

PREPARED STATEMENT OF ROBERT "BOBBY" UNSER

*Congressional Testimony*

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**Reining in Overcriminalization: Assessing the  
Problems, Proposing Solutions**

***Making an American Racing Legend Prove  
He Did Not Commit a "Crime"***

**Testimony Before  
Subcommittee on Crime, Terrorism, and Homeland Security  
Committee on the Judiciary  
United States House of Representatives**

**September 28, 2010**

**Robert "Bobby" Unser**

Thank you Chairman Scott, Ranking Member Gohmert, and the rest of the members of this Committee for inviting me here to tell my story about what often happens to honest, hard-working men and women because of bad criminal laws. The bad law in my case said that I was a criminal if I wandered into a certain part of the Colorado high country when a friend and I were lost in a blizzard. This unmarked wilderness area is off limits to motorized vehicles, and the blizzard came up when my friend and I were snowmobiling. It didn't matter that we never intended to enter the wilderness. It didn't matter that the wilderness was not marked. It didn't matter that we didn't even know that the wilderness area was there.

I could have been imprisoned for six months. Maybe I should be grateful that I wasn't sent to jail, and I guess I am. But someone else in my same situation might have ended up in prison. I'm here to help make sure that does not happen.

This is not the first time that I have come to Congress to tell my story. Another committee asked me to explain how and why I got prosecuted by the federal government for something that might (or might not, no one involved in this ever said they know for certain) have happened when I was lost and trying to figure out how to save my own life and the life of my friend, Robert Gayton. When I spoke before that other committee, we discussed whether federal officials should or should not have charged me under the law. Most of the Members of that committee said that the Forest Service officials made a mistake. I definitely agree, and every single person I have ever told my story to has also agreed.

But now I realize that the real problem was the law itself. The law should not give the U.S. Forest Service or any other government agency the power to make a federal criminal out of someone who never intended to do anything wrong and had no idea that he might have violated a law until weeks after it happened. Nothing I did caused any harm to anyone, and there was never any claim that it did.

I understand that this hearing is about overcriminalization, which to me means that there are thousands of federal laws that give prosecutors the power to make criminals out of people who were just going about their business trying to be respectable, honest citizens. But like most Americans, I'm no legal expert. I don't know, and I hope I never have to know, all of the details of the thousands and thousands of federal criminal laws and regulations that are on the books. So my testimony here will focus on my own story.

Before I begin, though, I want to say that it is important to me that this is a bipartisan hearing. One of the main reasons I was willing to come here and talk about my story again is because I was told that Mr. Scott and Mr. Gohmert were holding this hearing and working against overcriminalization in a bipartisan way. I have been bipartisan all of my life. I have never, ever voted either party line. I vote for the best person for the job, period. I've voted for Democrats, and I've voted for Republicans. I've given money to

Republicans, and I've given money to Democrats. And I will probably continue doing so the rest of my life.

I also understand that one of the things this hearing is about is a report by two organizations on opposite ends of the spectrum, the National Association of Criminal Defense Lawyers (NACDL) and the Heritage Foundation. I've followed politics and government for a long time. I never thought I'd see two organizations like that, along with the American Bar Association, the National Federation of Independent Business, and the ACLU (American Civil Liberties Union), all supporting the same thing. That's not a lineup probably anyone thought they would see.

This isn't a Republican problem or a Democrat problem. It's not about liberals or conservatives or progressives or whatever. It's not about who's rich or who's poor, or who's black, brown, or white. These bad laws can trap any American. Anyone can be the victim of overcriminalization, and bad laws and bad prosecutions ruin our criminal justice system.

And I'm sorry to say it, but this is a problem that has been caused by the United States Congress. Congress has been making all of these bad laws, and Congress has the power to stop doing that and get rid of them. I know that not everyone in Congress has voted for all of these bad laws. So I am very happy to see that Mr. Scott and Mr. Gohmert are working together in a bipartisan way to hold hearings on overcriminalization and decide how to end it. In my view, that's how it ought to be done.

The way you're going about this is very important to me. So thank you for hearing me out before I started into my story.

My three brothers and I were raised in New Mexico, and I have lived there most of my life. The four of us were always into athletics, the outdoors, and especially anything having to do with cars. All of us raced cars, and three of us raced or trained for the Indianapolis 500, which I ended up winning three times. But we got to know the New Mexico and Colorado Rockies real well growing up, and I never lost my love of the outdoors.

