A series of memos to President-elect Obama identifying policy areas where his words line up with our vision.

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Enacting Principled, Nonpartisan Criminal-Law Reform

A Memo to President-elect Obama

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As President, I will…work every day to ensure that this country has a criminal justice system that inspires trust and confidence in every American, regardless of age, or race, or background.

—Barack Obama, Howard University, September 28, 2007[1]

PRESIDENT-ELECT OBAMA, during your campaign, you promised to improve the administration of criminal justice for all Americans without limitation. This promise is vital because criminal punishment is the greatest power that government routinely uses against its own people.[2] Every expansion of the federal criminal law beyond its proper bounds, and every unjust federal criminal offense, is an exercise of raw governmental power that undermines Americans' trust and confidence in the justice system.

For centuries, citizens faced only a few dozen criminal offenses, but in recent decades the number of federal criminal offenses has proliferated beyond almost all constitutional and prudential bounds. Worse, many of these criminal offenses are improper and unjust exercises of federal power. The Supreme Court has frequently stated that the federal government lacks a plenary or general police power, yet hundreds of federal criminal offenses cover subjects that the Constitution reserves to the authority of state and local jurisdictions. Hundreds more lack meaningful criminal-intent requirements to protect from unjust criminal punishment those Americans who may violate a law or regulation only accidentally or inadvertently, without any criminal intent.

Compounding the problem, federal policies and practices for investigating and prosecuting crime have become increasingly aggressive

at the expense of fundamental protections against unjust criminal process. For the past decade, both the attorney–client relationship and the attorney–client privilege on which it is founded have been under attack by the Justice Department and other federal law enforcement agencies. In addition, unlike the grand jury systems in some reform-minded states, the federal grand jury system provides fewer protections against unwarranted prosecution and serves primarily as a vehicle that prosecutors can use to secure an indictment.

When it comes to federal criminal-justice reform, advocates and media commentators have typically directed the public's attention to proposed changes in sentencing and incarceration policy that would primarily benefit isolated classes of offenders. Some of these reforms may indeed be needed, but—in accordance with your campaign promise—you should focus your Administration's efforts on principled, nonpartisan reforms that benefit *all* Americans.

To inspire the widest possible trust and confidence in the federal criminal justice system, you and your Administration should:

- **Add basic protections against unjust punishment.** For centuries, the Anglo–American legal system has defined a crime to require both a guilty act (*actus reus*) and a guilty mind (*mens rea*). The latter is commonly referred to as a criminal-intent requirement: To win a conviction, the government must prove beyond a reasonable doubt that the accused acted with criminal intent. Today, however, Congress increasingly fails to include a meaningful criminal-intent requirement in new criminal offenses that it enacts.[3] Without a meaningful criminal-intent requirement, Americans who never intended to commit a crime—even those who violated a prohibition literally by accident—may nonetheless be convicted and punished as criminals.

  To protect innocent Americans, new provisions should be added to federal law specifically directing federal courts to grant a criminal defendant the benefit of the doubt when Congress fails to speak clearly in its definition of criminal offenses and penalties. The American Law Institute's Model Penal Code includes key provisions standardizing how courts interpret criminal statutes that have unclear or nonexistent criminal-intent requirements.[4] Federal law should include similar provisions. One such provision would apply a default criminal-intent requirement to criminal statutes that lack any such requirement. A second would mandate that any introductory or blanket criminal-intent requirement be applied to all material elements of the offense.[5]

  Although it would be unwise to do so, Congress would remain free to enact criminal offenses without meaningful criminal-intent requirements. But Congress would have to make this purpose clear in the text of the statute. This reform would thus enable law-abiding Americans to know which conduct carries an unavoidable risk of criminal punishment (i.e., is act-at-your-peril conduct) and which conduct they may safely engage in as long as they have every intention of following the law.

1. "Remarks of Senator Barack Obama: Howard University Convocation," Washington, D.C., September 28, 2007, at *http://www.barackobama.com/2007/09/28/remarks_of_senator_barack_obam_26.php* (January 2, 2009).

2. *See* Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952) ("Whatever view one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals.").

