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THE ADEQUACY OF CRIMINAL INTENT STANDARDS
IN FEDERAL PROSECUTIONS

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WEDNESDAY, JANUARY 20, 2016

United States Senate,
Committee on the Judiciary,
Washington, D.C.

The Committee met, pursuant to notice, at 10:01 a.m.,
in room SD-226, Dirksen Senate Office Building, Hon. Chuck
Grassley, Chairman of the Committee, presiding.

Present: Senators Grassley, Hatch, Cornyn, Lee,
Tillis, Leahy, Durbin, Whitehouse, Klobuchar, and
Blumenthal.

OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S.
SENATOR FROM THE STATE OF IOWA

Chairman Grassley. Thanks, everybody, for
participating. And for the benefit of the audience, Senator
Leahy, the Ranking Member, is not here because he is at the
Agriculture Committee for the nutrition bill that is being
voted out of Committee this morning. And since I am a
member of that Committee, after I give my opening statement,
I am going to go over there for a short period of time to
help make a quorum. So I hope everybody understands that
that is not a signal that I am not interested in this issue
before us this morning.

1 I thank everybody for participating. I am going to
2 give what is a relatively short statement today compared to
3 what I was going over last night, and then I will put that
4 longer statement in the record.

5 The American people are calling out for sentencing
6 reform. In October, our Committee here reported a
7 bipartisan bill by a wide margin. That bill would not
8 change any substantive criminal law. The bill has broad
9 support.

10 But some oppose any sentencing bill that does not make
11 far-reaching changes to substantive criminal law change
12 known as "mens rea."

13 Normally, but not always, a person charged with a crime
14 must not only commit a prohibited act, but act with a guilty
15 mind. Just last year, the Supreme Court repeated that mens
16 rea does not mean that the person knows the law.

17 For more than a century, however, the Supreme Court has
18 upheld some crimes that do not require intent. These tend
19 to be regulatory crimes, such as food contamination. Strict
20 liability food prosecutions have had their desired results.
21 The Wall Street Journal recently reported--and I will put
22 this article in the record--that these laws and court
23 determinations have "sparked greater awareness in corporate
24 boardrooms[,] and many companies have stepped up efforts to
25 bolster food safety."

1 Last December, the House Judiciary Committee passed a
2 revolutionary mens rea bill. A similar bill is pending
3 before this Committee. It is worth asking what problems
4 these bills seek to solve.

5 My constituents never tell me at my town meetings that
6 it is too easy to send corporate executives to jail for
7 fraud or selling poisonous food or polluting. In fact, if
8 the issue comes public option, it is the opposite. The
9 anecdotes that are raised to suggest that any ordinary
10 citizen can be found guilty of a Federal crime without any
11 showing of intent just do not hold up.

12 I will put in the record court documents that show
13 that.

14 [The documents follow:]

15 / COMMITTEE INSERT

1 Chairman Grassley. If these scenarios are all that
2 mens rea reformers can offer, it makes me wonder what is
3 really going on. The House bill would change strict
4 liability crimes to require mens rea. And even if the
5 defendant acted knowingly in such cases, the Government
6 would have to prove that a reasonable person would believe
7 their conduct to be unlawful. That would make ignorance of
8 the law a defense.

9 This provision has nothing to do with a guilty mind.
10 The Senate bill in various circumstances would apply a
11 willfulness default state of mind to each of the elements of
12 an offense.

13 The bill would also excuse ignorance of the law and
14 generate vast litigation. Both bills apply retroactively.
15 They would apply to thousands of offenses and elements
16 including some violent and sex offenses. They would make it
17 harder to obtain convictions, pleas, and just sentences.

18 In reality, criminal intent must vary from statute to
19 statute. The Supreme Court has never adopted any absolute
20 rules for criminal intent. The issues are too varied and
21 complicated to apply a blanket rule to enormous numbers of
22 laws.

23 Our reform bill sensibly creates an inventory of crimes
24 and their required mental states and facts surrounding
25 prosecutors under those laws. But the bills before us

1 reflect deep contradictions. Many who complain that no one
2 can possibly know all the criminal offenses favor sweeping
3 changes to them without any knowledge of those laws, how
4 they work, or what effect these bills would have on them.

5 Sometimes there is more sympathy for executives who
6 face jail for misdemeanors than for indigents who are jailed
7 without legal representation, and I have spoken to that
8 latter point quite a bit as something we need to be working
9 on.

10 Many who support automatic retroactive eliminate of
11 executive sentences oppose the reform bill's discretionary
12 retroactive reduction of very long mandatory minimum
13 sentences.

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

1 But we do not have a great deal of time to reach a
2 possible compromise. We have a distinguished panel of
3 witnesses today, including the Assistant Attorney General
4 for the Criminal Division, Leslie Caldwell, at the table,
5 and former Attorney General Edwin Meese.

6 I think there is a good deal of education on this
7 complicated subject that is necessary, and hopefully this
8 Committee will bring some attention to it.

9 [The prepared statement of Chairman Grassley follows:]

10 / COMMITTEE INSERT

1 Chairman Grassley. I will call on Senator Durbin at
2 this point, and I would ask either Senator Durbin or Senator
3 Cornyn to introduce our with if I am not back in time to do
4 that. Go ahead, sir.

5 OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S.

6 SENATOR FROM THE STATE OF ILLINOIS

7 Senator Durbin. Thank you very much, Mr. Chairman, and
8 thank you all for attending this important hearing.

9 This bill has not received a lot of attention, but it
10 should. What is being called for in this bill is a dramatic
11 change in criminal prosecution in America. It affects such
12 a wide variety of criminal laws that it really is impossible
13 even in this hearing to go through them and to do it
14 justice, if you will forgive me for the use of the term.
15 But we tried, as Senator Grassley said, to include an index
16 of crimes in our criminal justice reform bill so we can
17 start the conversation about where and which statutes we
18 have spelled out what criminal intent and knowledge is
19 required and where others may be silent.

20 Now, the courts, as Senator Grassley said, have over
21 the years inferred the requirement of a criminal mind, this
22 criminal intent knowledge in crimes. What the Hatch default
23 mens rea does is to say in many circumstances that, absent a
24 specific requirement of knowledge, they are going to infer
25 one.

1 I commend to you the testimony from the Assistant
2 Attorney General, Leslie Caldwell, and I ask you to please
3 read it carefully, because it goes into specifics, and I
4 think that is where this goes from the lofty textbook
5 hornbook argument down to the real world of crime and
6 justice.

7 Example: In the year 2008, ten terrorists decided to
8 attack Mumbai in India. They set fire to a hotel. You may
9 remember the scenes. At the end of the day, 164 people
10 died, 308 were wounded. Among the 164 victims were 4
11 Americans. Ms. Caldwell in her testimony makes reference to
12 18 U.S.C. 2332. This Federal statute criminalizes murder of
13 U.S. nationals outside of the United States. If the Hatch
14 bill, the default mens rea legislation, is enacted,
15 prosecutors would be required to prove that those terrorists
16 knew--knew--that the victim was a national of the United
17 States of America. Imagine that challenge and that burden.

18 Now, there are State statutes across America on
19 statutory rape, and they basically say knowledge that the
20 victim was under the age of 18 is not required. We are so
21 intent on protecting victims in that circumstance that we do
22 not require the knowledge. It is a strict standard. Now,
23 that is not a Federal law. It is a State law. But it is a
24 good analogy.

25 We have laws, for example, referred to in Ms.

1 Caldwell's testimony, 18 U.S.C 111, banning assault,
2 resisting, or impeding Federal officers or employees, and
3 1114, prohibiting killing Federal officers engaged in their
4 duties. There is no explicit mens rea requirement in either
5 statute. If the Hatch default mens rea standard applies,
6 prosecutors would have to prove that a defendant knew that
7 the officer he or she assaulted, resisted, impeded, or
8 killed was a Federal officer.

9 The third illustration I would like to use, in the area
10 of sexual exploitation of children and production of child
11 pornography, Ms. Caldwell's testimony spells it out. Every
12 Federal appellate court to have considered this issue has
13 held that prosecutions under 18 U.S.C. 2251 criminalizing
14 the sexual exploitation of children--excuse me, excuse me--
15 and the production of child pornography, the defendant's
16 knowledge of the age of the minor is not a required element
17 of the offense. The Hatch default mens rea changes this, ad
18 now the prosecutor has to prove knowledge of the exploiter,
19 knowledge of the person selling the child pornography, that
20 the victim was, in fact, under age.

21 This is significant, as you can tell. References have
22 been made to corporate responsibility, and that is part of
23 this as well, questions about whether the adulteration of
24 food should be held to strict liability. In other words, if
25 someone is distributing cantaloupe that has been

1 contaminated with Listeria and they have failed to do their
2 ultimate best to protect consumers, the question is did they
3 have to have knowledge of a Listeria or the fact that they
4 did not follow the ordinary course of business in keeping
5 their product sterile and non-adulterated has been
6 established.

7 This is a big leap in criminal law. It is a huge leap.
8 And it is the reason why this Hatch amendment, this Hatch
9 default mens rea, has been resisted by police and
10 prosecutors and our Department of Justice here.

11 Think twice. This would create a chaotic situation.
12 We may and should accept the responsibility to look at
13 individual statutes, to make sure we are explicit where we
14 need to be. But to do this across the board is to invite a
15 chaotic outcome. I hope that we do not choose to take that
16 course.

17 At this point, I would yield, and I think Senator Hatch
18 is also going to be the Chair of the Committee at this
19 point.

20 Senator Hatch. [Presiding.] Well, thank you, Senator
21 Durbin.

22 Let me just say that our first witness is Leslie
23 Caldwell. Ms. Caldwell serves as the Assistant Attorney
24 General for the Criminal Division at the U.S. Department of
25 Justice. And as head of the Criminal Division, Ms. Caldwell

1 oversees nearly 600 attorneys who prosecute Federal criminal
2 cases across the U.S. and helps to develop criminal law
3 enforcement policy and formulate criminal enforcement
4 policy. Previously, Ms. Caldwell, worked as a partner at
5 Morgan, Lewis & Bockius. Ms. Caldwell has her undergraduate
6 degree in economics from Pennsylvania State University and a
7 law degree from George Washington University Law School.

8 So, without further comment, I think we will turn to
9 you and take your testimony, Ms. Caldwell. Welcome, and we
10 are glad to have you here.

1 STATEMENT OF THE HONORABLE LESLIE R. CALDWELL,
2 ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION,
3 U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

4 Ms. Caldwell. Thank you, Senator Hatch. Thank you,
5 distinguished members of the Committee, for the opportunity
6 to appear this morning to provide the perspective of the
7 Department of Justice on potential reforms to the Federal
8 criminal codes concerning mens rea requirements. This issue
9 and today's hearing is of very great importance to the
10 entire Department of Justice and our prosecutors. We have
11 very grave concerns about possible enactment of an across-
12 the-board default mens rea standard that will serious harm
13 our basic ability to prosecute a wide array of Federal
14 crimes.

15 The establishment of a default mens rea standard for
16 all existing Federal criminal laws would not be a narrow
17 change. It would unleash sweeping changes across the entire
18 United States Code. It would create massive uncertainty in
19 the law, would undermine the enforcement of many criminal
20 laws, would allow defendants charged with serious crimes
21 such as some of the ones Senator Durbin mentioned--
22 terrorism, violent crime, child exploitation, major
23 corporate fraud--would allow those defendants to tie up the
24 Federal courts in extensive litigation and potentially even
25 escape liability for some of our most serious crimes.

1 There is simply no need for a sweeping one-size-fits-
2 all mens rea. The vast majority of Federal criminal
3 statutes already require the Government to prove beyond a
4 reasonable doubt some level of mens rea for at least one
5 element of the crime, whether expressly or as a matter of
6 binding judicial precedent. However, the pending proposals
7 in both the House and the Senate would apply a default mens
8 rea standard to a wide array of existing Federal criminal
9 laws, affecting many statutes that do not contain an express
10 mens rea requirements. Senator Durbin mentioned some of
11 those.

12 For example, in the national security realm, it is a
13 crime to murder U.S. nationals outside the United States,
14 such as happened in the Mumbai attacks. If the pending
15 legislation is enacted, prosecutors could be required to
16 prove that a terrorist knew that the person he was
17 intentionally bombing and killing was a U.S. citizen. That
18 would be extremely difficult, if not impossible, to
19 establish.

20 Also, it is a crime to assault Federal employees and it
21 is a crime to kill Federal officers engaged in the
22 performance of their Federal official duties. There is no
23 explicit mens rea requirement in either of those statutes.
24 If a default standard were applied, prosecutors would have
25 to prove that the defendant knew that the person who they

1 intentionally assaulted or deliberately killed was a Federal
2 officer.

3 Likewise, every Federal appellate court to have
4 considered the issue has found that, in child exploitation
5 cases and production of child pornography, the defendant's
6 knowledge that the child was under the age of 18 is not a
7 required element of the offense. Contrary to that well-
8 settled precedent, a default mens rea standard would force
9 the Government to prove in every prosecution that the
10 defendant not only exploited the child but knew that the
11 child was under 18.

12 These are just a few examples of the potential havoc
13 that a default mens rea provision could wreak.

14 Proposals for a default mens rea provision also would
15 severely weaken important statutes that are critical to
16 protecting the health and safety of the general public, for
17 example, those that punish the sale of contaminated foods or
18 adulterated drugs. These adulterated drugs and contaminated
19 foods have sickened and killed people. In one of the
20 examples that Senator Durbin mentioned, the cantaloupes that
21 were not adequately cleaned, 33 people died, and another 147
22 people were hospitalized as a result of that.

23 Mr. Chairman, an across-the-board mens rea standard
24 would seriously undermine important prosecutions. However,
25 the Department is willing to work with the Committee on any

1 concerns that the members have regarding specific criminal
2 statutes. And we support the proposal that would require an
3 inventory, a review of existing Federal criminal laws, and
4 the identification of laws that lack a mens rea requirement
5 so the concerns about those specific statutes can be
6 addressed on a statute-by-statute basis.

