January 19, 2016

The Honorable Charles E. Grassley,
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy,
Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

RE: "The Adequacy of Criminal Intent Standards in Federal Prosecutions"

Dear Chairman Grassley and Senator Leahy:

We are writing to thank you for holding a hearing exploring the adequacy of criminal intent standards in federal prosecutions. The National Association of Criminal Defense Lawyers is uniquely positioned not only to understand the necessity of an adequately protective *mens rea*[i] requirement, but to witness the practical effects of its erosion each and every day. NACDL is grateful for this opportunity to share our expertise on this concept, which is of fundamental import to our entire criminal justice system, and to present our views, supported by others across the ideological divide, on why *mens rea* reform demands immediate action.

The greatest power that any civilized government routinely uses against its own citizens is the power to prosecute and punish under criminal law. This power necessarily distinguishes the criminal law from all other areas of law and makes it uniquely susceptible to abuse and capable of inflicting injustice. More than any other area of law, criminal law, because its prohibitions and commands are enforced by the power to punish, must be firmly grounded in fundamental principles of justice. Such principles are expressed in both substantive and procedural protections.

One such fundamental principle is embodied in the doctrine of fair notice, which is a critical component of the Constitution's due process protection. The fair notice doctrine requires that, in order for a person to be punished criminally, the offense with which she is charged must provide adequate notice that the conduct in which she engaged was prohibited. In the words of the Supreme Court: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[ii] Due process therefore demands that a criminal law give "fair warning of the conduct that it makes a crime."[iii]

As a cornerstone of our criminal justice system since our nation's founding, this constitutionally-based principle of fair notice is embodied in the requirement that, with rare exceptions, the government must prove the defendant acted with criminal intent before subjecting her to criminal punishment. More specifically, no individual should be subjected to condemnation and prolonged deprivation of liberty, and all the serious, life-altering collateral consequences that follow, unless she intentionally engages in inherently wrongful conduct or acts with knowledge that her conduct is unlawful. It is only in such circumstances that a person is truly blameworthy and thus deserving of criminal punishment.

The criminal intent requirement is not just a legal concept—it is the fundamental anchor of the criminal justice system. The bedrock of Anglo-American criminal law for over six centuries, this principle has even deeper roots in English common law, Roman law, and canon law.[iv] It is this essential nexus between a person's conduct and mental culpability that provides the moral underpinning for criminal law. Absent a meaningful criminal intent requirement, an individual's other legal and constitutional rights cannot adequately protect that individual from unjust prosecution and punishment for honest mistakes or engaging in conduct that she had no reason to know was wrongful.

One laudable purpose of a *mens rea* requirement is to protect persons who did not intend to commit a crime from unjust punishment. This fundamental principle is exemplified by the maxim first attributed to Sir William Blackstone in 1765—it is "better that ten guilty persons escape than that one innocent suffer."[v] This maxim, which predates the founding of our nation, stands for three basic fundamental principles. First, the guilty should be punished. Second, the innocent should not. And third, it is imperative to our criminal justice system that we, as a society, do everything in our power to make sure that prosecutors distinguish correctly between criminal conduct and everything else—each and every time, and for every one of us.

Moreover, the inclusion of criminal intent requirements in criminal offenses serves the broad purpose of deterrence in the criminal justice system while acting as a safety valve against criminal punishment for innocent actors. Deterrence of criminal conduct cannot be achieved in a system that punishes those who are not culpable. If a person is unaware of the prohibited nature of the conduct in which she is engaging, then the risk of criminal punishment simply cannot affect, let alone prevent, engagement in that conduct. This is especially the case with strict criminal liability (laws that lack any *mens rea* requirement whatsoever), which "is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future[.]"[vi] As such, strict criminal liability should only be employed in the criminal law after weighty deliberation.

Whether the offense is relatively straightforward like homicide or a more complicated regulatory prohibition, careful consideration must always be given to the fundamental principles of culpability and fair notice when defining the guilty mind and guilty act that constitute the crime. By its own terms, a criminal offense should prevent the conviction of an individual acting without intent to violate the law and knowledge that her conduct was unlawful or sufficiently wrongful so as to put her on notice of possible criminal liability. A person who acts without such intent and knowledge does not deserve the government's greatest punishment or the extreme moral and societal censure such punishment carries. It is the view of the National Association of

Criminal Defense Lawyers that these fundamental principles should continue to guide American policy-making as they serve as a crucial bedrock to a fair and rational criminal justice system.

