privilege Disputes Between Congress and the President: A Legislative Proposal*, 3 ALB. GOV'T L. REV. 741, 743–50 (2010); Bush, *supra* note 161, at 719–20; Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 109–10 (1996); James Hamilton & John C. Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 HARV. J. ON LEGIS. 145, 145–47 (1984); Miller, *supra* note 160, at 632–35; David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1080–83 (2007). I also have discussed this problem in other contexts. *See* J. Richard Broughton, *Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?*, 21 WHITTIER L. REV. 797, 799–801 (2000) (discussing disputes between Congress and the President over the issue of congressional investigations).

dation,[209] there is constitutional value in the conflict itself—each of the political branches asserting its institutional prerogatives, sometimes to stalemate, with forces of political muscle and public interest ultimately determining the outcome.

Perhaps the Justice Department would ultimately prevail in an access dispute, or perhaps—as is often the case, and as I have recounted already—department leaders will politely defer to the committee, promise cooperation, and assure the committee that they will seriously consider the concerns the committee has raised, only to return to the department and continue the practices that initially instigated the oversight.[210] Perhaps the department is constitutionally entitled to do just that. But losing in conflicts with the executive branch is not nearly as deep a blow to the constitutional scheme as failing to suit up for a conflict in the first place. The arrogance of the federal prosecutorial regime cannot be cured with congressional passivity. And Congress should be competent enough to own up to its own arrogance in creating the existing federal criminal law behemoth. Moreover, should the Justice Department fail to cooperate in the oversight matter or should it cooperate for the day and then return to its usual practice, this action ought to be sufficient incentive for Congress to move forward with curative legislation consistent with its own institutional lawmaking powers. In this sense, institutional loyalty should trump political loyalty.

IV. CONCLUSION

Congress suffers from a comprehensive lack of constitutional awareness. It sometimes fails to respect the limits on its powers, and at other times it fails to assert constitutional prerogatives that it actually possesses to defend its institutional interests. The problems with the current state of federal criminal law represent an ideal example of this failure of constitutional consciousness, as well as of the potential of congressional inquiry as a structural way of achieving greater constitutional equilibrium in federal crime definition and enforcement. On the one hand, the problem is, to a significant degree, a problem of *ultra vires* legislating. Congressional inquiry could better inform the Congress as to the

209. *See* Broughton, *supra* note 208, at 800; Iraola, *supra* note 161, at 1586.
210. *See supra* notes 37–38 and accompanying text.

precise contours of its constitutional powers to define the criminal law, as well as give attention to the substantive doctrine that could improve it. On the other hand, the problem is also one of executive branch actors who wield tremendous influence over the substance of federal criminal law with few meaningful external checks, a matter fit for robust congressional oversight that remains respectful of the Executive's role in the constitutional design.

Of course, comprehensive reforms of the substantive federal criminal law cannot occur merely through congressional hearings. Naturally, it takes floor action in the House and Senate, and presidential assent, to achieve these legislative reforms. But floor action is more likely if a meaningful committee inquiry has preceded it and developed a legislative record demonstrating the necessity for reform. Moreover, congressional oversight of the Justice Department could potentially influence the ways in which the department employs its prosecutorial and investigative discretion, thus also resulting in some positive impact upon the scope of federal criminal law. The department may resist, but the mere possibility of executive resistance should not deter congressional inquiry—indeed, there is much constitutional value in the resistance and the congressional response to it. The assertion of congressional prerogatives is no less constitutionally valuable than the assertion of executive ones, but meaningful reform will never come to fruition in the absence of congressional will to assert those prerogatives. My proposal here is meant to demonstrate that congressional inquiry can serve as an important, valuable step in either producing reforms or, at a minimum (and perhaps as importantly), beginning a dialogue of constitutional dimension with the executive branch and even (indirectly) the judiciary about the nature and scope of federal criminal law.

The 2009 and 2010 hearings were a proper start, but, standing alone, they hardly put a dent in the armor of the vast federal criminal justice machinery. More—and more robust—congressional inquiry is both politically and constitutionally necessary.