7 And, finally, we hope that the debate regarding mens
8 rea that is ongoing here today and on other days does not
9 prevent passage of what we agree with the Senate and the
10 House is critical sentencing reform legislation.

11 Thank you again for inviting the Department to attend
12 this hearing. We appreciate the opportunity to discuss
13 criminal code reform, and I am happy to answer any questions
14 that you might have.

15 [The prepared statement of Ms. Caldwell follows:]

1 Senator Hatch. Well, thank you, Ms. Caldwell.

2 As I understand it, Senator Cornyn is first.

3 Senator Cornyn. Thank you, Mr. Chairman.

4 I want to express my appreciation to Chairman Grassley
5 for convening this hearing. I think this is really
6 important. It may be a topic that only lawyers love, but it
7 has broad application and implications to our criminal
8 justice system in America.

9 I share Senator Hatch's concerns about the promulgation
10 of regulations and the passing of laws that seem to
11 eliminate any sort of mens rea requirement. And while I am
12 conscious of the concerns that have been raised here about
13 doing something categorically, I do think this is a serious
14 issue, and I know Senator Hatch's heart is in the right
15 place even if the legislation he has introduced may end up
16 being modified to some extent.

17 But here is the practical challenge I think we have.
18 Senator Durbin and I have discussed the fact that we
19 actually have a piece of legislation that has passed the
20 Senate Judiciary Committee 15-5, criminal justice reform
21 legislation built on prison reform that has proven effective
22 in States like mine as well as sentencing reform, which this
23 package has gained the support of a number of prominent
24 people in the law enforcement community, including former
25 Attorney General Mukasey, among others, and the FBI

1 Director, I believe the Deputy Attorney General, Ms. Yates,
2 and others. And I worry that if we begin to add additional
3 things to that legislation, it is going to weigh it down to
4 the point where we will not be able to pass anything this
5 year. And of all the things I look at where we might be
6 able to do some good in terms of criminal justice reform, I
7 think we do have a small window of opportunity here.

8 So my concern is I share the concerns that Senator
9 Hatch has and I believe Chairman Goodlatte in the House has.
10 I do believe the House is going to pass legislation which
11 does include some mens rea requirement, and whether or not
12 the Senate version has it in there, we are going to have to
13 deal with this issue at some point along the way anyway, in
14 a conference committee, assuming we can get this done out of
15 the Senate.

16 So it seems to me that there are a couple things we
17 might want to consider doing, and I appreciate Ms.
18 Caldwell's offer for the DOJ to continue to consult with us
19 and talk about something that might make sense in terms of a
20 compromise. But it seems to me that if we made this
21 requirement, rather than retroactive, if we made it
22 prospective, if we amended the Administrative Procedure Act
23 that said that any agency regulation which did not include
24 an explicit mens rea requirement would be subject to attack
25 in court under the Administrative Procedure Act, something

1 like that, we might find some middle ground that would
2 address the concerns that Senator Hatch has raised, which I
3 agree with, but also deal with the practical challenges that
4 we face given my desire and I believe there is broad
5 bipartisan and bicameral desire to actually do something in
6 the criminal justice reform space this year. Certainly the
7 President wants to do that, and I think we ought to try.

8 The other alternative I would just respectfully suggest
9 is that Senator Gary Peters and I, among others, have
10 introduced legislation which would actually create a
11 commission to study the huge variety of issues that arises
12 in our criminal justice laws which are not being addressed
13 by our criminal justice reform bill. In other words, we
14 touch on prison reform, and Senator Lee and Senator Durbin
15 have been our main advocates on addressing the sentencing
16 reform issue.

17 I think there are a lot of other issues in our criminal
18 justice system that bear looking at by a commission with
19 experts that have more time and perhaps greater expertise
20 than we have here in the Congress that could report back to
21 us and make recommendations that then we could act on at a
22 future time.

23 So I think as a practical matter, we are going to have
24 to deal with this mens rea issue at some point, whether it
25 is in a conference committee or here in the Senate, Senator

1 Hatch's desire or others' desire to offer it as an amendment
2 to Senate legislation. But as somebody who would like to
3 actually see us get something done on criminal justice
4 reform and who actually agrees with Senator Hatch that this
5 is a genuine issue that needs to be addressed in some
6 fashion or another, I hope we can continue to work together
7 in a way where we can be constructive and find some way to
8 actually accomplish something in this Presidential election
9 year.

10 I do not have any questions at this time, but I will
11 certainly listen and be interested in the testimony. Thank
12 you, Ms. Caldwell.

13 Senator Hatch. Thank you, Senator.

14 Senator Durbin?

15 Senator Durbin. Thank you very much, Mr. Chairman.

16 And let me just second the comments made by Senator Cornyn.
17 And that is rare in this Committee, but I am happy to do it
18 because he and I are of the same mind, along with Senator
19 Lee, when it comes to criminal justice reform. And this has
20 been a long journey, and the journey involved sitting down,
21 all of us, with Senator Grassley and really hearing him out
22 in terms of his misgivings about our original legislation.

23 A dramatic change was made in the legislation, and yet
24 it still served the purpose of criminal justice reform, and
25 as Senator Cornyn has said, we ultimately had a vote of 15-5

1 in the Judiciary Committee, a bipartisan vote to report this
2 to the floor. It includes the original criminal justice
3 reform bill on mandatory minimum sentences, but it also
4 includes reform when it comes to incarceration, which
5 Senators Cornyn and Whitehouse were the leaders on, and we
6 thank them for joining us and making it a common effort.

7 Adding this element to this debate changes it
8 dramatically, and I second the comments of Senator Cornyn.
9 Let us not miss this opportunity, a bipartisan opportunity
10 in criminal justice reform and penal reform, to get this
11 bill done. This is a worthy issue, and the fact that
12 Senator Grassley and I and others have called for the
13 indexing of crimes so that we can sit down and make an
14 assessment statute by statute as to mens rea, that is the
15 responsible way to proceed. But to do a default where you
16 say, absent specific language, this is what we will consider
17 to be the standard, brings up all of these issues that I
18 raised and Ms. Caldwell raised in his testimony.

19 This whole question about child pornography and whether
20 or not we should require proof that the criminal defendant
21 exploiting the child had knowledge that the child was under
22 the age of 18 creates a new defense to the pornographers and
23 one which I do not believe is deserving. It is one that,
24 frankly, we should reject out of hand.

25 The same thing when it comes to terrorism overseas.

1 Can you understand the difficulty of taking a terrorist from
2 Pakistan who has blown up a hotel in Mumbai and trying to
3 set out to prove that he knew there was an American in that
4 hotel as part of the element of the crime? That becomes
5 almost impossible to prosecute, as Ms. Caldwell has
6 testified to earlier.

7 So I would just ask, Ms. Caldwell, my only question:
8 If we establish an index as required under the criminal
9 justice provisions, and in this index start spelling out by
10 statute the mens rea requirements, do you believe that we
11 can work with the Department of Justice to address the
12 questions that have been raised as to whether there should
13 be an inference or specific language when it comes to
14 criminal knowledge?

15 Ms. Caldwell. Absolutely, Senator, and we have agreed
16 that we will do that. We, on the other hand, very strongly
17 oppose the idea of imposing a one-size-fits-all mens rea
18 requirement. Many Federal statutes have mens rea
19 requirements as to certain elements but not as to others.
20 As you correctly pointed out, a default mens rea requirement
21 would cause very extensive litigation in many Federal cases
22 across the board to determine whether the default mens rea
23 provision applies, what it applies to, which elements it
24 applies to, what does it mean.

25 So we are very much opposed to that because we think it

1 will have very significant unintended consequences. We
2 understand that there are certain narrow issues that the
3 Senate is seeking to address, and we are happy to look at
4 the statutes, as you suggested, and consider whether on a
5 statute-by-statute basis it makes sense to make some
6 changes. But an across-the-board change that would sweep
7 the entire criminal code is something that we think is,
8 frankly, a very bad idea.

9 Senator Durbin. Thank you.

10 Thank you, Mr. Chairman.

11 Chairman Grassley. [Presiding.] I am going to do it
12 this way. Normally, I would ask my questions, but I am
13 going to go to Senator Lee and then Senator Hatch, and then
14 I will ask my questions unless somebody comes in on the
15 Democrat side, then we will work them in between. So go
16 ahead, Senator Lee.

17 Senator Lee. Thank you very much, Mr. Chairman, and
18 thanks to all of you who participated in this discussion.

19 When the eventual cosponsors of what ultimately become
20 the Sentencing Reform and Corrections Act began to work
21 together, we did not agree on everything, of course. We
22 still do not agree on everything, but we were able to find
23 areas to agree on, and we were able to recognize and agree
24 upon this as a unique opportunity to reach a rare and
25 bipartisan kind of consensus on the urgent need for criminal

1 justice reform.

2 So we put together a bill that makes some of the most
3 needed improvements to the front and to the back ends of the
4 Federal criminal justice system.

5 I am also a cosponsor of Senator Hatch's Mens Rea
6 Reform Act of 2015. Mens rea reform is not one of the areas
7 on which the cosponsors of the Sentencing Reform and
8 Corrections Act have as of yet found common ground. If we
9 could do so, I would wholeheartedly support including mens
10 rea reform in the broader comprehensive Federal criminal
11 justice bill. But I also do not believe that we should let
12 the lack of consensus in this area serve as any kind of an
13 impediment to the passage of this urgently needed reform on
14 those issues where we do agree, those issues that have been
15 encapsulated in our bill, in the Sentencing Reform and
16 Corrections Act. And so I will support the Sentencing
17 Reform and Corrections Act even if it does not include mens
18 rea reform.

19 I think we do have an obligation to pursue
20 opportunities for reform where we are not irreconcilably in
21 conflict as people with diverse political and ideological
22 beliefs. And I hope today's hearing will help shed light on
23 where agreement might be possible and where agreement might
24 perhaps be less possible.

25 The Supreme Court has interpreted criminal statutes

1 that fail to specify a required mental state by reference to
2 "the basic principle that wrongdoing must be conscious to be
3 criminal." That comes from Elonis v. United States, a 2015
4 Supreme Court ruling, quoting Morissette v. United States
5 itself, a 1952 ruling.

6 Thus, according to the Supreme Court, the general rule
7 is that to be convicted of a Federal criminal offense, a
8 person must have acted with a guilty mind, and this applies
9 regardless of whether the statute explicitly requires such a
10 state of mind. And statutes will be interpreted to include
11 at least that mens rea which is necessary to separate
12 wrongful conduct from otherwise innocent conduct.

13 Now, you noted in your prepared testimony that, "In
14 this way judicial decisions have ensured the necessary
15 limits to safeguard individual liberty." I assume that you
16 agree that Congress could do the same, correct? Congress
17 could do the same as you are suggesting?

18 Ms. Caldwell. Congress certainly has the power to
19 enact statutes, and we obviously do not dispute that. But I
20 think that the idea of enacting a single default mens rea
21 statute that would apply across the board to all Federal
22 criminal statutes, Title 18 and all the other criminal
23 titles, is not the right approach. It will generate a lot
24 of litigation. It will generate a lot of unnecessary
25 litigation. It may also yield the result that defendants

1 who are guilty of very serious crimes may not be
2 successfully prosecuted for those crimes, for example,
3 because they may not have known there was an American in the
4 hotel in Mumbai. They may not have known that carjacking
5 was a Federal crime. And I think that that is the result we
6 are trying to avoid, and we are happy to work with Congress
7 and we pledge to work with Congress to try to focus on
8 specific statutes on a statute-by-statute basis to try to
9 bring those in line with where Congress believes the intent
10 requirement should be for those particular statutes.

11 Senator Lee. Sure, sure. So, for example, if the
12 Court had no default interpretive rule, you would still have
13 to agree, would you not, that Congress might choose to
14 establish such a default for the same reasons?

15 Ms. Caldwell. I think that would be a mistake for
16 Congress to do that, for the reasons that I have said in my
17 testimony.

18 Senator Lee. Because we might be sloppy in how we did
19 it?

20 Ms. Caldwell. Well, I would not use that word, but I
21 do think that there are very--criminal statutes cover a lot
22 of different conduct, and there are a lot of different
23 elements to different statutes. Some have multiple
24 elements; some have one or two elements. There is not a
25 mens rea requirement for every element of every statute. A

1 default might suggest that there now is a mens rea
2 requirement for every element of every statute. That would
3 create a lot of litigation. Whether the defendants would be
4 successful or not would probably vary from court to court,
5 but that would create a lot of litigation, waste a lot of
6 time in the Federal courts, and it could have guilty
7 defendants of very serious criminal conduct escaping
8 liability. So we think that would be a mistake.

9 Senator Lee. Okay. So what about a situation in which
10 Congress might want to set a default mens rea rule that
11 would be more, say, protective of the accused than any rule
12 devised by the court?

13 Ms. Caldwell. I think we would have to talk about
14 particular legislation when we saw it, but I am not sure
15 exactly what you might be referring to, Senator. But I
16 think that we are obviously happy to look at legislation and
17 discuss it with you. But I do not think that, again, a
18 default of any type is the right way to go in this
19 circumstance because of the variety of criminal statutes,
20 the variety of elements. It would make the prosecutors' job
21 and law enforcement's job much more difficult if we had to
22 prove every single element of every single crime that there
23 was intentional violation of every single element, so that
24 you knew the bank was insured by the FDIC when you robbed it
25 or when you engaged in bank fraud, you knew that carjacking,

1 stealing somebody's car was not just a State crime but it
2 was also a Federal crime, you know that the minor was 16,
3 not 19. We would have to prove all those things, and that
4 would increase--it would increase litigation, it would
5 increase the difficulty of prosecution, and it would also
6 increase the risk that people would go free for over serious
7 criminal crime.