I have also been snowmobiling for decades. I've done it so much, and know so much about it, that I was the one who first convinced manufacturers to put shock absorbers on snowmobiles. I have come up with and helped them develop some of their biggest innovations over the years.

I have a place in Chama, New Mexico, up near the northern border with Colorado. Less than 20 miles north of Chama is a very popular place to go snowmobiling. It is in Colorado right off of Colorado Highway 17. Some folks call it the Jarosa Peak or Jarosa Mesa area. I have snowmobiled there with friends hundreds of times in my life.

Just before Christmas 1997, my friend Robert Gayton and I planned to go for a snowmobile ride at the Jarosa Peak area. Robert is a race car mechanic and a good race

car driver himself, but he had not grown up in the mountains and he had never snowmobiled before. So I decided to give him a short lesson on my property before we started. Because he was new to the sport, the plan was to keep the ride short and be back at my place in time for dinner.

The day was beautiful, crystal clear with the sort of gorgeous blue skies that you can't imagine unless you've been in the Rockies in the winter and seen one yourself. I lent Robert one of my best snowmobiles and decided to ride my brand-new one. I expected it to perform beautifully as well.

Now, I know that some environmentalists do not like having cars or motorcycles or snowmobiles anywhere in or near a national forest. But the fact is that a high percentage of the land in Colorado and New Mexico is national forest, and snowmobiling is perfectly legal in many areas. I knew it was legal where we were going, and everyone who snowmobiled in the area knew it was legal. The U.S. Forest Service had always been completely aware of the snowmobiling that was done in the Jarosa Peak area.

Around noon, we loaded up the two sleds, hooked up the trailer, and headed out. After a short drive, we were at the Red Lake Trail parking lot off of Colorado Highway 17. From there, it didn't take us long and we were off.

We took it easy at first, but Robert is talented and athletic and was doing pretty well on the snowmobile for a first-timer. The snow was deep Colorado powder and packed powder. It seemed like a perfect day.

Robert and I rode for about an hour, first about 5 miles up the logging road, and then along the path leading to the area that the judge in my trial called the Jarosa Peak area. There was actually a bowl up there that was terrific for snowmobiling. It was exposed and at very high altitude, about 11,000 feet, but there were no trees or other objects. It made for a safe place for Robert to learn the sport.

Our trouble started about an hour after we had left the parking lot. A severe ground blizzard suddenly kicked up. In a ground blizzard, it can be a clear blue sky above you but you can't see 20 feet away because the wind is blowing so hard that all of the snow around you creates what they call a "white out." That day, the wind was blowing about 60 to 70 miles an hour, and at times we could not see more than two or three feet in front of us. That powdery snow became little pellets that were driven pretty much horizontally into any part of your body that wasn't covered.

Almost immediately, we went from playing around, to trying to get out of there and find shelter from the blizzard. Already the winds were making the cold temperatures frigid and almost any sort of communication between Robert and me impossible. At times, you couldn't see the front end of your snowmobile when you were driving.

Less than 30 minutes after the blizzard started and the visibility went to zero, Robert rode his snowmobile into an embankment that he could not see and got it stuck. We tried for a

few minutes to get it moving again, but it was wedged into a tight place with its running track off the ground. I realized that it was unlikely we could get it unstuck and decided not to waste any more precious time we might end up needing.

Robert got on the back of my snowmobile and we started off again. At its best, the visibility was about 20 feet, but now we had another problem. Although my snowmobile was brand new, it kept breaking down. I'm a pretty good mechanic, and under normal circumstances I could have fixed it and kept it running. But these weren't normal conditions. When I took off my gloves to work on the snowmobile, the blizzard quickly turned my hands into ice. The wind wasn't helping matters either. I would get it working for a few minutes, and then it would break down again.

We were trying to make our way down the mountain, but the conditions were not cooperating. It was getting darker and darker and the snowmobile was continuing to struggle. We were beginning to get desperate. At about dusk, it was clear that the snowmobile wouldn't make it much further. By now we had been in the blizzard for about two hours. The wind was often so loud you could barely hear yourself think, let alone hear what the other fellow was saying.