3. To cite just one recent benchmark, Louisiana State University law professor John Baker, Jr., recently completed a Heritage Foundation study to number the criminal offenses in the United States Code and assess federal offenses' criminal-intent requirements. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Criminal Law*, Heritage Foundation Legal Memorandum No. 26, June 16, 2008. Baker's research showed that 17 of the 91 entirely new criminal offenses that Congress added to the United States Code from 2000 through 2007 included no criminal-intent requirement whatsoever. *Id.* at 7.

4. *See* Model Penal Code § 2.02(1), (3), (4).

5. *Cf.* United States v. Flores-Figueroa, No. 08-108, 2008 WL 2855747 (Jul, 22, 2008) (petition for writ of certiorari) (asking the Supreme Court to determine whether the "knowingly" criminal-intent term in 18 U.S.C. § 1028A(a)(1) protects Flores-Figueroa, who pleaded guilty to two immigration-related offenses, from a two-year sentencing increase for "aggravated identity theft" in the absence of evidence that he knew the Social Security number he was using actually belonged to someone else).

The common-law rule of lenity operates in a similar fashion to protect defendants from conviction under expansive interpretations of criminal provisions. It generally provides that ambiguities in a criminal statute (i.e., when it can reasonably be interpreted to define either a broader or a narrower offense) are to be resolved in favor of the defendant. The rule is based on the commonsense notion of justice that no one "should…languish[] in prison unless the lawmaker has clearly said they should."[6] It applies when the "metes and bounds" of a criminal offense, the language defining the severity of the offense, or both are ambiguous.[7]

Codifying the rule of lenity would reduce uncertainty in federal criminal law; narrow the scope of legal issues that the parties must litigate, both at trial and in the federal appellate courts; and require that Congress be clear when it defines a criminal offense. Americans are entitled to no less protection of their liberty.

- **Protect Americans' relationship with their attorneys.** Individuals and organizations across the political spectrum have long decried federal policies and practices that have been eroding the protections granted by the attorney–client privilege and the attorney–client relationship. These policies originated with the 1999 memorandum issued by your Attorney General nominee, then-Deputy Attorney General Eric Holder.[8] The text and subsequent implementation of the Holder memorandum coerced organizations to waive the venerable attorney–client privilege in order to reduce their chances of being indicted for the allegedly criminal conduct of any employee. The memorandum also pressured organizations either to violate any commitment they had made to pay employees' legal fees or to face a greater likelihood of indictment.[9]

  Such policies, though perhaps well-intentioned, resulted in a federal law enforcement culture in which it is expected (even when not demanded) that a company under investigation waive privileges, cut off legal fees, and take similar steps to limit their employees' ability to defend themselves. Since 1999, employees have been pressured into giving potentially incriminating statements to government agents without having their attorneys present.[10]

  A wide range of organizations, from the American Bar Association to the American Civil Liberties Union to the U.S. Chamber of Commerce, have worked together for several years to change these policies. As a result, and to forestall legislation, current Deputy Attorney General Mark Filip announced changes in the U.S. Attorneys' Manual last August that instruct federal prosecutors that they may no longer use coercive tactics to persuade companies to waive their rights to their attorney–client privilege and related protections.[11] Nor may prosecutors coerce companies to violate employees' constitutional rights or to pressure employees to waive such rights on their own. If actually and fully implemented by all federal prosecutors, the new guidelines should substantially reduce violations of the rights of companies and their employees.[12]

6. United States v. Bass, 404 U.S. 336, 348 (1971) (quoting Judge Henry Friendly).

7. *See* United States v. Rodriguez, 128 S. Ct. 1783, 1800 (U.S. 2008) (Souter, J., dissenting).

8. U.S. Dep't of Justice, *Federal Prosecution of Corporations*, Memorandum from Deputy Attorney General Eric Holder to All Component Heads and United States Attorneys §§ II, VI.B. (June 16, 1999) (on file with the Department of Justice) (authorizing prosecutors to request waivers of attorney–client privilege and encouraging them to factor companies' compliance with such "requests" into indictment decisions).

9. *Id.* (directing prosecutors to make an apparently independent pre-indictment determination of employees' criminal culpability and to consider a management decision to provide legal counsel to such "culpable" employees to be additional grounds for indicting the entire company).

10. *See, e.g.*, United States v. Stein, 541 F.3d 130, 155–57 (2d Cir. 2008).