8 Senator Lee. Sometimes that can have that effect when
9 we look out for the rights of the accused. I see my time
10 has expired. Thank you, and thank you, Mr. Chairman.

11 Chairman Grassley. Senator Blumenthal.

12 Senator Blumenthal. Thank you, Mr. Chairman. Thank
13 you for having this hearing.

14 Assistant Attorney General Caldwell, earlier Senator
15 Cornyn discussed the possibility of a mens rea requirement,
16 a bill that would establish a default mens rea for statutes
17 enacted in the future. Do you have thoughts on a
18 prospective default mens rea proposal? Would that solve the
19 problems that we have been discussing?

20 Ms. Caldwell. I do not think it would, Senator,
21 because I think that any default mens rea sweeps too
22 broadly. But I also think there are some very specific
23 problems with a default mens rea going forward. For
24 example, Congress frequently amends existing criminal laws.
25 What effect would the default mens rea have on the newly

1 amended criminal law? Would the default mens rea apply to
2 that law, or would it be what had traditionally been applied
3 in that law, whatever the mens rea standard might have been?
4 Or that law, would it still apply, or would the new standard
5 apply? Would it apply to individuals who had already been
6 convicted under that statute?

7 I think it raises a lot of problems and a lot of the
8 same problems that the non-prospective default mens rea
9 raises.

10 Senator Blumenthal. We have heard a lot of criticism
11 on both sides of the aisle about the lack of prosecutions
12 for some of the white-collar crime or corporate crime in
13 connection with the Great Recession which this country
14 endured and a feeling that perhaps justice was not done in
15 the failure to prosecute some of those white-collar crimes,
16 for lack of a better term. Would a mens rea bill--Senator
17 Hatch has offered one just as an example--or other similar
18 legislation undermine the Department of Justice's efforts to
19 encourage prosecution of individual corporate officials who
20 engaged in criminal wrongdoing? And why or why not?

21 Ms. Caldwell. I think the answer to that is clearly
22 yes. The Department has said through statements by Deputy
23 Attorney General Yates, Attorney General Lynch, and others
24 that prosecution of individuals is a very high priority in
25 the corporate context, and that is a very high priority. It

1 is quite challenging to prove that very senior corporate
2 executives were aware of criminal conduct that was going on
3 in their corporations. Oftentimes they may not have been
4 specifically actually aware of the fact that the books were
5 being altered, or whatever the underlying crime is, but they
6 may have been willfully blind to what was obviously
7 happening in their company. They may have consciously
8 avoided knowing the facts. And under the current law, the
9 intent element of the fraud statutes can be satisfied by
10 willful blindness or conscious avoidance.

11 If a default mens rea provision were put in and the
12 standard was that the defendant, the senior corporate
13 executive had--the Government had to prove that he knew that
14 what he was doing or what was happening was illegal, that
15 would make it even more challenging than it already is to
16 prosecute senior corporate executives. So, yes, I think it
17 would be a very damaging provision in the white-collar
18 space.

19 Senator Blumenthal. As a former United States Attorney
20 who has prosecuted under Federal law these kinds of crimes,
21 I would certainly strongly agree with you, and I thank you
22 for your testimony here today. Thank you.

23 Ms. Caldwell. Thank you, Senator.

24 Chairman Grassley. Senator Hatch.

25 Senator Hatch. It sounds to me like you want to be

1 able to convict people even if they did not know that what
2 was going on was wrong. And, yeah, I do not blame
3 prosecutors who want an easy path to convict people, but, my
4 gosh, the almighty Federal Government is just too powerful
5 to give that kind of authority to them. And I want to thank
6 you, Mr. Chairman, for convening this important hearing, and
7 I want to thank the witnesses who will be testifying here
8 today. I would particularly like to thank Mr. Meese, whom I
9 have known for many years and who served with great
10 distinction as Attorney General under Ronald Reagan.

11 Criminal justice reform is a hot topic right now.
12 President Obama mentioned it in his recent State of the
13 Union address. Speaker Ryan has discussed it in his
14 interviews. Countless news articles and op-eds have been
15 written recently on the subject. I think we can all agree
16 that there are infirmities in our prison system and in our
17 criminal laws. Some sentences are too harsh. Some people
18 go to prison who should not. Some people escape prosecution
19 while others face charges for the same exact conduct. And
20 surely there are improvements that can be made in how we
21 prosecute and punish offenders.

22 But it is important to do criminal justice reform the
23 right way. We must not allow the urge to do something to
24 overwhelm the responsibility to do it well. And we should
25 Nation give the almighty Federal Government just total carte

1 blanche to put people in jail or to accuse them criminally
2 if they do not really have the evidence that they actually
3 knew that what they were doing was wrong.

4 In this regard I have expressed significant concerns
5 that the sentencing bill this Committee reported out last
6 fall contains no meaningful provisions to address the
7 decades-long erosion of the crucial criminal intent
8 requirements. Such requirements--and I understand Federal
9 prosecutors want to have an easy time. I do not blame them.
10 It would be wonderful to be able to convict everybody they
11 take to court. But having defended some of those cases, I
12 understand the need to protect the rights of the individuals
13 who are accused.

14 Now, such requirements have long served as a bulwark
15 against unjust prosecution and incarceration of morally
16 innocent actors. Requiring proof of criminal intent
17 protects individuals from prison time and other criminal
18 penalties for doing things they did not know were wrong.
19 Unfortunately, as our Federal criminal code has ballooned in
20 size, our commitment to protecting morally innocent actors
21 from prosecution through criminal intent requirements has
22 shrunk.

23 Today, there are innumerable ways to break the law,
24 many of which require no proof of criminal intent. And so I
25 am glad that this Committee is taking up this important

1 issue, and I have introduced legislation together with
2 Senators Lee, Cruz, Perdue, and Paul to establish a default
3 intent requirement for all criminal statutes and regulations
4 that lack such a requirement. Our bill parallels similar
5 legislation that the House Judiciary Committee reported out
6 by voice vote late last year. The House bill, which is
7 sponsored by members as ideologically diverse as Jim
8 Sensenbrenner, House Judiciary Committee Chairman Bob
9 Goodlatte, John Conyers, and Sheila Jackson Lee shows the
10 default mens rea can and should be a bipartisan issue.

11 Just this morning, Chairman Goodlatte and I published
12 an op-ed in Politico--which I ask to be put in the record at
13 this point.

14 Chairman Grassley. Without objection.

15 [The op-ed follows:]

16 / COMMITTEE INSERT

1 Senator Hatch. Calling on Congress to pass default
2 mens rea. I ask unanimous consent that the op-ed be placed
3 in the record as well as--well, Chairman Goodlatte has also
4 said recently that any deal on criminal justice reform must
5 include mens rea if the deal is to "go anywhere" in the
6 House.

7 I am glad that Chairman Goodlatte has taken a strong
8 stand in favor of mens rea reform, and I urge my colleagues
9 to do the same.

10 I also ask unanimous consent that a letter to the
11 Committee from the National Association of Criminal Defense
12 Lawyers be placed in the record. You cannot just ignore
13 this. This letter responds to the claims some have made
14 that mens rea reform would help only the wealthy or well
15 connected. Give me a break. As the letter explains and
16 then details through a number of examples, "The protections
17 that mens rea requirements afford are not limited to white-
18 collar or corporate defendants." Rather, these protections
19 are a universal and fundamental principle of American law.
20 Like Chairman Goodlatte, I believe that any package of
21 criminal justice reforms that passes Congress must include
22 meaningful provisions to shore up mens rea protection.

23 [The letter follows:]

24 / COMMITTEE INSERT

1 Senator Hatch. Former Attorney General Meese expresses
2 similar sentiments in his written testimony. I would like
3 to close by quoting from his testimony: "Meaningful
4 criminal justice reform comes around only so often....If
5 sentencing reform passes without a meaningful mens rea
6 component, not only will Congress's `criminal justice
7 reform' effort be woefully incomplete, but we will also lose
8 the opportunity we have right now to correct the
9 deficiencies that have crept into our criminal intent
10 standards."

11 Now, Mr. Chairman, my time is up, but could I ask one
12 question?

13 Chairman Grassley. Yes, go ahead.

14 Senator Hatch. Okay.

15 Chairman Grassley. Then we will go to Senator Leahy,
16 and your enclosures are granted.

17 Senator Hatch. Thank you.

18 Ms. Caldwell, does the Department believe there are any
19 problems with current mens rea standards? And is the
20 Department's position that all mens rea provisions in all
21 criminal statutes and regulations are adequate? Do you
22 really believe that?

23 Ms. Caldwell. Senator, the Department recognizes that
24 there are a lot of different criminal statutes with
25 different mens rea requirements.

1 Senator Hatch. Right.

2 Ms. Caldwell. Most statutes, most criminal statutes,
3 and certainly the felony statutes in particular, have
4 explicit mens rea requirements in the statute, or there are
5 judicial interpretations imposing mens rea requirements, or,
6 I should say, interpreting the statute's mens rea
7 requirements. We are certainly happy to take a look at the
8 particular statutes that may be of concern to Congress and
9 the particular mens rea requirements on a statute-by-statute
10 basis. And there may well be some statutes that we would
11 agree with you need to be tweaked or need to be changed.
12 But we do not believe that an across-the-board one-size-
13 fits-all default mens rea requirement is going to address
14 the problem that we think you are seeking to solve, which is
15 a much narrower problem.

16 Chairman Grassley. Senator Leahy, and then Senator
17 Tillis.

18 Senator Leahy. Thank you, Mr. Chairman. And I
19 appreciate that answer. There are those who have been
20 pushing for what they call "mens rea reforms." I have asked
21 them for a list of the criminal statutes they find
22 concerning. Nobody has given us a list yet. I am perfectly
23 willing, as I have said before at meetings, if we want to
24 have an overall review of our criminal code, including mens
25 rea, let us do it. But nobody has come up with a specific.

1 And yet we have got a bill here that has brought together
2 voices from across the political spectrum with the promise
3 of criminal justice reform. It came out of this Committee
4 overwhelmingly.

5 Republicans and Democrats, faith leaders, civil rights
6 organizations, business leaders, law enforcement are calling
7 on Congress to reform our Nation's unfair and fiscally
8 unsustainable sentencing laws. We have made great strides
9 toward that. We reported the Sentencing Reform and
10 Corrections Act that Senator Grassley and I and Senator
11 Durbin and many others here cosponsored. And we got that
12 out, so we could actually pass legislation in the next few
13 weeks that would correct some of these historic problems.

14 Now, this progress could be at risk because some are
15 demanding--without naming specific statutes, they are
16 demanding sweeping changes that make it harder to hold
17 corporations accountable when they sell food that sickens
18 consumers or endanger workers or poison our water supply.
19 And the so-called default mens rea reform effort has been
20 soundly denounced by law enforcement and public safety
21 experts from across the political spectrum. They have a lot
22 of concrete examples.

23 Now, I think criminal statutes should be clearly
24 written. If there are statutes that should be reexamined--
25 nobody has given us a list, but if there is, well, then, let

1 us do it. Let us take up an overall reexamination. I am
2 open to that. Senator Lee, who is a supporter of changes in
3 mens rea, he is open to that. We are willing to do this.
4 But you are not going to solve a complex problem by a
5 simplistic, one-size-fits-all legislation. That kind of
6 thinking caused the crisis of overincarceration, which is
7 sentencing bill is trying to fix. It has darn near
8 bankrupted us, and it has taken money from law enforcement
9 to run the Bureau of Prisons.

10 So we have asked for those who do believe in this, give
11 us a list. Give us a list of which statutes--not a broad
12 brush to just do away with it. Tell us exactly which
13 statutes you are talking about, because I would hope that we
14 are not going to be stymied at a time when we have a chance
15 to have meaningful reform and be stopped by some vague mens
16 rea issue out there.

17 Now, I have been moved by the leadership of Senator
18 Grassley and Senator Cornyn and others who want to pass real
19 criminal justice reform. They have both given me their word
20 that we have not had the sweeping new default standard to
21 our sentencing reform, and I take them at their word. Let
22 us do this, and then let us go ahead and actually take up
23 the overall criminal justice, take up each case where we
24 have mens rea, and decide what we do with it. But we have
25 seen enough deaths, for example, corporations have put

1 poisoned food out, and said, "Well, gee whiz, we did not
2 realize it was poison," when, of course, they should have.
3 People died. We have had so many of these things when
4 people, children, have been crippled, their development has
5 been handicapped because of pollution in the water, for
6 example, and they say, "Oh, golly, I did not realize putting
7 all this through these lead pipes was doing something and
8 crippling these children," to take something at random, say
9 in Flint, Michigan.

10 Let us be specific. If we want to go after mens rea,
11 fine. There are areas we might want to change. But nobody
12 has given me one. And, Mr. Chairman, we know we had an egg
13 producer who did not abide the food safety standards, 2,000
14 consumer illnesses. We had a medical device company that
15 failed to report safety problems with its defibrillators,
16 patients were harmed by that; a food distributor of
17 cantaloupes, 33 deaths, 147 hospitalizations. And I would
18 ask consent that a letter signed by 40 American groups
19 opposed to changing the mens rea be placed in the record.

20 Chairman Grassley. Without objection, so ordered.

21 [The letter follows:]

22 / COMMITTEE INSERT

1 Chairman Grassley. Senator Tillis, then Senator
2 Whitehouse.

3 Senator Tillis. Thank you, Mr. Chair. I am going to
4 be brief. I have got to preside in about 6 minutes.

5 I think I am somewhere between Senator Leahy and
6 Senator Hatch on this issue. I am sympathetic to some of
7 the points that you made. You used the carjacking example.
8 I think that points to a need to better understand how this
9 would apply to all the various statutes.

