

ISSUE BRIEF

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Supplying the Information Required by Law: Directing the Federal Government to Identify All Federal Criminal Laws

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The Heritage Foundation has been concerned about the problem of overcriminalization for years. Most (but not all) of the papers that it has published on that subject have criticized Congress for passing unnecessary or unsatisfactory criminal laws. But Heritage also has given credit where credit was due.¹ Recently, Heritage witnessed another creditworthy event.

Two objections to the current state of federal law have been that no one knows how many federal crimes there are, and no one can easily find them all. Heritage and others have encouraged Congress to direct the executive branch to compile a list of all federal offenses and to make that list readily accessible to the average person without charge.² Recently, the Senate Judiciary Committee took a positive step toward that goal.

No List Exists. The American legal system has always presumed—often incorrectly³—that every person knows every criminal law. In fact, no one—no police officer, no prosecutor, no judge, and no law professor—knows all of them.⁴ One reason why this problem has existed is that there is no compendium of all federal criminal laws that a person—or a lawyer—could turn to when issues arise.

In the past the Justice Department and the American Bar Association (ABA) separately attempted to prepare a list of federal offenses. Neither the Justice Department nor the ABA succeeded, no other component of the executive branch has picked up the baton since then, and no comprehensive, easily accessible list exists today. Section 7 of the Smarter Sentencing Act would help address that need.

Smarter Sentencing. In 2013, Senators Dick Durbin (D-IL) and Mike Lee (R-UT) co-sponsored the Smarter Sentencing Act,⁵ which was designed to address some of the injustices that result from the use of mandatory minimum sentences in cases involving controlled substances.⁶ Over time the bill gained the additional support of several other Senators of both parties, who joined in a manager's amendment to the original bill. On January 30, 2014, the Senate Judiciary Committee voted 13–5 to send the amended bill to the Senate floor.⁷

The bulk of the amended bill still deals with reform of the federal laws imposing mandatory minimum sentences for certain controlled substance offenses, but it also contains a new provision that would lead to a salutary reform of the federal criminal law.

Section 7 imposes four new requirements on the federal government:⁸

1. It directs the Attorney General to prepare a report within one year that lists all federal criminal offenses, the punishment authorized for a violation of each offense, the *mens rea* (criminal intent) elements required by each offense, and the number of federal prosecutions that the federal government has brought for each offense within the past 15 years.

This paper, in its entirety, can be found at <http://report.heritage.org/ib4143>

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2. It directs each specified federal regulatory agency to prepare a similar report, also within one year, listing all federal criminal offenses enforced by the agency, the punishment authorized for a violation of each offense, the *mens rea* elements required by each offense, and the number of cases that the agency referred to the Justice Department for prosecution for each offense within the past 15 years.
3. It directs the Attorney General to compile, this time within two years, an index of each criminal offense listed in the report and to make that index publicly accessible without charge on the Department of Justice website.
4. Also within two years, it directs numerous federal agencies to prepare a similar list of regulatory offenses enforced by the agency and to make that list publicly accessible without charge on its agency website.

Kudos to the Senate Judiciary Committee.

The federal government has the legal and moral responsibility to make the federal criminal laws known to the public before someone can be charged with a crime. To date, it has not met that responsibility.

The public deserves to be able to easily find every federal criminal law. Were Section 7 of the Smarter Sentencing Act of 2014 to become law, the federal government would take a significant step toward remedying one of the major problems that overcriminalization causes the average person.

