

May 17, 2017

The Honorable Bob Goodlatte
U.S. House of Representatives
2309 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers
U.S. House of Representatives
2426 Rayburn House Office Building
Washington, DC 20515

RE: H.R. 2431, Michael Davis, Jr. and Danny Oliver in Honor of State and Local Law Enforcement Act

Dear Chairman Goodlatte and Ranking Member Conyers:

We write to respectfully express our serious concerns with H.R. 2431, the Michael Davis, Jr. and Danny Oliver in Honor of State and Local Law Enforcement Act.

We share this Committee's desire for humane and workable solutions to America's immigration issues, but we oppose the bill's elimination of a *mens rea* requirement for a key element of 18 U.S.C. § 1028A. Current law requires a consecutive two-year mandatory minimum prison term for a person who "during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of *another person*" (emphasis added). Section 312 of the bill under consideration by the Committee would eliminate any requirement that the government prove that the offender knew that the identity in question was that of another person for certain immigration-related felony violations.

While we oppose this mandatory minimum sentence generally, the all-important "of another person" element lies at the very heart of aggravated identity theft, and removing any intent requirement for this element eviscerates the statute's meaning. Under the bill, a person could be guilty of stealing another's identity without knowing that it was the identity of a person. Indeed, this lack of knowledge makes such an offender *less* culpable and *less* deserving of a mandatory minimum sentence than a person who acts with full knowledge that another's identity is, in fact, being used. The bill under consideration would make 18 U.S.C. § 1028A almost a strict liability offense. As lawmakers on both sides of the aisle have recognized, those kinds of criminal offenses should be created and used sparingly, and they should not be accompanied by mandatory minimum sentences that could lead to excessive and unjust punishments. The Committee should preserve intent requirements for all material elements of all criminal offenses.

This bill's elimination of *mens rea* is inconsistent with this Committee's admirable history of and concern for proper preservation of rigorous criminal intent standards. The House Overcriminalization Task Force of the 113th Congress spent nearly a year hearing from multiple witnesses and its own members of the importance of *mens rea* standards for all offenses and all key elements of offenses. Brian Walsh of the Heritage Foundation and Tiffany Joslyn of the National Association of Criminal Defense Lawyers produced a report, *Without Intent*, detailing the many disturbing outcomes that can arise when a *mens rea* standard is missing or insufficient.¹ They urge Congress to include an adequate *mens rea* requirement for each element of the offense, whenever possible.² This sound principle should hold true regardless of whether the crime is a regulatory violation or an immigration-related offense. At a minimum, to avoid unjust

results and unintended consequences, crimes lacking a *mens rea* standard should not carry a mandatory minimum sentence.

We do not believe that applying mandatory minimum sentences with diluted *mens rea* protections, as this bill would, is a solution to the complicated immigration issues facing this country. For these reasons, we respectfully oppose the bill and urge you to reconsider its changes to 18 U.S.C. § 1028A.

We hope to continue this dialogue with your offices and would be happy to discuss this and other sentencing legislation and policies with you at your convenience.

Sincerely,

Families Against Mandatory Minimums
National Association of Criminal Defense Lawyers

cc: House Judiciary Committee members

¹ Brian W. Walsh & Tiffany Joslyn, Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law, May 5, 2010, <https://www.nacdl.org/report/withoutintent/PDF/>.

² *Id.* at 31-32.