Congress has promulgated an extraordinary amount of federal criminal statutes and authorized an exponentially high number of criminal regulations that impact all aspects of our everyday lives.[vii] A fair amount of these impose criminal liability with an explicit *mens rea* requirement, but some do not. Moreover, it is often unclear whether a *mens rea* term that is contained in the law applies throughout the offense or only to certain limited elements. The sheer volume of these criminal statutes and regulations exposes us all to a vast array of potential criminal liability. Critics of *mens rea* reform have erroneously claimed that it is designed only to protect a certain kind of offender or aimed at reforming only a limited kind of conduct deemed criminal. As evidenced by the express language in S. 2298, the Mens Rea Reform Act of 2015, that is clearly untrue, as the legislation would explicitly apply with equal effect to criminal statutes and regulations regardless of whether they involved what could be characterized as "street crimes" or "white collar" crimes. That is because its sponsors recognized that in light of the vast umbrella of federal crimes that cover the most egregious to the most mundane of conduct, it is critical the laws reflect the fundamental principle that one should have a culpable state of mind to be deemed a criminal and to suffer the many collateral consequences of a conviction. The legislation supports the application of the principle well beyond just "white collar" or "corporate" conduct.

It is critical to understand that *mens rea* is not simply a protection available to a select few. Indeed, the Supreme Court in June 2015 reemphasized this universal importance in two general "street crime" cases: *Elonis v. United States* and *McFadden v. United States.* In *Elonis v. United States*, the petitioner Anthony Douglas Elonis posted on Facebook his original rap lyrics as a therapeutic way to release his anger at being separated from his wife and kids. His lyrics contained explicit and violent language about his wife, co-workers, a kindergarten class, and state and federal law enforcement officers. He was subsequently charged with the federal crime of transmitting, via interstate commerce, communications containing threats to injure another person.[viii] At trial, Elonis requested a jury instruction that the government was required to prove he intended to communicate a "true threat."[ix] His requested instructions were denied, and he was convicted. The Third Circuit affirmed his conviction, so he appealed to the Supreme Court. Chief Justice Roberts writing for an 8-1 Court held that to obtain a conviction, the government, in fact, had to show that Elonis intended to issue threats or knew that the communications would be viewed as threats[x] and not his amateurish rap musings. That is, the government had to prove Elonis had the requisite *mens rea* to communicate a threat under the statute. In *Elonis,* the Supreme Court explained that "[f]ederal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state."[xi] As noted by Chief Justice Roberts, this fundamental "understanding took deep and early root in American soil."[xii]

Similarly, in *McFadden v. United States*, Justice Clarence Thomas writing for a unanimous court held that to convict someone of distribution of controlled substance analogues, the government must prove that the accused knew the substance was a controlled substance under federal law.[xiii] In other words, even in a drug case, the government must still prove that the accused had the requisite *mens rea*. Specifically, Stephen McFadden had been arrested and charged with distributing baths salts, which were deemed to be a controlled substance analogue in violation of the federal Controlled Substance Analogue Enforcement Act of 1986. McFadden argued simply that he did not know that the bath salts he was distributing were regulated as controlled substance

analogues. He requested jury instructions to that effect. Instead, the District Court instructed the jury that it need only find that McFadden knowingly and intentionally distributed a substance with substantially similar effects as a controlled substance and that he intended for it to be consumed by humans. McFadden was convicted. The Fourth Circuit affirmed, and he appealed. The Supreme Court granted *certiorari* and reversed. In reversing the lower courts, the Supreme Court held that the government had to prove that McFadden knew he was distributing a substance regulated under the act.[xiv]

