



January 19, 2016

**S.2298, the *Mens Rea* Reform Act of 2015
Will Adversely Impact the Most Vulnerable Populations**

Dear Senate Judiciary Committee Member:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, we write to express our concerns with S. 2298, the “Mens Rea Reform Act of 2015” and its consideration as a part of sentencing reform legislation currently pending in the Senate. The proposal would make radical changes to existing law, by redefining the definition of “knowingly” and undermining the ability of the government to prosecute many significant corporate crimes, including crimes that put public health, safety, and the environment at risk. Moreover, this proposal fails to address the problem of mass incarceration or “over-criminalization” in any meaningful way.

There has been a growing desire to address what some believe has been a rise in federal criminal statutes and regulations that carry criminal penalties, an issue often referred to as “over-criminalization.” While this growing concern may have merit, proponents of “*mens rea*” reform have drawn the improper conclusion that in order to address the number of criminal penalties that exist within federal statutes and regulations, we must also implement sweeping reforms that would create an automatic “intent standard” or “*mens rea*” for certain federal offenses and regulations that carry criminal penalties.

The Leadership Conference believes that Congress should not legislate to solve a “problem” for which no demonstrable evidence suggests actually exists. In fact, much of the evidence proponents of reform use to support their position is anecdotal and does not present a clear case for how a lack of “*mens rea*” has led to an increase in the federal prison population or prison spending. Thus, in order to fully understand the scope of the “problem” of over-criminalization and the need for “*mens rea*” reform, we must take a reasonable first step to study the issue and require the government to make a full accounting of all of the federal statutes that carry criminal penalties and do not already specify a clear standard of intent. This important first step is already incorporated as a provision in the Sentencing Reform and Corrections Act of 2015. Without this full accounting, we cannot have a full and thorough debate on the merits of the current reform proposal.

Further, there is no evidence to suggest that current federal statutes or regulations are not already specifying, or incorporating by reference, a clear standard of intent that one must follow in order to be held accountable for violating federal law. In fact, the vast majority of federal criminal prosecutions that could be impacted require the government to prove some level of knowing or willful conduct as prescribed by statute or case law. Strict liability offenses are rare in federal prosecutions, and are generally misdemeanors that lead to zero

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prison time. Regulatory crimes constitute only a tiny part—.08 percent—of the federal prison population.ⁱ Proponents of various “*mens rea*” proposals have not demonstrated their need and have not provided any analysis or assessment of the impact they would have on our critical regulatory and legal protections.

More importantly, these proposals are not grounded in the type of weighty evidence that undergirds the sentencing and prison reform provisions of the Sentencing Reform and Corrections Act. They do not address the aspects of the federal criminal justice system that are the drivers of mass incarceration and racial inequality and should not be included in the sentencing reform legislation currently pending in the Senate. Unlike this proposal, the bipartisan sentencing reform legislation is aimed at addressing the principal legacies of the “War on Drugs” and the major drivers of over-criminalization in the federal prison system, including the application of mandatory minimums and misguided policing and prosecutorial discretion. These policies resulted in mass-incarceration that has disproportionately impacted poor communities and communities of color and their families. While we agree that “*mens rea*” as a concept is an important issue that needs to be discussed, especially in the context of drug crimes, an issue that this bill does not address, we cannot do so at the expense of protecting the nation’s most vulnerable communities.

S.2298 would make it much more difficult to enforce bedrock regulatory safeguards – such as environmental, health, financial, and consumer safety protections – and leave poor communities and communities of color disproportionately vulnerable to kinds of problematic business practices that exacerbate existing inequality in our communities. For example, S.2298 would negatively impact statutes and associated regulations that have existing “*mens rea*” requirements (e.g., Clean Air and Clean Water Acts, Food, Drug, and Cosmetic Act, National Highway Traffic Safety Act, Occupational Safety and Health Act) and those that have “*mens rea*” requirements read into them by courts (e.g., insider trading, mail fraud, and wire fraud). The bill would also weaken misdemeanor strict liability violations where no “*mens rea*” requirement exists. (for example, portions of the Food, Drug, and Cosmetic Act punish as a strict liability misdemeanor the sale of food and drugs that are “adulterated,” including contaminated foods and non-sterile drugs or medical devices. 21 U.S.C. § 333(a)(1)).

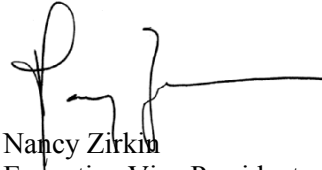
Additionally, the proposal would primarily apply in white collar criminal cases, in industries where applicable health, safety, and environmental statutes are interpreted by regulations or guidance that define, with specificity developed through rulemaking and judicial review, prohibited acts or omissions. Under a default “*mens rea*” standard that elevates violations to knowing or willful violations, prosecution would be precluded in most cases. Any effort to weaken federal laws that protect consumers and the environment is of serious concern to the civil and human rights community.

We commend the Judiciary Committee for taking up the critical issue of mass incarceration and applaud the efforts to forge a bipartisan consensus and produce the Sentencing Reform and Corrections Act of 2015. However, we are extremely troubled that the committee’s strong bipartisan efforts could be thwarted by the unrelated and partisan issue of “*mens rea*” reform. We look forward to working with Members of Congress to address the true drivers of mass incarceration and “over-criminalization” in the federal criminal justice system and urge them to focus their efforts on passing the Sentencing Reform and Corrections Act of 2015. The unrelated issue of *mens rea* reform as it is currently being debated should not be considered as part of any criminal justice reform legislation being considered in the Senate. If you have any questions, please contact Counsel Sakira Cook at (202) 466-3311 or cook@civilrights.org.

Sincerely,



Wade Henderson
President & CEO



Nancy Zirkin
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ⁱ See Inmate Statistics at https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp