

Statement by Senator Orrin G. Hatch
Senate Judiciary Committee
Markup on S. 2123,
Sentencing Reform and Corrections Act of 2015
October 22, 2015

Because of the way this process has played out, there are important pieces missing from this legislation. In particular, this legislation contains no provisions to clarify missing or ambiguous *mens rea* requirements—an issue I have spoken about on the Senate floor and here in committee—and contains very little to lessen the problems of overfederalization of crime and overcriminalization of conduct.

I think it's important to place this bill in context. For the past several years, a broad coalition of groups from across the political spectrum has been working together to address the problem of overcriminalization. The coalition formed over a shared concern that our criminal code has grown too large, too complicated, and too sclerotic. We have too many crimes that criminalize too much conduct and result in penalties that too often are unnecessarily harsh. Members of the overcriminalization coalition realized that although they had different priorities, by working together to advance some issues that were the priority of some members, and other issues that were the priority of other members, a lot could be accomplished that would not otherwise be possible through a more atomized approach.

Here in the Senate, however, we have lost our focus on overcriminalization and allowed the entire enterprise to become about sentencing and about prison reform. We have dropped the ball on other issues that must be addressed if we are to root out the problem of overcriminalization, including the lack of clear *mens rea* requirements in much of our criminal law. Such requirements are essential to ensuring that honest, hard-working Americans are not swept up in the criminal justice system for accidental conduct or for conduct that a reasonable person would not think was wrong. It's insufficient simply to deal with the problems on the back end without addressing the root causes of those problems that occur on the front end.

Now, I've been told by some people that now is not the time to address *mens rea* reform. Wait for the next bill, they say. We're too far along on this one. There's not enough time.

To that I have two responses.

First, the political reality is that *mens rea* reform must be part of the larger criminal justice reform effort or it is unlikely to happen at all. Already some groups have aligned themselves against *mens rea* reform out of the mistaken belief that requiring Congress and agencies to be clear when creating strict liability crimes is somehow an effort to unwind the regulatory state. These groups are not suddenly going to change their tune once their priorities—such as sentencing—have passed the finish line.

Second, if there's not enough time to include *mens rea* in this bill, why must this bill be moved so quickly? What is the rush? This bill—again, the most significant criminal justice reform bill in a generation—was introduced three weeks ago. We had a hearing on it three days ago. If the concern about *mens rea* reform is lack of process, then I would say that that same concern applies to the very bill we're considering today.

I'm glad that Chairman Goodlatte has indicated that the House Judiciary Committee will be taking up the issue of *mens rea*. We should, too. And we should take it up as part of this bill, which is being presented to the Senate, and to the public, as a comprehensive criminal justice package. Now, there is much good in this bill, and many needed reforms. I'd especially like to highlight the good work Senator Cornyn has done on back-end prison reform.

But I do not see how criminal justice reform can be truly comprehensive without getting at the underlying causes of our overcriminalization problem, including and especially the absence of clear criminal intent requirements in much of our criminal law. As I said on the Senate floor over a month ago, I believe that any package of criminal justice reforms that passes the Senate must include provisions to shore up *mens rea* protections. And as I said at the hearing earlier this week, I will not be able to support this bill unless it includes meaningful *mens rea* reform along the lines of the amendment I've circulated. I am hopeful that there will be a way to do so. I will have more to say on this later.