11. U.S. Department of Justice, U.S. Attorneys' Manual §§ 9-28.710 (stating that "prosecutors should not ask for such waivers and are instructed not to do so"), 9-28.720 ("Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection.").

12. The Securities and Exchange Commission issued a new Enforcement Manual in October 2008 with language placing some limits on the ability of SEC staff to engage in practices similar to those formerly authorized by the Holder memorandum and its successors. *See* SEC Enforcement Div., Enforcement Manual § 4.3 (Oct. 6, 2008), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf. But important loopholes undermine the effectiveness of this limiting language.

While the new policy is a substantial improvement over the Justice Department's previous policies, by its terms it applies only to federal prosecutors in U.S. Attorneys' Offices, includes exceptions that are likely to undermine its effectiveness, and has no effect on similar harmful policies that have been adopted by several other federal agencies since the Holder memorandum was issued. The Department's policy, standing alone, thus does not fully solve the problem of government-coerced waivers and violations of employee rights. What is needed is a permanent solution with the force of law that applies to all federal agencies—i.e., comprehensive legislation with provisions like those in the bipartisan Attorney–Client Privilege Protection Act that passed the House last year by unanimous voice vote.[13]

- **Reform the federal criminal code.** As Georgetown law professor Julie O'Sullivan has concluded, the federal criminal law does not even qualify to be called a criminal code. It is instead "an 'incomprehensible,' random and incoherent, 'duplicative, ambiguous, incomplete, and organizationally nonsensical' mass of federal legislation that carries criminal penalties."[14] Criminalization has become extremely popular. As you have previously noted, many candidates run campaigns based on greater criminal penalties and more criminal offenses.[15] This is true even of candidates for national office, despite the fact that, as the Supreme Court has frequently noted, the Constitution does not grant the federal government a plenary police power.[16]

  In its final report, the American Bar Association Task Force on the Federalization of Crime, chaired by former Attorney General Edwin Meese III, reported that it had been "told explicitly by more than one source that many…new federal laws are passed not because federal prosecution of these crimes is necessary but because federal crime legislation in general is thought to be politically popular."[17] Many Members of Congress apparently will not vote against crime legislation "even if it is misguided, unnecessary, and even harmful."[18]

  Federal criminal law thus has proliferated without rhyme or reason, and often with little evidence that the fundamental nature and proper boundaries of criminal law have been taken into account. Today, there are at least 4,450 criminal offenses in the federal code,[19] and Columbia law professor John Coffee has noted that criminal charges may be brought for the violation of an estimated 300,000 federal regulations.[20] As discussed above, many federal criminal offenses include no meaningful criminal-intent requirement at all.

  To give Americans a reasonable opportunity to understand what the criminal law requires of them before they act and later discover that the federal government deems them to be criminals, your Administration should support the bipartisan efforts already underway to make the federal criminal code smaller and more understandable. The first step is to eliminate provisions that have not been charged (or that have been charged only rarely) during the past 10 years as well as those held to be unconstitutional. This recodification should also:

  1. **Collect** all similar criminal offenses (such as all offenses covering conduct resulting in a victim's death) in a single chapter of the United States Code;

13. *See* Floor Statement of Robert C. "Bobby" Scott, Chairman, Subcommittee on Crime, Terrorism, and Homeland Security, House Judiciary Committee, in Support of H.R. 3013, the "Attorney–Client Privilege Protection Act," Sep. 27, 2008.
14. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 643 (2006) (citations omitted).
15. *See* Chris Sullentrop, "The Right Has a Jailhouse Conversion," N.Y. Times, Dec. 24, 2006 (quoting then-U.S. Senator Barack Obama describing how some members of the Illinois state legislature factored election-year politics into their decisions about whether to increase criminal penalties).
16. *See* United States v. Morrison, 529 U.S. 598, 618 (2000).
17. Crim. Law Div., Am. Bar Ass'n, *The Federalization of Criminal Law* 2 (1998). The ABA Task Force was composed of 17 academics, former prosecutors, Justice Department officials who served in Democrat and Republican Administrations, and Members of Congress of both major parties. Its final report was unanimous.
18. *Id.*
19. Baker, *supra* note 3, at 1, 5.
20. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991).

