

ISSUE BRIEF

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Senator Rand Paul: Overcriminalization Champion

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Since he was sworn into the Senate in 2011, Senator Rand Paul (R-KY) has consistently fought against overcriminalization, a term used to describe the use of criminal penalties to punish morally blameless conduct. Conduct that was not a crime in the past—and perhaps not a violation of any law—is now punished with time in prison.

Senator Paul has spent his time in the Senate educating people on the issue of overcriminalization, blocking legislation with overcriminalization elements, and proposing solutions to the overcriminalization problem. Paul should be applauded for his efforts.

Educating People on Overcriminalization. The first step to combating any problem is to let people know that one exists. Paul has brought the struggles of ordinary citizens with overcriminalization to

light. He has demonstrated that overcriminalization can hurt anyone.

Overcriminalization is an idea that is still relatively new to most people—if they understand the concept at all. Paul has made it his mission to educate the masses on this critical issue. He has held congressional hearings, participated in interviews and speaking engagements, and even written a book on the topic.¹

Most admirably, he practices what he preaches.

Blocking Bad Legislation. In the early hours of the morning of September 22, 2012, the Senate was finishing up its pre-election business as usual, which entailed quickly passing several bills via unanimous consent agreement to keep the federal government funded. One of these bills, the Coast Guard Authorization Act of 2012, is much less pernicious than it might have been thanks to the work of Senator Paul.

One section of the bill, “International Fisheries Stewardship and Enforcement,” was identical to a Senate bill of the same name (the International Fisheries Stewardship and Enforcement Act, or IFSEA) that likely did not have enough votes to pass as a stand-alone bill. However, “business as usual” in the Senate often entails Senators trying to

shovel bills such as the IFSEA into other bills which are considered “must-pass legislation,” such as the Coast Guard Authorization Act. In the end, Paul brought the Senate to a screeching halt to keep IFSEA from being enacted as part of the Coast Guard Authorization Act.

IFSEA would have added civil and criminal penalties for actions that are already penalized under 12 existing statutes. Existing criminal penalties would have increased from six months to five years in prison for simply catching the wrong type or number of fish. Additionally, IFSEA would have created an “International Fisheries Enforcement Program” and given the National Oceanic and Atmospheric Administration (NOAA) an additional \$30 million per year to implement the program. NOAA has a history of abusive enforcement and has threatened fishermen, marine biologists, and others with fines and prison time in order partially to fund itself.²

Senator Paul’s opposition to IFSEA was a matter of principle. IFSEA would have had little effect on his constituency—Kentucky is landlocked.

Proposing Solutions. Knowing there is a problem does not do much good unless one can supply a solution.

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Senator Paul has introduced solutions to two of the biggest over-criminalization problems: criminal liability based on foreign laws and criminal regulations.

The FOCUS Act. The Lacey Act makes it a criminal offense in this country to import flora or fauna in violation of another nation's laws. Thus, under the Lacey Act, in addition to the estimated 4,500 U.S. criminal laws and numerous criminal regulations, Americans are now responsible for knowing the laws of foreign countries, even when those statutes are often written in foreign languages.

The Lacey Act has damaged the lives of numerous citizens. It sent one man to federal prison for six years because the lobsters he imported were a little too small, and he wrapped them in plastic instead of paper.³ It also prompted federal agents to raid Gibson Guitar for the wood it imported from Indonesia.⁴

In response to these injustices, Senator Paul introduced the Freedom from Over-Criminalization and Unjust Seizures (FOCUS) Act of 2012, which would decriminalize any violations of the Lacey Act so that any violation of the act would be punishable with civil penalties only. This would, in effect, protect U.S. citizens from imprisonment merely for violating a foreign law that has no U.S. counterpart.

Special interest groups have kept the FOCUS Act from becoming law,⁵ but Paul keeps fighting the good fight.

Criminal Regulations. One of the most worrisome areas of the over-criminalization problem stems from overregulation. There are tens of thousands of criminal regulations spread throughout the *Code of Federal Regulations*. No one knows for sure how many there are because nobody has been able to count them all. Although these regulations have the same effect as other laws, they do not go through the legislative process. These regulations often define criminal conduct, much of which is obscure and not self-evident, and most of them have deficient *mens rea* (bad intent) requirements. Many morally blameless citizens have spent time in prison for unwittingly violating these regulations.⁶

Senator Paul has fought to rein in overregulation, introducing into the Senate the Write the Laws Act and the Regulations from the Executive in Need of Scrutiny (REINS) Act.

The Write the Laws Act would strip all rule-making authority from executive branch agencies and return that responsibility to Congress. This would mean that all laws that define criminal conduct would need to be passed in both houses of Congress and signed by the President, not simply implemented

by unelected bureaucrats working for federal agencies. The bill specifically addresses rules that define criminal conduct, demonstrating Senator Paul's concern in this area. This alone would significantly reduce the number of traps for the unwary.

The REINS Act would require Congress to approve any regulation that would have an economic impact of more than \$100 million annually. Although not as ambitious as the Write the Laws Act, this bill would rein in the power of unaccountable executive branch agencies to define criminal conduct in connection with regulations that also exact a large economic cost from those who are subject to them.

A Bipartisan Cause. Congress needs more champions like Senator Paul to battle against overcriminalization. Overcriminalization is an issue that is not limited to one political party. Each party has its saints and sinners on the issue. One need not look only to one side of the political aisle for overcriminalization champions—those who are willing to stand up for justice can be found on all sides.

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1. Senator Rand Paul, *Government Bullies: How Everyday Americans Are Being Harassed, Abused, and Imprisoned by the Feds* (New York: Center Street, 2012).
2. National Oceanic and Atmospheric Administration, "Timeline of NOAA Enforcement Program Improvements," <http://www.noaa.gov/lawenforcementupdates/timeline.html> (accessed December 10, 2012).
3. Paul J. Larkin Jr., "Defanging the Lacey Act: The Freedom from Over-Criminalization and Unjust Seizures Act of 2012," Heritage Foundation *Legal Memorandum* No. 78, March 16, 2012, <http://www.heritage.org/research/reports/2012/03/defanging-the-lacey-act-the-freedom-from-over-criminalization-and-unjust-seizures-act-of-2012>.
4. *Ibid.*
5. Paul J. Larkin Jr., "Rent-Seeking Others into the Slammer," Heritage Foundation *Commentary*, August 13, 2012, <http://www.heritage.org/research/commentary/2012/08/rent-seeking-others-into-the-slammer>.
6. See Brian W. Walsh and Benjamin P. Keane, "Overcriminalization and the Constitution," Heritage Foundation *Legal Memorandum* No. 64, April 13, 2011, http://www.heritage.org/research/reports/2011/04/overcriminalization-and-the-constitution#_ftn2.