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1. See Daniel Dew, *Senator Rand Paul Gets It Right on Overcriminalization*, THE FOUNDRY (Oct. 1, 2012), <http://blog.heritage.org/2012/10/01/senator-rand-paul-gets-it-right-on-overcriminalization/>; John G. Malcolm, *Congress Takes a Positive First Step to Address Overcriminalization*, THE FOUNDRY (May 7, 2013), <http://blog.heritage.org/2013/05/07/congress-takes-a-positive-first-step-to-address-overcriminalization/>.
 2. See, e.g., Paul Rosenzweig, *Ignorance of the Law Is No Excuse, But It Is Reality*, THE HERITAGE FOUNDATION BACKGROUNDER No. 2812 (June 17, 2013), available at <http://www.heritage.org/research/reports/2013/06/ignorance-of-the-law-is-no-excuse-but-it-is-reality>; Paul Rosenzweig, *Congress Doesn't Know Its Own Mind – And That Makes You a Criminal*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM No. 98 (July 18, 2013) available at <http://www.heritage.org/research/reports/2013/07/congress-doesnt-know-its-own-mind-and-that-makes-you-a-criminal>; Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 759 N.193 (2013).
 3. See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. OF CRIM. L. & CRIMINOLOGY 725 (2012); Larkin, *supra* note 2, at 777-79.
 4. See, e.g., Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102 (2013) (“[A]ny reasonable observer would have to conclude that actual knowledge of all applicable criminal laws and regulations is impossible, especially when those regulations frequently depart from any intuitive sense of what ‘ought’ to be legal or illegal. Perhaps placing citizens at risk in this regard constitutes a due process violation; expecting people to do (or know) the impossible certainly sounds like one.”); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000) (“Ordinary people do not have the time or training to learn the contents of criminal codes; indeed, even criminal law professors rarely know much about what conduct is and isn’t criminal in their jurisdictions.”).
 5. S. 1410, 113th Congress (2013).
 6. See Evan Bernick & Paul J. Larkin, Jr., *Reconsidering Mandatory Minimum Sentences: The Arguments For and Against Some Potential Reforms*, THE HERITAGE FOUNDATION, LEGAL MEMORANDUM No. 114 (Feb. 10, 2014), available at <http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms>.
 7. *Results of Executive Business Meeting—January 30, 2014*, U.S. SENATE JUDICIARY COMMITTEE, <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=138603a26950ad873303535a630d2e0b>.
 8. The text of Section 7 is reprinted in an appendix to this *Issue Brief*. The entire reported bill is reprinted in the Heritage memorandum cited above at note 6.
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Appendix: Section 7 of the Smarter Sentencing Act

SEC. 7. REPORT ON FEDERAL CRIMINAL OFFENSES.

(a) Definitions.—In this section—

(1) the term “criminal regulatory offense” means a Federal regulation that is enforceable by a criminal penalty; and

(2) the term “criminal statutory offense” means a criminal offense under a Federal statute.

(b) Report on Criminal Statutory Offenses.—Not later than 1 year after the date of enactment of this Act, the Attorney General shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report, which shall include—

(1) a list of all criminal statutory offenses, including a list of the elements for each criminal statutory offense; and

(2) for each criminal statutory offense listed under paragraph (1)—

(A) the potential criminal penalty for the criminal statutory offense;

(B) the number of prosecutions for the criminal statutory offense brought by the Department of Justice each year for the 15-year period preceding the date of enactment of this Act; and

(C) the mens rea requirement for the criminal statutory offense.

(c) Report on Criminal Regulatory Offenses.—

(1) Reports.—Not later than 1 year after the date of enactment of this Act, the head of each Federal agency described in paragraph (2) shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report, which shall include—

(A) a list of all criminal regulatory offenses enforceable by the agency; and

(B) for each criminal regulatory offense listed under subparagraph (A)—

(i) the potential criminal penalty for a violation of the criminal regulatory offense;

(ii) the number of violations of the criminal regulatory offense referred to the Department of Justice for prosecution in each of the years during the 15-year period preceding the date of enactment of this Act; and

(iii) the mens rea requirement for the criminal regulatory offense.

(2) Agencies described.—The Federal agencies described in this paragraph are the Department of Agriculture, the Department of Commerce, the Department of Education, the Department of Energy, the Department of Health and Human Services, the Department of Homeland Security, the Department of Housing and Urban Development, the Department of the Interior, the Department of Labor, the Department of Transportation, the Department of the Treasury, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Equal Employment Opportunity Commission, the Export-Import Bank of the United States, the Farm Credit Administration, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Election Commission, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Mine Safety and Health Review Commission, the Federal Trade Commission, the National Labor Relations Board, the National Transportation Safety Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Office of Compliance, the Postal Regulatory Commission, the Securities and Exchange Commission, the Securities Investor Protection Corporation, the Environmental Protection Agency, the Small Business Administration, the Federal Housing Finance Agency, and the Office of Government Ethics.

(d) Index.—Not later than 2 years after the date of enactment of this Act—

(1) the Attorney General shall establish a publicly accessible index of each criminal statutory offense listed in the report required under subsection (b) and make the index available and freely accessible on the website of the Department of Justice; and

(2) the head of each agency described in subsection (c)(2) shall establish a publicly accessible index of each criminal regulatory offense listed in the report required under subsection (c)(1) and make the index available and freely accessible on the website of the agency.

(e) Rule of Construction.—Nothing in this section shall be construed to require or authorize appropriations.