10 What I am more concerned with--and Senator Leahy
11 reminded me of it--you know, large businesses have dozens of
12 attorneys, they have regulatory affairs organizations, they
13 have compliance organizations, many of which I worked with
14 back in the private sector. I am less concerned with them,
15 although I think we should be careful. I am more concerned
16 with how this weaves into regulatory overreach. We are
17 talking about carjacking. I want to talk about a man who
18 came in as a head engineer to a military retirement home.
19 For 20 years, there had been a practice that--they had had a
20 problem with the plumbing where adult diapers were causing a
21 backup, and actually causing a backup into the hospice floor
22 of this facility. This gentleman came in, and they had been
23 doing this for 20 years. When they had a backup, they would
24 divert I guess from the main drainage to some other drain.
25 They came into a crisis situation. They did the same thing

1 that had been done for 20 years. But, unfortunately, on
2 this man's watch, we found out that it actually ultimately,
3 I think, went into the Potomac. He was charged with a
4 felony, ended up having to plead to a misdemeanor.

5 Now, it seems to me in that case it may have been
6 reasonable to assume that he was not aware of this and he
7 was reacting to a crisis, and yet this man now has a
8 conviction.

9 That is one of several examples of where I think we
10 talk about the regulatory overreach here that could lead to
11 criminal convictions for people who are several layers
12 removed from potentially having the knowledge, particularly
13 if you are talking about a plumber that is a one- or two-
14 person shop and an electrician. Just pick a trade where
15 they are not going to have the luxury of the insights that
16 large corporations would have. That is why I think we need
17 to look at it.

18 But I do think, back to what Senator Leahy said, maybe
19 we need to be a bit more surgical before we go through
20 applying this so that we do not necessary apply it to
21 instances where we think it is not really producing the
22 outcome that we want.

23 So back to Senator Leahy--and this is the only question
24 I will ask because of my limited time. But back to Senator
25 Leahy, how difficult would it be for us to take a look at

1 what has been proposed here by Senator Hatch and the
2 cosponsors and delineate the number of statutes that could
3 potentially be affected by it? You know, I am a consultant,
4 so I have to boil everything down to quadrants or red-
5 yellow-green. Why can't we come back on a fairly quick
6 basis with a red-yellow-green. Green, it makes sense that
7 we should probably apply the standard that--

8 Senator Leahy. Would the Senator yield for just a
9 moment on that? The bill does require an inventory, which I
10 think will do what you are talking about.

11 Senator Tillis. But have that discussion before we
12 move forward with anything, and certainly I share you
13 comments about this being separate from the matter that we
14 have already moved out of the Committee, but just the
15 methodology, because I am not familiar with it, I am not an
16 attorney, but really getting back to a point where we fairly
17 concisely understand your concerns and we can get to the
18 parts that you think should be carved out of any broad
19 application.

20 Ms. Caldwell. So our position is that we do not think
21 any broad application or any default application of the mens
22 rea standard works. There are too many different statutes,
23 too many different elements. It would create a lot of
24 uncertainty. It would create a lot of litigation.

25 Senator Tillis. I think you have done a good job of

1 pointing that out. Could you possibly in fairly short order
2 come up with the top 25 most egregious examples of that
3 application?

4 Ms. Caldwell. I think that rather than do that, what
5 we would propose is that we identify, working with you,
6 which statutes are of concern to you, which statutes you
7 think should have stronger provisions or different
8 provisions, and then work with you to make those changes
9 rather than identify--

10 Senator Tillis. Rough order of magnitude--I am sorry.
11 I am just running out of time, and I am going to have to run
12 as it is to get to the chamber. But rough order of
13 magnitude, how many statutes do you think this would apply
14 to if we did a broad application of it?

15 Ms. Caldwell. I think it would apply to virtually all
16 the statutes.

17 Senator Tillis. And how many would that be? Just
18 rough order of magnitude.

19 Ms. Caldwell. I do not know the number off the top of
20 my head, Senator.

21 Senator Tillis. More than 100?

22 Ms. Caldwell. Way more than 100.

23 Senator Tillis. More than 1,000?

24 Ms. Caldwell. Probably more than 1,000.

25 Senator Tillis. Okay. Thank you.

1 Ms. Caldwell. Thank you.

2 Chairman Grassley. Before I go to Senator Whitehouse,
3 for the benefit of anybody that is interested in the case
4 that he just talked about, my staff would be glad to brief
5 anybody. I think there is a little bit more to it than what
6 was just said.

7 Senator Whitehouse?

8 Senator Whitehouse. Thank you, Chairman. Let me first
9 say that, as one of the Democrats who was most involved with
10 putting together the criminal sentencing reform compromise,
11 the bipartisan criminal sentencing reform compromise, I hope
12 very much that we can continue that good work, which I think
13 was done in good faith on both sides.

14 If after the bill has cleared the Committee we now
15 begin to attach this mens rea situation, I begin to have
16 concerns that that whole effort was just a Trojan horse to
17 bring this mens rea idea forward. I really hope that that
18 is not the case because I think we have sentencing reform
19 issues where we agree, where we have done a lot of good
20 work, and that should not be disrupted by this, particularly
21 after the fact.

22 So entirely apart from the question whether having a
23 conversation about mens rea reform is a good idea, the
24 question about whether we insert this into the criminal
25 sentencing reform, which I think at this point has broad

1 bipartisan support, is a very serious question, and I very
2 much hope that we do not do that. And I certainly hope that
3 inquiry into this does not reveal that this was actually
4 somebody's stratagem all along and that the real goal was
5 mens rea reform.

6 So that takes me to my questions about mens rea reform.
7 It strikes me from the questioning and the answers that we
8 have heard already and just from my own experience as a
9 prosecutor that the bulk of the application of this bill,
10 were it to pass, would be in the area of regulatory
11 offenses. Would you agree with that, Ms. Caldwell?

12 Ms. Caldwell. Senator, unfortunately, I do not think I
13 do agree with that because I think that this bill would have
14 a significant effect on some of the other statutes we have
15 talked about today, including terrorism statutes--

16 Senator Whitehouse. Yes, but if you set aside the
17 question about let us just say--I mean, I think your
18 position is a good one, that if you know that the conduct is
19 underlying wrong, but now the Government has to prove that
20 this person knew that it was a Federal offense, what, do
21 they have to know the statutory number, too? I mean, you
22 can get into misapplications of mens rea reform that apply
23 across the board. But the bulk of the offenses that have
24 either low or strict liability mens rea standards are what
25 fall into the regulatory offense category, do they not?

1 Ms. Caldwell. Most of those statutes, Senator, most of
2 which are misdemeanors, do deal with public safety, public
3 health type issues, yes.

4 Senator Whitehouse. And so if you change that, the
5 people who you are protecting primarily are the people who
6 are most likely to be guilty of regulatory offenses, i.e.,
7 corporations and white-collar defendants. So that creates a
8 considerable worry for me.

9 Another worry for me is that if you are going to go
10 down this mens rea road, it strikes me that if you have got
11 an individual who committed a robbery and you have to solve
12 the mens rea problem, this would make the case a little bit
13 more difficult. But comment on the difficulty of when you
14 are dealing with a corporate defendant since a corporation
15 is actually not a person that has guilty intent; it has to
16 be inferred from conduct and from statements of people.
17 Very often in a corporate case they have lawyered up, and it
18 is very hard to get to the truth. Is it more difficult with
19 a corporate defendant than with a human defendant to deal
20 with the mens rea problem?

21 Ms. Caldwell. It is certainly difficult, Senator,
22 because, as you know, in corporate prosecutions we have to
23 prove that, for the corporation to be criminally liable,
24 that at least some individuals were criminally liable as
25 well, and that could be very difficult.

1 In the corporate context we often rely--we often prove
2 intent by relying on things like conscious avoidance and
3 willful blindness, and the mens rea requirement requiring
4 that somebody know their conduct is unlawful would make that
5 much more difficult.

6 Senator Whitehouse. Particularly when that somebody is
7 a fictional legal entity that exists as a matter of law.

8 Ms. Caldwell. That is right.

9 Senator Whitehouse. Yes. So that is my concern, Mr.
10 Chairman, and it strikes me that this mens rea proposal is
11 highly tilted towards protecting corporate and white-collar
12 defendants and making the protection of public health and
13 safety concerns more difficult and more challenging. And
14 the idea that we are now going to have this bonanza for
15 corporate defendants loaded up into our bipartisan criminal
16 sentencing reform I think would be very, very unfortunate.

17 So I happen to disagree with the mens rea provisions
18 and the bill, but I particularly hope that we do not foul up
19 the progress we have made on criminal sentencing reform by
20 turning that bill into a Trojan horse for this bill.

21 Thank you, Chairman.

22 Chairman Grassley. I am going to call on Senator Hatch
23 because he asked for a special privilege here, so go ahead.

24 Senator Hatch. Well, all I can say is I can assure you
25 that nobody is trying to just screw up this bill. I have

1 been in Federal court. I have tried Federal criminal cases,
2 some of which were--and won them. And I have to say that
3 what I am trying to do is protect the rights of defendants,
4 and that includes the corporate world as well. But I have
5 seen them do this against average, everyday citizens. And
6 they want to get a conviction so badly that they would tilt
7 the law to get it.

8 Now, this is really bothersome to me because I think if
9 you are going to accuse somebody of a crime, even a
10 corporate executive, you ought to have some reason for their
11 having committed that crime. You know, they deserve some
12 freedom, too, and they deserve some fair treatment.

13 So that is what I am interested in. I just believe it
14 is an essential thing in criminal law. And certainly the
15 criminal defense lawyers all tend to agree with me. Or at
16 least that is what they say. So I can say this is a very
17 sincere effort, and it is not an effort to just try and--
18 there is much good in this bill, in the bill that passed.
19 On the other hand, there are some things that I disagree
20 with in that bill, too, because I am very concerned that we
21 are so interested in law and order, which is important to
22 me, too, that we are going to provide tools and equipment to
23 be able to convict people who do not deserve to be convicted
24 and do it on suspicion rather than really proving the case
25 against them. And I have been there. So I just am very

1 concerned about it, and I can assure you that there is no
2 evil intent here in bringing up this mens rea.

3 Senator Whitehouse. Well, I am a great admirer of
4 Senator Hatch, and I will say that anywhere anytime. But I
5 also think that following Senator Leahy's advice, if we were
6 to have the proponents of this measure actually put forward
7 a list of the statutes that they have in mind, since the
8 burden is usually on the proponent to show what they want to
9 do, it would not surprise me if that list showed that the
10 vast majority of statutes are the types of regulatory
11 offenses where corporate defendants are most likely to be
12 the malefactor. And if that is the case, we should know
13 that going in.

14 Senator Hatch. Well, I do not think we should have to
15 do that. I think we ought to have in the law information
16 and language that protects everybody, no matter how wealthy
17 they may be or how poor they may be. And we should not just
18 be picking on people because we want to get a conviction.

19 Chairman Grassley. Before I ask my questions, I would
20 say as one person who was kind of a group of six or seven
21 Senators that were working on this compromise, it was an
22 effort to find a compromise between some Senators that think
23 nothing should be done on mandatory minimums and people that
24 think they should be done away with in the case of the
25 issues before us. It never came up at all, anything about a

1 Trojan horse, and I think that we would like to move forward
2 on two different levels--one the level of getting this
3 sentencing reform bill passed, and one on whatever we can do
4 about mens rea separately.

5 I have just a few questions, Ms. Caldwell, and then I
6 will call the second panel. The Heritage Foundation and the
7 National Association of Criminal Defense Lawyers issued a
8 report called "Without Intent." The report said that it was
9 a "core principle of the American system of justice that
10 individuals should not be subjected to criminal prosecution
11 unless they intentionally engage in inherently wrongful
12 conduct or conduct that they know to be unlawful."

13 Recent media reports have also defined mens rea as the
14 defendant knowing that his conduct was unlawful, but that
15 term means only that the defendant has a guilty intent based
16 upon his knowledge of the facts, not his knowledge of the
17 law, never mind an intent to act unlawfully.

18 We all know that ignorance of the law is not an excuse,
19 and for more than a century, the Supreme Court has permitted
20 criminal convictions in some instances where the defendant
21 did not intentionally engage in inherently wrongful conduct.

22 A very simple question that will have some follow-up.
23 As you heard what I just said, am I correct in my
24 understanding?

25 Ms. Caldwell. Yes, Senator.

1 Chairman Grassley. The Senate bill would impose a
2 willfulness default mens rea in various circumstances.
3 "Willfully" means that the defendant knew that his conduct
4 was unlawful. Would such a default mens rea standard allow
5 some defendants to claim ignorance of the law as a defense?

6 Ms. Caldwell. It absolutely would, Senator. That
7 would be one of the major problems that the Department has
8 with the proposed law, is that it would completely overturn
9 what you have indicated is a long-held concept in the law,
10 which is that ignorance of the law is not a defense in a
11 criminal case.

12 Chairman Grassley. Okay. For you again, time did not
13 permit you during your statement from mentioning all the
14 impacts if these bills became law. I would like to have you
15 elaborate, if you would, please, on any other prosecutions
16 that would be eliminated or made more difficult or any other
17 litigation or resource issues that would be generated by
18 these bills, and especially I would like some comment as it
19 might relate to child pornography or child abuse.

20 Ms. Caldwell. Senator, I think that the statute would
21 have a very sweeping effect on a lot of different laws.
22 First, it would increase the level of litigation in
23 virtually every case where there is not a specific mens rea
24 element in the statute itself. There would be a threshold
25 issue about whether the default provision applied. There

1 would be litigation over that. There would be an issue
2 about what the default provision means. How does the
3 default provision intersect with other provisions that have
4 been interpreted by the courts over the years or provisions
5 that are already in statute? So that would be one immediate
6 effect. There would be a lot of litigation in a lot of
7 different kinds of cases.