As exemplified by *Elonis* and *McFadden*, the requirement that a defendant have the requisite criminal intent to commit the alleged crime is a universal and fundamental principle of American criminal law. Neither of these cases involved financial fraud, decent, or financial manipulation often synonymous with "white collar" crimes. In fact, almost all of the cases over the last quarter century that shape American jurisprudence with respect to *mens rea* are outside the context of traditional white collar crimes. For example, in *Rosemond v. United States*, a drug and firearm possession case, the Supreme Court held that the firearm sentencing enhancements for discharging a firearm during a drug deal could not stand because the defendant did not have advance knowledge that a gun would be used during the drug deal, *i.e.*, he lacked the requisite criminal culpability.[xv] Similarly, in *United States v. X-Citement Video, Inc.*, involving distribution of pornography, the Court clarified that for any federal statute, the presumption in favor of a culpable *mens rea* requirement should "apply to each of the statutory elements that criminalize otherwise innocent conduct."[xvi] The *X-Citement Video* Court even suggested that "a statute completely bereft of a scienter element . . . would raise serious constitutional doubts."[xvii] In *Liparota v. United States*, a case involving the use of food stamps in an unauthorized manner, the Court rejected the government's interpretation of the statute because it would have criminalized "a broad range of apparently innocent conduct" and swept in individuals who had no knowledge of the facts that made their conduct blameworthy.[xviii] To take another example, in *Posters 'N' Things, Ltd. v. United States,* a case dealing with the selling of drug paraphernalia, the Court held that an individual could not be convicted of selling such paraphernalia unless he "knew that the items at issue [were] likely to be used with illegal drugs."[xix] Lastly, in *Staples v. United States*, a possession of a firearm case, the Court held that to be criminally liable, a defendant must know that his weapon possessed automatic firing capability so as to make it a machine gun as defined by the National Firearms Act, *i.e.*, that he knew his unauthorized possession of the modified gun violated the statute.[xx] These non-white collar cases have all shaped key aspects of the federal law regarding *mens rea* and illustrate why the protections that *mens rea* requirements afford are not limited to white collar or corporate defendants.

Despite the depth and breadth of Supreme Court precedent supporting the inclusion of criminal intent requirements in our nation's criminal laws, however, legal precedent is not enough to protect innocent people, or people acting inadvertently, from being unfairly charged or convicted. It might surprise some to know that an astonishing 97% of federal cases are resolved through "plea bargains" whereas less than 3% of cases go through a trial process during which the charges against the accused can be tested.[xxi] Out of this tiny number, only a small percentage of those cases will have the financial resources and luck needed to make it up to the United States Supreme Court to be reviewed.

NACDL is grateful for the opportunity to share our expertise and perspective with the Senate Judiciary Committee and commends the Members' efforts to address the challenges facing our

nation's criminal justice system. A bipartisan approach to this problem, especially in the current political climate, is meaningful and important. NACDL and its partners from across the political spectrum have highlighted the problem of overcriminalization for several years. Deficient intent provisions are one core aspect of that problem and an issue that matters for every single federal crime, regardless of the background of the accused, the nature of the crime alleged, the level of impact of the crime, or any other demographical metric. NACDL believes that the solutions outlined in S. 2298 constitute meaningful, important, and achievable remedial steps that will garner broad support. We continue to be inspired by your willingness to tackle this problem and stand ready to assist in every way possible.

Respectfully,

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[i] For anyone who has attended law school, *mens rea*, the Latin phrase for "guilty mind," is familiar and understood as integral to the realm of criminal law. For the general public, however, the concept of *mens rea* is more commonly understood and known as "criminal intent." While these phrases are not identical in meaning, for the sake of greater understanding, this statement will use the phrases interchangeably.

[ii] *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (internal quotation marks omitted) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

[iii] *Id*. at 350.

[iv] Brief of the National Association of Criminal Defense Lawyers *et al*. as *Amici Curiae* in Support of Petitioner at 18-22, *Shelton v. Sec'y Dept. of Corrections*, 802 F.Supp.2d 1289 (M.D. Fla. Jan. 28, 2011) (No. 6:07-cv-839-Orl-35KRS) (detailing the history and origins of the *mens rea* or guilty mind requirement in criminal law).

[v] Sir William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1st ed., 1765).

[vi] Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 109.

[vii] *See* generally, Brian W. Walsh & Tiffany M. Joslyn, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW, The Heritage Foundation Special Report No. 77 (May 5, 2010), available at http://www.heritage.org/research/reports/2010/05/without-intent.

[viii] *See Elonis v. United States*, 135 S.Ct. 2001, 2004-7 (June 1, 2015).

[ix] *Id*. at 2007.

[x] *See id*. at 2012.

[xi] *Id*.

[xii] *Id*.

[xiii] *McFadden v. United States*, 135 S.Ct. 2298 (June 18, 2015).

[xiv] *Id*. at 2305-6.

[xv] *Rosemond v. United States*, 134 S.Ct. 1240, 1249 (Mar. 5, 2014).

[xvi] *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994).

[xvii] *Id*. at 78.

[xviii] *Liparota v. United States*, 471 U.S. 419, 426 (1985).

[xix] *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 524 (1994).

[xx] *Staples v. United States*, 511 U.S. 600, 619 (1994).

[xxi] Jed S. Rakoff, *Why Innocent People Plead Guilty*, November 20, 2014, available at http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.