Statement of U.S. Chamber Institute for Legal Reform

BY: The Honorable Michael Mukasey, Of Counsel, Debevoise & Plimpton LLP

On Behalf of the U.S. Chamber Institute for Legal Reform

ON: Executive Overreach in Regulatory Enforcement and Infrastructure

TO: U.S. House of Representatives Judiciary Committee Executive Overreach Task Force

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Testimony of The Honorable Michael Mukasey
On Behalf of the U.S. Chamber Institute for Legal Reform
Regarding Executive Overreach in Regulatory Enforcement and Infrastructure

Chairman King, Ranking Member Cohen, and distinguished members of the Task Force, good afternoon, and thank you for inviting me to testify on behalf of the U.S. Chamber Institute for Legal Reform (ILR). ILR is an affiliate of the U.S. Chamber of Commerce dedicated to making our nation's civil legal system simpler, faster, and fairer for all participants. The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million companies of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system.

I appreciate the opportunity to testify at this hearing, which deals with the important and troubling abuses that have crept into our law enforcement system in recent years, and how they affect people and businesses trying to keep our economy functioning. The result has been that a legal system intended to promote fairness and economic health has been transformed slowly, but perceptibly, into one that is seen as arbitrary and burdensome.

The symptoms include losses in court cases where the government pressed for implausibly broad reading of criminal statutes. In *Bond v. United States* and *Yates v. United States*, the Supreme Court rejected the government's arguments that a woman who put a chemical irritant on the automobile, doorknob, and mailbox of another woman

who was having an affair with her husband could be prosecuted for violating a law implementing a chemical weapons treaty, and that throwing 72 undersized fish back in the water to avoid a citation for catching them constituted destruction of a "tangible object" in order to obstruct or influence a government investigation under the Sarbanes-Oxley Act that deals principally with the record-keeping obligations of corporations.

In another case, the government spent two years criminally prosecuting Howard Root and his company, Vascular Solutions, Inc., for criminally promoting a vein treatment device administered by doctors and approved by the FDA for one condition, as a treatment for a closely related condition without seeking supplemental approval. Testimony at trial showed that the administering doctors found the device beneficial for the related condition, and that it had improved patients' lives. Total sales of the device constituted one tenth of one percent of Vascular Solutions' revenues during the relevant period. The government's conduct during this crusade to criminalize truthful speech cost Root and his company millions of dollars to defend. The trial ended in a defense verdict from a jury instructed that it could not convict if it found the promotional speech in question truthful and not misleading.

Another multi-year crusade, this one against Federal Express for allegedly acting as a co-conspirator with illegal online pharmacies because it shipped their goods, recently ended on the third day of a bench trial when the government dropped the case because it could not produce evidence that the company knew of the unlawful activities of the pharmacies, and intended drugs to be distributed illegally.

The problem here is not that the government lost cases; that happens. Rather, the problem is that in each instance the government sought criminal penalties against defendants by pressing far-fetched theories of liability against people and entities that could not reasonably have anticipated criminal prosecution for their acts. When I was a prosecutor I was taught that we should not prosecute a case unless as prosecutors we could tell ourselves truthfully that at the end of the day when the crimes in question were committed, the prospective defendant either thought or should have thought, "I committed a crime today." There is plenty of perfectly routine crime to prosecute without pressing for novel extensions of the criminal laws.

Even prosecutorial successes often are discussed by the government in financial terms that make it sound as if the principal incentive of prosecutors is to outdo one another in the size of the financial penalties they can extract from defendants, as if the proper role of law enforcement is to serve as a profit center for government rather than as a shield to protect commerce and the nation that benefits from it. Also, the incentive here appears at times to be not merely bragging rights but rather use by law enforcement agencies themselves of the proceeds to support favored causes.

Another symptom has been the swarming effect when multiple agencies and jurisdictions—state and federal—zero in on a company that has become the target of a prosecution or enforcement action in one jurisdiction, often one that has resulted in a negotiated plea and penalty supposedly calculated to address and redress the wrongdoing.