8 It would also make much more difficult some particular
9 kinds of cases. White-collar cases we have talked about a
10 little bit today. It would be much more difficult to
11 establish the culpability and the criminal intent of a very
12 senior corporate executive in a corporate fraud case. I
13 prosecuted the Enron case, and I am aware from that
14 experience that it can be very challenging to prove that
15 senior executives who are not on the front lines making
16 decisions and entering things in the accounting books and
17 records knew what was happening. That can be a very
18 challenging thing, which would be made even more difficult
19 by this law.

20 It would be difficult to prosecute terrorists for
21 murders of U.S. citizens overseas because we would have to
22 prove that they knew in a terrorist attack--and, frankly, we
23 probably would not be able to prove it in most cases, and
24 then maybe they did not know, they may not have known when
25 they came from Pakistan to Mumbai that there were Americans

1 in the Taj Mahal Motel. And that would make it impossible
2 to prosecute those people for those murder of the Americans.

3 In a carjacking case, where somebody is using a gun in
4 connection with a carjacking, a crime of violence, we would
5 have to prove that they knew, as they wielded their weapon
6 and tried to pull the driver out of the car, that they were
7 committing a Federal crime as opposed to just an obvious
8 crime.

9 So there are a lot of--I do not want to take the time
10 to try to list all the potential crimes here today, but I
11 think that the default provision really will have a lot of
12 unintended consequences. And as I said before, we are
13 willing to work with you all and with Congress to identify
14 statutes where there really might need to be a change. But
15 this default provision sweeps far too broadly and will not
16 fix what you are trying to fix.

17 Chairman Grassley. Would there be anything about child
18 pornography that would be different than what you just told
19 me, or the same as what--

20 Ms. Caldwell. Yes. I am sorry, Senator. I did not
21 mean to omit that. That would be a statute that would be
22 very seriously affected. Right now we have a very serious
23 problem of child exploitation and abuse. The Internet has
24 exacerbated that problem so that we now have entire Internet
25 online forums where people are selling and exchanging child

1 pornography. People are creating child pornography for sale
2 over the Internet. Right now there is no requirement--it is
3 very clear from the case law that there is no requirement
4 that the people who are manufacturing and producing those
5 items have to know that the people were, in fact, children
6 under the age of 18. If we had to prove that, that would
7 make it extremely challenging and, frankly, probably
8 impossible, particularly in the case of Internet pornography
9 where we do not have the actual children and do not know
10 their ages. We would have to prove that the defendant knew
11 that this person was 12, 13, 6, 15, under 18, and that would
12 be very challenging.

13 Chairman Grassley. My time is up, but I have one last
14 question that I want to ask. I think a failure of this
15 administration has been its inability to criminally
16 prosecute executives who were responsible for causing the
17 financial crisis. So, recently, our Deputy Attorney General
18 Yates issued a memorandum calling for increased prosecution
19 of individuals when corporations are criminally pursued.
20 The memo noted that under existing law it is often difficult
21 to prove criminal intent. If the House or Senate mens rea
22 bills were enacted, how much harder would it be to
23 accomplish the outcomes outlined in the Yates memorandum?

24 Ms. Caldwell. I think in the context of corporate
25 criminal prosecutions, it is generally not terribly

1 difficult to convict low-level people, for example, a trade
2 who was actually engaged in trading activity or the
3 accountant who actually altered the books and records of the
4 company. But it is much more challenging to prosecute the
5 senior executives, and in many of those instances, the
6 people who actually implemented the criminal conduct were
7 following the directive of the senior executives. That
8 would be much harder to prove with a default mens rea
9 provision because we would have to prove that those senior
10 executives intentionally did something that they knew
11 violated the law, and it just becomes much more difficult as
12 you go up the ladder in corporate crime. And I know that
13 from my own experience in prosecuting--and, frankly, also in
14 defending--significant corporate fraud cases.

15 Chairman Grassley. Thank you very much for
16 participating. I think I will move on to the next panel
17 now.

18 Ms. Caldwell. Thank you very much, Senator.

19 Chairman Grassley. Oh, well--

20 Senator Hatch. Could I just add one statement?

21 Chairman Grassley. Yes, you go ahead. You are in the
22 middle of this thing.

23 Senator Hatch. I do not get the Mumbai thing, and I do
24 not get a number of other things either. The fact of the
25 matter is, yes, it would be more difficult for the

1 prosecutors in some cases to be able to prove that there was
2 a wrongful intent. On the other hand, isn't fairness
3 something we ought to be considerate of here? I mean, I
4 agree, if I was a prosecutor, I would want the broadest laws
5 I could get so I could convict everybody I want to--although
6 I personally would not do that. But the fact of the matter
7 is that I cannot blame prosecutors for feeling that they
8 need even more tools than they have now.

9 The fact of the matter is there is no reason, if you
10 cannot prove that a person had a wrongful intent--in many of
11 the instances you have given, it is not going to be
12 difficult to prove wrongful intent. If you do not do that,
13 then there is going to be a lot of injustice in this world
14 that really should not exist.

15 So, look, I understand--you are an eloquent
16 spokesperson for the Justice Department, and I understand
17 your desire to make sure that we get evil people convicted.
18 On the other hand--and I feel the same way. On the other
19 hand, I do not want to do it at the expense of freedom, at
20 the expense of doing what is right, at the expense of
21 unjustly picking on people, which I have seen with this
22 Justice Department and the prior Justice Department and
23 other Justice Departments from time to time in bringing
24 criminal litigation when they should not have done it.

25 So this is what bothers me. It is a really serious

1 issue. And, you know, if you could come up with a way of
2 making our language better, I am open, I am certainly open
3 to it. But I just do not understand why the administration
4 would take the position that you can convict somebody that
5 did not have any intent to commit the crime to begin with.

6 Chairman Grassley. Does anybody want equal time?

7 Senator Durbin.

8 Senator Durbin. I am going to just comment very
9 briefly. Senator Hatch and I have known one another for a
10 long time. I respect him. We have differences of opinion
11 on many political issues, but I respect him.

12 I do not believe for one second that Senator Hatch
13 would want to make it easier to exploit children, to engage
14 in the trafficking of children, child pornography, or to
15 protect terrorists. I do not believe that is your intent at
16 all. But I think the fact that we bring these examples up
17 is an indication of how far-reaching your original bill is.
18 It really goes back to the suggestion that we be more
19 surgical and direct. Let us go after those statutes which
20 trouble you, that we can discuss openly when it comes to
21 intent and knowledge, rather than to broad-brush the
22 hundreds if not thousands of statutes that might be
23 affected.

24 Senator Hatch. I would rather apply the mens rea
25 requirement and then work on showing any incidences where it

1 does not work, where it is not fair. I would be happy to
2 work on that basis. But I think to not have that in there
3 is just the wrong way to go.

4 But be that as it may, I understand that reasonable
5 people can differ, and, of course, I have the same respect
6 for you, as you know. And we just differ on this. And I
7 have great respect for the witness. In fact, I may be
8 related to her. I hate to tell you that. I mean, I am sure
9 that is going to be a disgrace through the rest of your
10 life.

11 [Laughter.]

12 Senator Hatch. There are lots of Caldwelles in my
13 background, I will tell you that.

14 Ms. Caldwell. And I understand you are from
15 Pittsburgh, which is where I am also from, so we should
16 explore that further.

17 [Laughter.]

18 Senator Hatch. Well, then I understand why you are the
19 way you are.

20 [Laughter.]

21 Senator Leahy. In a good way.

22 Senator Hatch. That is a good way.

23 Chairman Grassley. If it is okay with everybody, I
24 will move on.

25 [Laughter.]

1 Chairman Grassley. Would the next panel come while I
2 introduce you, please? Our next panel is three people.

3 The first witness is Edwin Meese. We all know that Mr.
4 Meese was Ronald Reagan--right now is Ronald Reagan Fellow
5 Emeritus and a distinguished fellow as well at the Heritage
6 Foundation. He served as Attorney General during the second
7 term of the Reagan Presidency. Mr. Meese has an
8 undergraduate degree in political science from Yale and a
9 law degree from the University of California, Berkeley
10 School of Law.

11 Then the next witness is Robert Weissman. Mr. Weissman
12 serves as president of Public Citizen, a nonprofit consumer
13 rights advisory group based in Washington. Mr. Weissman has
14 his undergraduate degree from Harvard and law degree from
15 Harvard Law School.

16 Our final witness, Stephen Saltzburg, will be
17 testifying on behalf of the American Bar Association. Mr.
18 Saltzburg is a professor at George Washington University Law
19 School. Prior to that, he worked at the University of
20 Virginia School of Law and served as Deputy Assistant
21 Attorney General, Criminal Division, Department of Justice.
22 Mr. Saltzburg received his undergraduate degree from
23 Dickinson College and his law degree from the University of
24 Pennsylvania.

25 Let us start with Mr. Meese, and then go to Mr.

1 Weissman, and then Mr. Saltzburg. Go ahead.

1 STATEMENT OF THE HONORABLE EDWIN MEESE III, 75TH
2 ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, AND
3 RONALD REAGAN DISTINGUISHED FELLOW EMERITUS, THE
4 HERITAGE FOUNDATION, WASHINGTON, D.C.

5 Mr. Meese. Thank you, Mr. Chairman, members of the
6 Committee. I appreciate the opportunity to discuss what I
7 consider one of the most important bills affecting criminal
8 law that we have before the Congress of the United States.

9 As was mentioned, I have been Attorney General of this
10 country. I have been a professor of law where I specialized
11 in criminal law for a number of years. I also many years
12 ago was a prosecutor myself for a number of years. So these
13 matters are very real to me in terms of my own professional
14 background.

15 I think it is important to recognize that, contrary to
16 some things that have been said this morning, the
17 fundamental aspect of this bill is not something new. As a
18 matter of fact, it goes back to common law and came to this
19 country initially, this whole idea that a person should not
20 be held to be criminally liable for something where they
21 really had no moral culpability.

22 In the common law, which was the basis for the criminal
23 law of this Nation, every crime required a mens rea
24 component, and that was part of the idea that the act itself
25 had to be accompanied by a mental situation. In other

1 words, the criminal law requires a moral and a practical
2 element, and that for an act to be a crime, the law has
3 traditionally required both the act, that is, the cause or
4 threat of cause, plus some kind of harm, and that the
5 individual who committed the act did so with intent.

6 The requirement of a guilty mind--and that is really
7 what "mens rea" means--helps to separate conduct that may be
8 harmful but which is not morally culpable from that which is
9 truly deserving of criminal penalties.

10 Criminal laws with weak or inadequate intent
11 requirements empower the Government, as we heard some
12 discussion already, to rain down devastating consequences in
13 situations where a person did not know he or she was doing
14 anything wrong or was powerless to stop the violation. As
15 such, it would breed distrust of Government and would
16 certainly undermine the rule of law.

17 In terms of some of the things that have been said
18 earlier today, I would like to point out that it is wrong to
19 say, as was testified, that this would apply to all
20 statutes. What we are really talking about today is not a
21 one-size-fits-all bill. What we are doing is a bill that
22 fills in the gaps among those statutes that do not have a
23 mens rea requirement, because any criminal law statute
24 should, unless the Congress of the United States
25 specifically decides that there will be strict liability, in

1 which case it should be said in the law as such. And so
2 that would really bring all of the criminal statutes into
3 line, which has always been a cardinal principle of criminal
4 law in this Nation.

5 Establishing the default mens rea standard would not
6 remove any crimes from the books. It would not apply in
7 many of the cases that were cited today. It would not apply
8 to the child pornography cases. It would not apply to the
9 terrorism cases that were cited. In those cases, it would
10 not require that someone had to know that something was a
11 Federal law as opposed to a State law. It would simply
12 require that someone know that the conduct itself was
13 unlawful. It would not limit the authority of Congress or
14 the agencies in regulations to override existing mens rea--
15 to create new criminal offenses or new criminal regulations.
16 It would not override the existing mens rea standards. That
17 is why it does not apply to all statutes. It would have no
18 impact, quite frankly, on the Justice Department's ability
19 to prosecute corporate executives for willful blindness or
20 to prosecute them for reckless or negligent conduct under
21 the statutes and regulations that already criminalize
22 reckless or negligent behavior. Further, establishing a
23 default mens rea standard would have no impact whatsoever on
24 statutes or regulations that prescribe civil penalties. In
25 other words, it would apply only to criminal prosecutions.

1 And I might say that one of the important things which
2 has been really mixed up recently in prosecutions and in
3 some of the laws is this idea of the distinction between
4 civil penalties and criminal penalties. Criminal penalties
5 are for inherently moral culpability. Civil penalties are
6 for harm which can be corrected then by monetary
7 compensation or by specific requirements related to the harm
8 itself. But putting a person in prison is really one of the
9 strongest capabilities, the strongest powers that the
10 Government has, and, therefore, it should be handled very
11 carefully.

12 I would also like to deal with this issue of whether
13 this should be separated from the overall criminal justice
14 reform. You know, criminal justice reform I would say has
15 both a front-end and a back-end component. Up until now the
16 Senate efforts have focused largely, as has already been
17 mentioned, on reforms that address how long criminals will
18 stay in prison or what happens when they get out. Both may
19 be very worthy, but in my view, you cannot have meaningful
20 criminal justice reform without tackling both sides of the
21 issue: the front end of whether an individual deserves
22 punishment in the first place and the back end of what
23 punishment that person or a person should receive.

24 In other words, criminal justice reform without dealing
25 with the most fundamental principle of mens rea reform is

1 woefully incomplete, and that is why I believe that this is
2 a very important part of what this Committee particularly
3 and the Senate is doing in the field of criminal justice
4 reform.

5 I would suggest to you that if sentencing reform passes
6 without a meaningful mens rea component, we will lose the
7 opportunity we have right now to make progress on this
8 important issue.