2. **Consolidate** criminal provisions that overlap in whole or in part; and
3. **Eliminate** provisions that are blatant exercises of federal power in areas that the Constitution has reserved to the states.

A primary goal of this reform would be to impose structure and coherence on the federal criminal law, making it more like a real criminal code. This proposed reform, if conducted under your leadership with appropriate bipartisan involvement and support, would lay the groundwork for more substantive reforms that are of interest to and acceptable to both Democrats and Republicans, liberals and conservatives.

- **Pursue federal grand jury reform.** The Fifth Amendment protects Americans' right to indictment by a grand jury because the grand jury is supposed to serve as a "protector of citizens against arbitrary and oppressive governmental action."[21] Even if an individual is cleared of all charges and found not guilty, federal indictment by itself often works severe and irreparable damage to his career and reputation.[22] Entire business organizations can be destroyed by a federal indictment even if the U.S. Supreme Court later determines that the legal theory on which federal prosecutors based their charges was erroneous.[23] And defending against an unjust indictment can easily wipe out all of a defendant's financial resources.

  Today, however, the federal system lacks important rights for grand jury targets and suspects, and it no longer serves as the bulwark against unjust prosecution that it did when the Fifth Amendment was adopted.[24] Proposals for federal grand jury reform should be examined in a careful and deliberate manner and should focus initially on two important protections:

  1. Without allowing defense attorneys to object or otherwise participate in the proceedings, your Administration should work with Congress to experiment with allowing subjects and targets of federal grand jury investigations to have their attorneys present in the grand jury room.
  2. Absent exceptional circumstances, federal criminal defendants should be provided with transcripts of the entire grand jury proceedings, including all evidence and all statements made by prosecutors in the grand jury's presence.

  Others may be studied,[25] but reforms such as these enjoy broad support, including support from high-ranking Justice Department officials who served in past Administrations and such professional organizations as the American Bar Association.[26]

Conclusion

Because they respect and restore basic principles on which all criminal law should rest, proposals for criminal-law reform such as those outlined above have broad support across the political and ideological spectrum. Nonpartisan coalitions are already in place to pursue and promote these reforms, and your Administration should work with these Left–Right coalitions to implement them.

21. United States v. Calandra, 414 U.S. 338, 343 (1974).

22. Former Secretary of Labor Raymond J. Donovan famously captured the destructive effect of mere indictment when, after a jury acquitted him and each of his co-defendants of charges based on the government's tenuous theory of criminal culpability, he asked, "Which office do I go to, to get my reputation back?" Selwyn Raab, "Donovan Cleared of Fraud Charges by Jury in Bronx," N.Y. Times, May 26, 1987, at A1.

23. *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 698, 706–08 (2005). Despite the U.S. Supreme Court's reversal of the firm's conviction, the 28,000 partners and employees of international accounting giant Arthur Andersen lost their careers and everything they had invested in the firm when federal prosecutors destroyed it by indicting the firm on a hyper-aggressive and fallacious legal theory of the entire firm's criminal culpability for the allegedly wrongful conduct of a handful of its employees.

24. Prosecutors and legal scholars alike have acknowledged that the saying in essence is correct that if a prosecutor were to ask nicely, a grand jury would indict a ham sandwich. *See* "The Supreme Court, 1991 Term: Independence of the Grand Jury," 106 Harv. L. Rev. 191, 199–200 (Nov. 1992) (unsigned article); Martin S. Himeles, Jr., Op-Ed., "How to Indict a Ham Sandwich," Wash. Times, Aug. 18, 1999.

25. *See* Paul Rosenzweig, "Time Is Now for Federal Grand Jury Reform," The Heritage Foundation, Feb. 21, 2003.

26. *See* Nat'l Ass'n of Crim. Defense Lawyers, Report of Commission to Reform the Federal Grand Jury (undated), *available at* http://www.nacdl.org/public.nsf/freeform/grandjuryreform?opendocument (citing support of former Deputy Attorney General Larry S. Thompson and other former Justice Department officials and federal prosecutors).

Further, these principle-based reforms benefit all Americans suspected of or charged with a crime. They are thus not as susceptible to the politicization that has infected most criminal justice policy. Implementing them will inspire Americans' trust and confidence in the federal criminal justice system and fulfill your campaign promise to do so.

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