Nonetheless, others seek to share both the limelight and the spoils, and engage in a prosecutorial feeding frenzy.

To the extent that people in authority within the government have discussed this particular problem of multi-jurisdictional piling-on, there has seemed to be little interest in actually doing anything about it, and at times a disclaiming of responsibility. For example, the assistant attorney general in charge of the criminal division, in a speech in New York in April, recognized in a phrase "the unfairness when a company is asked to pay for things over and over again," but then went on quickly to point out that different regulators have different and legitimate interests, without explaining why one regulator's interest cannot legitimately satisfy another's as well, and that companies "voluntarily operate in multiple countries [and] obviously know that by doing so, they subject themselves voluntarily to those countries' laws and regulatory schemes." She said that although the Department of Justice is "trying to address this concern so that companies are not punished unfairly[,] that is often easier said than done."

There is no single factor that can account for all these developments, but it is nonetheless possible to identify contributing causes, and to do something about them.

One problem is that the statutes themselves are often are vaguely worded and leave room for novel and expansive interpretations. For example, under the Foreign Corrupt Practices Act, even when no prosecution is brought, companies devote inordinately large resources in trying to determine what value of gift is appropriate to

give to a business associate in a foreign country on the occasion of a wedding or a birthday. Or in the False Claims Act (FCA) context, an enterprising employee with information about a problem the company may be trying to resolve with respect to receipt of funds from the federal government can enlist the aid of a lawyer to act as a "private attorney general" on the government's behalf under the FCA, and recover a share of treble damages for each false request for payment, and statutory penalties of up to $11,000 per claim under current law.

Loosely drawn statutes provide the means for prosecutors so inclined to respond to periodic demands in the media to punish perceived "bad guys." Some legislators and media outlets expressed outrage that although record fines had been exacted from institutions in connection with the 2008 financial collapse, few individuals had gone to jail. In part, this was the result of institutions settling rather than face the impact of even being charged, whereas individuals with their freedom at stake fought when charges were brought, and often won.

In September 2015, Deputy Attorney General Sally Quillian Yates issued a memorandum to all Department of Justice offices with power to enforce criminal statutes, directing that priority in prosecuting corporate wrongdoing be put on prosecuting individual defendants. Often, corporations will try to settle even a barely colorable claim of wrongdoing in order to avoid the severe consequences of an indictment that can result in debarment for some and loss of market capital for most. The Yates memorandum announced six points of guidance emphasizing that the Justice Department would give no

credit to corporations for cooperation unless they provided all relevant information with respect to individuals involved in potential misconduct, and directing that prosecutors "vigorously review" information proffered by companies to assure in particular that information about individuals was disclosed. It directed prosecutors to build cases against individuals from the outset of an investigation instead of waiting, and urged that cases against even lower level employees be pressed so they can be "flipped" to cooperate against higher level corporate employees.

Further, the memo urged that Department civil and criminal lawyers share information relevant to parallel or potential investigations in order to enhance the government's ability to prosecute individuals, and that even when resolving cases against corporations those lawyers take care not to provide immunity to individual officers or employees or dismiss charges or release claims against them without the approval of a senior Justice Department official.

When a case against a corporation is to be resolved before investigation of individual misconduct has concluded, lawyers are directed to submit a plan for resolving such investigations before the statute of limitations has run.

Finally, even when potential individual defendants are not wealthy, the memo instructs that cases against them should be pursued so as to exact penalties that will hold them accountable and deter them and others.

These directives, along with others of similar import, were then incorporated into the U.S. Attorneys' Manual, the document that guides all Justice Department litigation. Although the directives themselves, taken individually, may provide useful and unexceptionable reminders to government lawyers, and although they are accompanied by disclaimers of any intent to violate norms and privileges, considered as a whole they forcefully drive a wedge between companies and their employees and create potentially perverse incentives, including the "voluntary" surrender of privileged information so as to obtain rewards for cooperation. They will also likely result in less cooperation in investigations because of this new adversarial relationship between company and employee/corporate officer.