I made one last effort to fix the snowmobile, but when I couldn't get it going after another half hour or so, I made the decision to abandon it. If we stayed in the high, exposed terrain above the tree line, we would certainly die that night. We had to get down somewhere low enough that there would be trees providing some stability for the snow so that we could build a snow cave. We had to make it there before the temperatures dropped any further, so we grabbed everything we could off of my machine.

After abandoning my snowmobile, we headed off on foot down the mountain in what was now complete darkness. That was one of the decisions that saved our lives. If we had stayed in those 60 to 70 mile per hour winds through the night above the tree line, we would certainly have frozen to death.

We trudged through the snow slowly but surely, feeling our way down the mountain like two blind men. The snow was sometimes hip-deep and sometimes waist-deep, but we moved as fast as we could under the conditions.

After a few hours of wandering, we finally found an area below the tree line where the snow was deep and there were sizable pine trees for constructing a cave. The wind was not quite as bad as it had been in the bowl, so we felt it was a good area to begin digging a snow cave. Robert had lost one of his gloves somehow, so the two of us used three hands to dig a cave big enough for both of us to fit. The cave was certainly makeshift, but we did the best we could in complete darkness.

We spent the night in that snow cave. It sheltered us from the wind and stored some of our body heat, but I don't think either of us slept one bit. Robert lay on a waterproof blanket throughout the night while I tried to stay warm in my waterproof snowmobiling suit. It was a long, long, long night.

The next morning, the wind had died down some, but we had no clear idea where we had come from and no idea where to go. Our decision then was whether to go back to try to find the snowmobile and get it started again or to walk our way out of the mountains. The wind made that decision pretty easy, though, because it had erased all of our footprints through the snow.

I didn't know it then, but when I didn't show up at the Christmas party I was supposed to be at the night we went snowmobiling, the party's host tried calling me at home the next morning. When he couldn't reach me, he drove over to my place. He found my front storm door closed but the main door standing open, and then saw that my bed had not been slept in the previous night. He called my brother Al Unser the race car driver, and Al got in his truck right away and started calling friends to start a search party. Pretty soon, about a dozen friends, neighbors, and good citizens were looking for Robert and me.

Having spent much of my life in and near the mountains, I knew that if we followed the downhill path of each creek, gully, or ditch we ran into, they would eventually lead us out of the mountains. All the next day, we trudged through the snow that was never any shallower than our hips. There were cliffs and canyons all throughout the area, and we had to find a fast, safe way down or around them. We even had to slide down on our backs with our helmets on a frozen stream that was nearer to straight up and down than it was to horizontal. Amazingly, neither of us was injured by that high-speed slide.

I knew there was a tourist lodge and dude ranch down at the base of those mountains, along Colorado Highway 17. I also knew it was about 15 miles away and 3000 feet down below us. We might be able to make it if we trudged through the snow all day long.

During that second day, we continually ran into snow drifts that were chest-high, and we took turns breaking through them. We had a few pieces of chocolate candy to eat, but I was in no shape to be eating anything. After eating only one of the candies, I suddenly felt nauseated. A short while after, I began vomiting repeatedly. I soon started vomiting and coughing up blood. Robert thought it was because of the candy I had eaten, and he decided not to have any of them even though they were our only food. It turns out that the candy was not the source of my stomach problems (I had contracted a terrible virus), but we did not know that at the time.

We continued our journey down the mountain slowly but surely. At one point on the trail, Robert broke through the thin ice covering one of the creeks we crossed and got soaked up to his knees. That caused the cold to set in on him very deeply. He got so cold and exhausted that he laid down against a tree and said he couldn't make it any farther. There was no way that I was going to let my friend die, so I basically forced him to eat the candy and to get up and keep moving. Later, as I got sicker, Robert was the one who encouraged me that we really would make it back alive.

We were so cold and so near the end of our strength that we did not stop to sleep at the end of the second day because we might not have been able to keep from freezing to

death. So we kept struggling on throughout that night. We were operating on autopilot, exhausted, hungry, and suffering from dehydration, hypothermia, and frostbite. I wasn't sure how close we were to civilization and help, but we just had to hope we would make it.