9 The House bill, as was mentioned, already has found the
10 way in which the entire situation, the entire criminal
11 justice reform, would include both the mens rea idea along
12 with the other matters pertaining to sentencing reform,
13 pertaining to helping people in reentry into the world from
14 prison. And so I urge the Committee and the Senate as a
15 whole to find common ground on this issue, just as your
16 House colleagues have done.

17 Mr. Chairman, in concluding, let me just say that
18 legislation for criminal justice reform must be balanced
19 legislation. When the Congress of the United States is
20 thinking about letting people who are actually guilty of
21 serious crimes out of prison early, I think it is equally
22 important to prevent morally innocent people from getting
23 prosecuted in the first place.

24 Thank you.

25 [The prepared statement of Mr. Meese follows:]

1 Chairman Grassley. Thank you.

2 Now, Mr. Weissman.

1 STATEMENT OF ROBERT WEISSMAN, PRESIDENT, PUBLIC
2 CITIZEN, WASHINGTON, D.C.

3 Mr. Weissman. Thank you, Mr. Chairman. It is an honor
4 to be here before the Committee and with Mr. Meese and
5 Professor Saltzburg.

6 My top-line message today is that the really inspiring
7 work that the Committee and the Congress is doing on
8 criminal justice reform should not include so-called mens
9 rea reform. I believe that the proposals that have been put
10 forward would have a serious harmful impact on public health
11 and public welfare and undermine efforts to hold
12 corporations accountable. Let me make five quick points to
13 elaborate on that overall theme.

14 First, in contrast to low-level street crime,
15 nonviolent offenses, and victimless crime, the cost of
16 corporate crime, regulatory crime, is great and severe,
17 measured in lives or dollars. The GM ignition switch
18 disaster has cost at least 174 lives; 60 people were killed
19 by contaminated steroids; dozens are killed by contaminated
20 food crises that seem to pop up constantly. The Government
21 loses \$100 billion, it is estimated, in health care fraud a
22 year, and the Wall Street crisis, which was caused in large
23 part--the Great Recession, which was caused in large part by
24 Wall Street wrongdoing, cost the economy \$20 trillion,
25 according to GAO. The costs are high.

1 Second, however, and in contrast to that, the incidence
2 of regulatory and corporate criminal prosecution is low.
3 There are only about 2,100 regulatory crimes prosecuted at
4 the Federal level a year, a significant decline from decades
5 past. There were only about 250 corporate criminal
6 prosecutions in the last year--lower than that, actually, a
7 25-percent decline from a decade earlier. So while we have
8 a serious problem, we have a relative low number of
9 prosecutions occurring.

10 Third, corporate defendants, both the corporations
11 themselves and corporate officials, are fundamentally
12 different than street criminal defendants. Absolutely,
13 Senator Hatch, they deserve the protections of fairness and
14 due process, but they are differently sophisticated in their
15 understanding of the law, the resources they are able to
16 bring to bear, the way prosecutors treat them and the
17 deference to collateral consequences both for family,
18 community, and the overall economy that is rarely shown for
19 street criminal defendants. Corporate criminals are unique
20 in their ability to actually shape the law itself through
21 their activities in Congress or regulatory agencies. And in
22 a fundamentally different way than street criminals, they
23 are rational actors. They respond to incentives. That is
24 what corporations are and do. And so the incentives we
25 provide for them make a huge difference in ways that are not

1 so clearly true for street criminals.

2 Fourth, if we were to move to a default willfulness
3 standard, as some have proposed, key statutes relating to
4 corporate criminal prosecution would be affected in far-
5 reaching and harmful ways, even though, in fact, corporate
6 crime is rarely prosecuted and corporate criminal officials
7 are rarely prosecuted without some significant mens rea
8 showing.

9 What are those actual consequences? Well, as we heard
10 from the previous panel, it would be just tougher and
11 require prosecutors to bring more evidence to cases. The
12 standards of proof would be much harder because of the
13 diffuse nature of decisionmaking in the corporation. It is
14 not a matter of sending people to jail for crimes they did
15 not commit or without an actual sense of wrongdoing. But
16 the problems of proof are unusually difficult due to the
17 structure of the corporation.

18 The result of heightened mens rea standards will be
19 fewer prosecutions, all too few already, of top-level
20 executives and more prosecutions of lower-level employees.
21 We will effectively establish ignorance of the law as a
22 defense. We will make it more difficult to pursue
23 corporation criminal activity that is reckless. And we will
24 move away from the idea that corporations have an
25 affirmative duty to comply with the law.

1 I should say as a last point that even some knowing
2 standards, depending on definitions--and I think there are
3 some concerning definitional issues in the Hatch bill--would
4 also move us in the direction of willfulness.

5 Last, what are some alternatives? I elaborate on a
6 number of these in my written testimony, but let me just
7 make two points in this regard specifically related to the
8 mens rea issue.

9 First, as has been discussed, it makes sense to
10 inventory the criminal code to find the areas where there
11 actually are issues and address those issues directly, both
12 in terms of understanding what is statutorily required but
13 also how often these areas are actually prosecuted. And
14 then Congress should deal with them directly.

15 Second, I think it would be very useful perhaps
16 pursuing the commission idea that Mr. Lee has proposed to
17 investigate why, in fact, there are not more individual
18 prosecutions of corporate officials. I think that
19 investigation will show that prosecutors are already
20 deterred from prosecution by existing mens rea standards,
21 and, in fact, the tough mens rea standards are a significant
22 reason why we do not see more justice meted out for high-
23 level corporate officials as people across the country are
24 demanding in the wake of the Wall Street crisis and the
25 Great Recession, in the wake of food safety scandals, in the

1 wake of automaker scandal after scandal. We are not seeing
2 people held criminally accountable. Until we do, we are not
3 going to see corporate accountability and the protection of
4 the safety and welfare of the American people.

5 [The prepared statement of Mr. Weissman follows:]

1 Chairman Grassley. Thank you, Mr. Weissman.

2 Professor Saltzburg.

1 STATEMENT OF STEPHEN A. SALTZBURG, PROFESSOR,
2 GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, ON BEHALF
3 OF THE AMERICAN BAR ASSOCIATION, WASHINGTON, D.C.

4 Mr. Saltzburg. Thank you, Mr. Chair, and I appreciate
5 the Committee hearing me on behalf of the American Bar
6 Association.

7 I would like to try to help the Committee go forward
8 and to see that this, as Mr. Weissman said, really inspiring
9 legislation that both the House and the Senate have come up
10 with goes forward.

11 Is mens rea important? The American Bar Association
12 believes it is. The question is how to move forward,
13 recognizing it is important, but that other fundamental
14 parts of our criminal justice system are every bit as
15 important and need reform and need it now.

16 The American Bar Association supports the inventory.
17 We believe that it is time for Congress to look carefully at
18 what it has done over decades. Ask yourself, how did we get
19 to the point where we have laws without mens rea and
20 regulations that criminalize conduct without mens rea? And
21 the answer is you authorized it. Over decades, Congress
22 said we want legislation that punishes people for conduct,
23 as General Meese said, without attaching a culpability state
24 of mind to that conduct. You did it, and the question is:
25 Do you want to adhere to that?

1 If you were to undo this with a general bill such as
2 the Hatch bill, I think you would in a sense stifle debate
3 about when and where if there is a place for strict
4 liability in the criminal law. And there is a case to be
5 made maybe there is no place. There is another case to be
6 made, as Mr. Weissman said, that when it comes to corporate
7 prosecution, there may be a place for it, an appropriate
8 place.

9 The American Bar Association position is very clear
10 that no one should be put in jail or prison who has been
11 convicted of a crime where there was not a mens rea
12 component. We do not have that belief about organizations.
13 But when it comes to individuals, putting people in prison,
14 which you cannot do to an entity, is something that should
15 require mens rea. And when I speak of mens rea, let us
16 recall what we are talking about. We are not necessarily
17 talking about intent to violate the law, or knowledge. We
18 are talking about intent, knowledge, willfulness,
19 recklessness, or negligence under some standards. And over
20 time, legislatures--this Congress has decided that the
21 appropriate mens rea for some crimes is lower than other
22 crimes. And that I think makes sense.

23 If you were to inventory the criminal provisions in our
24 law, no one knows how many there are. If you ask me for a
25 list, you could give me years, and I could not come up with

1 a list by myself. The Department of Justice I think has
2 some pretty good ideas about how to do an inventory and do
3 it promptly. But if you were to apply a default mens rea
4 retroactively, you could do a lot of harm and create a lot
5 of confusion. Let me just give you an example because it
6 came up today, and I think that it surprised me that no one
7 corrected it.

8 The Mumbai example of Americans being murdered in India
9 by Pakistani terrorists, as I understand the Hatch bill,
10 actually there would be no requirement that you prove that
11 the terrorists knew they were killing Americans because the
12 Hatch bill takes jurisdictional elements and says,
13 appropriately in my judgment, no mens rea as to those.
14 Indeed, I think if Congress were to take a careful look at
15 all Federal statutes, you would probably want to eliminate
16 mens rea requirements for such things as interstate
17 commerce, that people ought not to have to know that they
18 are engaged in interstate commerce if they are doing
19 something that otherwise is criminal. And that would take
20 care of carjacking, for example.

21 There is a way to go forward, and I think the way to go
22 forward is for this Committee to get the Congress to commit
23 that there will be no future criminal legislation unless
24 mens rea is explicitly addressed in it. Whether there is a
25 default provision is not as important, I do not think, as

1 the commitment that there should be a clear statement as to
2 each element of each crime that this Congress approves as to
3 whether there is mens rea or whether it is intended there
4 not be mens rea; and if it is, what that mens rea
5 requirement would be.

6 I think that reasonable minds would conclude that the
7 same mens rea requirement for all Federal laws just does not
8 make a lot of sense. But I think Senator Hatch and Senator
9 Lee, the focus that they have asked for is on recognizing
10 the importance of mens rea and finding a way to assure that
11 it is appropriately recognized and appropriately taken care
12 of. And I have great respect for the thought that went into
13 the bill, but I think it is an approach that I think would
14 do more harm than good.

15 Going forward, I think a commitment that every single
16 Federal statute would be carefully examined with respect to
17 mens rea and have mens rea provisions in, including a
18 provision that says there is none for certain elements,
19 would make a lot of sense going forward. I think it could
20 get widespread support. I think it is the right thing to
21 do. And that would assure that no individual, if Congress
22 does this right, goes to jail or prison without a guilty
23 mind, without at least having negligence proven, and that if
24 we are going to have public welfare offenses that are, in
25 fact, strict liability, that the Congress identify those,

1 stand up and say this is what we intend and this is what we
2 want going forward--true strict liability offenses.

3 [The prepared statement of Mr. Saltzburg follows:]

1 Chairman Grassley. Thanks to all our witnesses.

2 I am going to ask my questions first, and then it would
3 be in this order: Lee on the Republican side, Whitehouse on
4 the Democrat side, then Hatch on the Republican side, and
5 Klobuchar on the Democrat side. And I would ask one of my
6 colleagues if they could finish the meeting after I am done
7 asking my questions because I have a 12 o'clock appointment.
8 If you cannot, I will have to make an adjustment.

9 Mr. Meese, when we negotiated this sentencing bill, we
10 addressed specific criminal laws that we knew had created
11 problems, and we laid the foundation for future mens rea
12 reform. We compromised. We stand willing to make changes
13 to gain more support for the bill. Our sentencing reform
14 has the support of a wide and diverse coalition, including
15 law enforcement, civil rights, fiscal conservatives, and
16 religious organizations. All of these groups were willing
17 to compromise to get us to where we could between people
18 that think nothing should be done to mandatory minimums and
19 people, both Republican and Democrat coalitions, that felt
20 that they ought to be done away with. So we found
21 compromise.

22 On the other hand, only a few Washington think tanks
23 and white-collar criminal defense lawyers are more
24 interested in passing default mens rea reform than
25 sentencing reform. These groups, from my point of view,

1 being in the middle of these negotiations, have dismissed
2 compelling and sensible arguments with a back of the hand
3 and have so far shown no willingness to compromise.

4 So I respect the rights of any group to oppose any
5 bill, and I respect everything you have done throughout your
6 lifetime. But if mens rea bills are so good, why shouldn't
7 supporters pass them freestanding instead of holding an
8 unrelated bill hostage unless they get exactly what they
9 want? And I would refer to your use of criminal law reform
10 as being a legitimate position for you to take, but I think
11 sentencing reform is far from a criminal law reform or
12 criminal justice reform. So go ahead and please answer that
13 question.

14 Mr. Meese. Mr. Chairman--I seem to be having mic
15 trouble, I understand.

16 Chairman Grassley. It is hard to know. Can somebody
17 help him? You have got to see the green light, and they are
18 very hard to see on that.

19 Mr. Meese. Is this working now? Okay. Mr. Chairman,
20 I think that what I have mentioned earlier is really the
21 case, and that is that you cannot do this piecemeal in the
22 sense of having true criminal justice reform or whatever you
23 want to call it.

24 In terms of what has been done in the House was an
25 appreciation that it all works together, that you need to

1 help people not only who are guilty, but you have to help
2 people who are innocent as well. And that is really what
3 this bill particularly does.

4 And so I think to lose that opportunity--we all know
5 that once you pass something in the area of reform, certain
6 apathy sets in from that point on, and people are much more
7 reluctant to deal with the matter if you are dealing with it
8 piecemeal as the so-called sentencing reform does.

9 Now, there are some problems with the sentencing
10 reform, quite frankly, that I have difficulty with. For
11 example, I do not think that violent gun crimes--that people
12 who commit violent gun crimes should have their sentences
13 reduced. But that is a different issue. But I do think
14 that when you have a group of people--and, believe me,
15 having the Heritage Foundation and the Criminal Justice
16 Association together on something, and the ACLU on many
17 things as well, is about as far as you could bring two poles
18 together in a particular matter. And so I think the fact
19 that to have total criminal justice reform or as near it as
20 we can get at this particular time in history, it would be
21 very unfortunate to leave out what I consider one of the
22 most important components of the House bill, and that is the
23 issue we are discussing today, and that is, making sure that
24 the Federal statutes and the regulations that are
25 promulgated pursuant to those statutes live up to the basic

1 fundamental principle of criminal law that people who are
2 not morally culpable should not be prosecuted.

