Prepared Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Judiciary Committee
Hearing on The Adequacy of Criminal Intent Standards in Federal Prosecutions
January 20, 2016

The American people are calling out for sentencing reform. In October, the Judiciary Committee reported a bipartisan reform bill by a vote of 15-5. That bill focuses on sentencing reform and wouldn't change any substantive provision of federal criminal law. The bill has broad support from countless organizations from all over the political spectrum, including the NAACP, Americans for Tax Reform, the Leadership Conference for Civil and Human Rights, and Justice Fellowship.

But there are members in both chambers who have decided to oppose any reform that does not make a far-reaching and substantive law change to mens rea, or criminal intent. They insist on this even though there are leading outside supporters of mens rea reform who have made it clear that they favor the reform bill without it. Today's hearing is an effort to try to get to the bottom of this issue.

Normally, but not always, a person charged with a crime must not only commit a prohibited act, but act with a guilty mind. Just last year, the Supreme Court repeated that mens rea means the defendant has knowledge of the facts that constitute the offense, not knowledge that his conduct was illegal. Ignorance of the law is no excuse. Despite statements in the press and elsewhere, mens rea is entirely separate from unawareness of laws.

For more than a century, though, the Supreme Court has upheld some crimes that do not require intent. These tend to be regulatory crimes. For instance, the Food, Drug and Cosmetic Act imposes criminal penalties, including short jail sentences, on companies and individual executives of companies that sell contaminated food or drugs. The law requires that a supervisor prevent violations, even if he is unaware of them.

Strict liability food prosecutions have had their desired results. According to an article in the Wall Street Journal that I will also place in the record, they have "sparked greater awareness in corporate boardrooms[,] and many companies have stepped up efforts to bolster food safety."

But there are some who say that this is a problem. Last December, the House Judiciary Committee passed a revolutionary mens rea bill by voice vote. A similar bill is pending before this Committee. It is worth asking what problem these bills seek to solve.

Many of my constituents express concern about severe prison sentences, and they want to try to reduce recidivism. No one ever tells me that it is too easy to send corporate executives to jail for fraud or selling poisonous food or polluting the environment. Just the opposite. The anecdotes that are raised to suggest that any ordinary citizen can be found guilty of a federal crime without any showing of intent just don't hold up.

I will put into the record court documents that show that auto racer Bobby Unser as well as an individual who dumped waste down a drain were not convicted without intent. Mr. Unser was convicted of riding his snowmobile in a federal wilderness area, after a two-day trial in which the judge found that the facts did not support his defense. And it isn't the case that an 11-year-old girl was fined for rescuing a woodpecker. If these scenarios are the best that mens rea reformers can come up with, it makes you wonder what really is going on.

Since strict liability crimes do not set forth a state of mind, the House bill would change all of them to require that the defendant act "knowingly." That would jeopardize public health and safety.

The bill seems to impose a default mens rea even if the Supreme Court had read such a requirement into a statute that lacked it. And it might actually reduce mens rea where the Court had read into a particular statute lacking mens rea a requirement that the defendant act "willfully." That is, where he acted with knowledge that his conduct is illegal, a higher standard than "knowingly."

Even if the default "knowing" requirement were met, under the House bill, if the defendant's conduct was not also such that a reasonable person would believe it to be unlawful, the government would have to prove that the defendant knew or had reason to know it was unlawful. That would make ignorance of the law a defense. This provision has nothing to do with a guilty mind. It could give wrongdoers an incentive not to know the law. And it could allow wealthy prospective defendants to buy legal opinions stating that a reasonable person would not find their conduct to be unlawful.

The Senate bill poses its own difficulties. With certain exceptions, it requires that where any element of an offense lacks a specific state of mind, the government must prove that the defendant acted "willfully" with respect to that element. Where a statute specifies one state of mind, the bill would apply that state of mind to all elements. It might not matter that the Supreme Court had read mens rea into the statute, if that intent requirement was lower than "willfully," no matter how strong the reasons for the Court's ruling. The bill could supply endless arguments to defense attorneys to argue in litigation that would take many years to resolve.

Both bills apply retroactively.

These bills would make far-reaching changes to our criminal laws. They would apply to thousands of offenses and elements. They would apply to some violent offenses and sex offenses as well. They would make securing convictions harder, almost across the board. They would make it harder to obtain plea agreements and just sentences.

In reality, criminal intent must vary from statute to statute. The Supreme Court in its wisdom has never adopted any absolute rules for criminal intent. The issues are too varied and complicated.

Does anyone know the ramifications of imposing a default mens rea to a gigantic and undefined number of existing criminal laws? That is why the reform bill contains a sensible provision directing the Attorney General to provide us with a list of all criminal statutes, the number of prosecutions brought under them, and their mens rea. And it directs federal agencies to collect the same information with respect to regulations imposing criminal penalties.

The bills before us reflect deep contradictions. Many of the same people who complain that there are so many criminal laws that no one can possibly know them support bills that would amend all those laws without any knowledge of those laws, how they work, and what effect these bills would have on them. Many who think it is unfair that a corporate executive might have to serve jail time for a misdemeanor don't think it's much of a problem that indigent people in this country every day are convicted of misdemeanors without having an attorney appointed for them. A number who support automatic retroactivity to reduce criminal liability for corporate executives oppose our reform bill's discretionary retroactivity for defendants who now face very long mandatory minimum sentences and who could petition a judge for a shorter sentence under that bill.

These are questions of priorities.

Having said that, I am willing to continue to look for ways to find common ground with my colleagues. For instance, maybe Congress could do a better job and be clearer about mens rea in the future. A default rule that applied an intent standard to crimes enacted in the future, where we would know exactly who we are affecting, might be worth discussing. Or perhaps we could look into a distinction between Congress passing a future strict liability crime and agency bureaucrats issuing regulations that impose strict liability criminal penalties. And, of course, I would be open to making changes to specific existing statutes where the intent requirement is missing or unclear.

Finally, I could also imagine codifying the rule of lenity. That is a well-established judicial rule of statutory construction under which ambiguities in criminal statutes are read in the defendant's favor.

But we don't have a great deal of time to reach a possible compromise.

I am pleased that we have a distinguished panel of witnesses today, including the Assistant Attorney General for the Criminal Division, Leslie Caldwell, and a former Attorney General, Edwin Meese.

I think there is a good deal of educating on this complicated subject that is necessary, and I look forward to their testimony.