



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 7, 2016

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find the response to questions for the record arising from the appearance of Leslie Caldwell, Assistant Attorney General for the Criminal Division, before the United States Senate Committee on the Judiciary, on January 20th, 2016, at a hearing entitled "The Adequacy of Criminal Intent Standards in Federal Prosecutions." We hope that this information is of assistance to the Committee.

Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

A handwritten signature in blue ink, appearing to read "P. J. Kadzik".

Peter J. Kadzik
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Member

Written Questions of Senator Jeff Flake
“The Adequacy of Criminal Intent Standards in Federal Prosecutions”
U.S. Senate Judiciary Committee
January 27, 2016

Questions for Leslie Caldwell, Assistant Attorney General, Criminal Division, U.S. Department of Justice

1. Does the Department of Justice know exactly how many federal criminal statutes are in existence?
 - a. Does the Department of Justice know the corresponding mens rea requirement for each criminal statute?
 - b. Does the Department of Justice know the number of federal criminal statutes that do not have a mens rea requirement for the offense or an element of the offense?
2. How many prosecutions has the Department of Justice brought over the last 5 years pursuant to statutes that did not contain a prescribed mens rea requirement for every element?
 - a. How many referrals for prosecution has the Department of Justice received over the last 5 years from agencies for a regulation that did not contain a mens rea requirement?
3. Do you believe that the creation of an index of criminal statutes and regulatory offenses that punishable by a criminal penalty and the corresponding mens rea requirement is beneficial? If so, why?

Answers to 1-3:

The questions you raise are important ones, and the Department recognizes that there may be statutes that are duplicative, unnecessary or unused. That is why the Department is committed to working with the Committee to bring greater clarity, consistency, and fairness to specific federal statutes and the federal criminal code, generally. As a first step, we support the approach embodied in Section 109(b) and (c) of the Sentencing Reform and Corrections Act of 2015. That provision—which you were instrumental in including—would require an inventory of federal criminal laws and the identification of laws that lack an explicit *mens rea* requirement. Reviewing the results of this report will better enable everyone to understand the universe of statutes, offenses, and elements that are at issue. It will allow those who believe there are potential problems with specific statutes to address those deficiencies after a careful examination of each statute’s purpose, including the particular conduct it penalizes, the harm it is meant to prevent, and the deterrence goals it is intended to achieve.

4. The Department of Justice frequently decides to take a case for criminal prosecution referred by an administrative agency.
 - a. What factors go into the process of deciding whether to prosecute a case referred from an agency? In particular, is the mens rea required for the offense part of that calculus?
 - i. If so, how does it factor in?
 - ii. If not, why is it not factored in?

Answer to 4:

When deciding whether to criminally prosecute a case, Department prosecutors follow guidance set forth in the United States Attorney's Manual (USAM), and particularly as set forth in the Principles of Federal Prosecution at USAM 9-27.000 *et seq.* Specifically, prosecutors must consider whether the conduct at issue constitutes a Federal offense and whether the admissible evidence will be sufficient to sustain a conviction. This analysis necessarily requires a consideration of the evidence available to prove each and every element of a criminal offense, including any *mens rea* required.

The USAM also instructs that prosecutors should decline to criminally prosecute a person if: (1) no substantial Federal interest would be served; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there is an adequate non-criminal alternative to prosecution.

In making the decision to bring federal criminal charges, prosecutors are further directed to consider:

1. Federal law enforcement priorities;
 2. The nature and seriousness of the offense;
 3. The deterrent effect of prosecution;
 4. The person's culpability in connection with the offense;
 5. The person's history with respect to criminal activity;
 6. The person's willingness to cooperate in the investigation or prosecution of others; and
 7. The probable sentence or other consequences if the person is convicted.
5. The proposed mens rea legislation applies retroactively in some cases.
 - a. Do you have concerns with this? If so, what are they?

Answer to 5:

The establishment of a default *mens rea* standard for all existing federal criminal laws would unleash sweeping changes across the *entire* United States Code. It would create massive uncertainty in the law, undermine the enforcement of many criminal laws, and allow defendants charged with serious crimes—including terrorism, violent crime, child exploitation offenses, and corporate fraud—to tie up federal courts in extensive litigation

and potentially escape liability for very serious criminal conduct. Moreover, proposals for a default *mens rea* would severely weaken important statutes that are critical to protecting health and safety, such as those that punish the sale of contaminated foods and drugs which can—and have—sickened and killed people.