3 Chairman Grassley. Mr. Weissman, is Public Citizen
4 open to some sort of prospective compromise on mens rea?
5 And what kind of proposal might you consider supporting?

6 Mr. Weissman. I think we share the view that the
7 blanket across-the-board approach is a mistaken one, for
8 many of the reasons that were articulated earlier, and
9 including, I think, there are inherent complexities in a
10 blanket approach, even if it is prospective, in terms of how
11 it is going to affect existing law and also especially this
12 issue of dealing with every element of a criminal statute.

13 I think prospectively what makes for it is to identify
14 areas where there actually are problems and address those
15 problems. It is just not clear to me that there is a
16 problem at any scale whatsoever. And if there is, it
17 absolutely should be dealt with.

18 Now, if I could just say one other thing, I think Mr.
19 Hatch was eloquent on the point of prosecutorial misconduct,
20 and it is not our view that there is no such thing as
21 prosecutorial misconduct. But it is our view that we have
22 not seen evidence that abuse of mens rea issues or that
23 prosecutorial misconduct is manifested through cases
24 brought, especially under regulatory offenses, against
25 unfairly targeted corporations or corporate officials or

1 others because they did not satisfy an intent standard.

2 Chairman Grassley. Mr. Weissman, I will have one
3 question for you to answer in writing, please.

4 [The question follows:]

5 / COMMITTEE INSERT

1 Chairman Grassley. Senator Lee.

2 Senator Lee. Thank you, Mr. Chairman, and thanks to
3 all of you for being here to address this really important
4 topic. We are honored to have such an impressive panel,
5 and, General Meese, it is a pleasure to see you again.

6 In your prepared testimony, General Meese, you say that
7 passing sentencing reform and waiting to address mens rea
8 later would mean that mens rea reform would die. You also
9 say that there may be room for bipartisan agreement on a
10 default mens rea provision, perhaps giving hope that some
11 sort of compromise could be reached here.

12 Some reservations have been expressed about this idea,
13 particularly with regard to, one, the application of a new
14 mens rea requirement to previously enacted laws, and, two,
15 with regard to a default state of mind requirement that
16 would require proof that the accused acted with knowledge
17 that his or her conduct was unlawful.

18 And so my question for you is: Are there any other
19 models for a default mens rea bill separate and apart from
20 the one we are talking about here, Senator Hatch's bill, of
21 which I am a cosponsor, any other measures aside from
22 Senator Hatch's bill and the House version? And is there a
23 particular formulation that you think is perhaps most likely
24 to be able to garner bipartisan support of the kind that we
25 need?

1 Mr. Meese. I will give it a try again. Here we go.
2 Senator, I think that, frankly, Senator Hatch's bill itself
3 could be the subject of bipartisan action, and I think that
4 if there are specific aspects of his bill that someone has
5 that they think would take away whatever misgivings they
6 might have, I am sure the Senator would be glad to entertain
7 that to see if it could be incorporated in this bill and
8 then have this bill incorporated with the other sentencing
9 reform and reentry reform.

10 There are some other ideas along this line. Paul
11 Larkin, who is at the Heritage Foundation with me, and I
12 have worked on a law review article that talks about it, but
13 it is very similar along the same lines that Senator Hatch
14 has proposed. But there are some ideas there that might be
15 worthwhile to be incorporated.

16 But I think basically what the fundamental principle of
17 Senator Hatch's bill that there has to--and, quite frankly,
18 it has been misinterpreted today in some of the discussion
19 as requiring far more than what the bill actually says, but
20 particularly this "knowingly," has to do with knowing that
21 something was unlawful, means basically having an
22 understanding that the conduct itself is unlawful. And that
23 is something that it seems to me ought to be part of any
24 criminal law that would put people in prison. And what we
25 are worried about, quite frankly, is some of the things that

1 Mr. Weissman has been talking about, and that is, these
2 secret laws which nobody knows until they get prosecuted.
3 There is something in the neighborhood of literally hundreds
4 of thousands of regulations today that carry criminal
5 penalties because of the way in which the initial statute is
6 enacted allowing regulatory agencies to promulgate
7 regulations the violation of which is in effect a crime.
8 And so that is really the problem. And some of the things
9 that Mr. Weissman talked about today is really one of the
10 real problems here of this regulatory overreach, which was
11 addressed earlier in the testimony and in the questions.

12 So we have a real problem there, and there are ample
13 examples of what is wrong in the report that was referred to
14 by Senator Hatch which show how innocent people--and these
15 are people like Bobby Unser, who was lost in a blizzard and
16 his snowmobile gets into a Federal territory where he should
17 not be, and Bobby Unser is now prosecuted for a Federal
18 offense.

19 Likewise, there are many other situations like that,
20 particularly--I think there was an indication earlier about
21 a plumber who gets involved. The person does not know
22 anything that is wrong, and yet at the same time, they are
23 being prosecuted for a criminal offense.

24 So I think that if there are ways in which the
25 legislation can be improved to take away someone's

1 misgivings, I am sure the Senator would entertain that.

2 Senator Lee. Sure. Now, that is good to know. It
3 sounds like you are saying Senator Hatch's formulation is
4 the one that you prefer, and we can always look for ways to
5 improve that. And I appreciate your analysis on that.
6 Getting lost on a snowmobile is not something that puts you
7 on notice that you are about to commit a criminal offense.
8 That is even less obviously culpable behavior than it would
9 be for someone to remove the "Do Not Remove" tags from their
10 mattress, thus beckoning the brigade of mattress police that
11 I am sure exists somewhere out there. It is one of the
12 reasons why we are worried about this.

13 If I could ask one more question, Mr. Chairman, of Mr.
14 Weissman. You note that in regulatory cases, defendants are
15 rarely prosecuted without a showing of intent or at a
16 minimum a showing of negligence in misdemeanor cases. You
17 conclude from this that there is no need for a uniform sort
18 of default mens rea statute because law and practice ends up
19 effectively importing an intent standard.

20 Is that really the case and is that really fair to
21 conclude that? You know, because when we have an explicit
22 statutory element that is lacking, it would seem to me that
23 we would still need one. So what about this is so
24 problematic that we would want to put this into statute? If
25 it is already this way in practice, what is the harm of

1 putting it in statute?

2 Mr. Weissman. Well, I think what the situation is now,
3 both because of statute, Justice Department practice, and
4 judicial rulings, is that we have a variety of mens rea
5 requirements that are sort of tailored to particular
6 statutes or regulatory crimes. They sometimes involve a
7 willful standard, but they frequently do not. And they
8 frequently, even when they have a knowing standard, do not
9 require the same definition of "knowingly" as contained in
10 the Hatch legislation.

11 So I think if we were to replace the existing
12 framework, which we would in cases both where the statute is
13 silent but there, in fact, are mens rea requirements or
14 where the statute includes a mens rea requirement but not
15 for all elements, and now we will import the willful
16 standard for the elements that do not have a specific
17 statutory mens rea required--that is what I think we would
18 do under the Hatch bill--I think we would have serious
19 consequences, making it much harder to bring the cases that
20 I was talking about.

21 Senator Lee. I understand that, and therein lies my
22 concern with what you are saying. We do live in a Nation
23 where we have a separation of powers. The job of making the
24 law is given to the legislative branch. To the extent that
25 we have done a bad job in making the laws where we have not

1 specified what the element is, the ability to fill in the
2 gaps, the responsibility of filling in the gaps really
3 stands with us and not with the executive branch.

4 And so if what you are saying the problem with this
5 bill would be was that it would create a new default that
6 could make it more difficult for the Government, well, so be
7 it. But if we have got to resolve that in some way or
8 another, I think we ought to resolve it in favor of the
9 rights of the individual, the rights of the accused, so that
10 if there are crimes for which people are being prosecuted
11 and it is unclear whether or not there is an intent element
12 or an intent element is lacking altogether, I think Congress
13 needs to take that up. And if that leads to other problems,
14 and if that shows that there are areas where the default
15 that we have established is too burdensome for the
16 Government and it makes it ridiculous, then we can go back
17 and change that. But I do think that is our job and our
18 responsibility and our burden.

19 Thank you.

20 Senator Hatch. [Presiding.] Those are good points,
21 Senator.

22 Senator Whitehouse, you are next.

23 Senator Whitehouse. Thank you very much, Chairman.

24 First, let me welcome Professor Saltzburg to the Committee.

25 He was my civil procedure professor. And I look very

1 different, but he does not look very different at all.

2 [Laughter.]

3 Senator Whitehouse. So I am delighted to have him here
4 in the Committee.

5 Senator Hatch. You have gotten much wiser, is all I
6 can say, except for this bill.

7 [Laughter.]

8 Senator Whitehouse. I have the same concerns that I
9 articulated to Assistant Attorney General Caldwell about
10 this measure: one, that it disproportionately will apply in
11 the area of regulatory offenses, which disproportionately
12 will benefit corporate and white-collar defendants; and,
13 two, that because a corporation is an artificial entity that
14 is a legal fiction, the process of proving intent on the
15 part of a corporation creates different legal challenges and
16 greater difficulties than with respect to a walking-about
17 regular human being. And, therefore, I see this as
18 disproportionately benefiting corporate and white-collar
19 defendants.

20 Now, I do not know if that is its intention, but I am
21 convinced that it has that effect. And I think if we are
22 going to go forward on this, two of the sort of signs of
23 good faith that this is not the folks emerging from the
24 Trojan horse of criminal sentencing reform to suddenly
25 deliver this pro-corporate mens rea benefit, one would be to

1 follow Professor Saltzburg's advice and distinguish between
2 organizations and individuals. The Attorney General
3 indicated the plumber and Mr. Unser. I feel rather
4 differently if we are dealing with plumbers and Bobby Unser
5 than I am if we are dealing with Koch Industries, Exxon-
6 Mobil, and other big regulatory offenders who are frequently
7 in the dock for pollution and safety violations of various
8 kinds.

9 And I guess if I could ask Professor Saltzburg, you
10 were the person who mentioned a distinction between
11 organizations and individuals. Would you be able to
12 elaborate a little bit further on why you made that
13 distinction?

14 Mr. Saltzburg. I think I can. If you were to go back
15 and look at where strict liability crimes arose, why they
16 came into being, I think you would find they came into being
17 largely in the regulatory arena, public health and safety,
18 the desire to hold entities liable for the harms that they
19 were doing. And the Supreme Court upheld that, and I think
20 that Congress and a lot of the State legislatures followed
21 suit.

22 I am going to give you a specific example of how this
23 works. In preparation for coming in, I looked at the
24 Federal statute that prohibits transporting adulterated food
25 in interstate commerce. Under that statute, I cannot find

1 any mens rea requirement, so that if a major food producer
2 puts out adulterated food, they get prosecuted. I think
3 they should. But, fortunately, my mother is still alive.
4 She lives in Philadelphia. If I drive up to Philadelphia
5 and happen to want to bring her a cantaloupe or a watermelon
6 and it is a hot day, and by the time I get there I have a
7 spoiled cantaloupe or watermelon, I have violated that
8 statute. I have put adulterated food in interstate
9 commerce. And I know the Department of Justice will say,
10 well, they were not going to prosecute me because that is
11 prosecutorial discretion. But I do not want to count on
12 that, and I should not have to count on that. And I think
13 that that is the problem with saying there should be one
14 mens rea requirement for every Federal statute across the
15 board no matter what.

16 It does not diminish--and I think I have said this
17 before. It does not diminish the importance of the
18 question, which for me is: Is it appropriate to sometimes
19 punish entities without having to show intent or knowledge
20 simply because they engaged in conduct that caused really
21 serious harm? And I think that is the kind of question the
22 Congress should debate, and in the past the answer has been
23 yes. And if that is no longer appropriate, then Congress
24 can change its view of how to move criminal law forward.

25 Senator Whitehouse. Thank you. I guess I will just

1 leave it at that, although I would say that, in my view, the
2 bill that we worked on, that Chairman Grassley led us to a
3 bipartisan consensus on, related to criminal sentencing and
4 incarceration. It did not relate to all phases of criminal
5 law. Had it, I would have had a whole bunch of other things
6 I would have wanted to bring in myself. But one of the
7 first things that you do in working on a compromise is you
8 scope out what the area is that you are going to work in.
9 And we scoped out the area of sentencing and incarceration.
10 And to after the fact go back, reopen this, and put whatever
11 soldiers there are in this--behind this mens rea episode
12 into that deal does, in fact, turn it into a Trojan horse.
13 And I do not think we should do that, and I think it would
14 be a sign of good faith by the proponents of this if they
15 were willing to deal with the mens rea question separately
16 so that it did not go along for that ride, that you would,
17 in fact, lose that opportunity, as you said, Attorney
18 General Meese; and, secondly, you consider exempting
19 organizations. Is this really about helping Bobby Unser? I
20 have got a whole different point of view than if it is about
21 letting Exxon-Mobil and Koch Industries be immune from
22 prosecution when they pollute and create safety violations
23 and do the things that they so often do. I mean, there is a
24 long record of criminal activity in the public safety area
25 by big corporations, and they should not get a pass on that

1 simply because they are corporate. And that is where I
2 think this is going if we do not restrain it.

3 Senator Hatch. Well, thank you, Senator. I agree with
4 you they should not get away with improper conduct, but that
5 is not where this is going. This is where I am concerned,
6 is making sure we do justice in the courts. I have been
7 there, as have you and others on this Committee. I have
8 been there. I have been in both State courts and Federal
9 courts, and I have tried lots of cases. And I have to say
10 that I have tried some criminal cases where there was no
11 fairness at all on the part of the prosecutor, and won them--
12 -partly because there was no fairness. But those poor
13 people would have gone to jail if they had not had a good
14 lawyer. And they should not have gone to jail.