Before dawn, we found our oasis – an open barn that had a working space heater and a phone. I immediately called my brother Al. Then Robert and I collapsed. As Reader's Digest said, we had "trekked through almost 20 miles of some of the wildest country in the Colorado Rockies." I ended up spending weeks in bed recovering from my experience, but with the help of my friends, family, and doctor I was able to survive. I still feel the lasting effects on my health of this survival experience, but all that really matters is that Robert and I both made it back alive.

After regaining my strength and returning to business, I started thinking about finding my lost snowmobile. I have a lot of friends in law enforcement. When I told a friend who was at that time one of our New Mexico deputy sheriffs, he told me I should check with the Forest Service first. He said that there is a National Wilderness area that we might have wandered into after we got lost, and he told me not to try to find my missing sled on my own. I had planned to contact the Forest Service at some point anyway because they have employees who go out in the field almost every day and who know the area and are familiar with the terrain. A friend of a friend was a retired Forest Service employee, so we asked him to put us in contact with the right people.

We had a short first meeting with this Forest Service employee, and he told me that he would see what he could do to help. The next day, he called me to say he had contacted employees who could help me, and I should come back to their office to meet with them. He knew but didn't tell me that the Forest Service had started a criminal investigation against me.

I came down that afternoon to speak with them. I thought they were there to assist me and had no idea that they were basically police officers because they never showed me a badge or any other credentials. We met with them in a conference room and talked from right after lunch until the end of the day. I told them everything – where we started, where we rode to, where the ground blizzard started, and where we spent the first night. Then they pulled out a map of the area and asked me to guess where we might have wandered after we got lost. I gave them several guesses but made it clear that I obviously had no way of being certain where Robert and I had abandoned my snowmobile. I couldn't see five feet in front of me, so how could I possibly know where we had been walking?

After we had talked for about three and a half hours, one of the two Forest Service agents reached under the table into her briefcase and pulled something out. She handed me an official form document they had already filled out saying they were going to charge me with a federal crime. They claimed I had entered the National Wilderness area on my snowmobile, which at that point, of course, they had absolutely no way of knowing was true. No one had even seen my snowmobile by then.

I had thought they were my friends and were there to help me. I'm no legal expert, so maybe entrapment is not the right word, but there is no doubt that they tricked me. The judge in my case said the Forest Service agents used "subterfuge" against me.

I'm not a dumb fellow, so if I had had any reason to believe I might be in trouble with the law or the Forest Service, I certainly would not have waltzed right in to their office and started speculating about where Robert and I might have ridden after we got lost. My attorney's office is right down the street from me, and I would at least have asked him what my rights were.

So when I found out that they were going to prosecute me for driving my snowmobile into the wilderness area, I told them flat out that there was no way in the world I was going to admit I had committed a crime. I have never been a criminal and I wasn't going to admit to committing a crime – if you can even call it a crime in the first place.

Even though they had betrayed my confidence, the Forest Service employees tried to make nice and say they would charge me with only a small fine. Maybe they were using more "subterfuge" because they couldn't have known that for certain.

First of all, they could not assure me that I would only pay a small fine because the crime they charged me with carried a maximum penalty of a \$5000 fine and six months in prison. Even if a small fine was all that they wanted, they weren't the ones who would try me in court and sentence me if I was found guilty. The prosecutors and judge would make those decisions.

Second, I later learned from my attorney and from my friends in law enforcement that the Forest Service agent who charged me that day had told several people that the Forest Service was in fact going to push for the maximum penalty. He was getting near retirement and was bragging that the final feather in his cap would be "taking down Bobby Unser." It's hard to believe that he was talking about me like I was Al Capone. He was treating me like I was some kind of outlaw, but I had never had a problem with the law in my life. I now have a criminal record because of this bad law, but I had no criminal record before. No law-abiding, hard-working, taxpaying American should be treated that way.

My reputation and relationship with law enforcement at all levels was sterling. I probably knew just about every member of the Rio Arriba County Sheriff's Department and New Mexico State Police that worked in my area. For years, I had let them use my place in Chama as an unofficial operating base against drug smugglers and other real criminals. I had some very high-tech radio equipment there that they could use to monitor the bad guys' communications and to make sure the bad guys couldn't do the same to them.

Given my clean background and the nature of the charges against me, there was no way that I was going to plead guilty to a federal crime. I told the Forest Service agents who charged me that I would fight this to the end, and that's exactly what I did.

