CRIMINAL LAW AND THE ADMINISTRATIVE STATE
DEFINING AND ENFORCING REGULATORY CRIMES

May 13, 2014
Senate Hart Office Building, # SH-902

Program Description

The Administrative Conference, together with the American Bar Association's Criminal Justice and Administrative Law and Regulatory Practice Sections, the American Constitution Society, and The Federalist Society, is hosting a workshop to explore current topics at the intersection of criminal law and the administrative state.[1] The workshop will feature two panels, as well as keynote remarks by Senator Mike Lee, Senator Sheldon Whitehouse, and U.S. Sentencing Commissioner Rachel Barkow.

One panel will examine some questions arising from statutory schemes that include criminal penalties for regulatory violations. The overlapping relationship between criminal and administrative law dates to the turn of the 19th century, when Congress established early federal administrative agencies and laid regulatory frameworks that included civil and criminal penalties.[2] Since that time, federal criminal violations and regulatory offenses have proliferated. Some scholars and legal practitioners argue that this increase has resulted in an overfederalization or overcriminalization of regulatory offenses.[3] Critics also argue that many of these offenses are established through extremely broad statutory language with minimal or no mens rea requirement, and that the combination leaves too much authority to determine what constitutes criminal conduct in the hands of regulatory agencies and prosecutors. On the other hand, supporters of the current approach argue that broadly worded statutes and strong criminal penalties, combined with agency and prosecutorial discretion, are a reasonable and cost-effective way to get the level of deterrence needed to ensure compliance with important federal laws. [4] These writers counter overcriminalization concerns with those of underenforcement.

This panel will examine subtopics such as: the extent of the prevalence and availability of public information about regulatory criminal sanctions and prosecutions; the debate regarding overfederalization and overcriminalization; defining criminal conduct, including mens rea requirements for regulatory crimes; separation of powers and judicial review dynamics, including judicial responses to congressional grants of authority to agencies to define criminal conduct and set sentences; and recent legislative activity in these areas.

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[1] The Administrative Conference (ACUS) has issued a number of prior recommendations in this area. *E.g.*, Recommendations 72-3, 72-6, 76-4, 82-7, 86-2, 86-4, 93-1, 92-7, and 94-2. Available at www.acus.gov. ACUS hopes to use the workshop to identify subjects appropriate for future Administrative Conference research and recommendations.

[2] Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, ANNALS AM. ACAD. POL. & SOC. SCI. 39, 41-42 (1996).

[3] In 1990, attorney Stanley Arkin estimated in a public lecture that as many as 300,000 federal regulations could be enforced through the criminal process. 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) (citation omitted). No current inventory of federal regulations with potential criminal sanctions could be identified, although a bill pending before the U.S. Senate would require agencies to provide such information. S. 1410, 113th Cong. (2013).

[4] Michael Herz, Structures of Environmental Criminal Enforcement, 7 FORDHAM ENVTL. L.J. 679, 683-84 (1996) (describing the "powerful deterrent effect" that results in corporate managers from the fear of penal sanctions).

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A second panel will examine agency enforcement of regulations carrying potential criminal sanctions. Lately, varied constituencies have expressed concern that some large financial institutions are treated as "too big to jail" by federal prosecutors and questioned whether the trend towards deferred prosecution agreements requiring future compliance measures provides sufficient deterrent value.[5] Recent scholarship has examined arguments for and against "regulation by prosecution."[6] Some academics, such as Professor Richard Epstein, argue that prosecutors exercise too much regulatory power over companies through such agreements. Others, such as Stanford scholar (and ACUS Council Member) Mariano-Florentino Cuéllar, argue that prosecutors bring unique advantages to risk regulation by virtue of their investigative skills, and thus that criminal justice authorities have an important role to play in modern regulation.

This panel builds on early Administrative Conference work on institutional design and separation of powers in unitary agency enforcement models and alternatives thereto, such as the split-enforcement model, but examines innovations of the modern administrative state. Potential subtopics include existing enforcement practices, such as the modern trend towards deferred prosecution agreements and "regulation by prosecutors"; prosecutorial guidance and charging policies, as potential internal restraints on discretion in decisions to pursue criminal charges; and executive control over prosecutorial discretion, as an external check on agency authority.

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More information is available at www.acus.gov/regulatorycrimeworkshop.

[5] Mark Calabria (The CATO Institute) and Lisa Gilbert (Public Citizen), *Are banks too big to jail?*, CNN OPINION (Jan. 6, 2014); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, THE NEW YORK REVIEW OF BOOKS (Jan. 9, 2014).

[6] PROSECUTORS IN THE BOARDROOM (Anthony S. Barkow and Rachel E. Barkow eds., 2011).