15 Well, given the discussion thus far--and then we will
16 go to Senator Klobuchar when I am through--I would like to
17 make two comments before getting to my questions.

18 First, there has been a suggestion by some members of
19 the Committee that mens rea reform is a last-minute attempt
20 to undercut sentencing reform. But, of course, nothing
21 could be further from the truth. For many years now, groups
22 as ideologically diverse as the Heritage Foundation, the
23 National Association of Criminal Defense Lawyers, the
24 Federalist Society, and the ACLU have decried the lack of
25 criminal intent requirements in the growing body of Federal

1 criminal law and in many cases have proposed mens rea
2 legislation similar to our bill.

3 I spoke on the Senate floor in September and in many
4 other venues about the need to include mens rea as a part of
5 criminal justice reform. The House chose to do so, but the
6 handful of those who negotiated the Senate bill--behind
7 closed doors, by the way--were more focused on letting
8 convicted criminals out of jail on the back end and chose to
9 ignore the fundamental problem of overcriminalization on the
10 front end. My point is that if we are going to do criminal
11 justice reform, we ought to do it right, which must include
12 criminal intent.

13 Second, several colleagues have asked for a specific
14 list of crimes for which the mens rea requirement is
15 deficient. But, of course, no such list could be compelled
16 because our Government does not even have a comprehensive
17 list of all Federal criminal statutes. We saw that today in
18 our representative from the Justice Department. The
19 American Bar Association commissioned a study that concluded
20 on the basis of a computer search looking for words like
21 "fine" and "in prison" that our Nation has more than 3,000
22 Federal crimes on the books. Nobody knows how many. A
23 leading academic has published a study estimating that the
24 number exceeds 4,000. But no one really knows. And these
25 studies do not even broach the subject of regulatory crimes,

1 which may number in the tens of thousands. And as the ABA
2 task force put it, the body of Federal criminal law is "so
3 large that there is no conveniently accessible complete list
4 of Federal crimes."

5 Now, this is precisely the problem of
6 overcriminalization and the overfederalization of criminal
7 law, and it is precisely the reason why a default mens rea
8 standard is essential. And I have to say I get a kick out
9 of the liberals who, you know, claim that they are for the
10 little guy, and yet want this bill so they can convict
11 corporate leaders more easily. Now, I think there are
12 certain corporate leaders who ought to be convicted. But it
13 should never be "more easily." It ought to be in accordance
14 with the law, and they ought to have to prove the cases
15 against them, which good lawyers and good prosecutors can do
16 in some of these cases that my colleagues on the left here
17 are so concerned about.

18 Look, it is not hard to get them to be concerned about
19 the poor little Joe Schmo who has no money and gets indicted
20 for some stupid reason like some of the clients that I had
21 in the past and then had to go to a full Federal trial. One
22 client I had, they indicted him for failure to file proper
23 returns and willful filing of false returns. He was a
24 convert to the Mormon church from, I think, if I recall it
25 correctly, the Netherlands who did not even speak English.

1 He was a drycleaner, and he could not speak very good
2 English. And he had to go through a full Federal trial
3 because he made a mistake on his tax returns. We won the
4 case, but it was not easy. It was 3 days of really hard
5 trying, and I just mention one case just to make the case.

6 Look, my goal here is not to try and foul up this bill.
7 There are many good things in the bill. There are some
8 stupid things in the bill, too. And I would like to see
9 things done a little bit better than what we have done. And
10 it has been done, like I say, behind closed doors, with a
11 slick group of people on the Committee. It is okay with me.
12 But that does not mean that we should not raise important
13 issues that really ought to be raised in something as
14 important as this. And everybody on the other side knows
15 that it is very unlikely we are going to get a mens rea
16 requirement standing alone. And yet everybody pretty well
17 has to admit, as all three of you have, Mr. Meese more
18 forcefully than the other two, but nevertheless--and, Steve,
19 you admit that we need this requirement.

20 I am open. I am open to resolving this. But I will be
21 darned if I am going to allow people to go to jail because
22 they are corporate executives that we hate or that we just
23 do not like. I mean, my gosh, that is--what I find wrong
24 with some of my colleagues on the other side is they are for
25 the little guy, even though he may be totally evil. But,

1 boy, if it is a big corporation, then they ought to all go
2 to jail.

3 Now, that is an exaggeration, of course, but the fact
4 of the matter is I am trying to make a point that both sides
5 need a fair trial. They need fair representation. They
6 need fair laws. They need fair rules of evidence. And we
7 should not be stacking the deck against people who really
8 have not had any intent whatsoever to commit a crime. Does
9 that mean that they still cannot be convicted? No. There
10 are ways that they could still be convicted under good law
11 if they really committed the crime.

12 So these are not little itty-bitty issues. These are
13 important issues to me, and, frankly, I want to thank each
14 of you for being here today. Your testimony here has been
15 critical, and so has the testimony of our Attorney General's
16 office. I was impressed with her as a testifier, just
17 great, as far as I am concerned. But I do not agree with
18 her, and she could not name how many laws there were, as you
19 easily saw.

20 Let us finish with Senator Klobuchar, who has been a
21 prosecutor.

22 Senator Klobuchar. Very good. Well, thank you.

23 Senator Hatch. A very good prosecutor.

24 Senator Klobuchar. Well, thank you. That is very
25 kind. Thank you very much, and thank you, Senator Hatch,

1 for your leadership over the years and for raising important
2 issues.

3 I was very impressed when I walked in from a meeting
4 and heard the former Attorney General discussing
5 snowmobiling. For me, it did not really matter what he was
6 saying, being from the State of snowmobiling and the State
7 that has the two biggest manufacturers in the United States,
8 Arctic Cat and Polaris. So thank you for that.

9 But not to get into that exact topic, an example that
10 he used, my question was more Ms. Caldwell testified earlier
11 today that one way forward to the problems that Senator
12 Hatch was discussing is a targeted approach focused on
13 specific statutes as it becomes clear that they need to be
14 reformed. And I know this does not get at the intellectual
15 argument that everything should be the same, but one step to
16 this targeted approach is to look at the Federal criminal
17 statutes and laws and their mens rea requirement, and a
18 provision that would do this is actually included in the
19 recent Sentencing Reform and Corrections Act. I appreciate
20 Senator Hatch's work. And why shouldn't we wait until we
21 have that inventory before moving forward on mens rea and
22 then figure out if we want to do a more targeted approach?
23 I will ask you that first, Attorney General Meese.

24 Mr. Meese. Basically, the reason is that no one can
25 compile such an inventory. The estimates, as Senator Hatch

1 mentioned, found by the ABA task force that even the number
2 of Federal statutes cannot be known precisely. The estimate
3 today is somewhat over 4,500. I happened to be Chairman of
4 the ABA task force that he referred to that gave that report
5 in 1998. Certainly we have many more statutes today.

6 But beyond that are literally the hundreds of thousands
7 of regulations that now have criminal penalties attached.
8 So what we are talking about is if that would be the
9 approach that were taken rather than filling in the gaps,
10 which is what Senator Hatch does now in his legislation that
11 is proposed, quite frankly, we are talking about something
12 that is impossible to do under current circumstances. But
13 if we attempted it, it would undoubtedly take years and
14 years to do the kinds of things that you are talking about.

15 Senator Klobuchar. Okay. Did you notice your
16 microphone started working when I asked you a question? I
17 would just like to point that out.

18 Okay. So, Professor Saltzburg, what was Sheldon
19 Whitehouse like in class?

20 Mr. Saltzburg. If I recall correctly, I was a young
21 professor. I did not have that much control. I think he
22 brought his dog to class.

23 Senator Whitehouse. I did.

24 Senator Klobuchar. Really?

25 [Laughter.]

1 Senator Klobuchar. Okay. That is, like, not the
2 answer I expected.

3 Mr. Saltzburg. A very smart dog.

4 Senator Klobuchar. Did you hear that, Senator Hatch,
5 that Sheldon brought his dog to class? I asked what he was
6 like in class.

7 Senator Whitehouse. At least the dog was smart,
8 Professor Saltzburg.

9 Senator Klobuchar. I wanted it on the record. Okay.
10 Well, that would be a very memorable thing. Then really the
11 real thing, the only thing you remember about Sheldon, I
12 guess.

13 Senator Hatch. I am glad to see some humor in this.

14 Mr. Saltzburg. I knew early on that he was going to go
15 on to be a great political figure.

16 Senator Klobuchar. Okay. That is a really good
17 answer. Okay. But just the same question I asked Attorney
18 General Meese, just about this inventory idea, and I would
19 ask you, too, Mr. Weissman, if there is any way--he raised
20 concerns about how many statutes there are, how could you
21 really do this, is there a way to do this that would be more
22 limited?

23 Mr. Saltzburg. I would like to answer that. I had a
24 conversation with the Justice Department earlier today, and
25 we decided that you could do this inventory in 6 months--

1 unlike the state of affairs in 1999. And the way it could
2 be done--I will just give you our conversation--is to use a
3 Wikipedia kind of approach, which is establish a website,
4 the Department putting up all the criminal statutes,
5 regulations that exist, and to challenge law schools
6 throughout the country and anybody else to fill in the
7 missing statutes. And they believe and I believe that
8 actually it should be done because the ABA has been on
9 record for a long time, and General Meese led the charge on
10 this for the ABA, that Federal overcriminalization is a huge
11 problem all by itself, aside from mens rea.

12 I mean, if you were to look and see what has happened
13 to criminal law in America, you might decide that, number
14 one, way too many statutes, some of which should be
15 repealed, way too much discretion to certain administrative
16 agencies to create criminal laws that used to belong in the
17 province in Congress, and, third, you might find these mens
18 rea issues that you could isolate and focus on.

19 The problem, though, is fixing them. After you did
20 this, fixing them, agreeing on exactly how you are going to
21 fix them would take a long time. And the ABA believes that
22 the sentencing reform issues cry out for action now, that
23 the overcriminalization, the incredibly punitive sentences
24 that existed for non-violent--I want to emphasize that--drug
25 offenders, that relief is really necessary.

1 One of the things that could happen--and Senator Lee
2 mentioned the idea of a commission to look more broadly at
3 mens rea as a possibility. But if Senator Hatch's bill or
4 something like it were made prospective, one of the things
5 that one could say about that is that it would mean that the
6 Congress was committed to doing what I think it needs to do,
7 which is to focus on mens rea, because if you do not focus
8 on it, in every criminal statute that default provision
9 would kick in. And if people do not think that default
10 provision is appropriate--because I think actually the
11 problem is it provides too little protection in some
12 instances for individuals. It provides knowledge rather
13 than intent as to mens rea. And for some crimes, intent
14 should be the mens rea. In other instances, I believe it is
15 too demanding, in certain of the regulatory instances. But
16 at least going forward you would know that you have to
17 debate mens rea. And that would not be a bad thing.

18 Senator Klobuchar. Okay. Just quickly, Mr. Weissman,
19 if that is all right, Senator Hatch, because I know you want
20 me to have the last word at the hearing.

21 Mr. Weissman. Quickly on the inventory, I think that
22 is the right approach and it is doable. I think there is an
23 additional thing that could be done that is smaller, which
24 is to just identify--if there are so many concerns, identify
25 the two dozen, the one dozen, the three that actually are

1 problems, that people really care about. The 4-H example is
2 included in some of the testimony. That is probably not a
3 real top priority. If it is, you know, fine. But find out
4 where there actually are abuses. Those examples should be
5 identifiable without doing the inventory, and then have the
6 debate about those and see if they play out, and remedy them
7 if there is actually a problem there.

8 Senator Klobuchar. All right. Thank you. Thank you
9 so much, Senator Hatch.

10 Senator Hatch. Thanks to both of you.

11 Well, this has been a very interesting hearing. Look,
12 I am open. I am open to trying to resolve this in a way
13 that is acceptable. But as you can see, this was done
14 behind closed doors with no acceptance. It was acceptable.
15 And, frankly, that is not the way I think criminal law
16 should be decided. The House has done, in my book, a better
17 job of doing this, and because--not just because they have a
18 mens rea requirement in their bill, but because I think they
19 have taken more time to do it and it is more bipartisan than
20 ours apparently is at this point--although ours is
21 bipartisan. We have some very esteemed colleagues who have
22 agreed to go on this bill. But to not have a mens rea
23 requirement is just subjecting unnecessarily--because not
24 all prosecutors are honest. Not all prosecutors are fine
25 people. Not all prosecutors interpret the law the way good

1 people do. I mean, we have seen some real misuse of the law
2 by some prosecutors. You know, it is not just in novels.
3 It is in real life. And this is something that really
4 concerns me.

5 But I am open. I am open to have you experts weigh in
6 and let us find a way of coming up with a mens rea approach
7 that not only makes sense but will do justice, which is not
8 going to be done without one. And I have seen overzealous
9 prosecutors. I can name a number of cases. You can even go
10 back to the Enron case. There was a lot of overzealousness
11 there, even though there was a lot of wrongdoing there. And
12 all I can say, in the end it came to not an awful lot.

13 So these are things that I think are not little issues.
14 They are big issues, and if we do not debate them and argue
15 them and try and come to some reasonable resolution of them,
16 we are not doing our country much good, and we are not being
17 fair.

18 But I want to personally thank each one of you for
19 being here today and our representative from the Attorney
20 General's office. I think it has been a good hearing, and I
21 certainly have learned a lot from it and have enjoyed it
22 very, very much. So thank you for your time and thanks for
23 being here. With that, we will recess until further notice.

24 [Whereupon, at 12:18 p.m., the Committee was
25 adjourned.]

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