Added to the pressure of popular demand to punish perceived villains is the attraction of generating funds either for agency projects or for favored private sector interests. Here, the potential for abuse is rivaled only by the constitutional dubiousness of the entire practice. Under Article I, Sections 7 and 8 of the Constitution, it is Congress that is supposed to determine the funding of the federal government in all its branches, with all measures for raising revenue to originate in the House of Representatives. When executive agencies adopt programs to raise funds on their own, and to spend those funds as they wish, they circumvent the constitutional structure and evade the authority and oversight of Congress. This is a defect that should be considered so fundamental as to call into question the existence of any of these programs. Yet the executive has shown little enthusiasm for curtailing these programs. It is Congress that should act at least to

bring them within legislative control and discipline. Fortunately, this is a problem that the Judiciary Committee is now working to remedy through Chairman Goodlatte's slush fund legislation.

The Department of Justice had to try to reform the asset seizure and equitable sharing feature of its narcotics program after disclosure in September 2014 that state and local police were seizing billions of dollars in assets by stopping motorists for minor infractions, pressuring them to agree to searches, and then seizing cash even when there was no evidence of drug violations. This money was then shared between those police agencies and the federal government. However, even the reforms in the program are both self-imposed and self-enforced, which is hardly reassuring.

But that program is only the tip of the proverbial iceberg when one considers the self-funding features of federal law enforcement. The Departments of Justice and Health and Human Services maintain a fund for the proceeds of all fines, settlements and civil penalties imposed in health care prosecutions under an array of statutes including the False Claims Act and the Health Insurance Portability and Accountability Act (HIPAA) that permits them to fund their own staffs and enforcement activities. The Consumer Financial Protection Bureau is itself another example of a self-propelled agency largely outside Congressional control.

Another factor that allows these abuses to continue is lack of oversight of prosecutorial decisions and lack of punishment of leaks. There are supervisors aplenty in

the Department of Justice, but if they and those they supervise are recognized and rewarded for helping to rack up litigation victories and set records in cash recoveries, they will not stop abuses but rather encourage them. Leaks to the press are too often the precursors of large settlements, and the impropriety is washed away when the case ends.

Finally, these abuses are often committed against inviting targets. As noted, corporations often find it preferable to settle than to risk the reputational and other damage that can result from indictment. There is a good reason why most Supreme Court challenges to fanciful prosecutions involve individuals; they can go to jail and have no choice but to fight. The one company to resist a high-profile prosecution was the accounting firm Arthur Andersen, which had been driven out of business by the time it "won."

There is a good deal that can be done to mitigate if not actually end these abuses. The "swarming" or agency pile-on can be stopped at the federal level. The Department of Justice is the principal law enforcement arm of the government across the board. Yes, other entities have an interest. But if the Department of Justice initiates an investigation, others should stand down. In any event, someone at DOJ should be empowered to act as traffic cop in situations where federal agencies engage in overlapping law enforcement activity. States present a tougher issue, and it may be that Congress, exercising its authority over interstate commerce, can impose some federally supervised order.

There should be legislative standards for monetary penalties so as to prevent defining each offense so narrowly that federal statutes can be used as pin-ball machines with penalties totally out of proportion to the harm caused.

End self-funding agencies and law enforcement programs by directing that penalties and settlements beyond what the agency spent to bring a case be deposited into the general fund where its disbursement can be controlled by the body constitutionally empowered to control it—Congress.

Third-party funding provisions in settlement agreements and sentences imposed in federal courts should be banned. These are simply devices to undermine the constitutional funding authority of Congress.

Encourage a culture within the Department of Justice and law enforcement generally that recognizes restraint in the exercise of federal authority as well as appropriate vigor in the application of federal law.

At the risk of sounding self-serving, I should add that when I served as an Assistant U.S. Attorney, as a U.S. District Judge, and as Attorney General, I do not think I was known as someone who was reluctant to bring the full weight of the law to bear on those who violate it, and I am proud to have done so. But I am equally proud of those instances—fewer in number, to be sure—when I recognized that it was wiser to forbear, and did so. I am happy to answer any questions you may have. Thank you.