Heritage, NACDL Session Weighs In on Criminal Intent

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An unusual coalition of the conservative Heritage Foundation and the National Association of Criminal Defense Lawyers (NACDL) recently issued a study entitled "Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law." See this blog's discussion at Crime in the Suites: Has Congress Eroded the Intent Requirement in Criminal Law? and the discussions on the Letter of Apology and the Sentencing Law and Policy blog. On May 24, the foundation hosted a panel to discuss the study's conclusions that a disturbing trend toward overcriminalization is under way. Panelists included Brian Walsh (Heritage Foundation), Norman Reimer (NACDL), Andrew Weissmann (Jenner & Block LLP) and Eric Grannon (White & Case LLP).

According to the study, Congress has passed a significant amount of criminal legislation that is vague, overbroad, and lacking adequate mens rea requirements. During the discussion, the panelists contended that the problems are essentially traceable to one central issue – poor drafting. Panelists were also disturbed by Congress' increasing delegation of legislative authority to bureaucrats, who define criminal conduct (perhaps less carefully) by way of informal rulemaking.

The discussion was less compelling than one would hope — probably because the panelists did not articulate in concrete terms how poorly drafted legislation has cost individuals their civil liberties. But the panelists' observations regarding Congress's delegation of authority raises an interesting possibility for litigators who want to effect positive change.

Litigators troubled by Congress' delegation of legislative authority can argue, for example, that a heightened standard should apply when agencies are tasked with defining criminal conduct. Generally, Congress may delegate legislative authority so long as it lays down an "intelligible principle." See *Mistretta v. United States,* 488 U.S. 361 (1989) (upholding Congress' delegation of authority to promulgate Federal Sentencing Guidelines). It is an open question, though, whether Congress must provide something more than an intelligible principle when it delegates authority to make rules that contemplate criminal sanctions. See *Touby v. United States,* 500 U.S. 160 (1991).

Some lower courts have rejected this argument in certain contexts. For example, the Eleventh Circuit has held that even if a heightened standard exists, it would not apply to National Park Service regulations because Congress criminalized those offenses and fixed the punishment. See *United States v. Brown*, 364 F.3d 1266, 1274 (11th Cir. 2004).

But the Eleventh Circuit need not have the last word, particularly now that the co-authors of "Without Intent" have published objective evidence that the "intelligible principle" standard may not be sufficiently protective.

Crime in the Suites is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

The commentary and cases included in this blog are contributed by Jeff Ifrah and firm associates Rachel Hirsch, Jeff Hamlin, Steven Eichorn and Sarah Coffey. These posts are edited by Jeff Ifrah and Jonathan Groner, the former managing editor of the Legal Times. We look forward to hearing your thoughts and comments!