Regulation horror stories for Halloween

Joyce Kinder was fined $5,000 and sentenced to three years probation for unknowingly catching protected paddlefish in the Ohio River.

Lawrence Lewis was arrested for violating the Clean Water Act after he disposed of sewage from a Washington, D.C., retirement home. He thought it would drain to a water treatment plant, but it instead went into Rock Creek.

Lewis and Kinder are both victims of overenforcement of regulations, according to lawmakers from both parties who say agencies should not threaten to jail people for violating regulations they don’t even know exist.

Though violations of regulations account for a just a sliver of the 1.5 million people jailed in the United States, it’s one of the few areas regarding regulations that unifies Democrats and Republicans.

“We must ensure that regulations, especially those that impose criminal sanctions, provide fair notice to everyone and punish only the appropriate violators,” Rep. Bobby Scott (D-Va.) said Wednesday at a hearing on the issue.

Using regulations to bring criminal charges “threatens to undermine the legitimacy of criminal law and delude its moral force,” declared Rep. Louie Gohmert (R-Texas).

Gohmert and Scott both sit on the House Judiciary Committee’s Over-Criminalization Task Force, which on Wednesday heard testimony from Kinder and Lewis.

“We didn’t want to violate any law,” said Kinder, who with her husband ran a small caviar company in Kentucky. They were fishing for sturgeon and paddlefish in the river to harvest fish eggs.

The two were confronted by federal agents when their nets caught paddlefish, a protected species on the Ohio side of the river that separates the two states. The federal Lacey Act makes it a federal crime to sell fish or wildlife taken in violation of a state’s laws.

Besides the fine and probation, the Kinders lost their boat and truck for the violation.

“We unknowingly fished on the wrong side of the Ohio River,” she said. “We lost everything. ... We thought we were obeying the law.”

Lewis told the task force that he was unaware of the crimes he was alleged to have committed.

“It’s real lives being affected,” he said. “Normal people because we don’t know. We’re not aware of the law.”

Less than one-tenth of 1 percent of people in jail are there for violating regulations. Still, lawmakers said that agencies’ overenforcement was having a devastating effect for some families.

“It’s almost like an iceberg in that it’s invisible to the general public and to most of us until someone hits it,” Rep. Spencer Bachus (R-Ala.) said.

For many regulatory crimes, the legal concept that perpetrators need to be aware that they are breaking a law to be convicted does not necessarily apply.

“People who are not regular industry players have no reason to know that there’s a regulatory landscape that requires compliance at the risk of criminal sanctions,” said Rachel Barkow, a professor at the New York University School of Law.

The problem, according to Gohmert, rests in the powers that lawmakers give to agencies to write regulations.
"It has become routine practice for Congress to authorize an agency generally to promulgate regulations while providing that violating the yet-to-be-seen regulations will be a criminal offense," he said.

Rep. Hakeem Jeffries (D-N.Y.) said that some federal officials had too much power to prosecute crimes.

"In the continuum of justice, which moves from congressional action to administrative rule-making, prosecutorial discretion and judicial review, obviously there's a breakdown, at least I believe, in that prosecutorial discretion phase that requires some measure of corrective action," he said.

Some Democrats also bemoaned that small businesses and middle-class Americans are unable to fight federal charges, while executives on Wall Street and at BP have avoided indictments for their role in the financial crisis and Deepwater Horizon oil spill.

That problem, they said, went deeper than crimes about regulations.

"People really end up pleading to crimes that they didn't commit because they didn't have the resources to defend themselves," said Rep. Karen Bass (D-Calif.). "That certainly is a problem here, but it is a general problem in the system."

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