I want to point out that once I was safe and the U.S. Forest Service had decided to prosecute me, they began sending a helicopter out, day after day, to fly over the area where Robert and I had been lost. They were looking for my snowmobile because they wanted to prove that I had entered the wilderness area so they could convict me. But even though the weather was clear with little wind the second day we were lost, the Forest Service never flew their helicopter in there one time to look for me when Robert and I were fighting to stay alive.

My trial never attempted to get to the truth of my case. In fact, it seemed like the American justice system had been turned on its head. I didn't have a jury trial because the maximum penalty for my crime was less than a year in prison, and rather than the government having to prove my guilt, I essentially had to prove my innocence. That didn't make a bit of sense to me. What kind of American law requires the person accused to prove his own innocence? Why should I – who nearly died in a ground blizzard – have to show that there was a “necessity” for me to enter the National Wilderness? I was fighting for my life for two days in sub-zero temperatures and didn't know whether I had entered the wilderness area or not. What proof was I supposed to offer?

I carefully described Robert and my story to the judge, assuming that the act of trying to save our lives would prove a good enough need to justify our actions whether we actually entered the wilderness area or not. This didn't turn out to be the case. The government presented evidence from Robert Martin, a heavy equipment operator who did work on contract for the U.S. Forest Service, which supposedly showed we had wrongfully crossed into the National Wilderness. He made several estimates on maps of where we might have gone after the ground blizzard got us lost, but never offered any proof of our whereabouts. In fact, he twice referred to his determination of our location as a “guess.” In attempting to find my snowmobiles after the incident, Martin also admitted that he had trouble retracing my estimated path and claimed that his own sense of direction was off by at least 80 degrees. How could this evidence support a criminal case against anyone?

It turns out that it hardly mattered, however, because of the nature of the law itself. It seems that because the law was “strict liability,” the government hardly had to prove anything at all. Under strict liability laws, the government doesn't need to show that the defendant intended to do something wrongful, something illegal, or even knew that he was violating the law. In my case, the government used this to its advantage. Once it presented even completely unclear and unreliable testimony that I might have driven into the National Wilderness, the prosecutor put the burden on me and my attorneys to prove that I had not actually entered the wilderness or that I had a true need to be in that wilderness. Despite our best efforts to present a convincing case on those two points, the judge convicted me, mostly because the law was so stacked against me. In the court of common sense I was as innocent as could be, but in this court of law I was a convicted criminal.

I appealed this matter up the ladder hoping to draw attention to the absurdity of the law and the unfairness of its application to defendants. Perry Pendley, an attorney with the Mountain States Legal Foundation, was so outraged when he heard about my case that he agreed to handle my appeals at little cost to me. He had handled similar cases, so I agreed. The federal court of appeals in Denver, however, upheld my conviction, and the U.S. Supreme Court refused to hear my case. If someone with the ability and help I had to fight this case could make so little headway against the government, then it will be completely impossible for most people charged under bad laws like this to defend themselves.

The long and short of it is that what happened to me was wrong. It should not happen to me, and it should not happen to anyone else in America. The Forest Service made a mistake in charging me. The judge at my trial made mistakes, including using the wrong scale of the little map he used to “measure” and try to plot out where he thought my snowmobile was found. And because the law Congress created was so unclear, the appeals court basically had no choice but to agree with the trial judge that the law was strict liability and that the government did not have to prove that I had any criminal intent to enter the National Wilderness in order to convict me.

Laws should not be written so that the government can prosecute us for things we have no idea are illegal or wrong. There was nothing I could have done on that day to keep from becoming a criminal short of staying at home in my house. Lord knows there are probably laws that the government could use to make me a criminal in my own home as well.

Given how bad the situation currently is, my request to you, Members of Congress, is that you will make the changes that this non-partisan group of organizations is recommending. Real criminals – those who intentionally commit robberies, burglaries, and violent crimes – should be properly punished. No one disputes that at all. But Americans who are working to do the right thing and stay out of trouble should not be caught up in these traps of overcriminalization.

Right now, it is way too easy for the government to convict me or another American for acts that no one would recognize as criminal. I, thank God, did not get any jail time for my offense. Someone else in my position without as many resources or as good an attorney could very well have spent six months in jail. That’s not right. That’s not just. And that’s not the way that our criminal justice system should be if we want it to stay the best in the world.