

IDENTITY THEFT PENALTY ENHANCEMENT ACT

JUNE 8, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1731]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1731) to amend title 18, United States Code, to establish penalties for aggravated identity theft, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Identity Theft Penalty Enhancement Act”.

SEC. 2. AGGRAVATED IDENTITY THEFT.

(a) IN GENERAL.—Chapter 47 of title 18, United States Code, is amended by adding after section 1028, the following:

“§ 1028A. Aggravated identity theft

“(a) OFFENSES.—

“(1) IN GENERAL.—Whoever, 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 shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

“(2) TERRORISM OFFENSE.—Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

“(b) CONSECUTIVE SENTENCE.—Notwithstanding any other provision of law—

“(1) a court shall not place on probation any person convicted of a violation of this section;

“(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

“(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

“(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28.

“(c) DEFINITION.—For purposes of this section, the term ‘felony violation enumerated in subsection (c)’ means any offense that is a felony violation of—

“(1) section 641 (relating to theft of public money, property, or rewards), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 (relating to theft from employee benefit plans);

“(2) section 911 (relating to false personation of citizenship);

“(3) section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm);

“(4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);

“(5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);

“(6) any provision contained in chapter 69 (relating to nationality and citizenship);

“(7) any provision contained in chapter 75 (relating to passports and visas);

“(8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);

“(9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);

“(10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or

“(11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a–7b(a), and 1383a) (relating to false statements relating to programs under the Act).”.

(b) AMENDMENT TO CHAPTER ANALYSIS.—The table of sections for chapter 47 of title 18, United States Code, is amended by inserting after the item relating to section 1028 the following new item:

“1028A. Aggravated identity theft.”.

(c) APPLICATION OF DEFINITIONS FROM SECTION 1028.—Section 1028(d) of title 18, United States Code, is amended by inserting “and section 1028A” after “In this section”.

SEC. 3. AMENDMENTS TO EXISTING IDENTITY THEFT PROHIBITION.

Section 1028 of title 18, United States Code, is amended—

- (1) in subsection (a)(7)—
 - (A) by striking “transfers” and inserting “transfers, possesses,”; and
 - (B) by striking “abet,” and inserting “abet, or in connection with,”;
- (2) in subsection (b)(1)(D), by striking “transfer” and inserting “transfer, possession,”;
- (3) in subsection (b)(2), by striking “three years” and inserting “5 years”; and
- (4) in subsection (b)(4), by inserting after “facilitate” the following: “an act of domestic terrorism (as defined under section 2331(5) of this title) or”.

SEC. 4. AGGREGATION OF VALUE FOR PURPOSES OF SECTION 641.

The penultimate paragraph of section 641 of title 18 of the United States Code is amended by inserting “in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case,” after “value of such property”.

SEC. 5. DIRECTIVE TO THE UNITED STATES SENTENCING COMMISSION.

(a) IN GENERAL.—Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and amend its guidelines and its policy statements to ensure that the guideline offense levels and enhancements appropriately punish identity theft offenses involving an abuse of position.

(b) REQUIREMENTS.—In carrying out this section, the United States Sentencing Commission shall do the following:

- (1) Amend U.S.S.G. section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) to apply to and punish offenses in which the defendant exceeds or abuses the authority of his or her position in order to obtain unlawfully or use without authority any means of identification, as defined section 1028(d)(4) of title 18, United States Code.
- (2) Ensure reasonable consistency with other relevant directives, other sentencing guidelines, and statutory provisions.
- (3) Make any necessary and conforming changes to the sentencing guidelines.
- (4) Ensure that the guidelines adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.

SEC. 6. AUTHORIZATION OF APPROPRIATIONS.

In addition to any other sums authorized to be appropriated for this purpose, there is authorized to be appropriated to the Department of Justice, for the investigation and prosecution of identity theft and related credit card and other fraud cases constituting felony violations of law, \$2,000,000 for fiscal year 2005 and \$2,000,000 for each of the 4 succeeding fiscal years.

PURPOSE AND SUMMARY

H.R. 1731, the “Identity Theft Penalty Enhancement Act,” addresses the growing problem of identity theft. Currently under 18 U.S.C. § 1028 many identity thieves receive short terms of imprisonment or probation; after their release, many of these thieves will go on to use false identities to commit much more serious crimes. H.R. 1731 provides enhanced penalties for persons who steal identities to commit terrorist acts, immigration violations, firearms offenses, and other serious crimes. The bill also amends current law to impose a higher maximum penalty for identity theft used to facilitate acts of terrorism.

BACKGROUND AND NEED FOR THE LEGISLATION

The terms “identity theft” and “identity fraud” refer to all types of crimes in which someone wrongfully obtains and uses another person’s personal data in some way that involves fraud or deception, typically for economic or other gain, including immigration benefits. The Federal Trade Commission (“FTC”) received 161,819 victim complaints of someone using another’s information in 2002. Of these, 22% involved more than one type of identity crime.

For 2002, the FTC breakdown of types of identity theft shows that 42% of complaints involved credit card fraud, 22% involved the activation of a utility in the victim’s name, 17% involved bank accounts opened in the victim’s name, 9% involved employment fraud, 8% involved government documents or benefits fraud, 6% involved consumer loans or mortgages obtained in the victim’s name, and 16% involved medical, bankruptcy, securities and other miscellaneous fraud.

In 2003, the FTC randomly sampled households. A total of 4.6 % of survey participants indicated that they had discovered they were victims of some type of identity theft in the past year. This result suggests that almost 10 million Americans were the victims of some form of identity theft within the last year, which means despite all the attention to this type of crime since September 11, 2001 the incidence of this crime is increasing.

As international cooperation increases to combat terrorism, al-Qaida and other terrorist organizations increasingly turn to stolen identities to hide themselves from law enforcement. For example, according to testimony by Jim Huse, Inspector General of the Social Security Administration before a 2002 joint hearing of two Subcommittees of this Committee, five Social Security numbers associated with some of the terrorists appeared to be counterfeit and were never issued by the Social Security Administration, one was assigned to a child, and four of the terrorists were associated with multiple Social Security numbers. An FBI agent testified at the same hearing, “terrorists have long utilized identity theft as well as Social Security number fraud to enable them to obtain such things as cover employment and access to secure locations. These and similar means can be utilized by terrorists to obtain driver’s licenses, and bank and credit card accounts, through which terrorism is facilitated.”

Since September 11, 2001, Federal and State officials have taken notice of this crime because of the potential threat to security, but the cost to the consumer and corporations is equally alarming. The FTC estimates the loss to businesses and financial institutions from identity theft to be \$47.6 billion. The costs to individual consumers are estimated to be approximately \$5.0 billion.

As this crime increases, we must try to find new ways to combat it. Websites developed by the FTC and consumer groups encourage consumers to protect themselves by shredding mail and keeping a close watch over their credit reports; yet, the FTC’s statistics suggest that identity thieves are obtaining individuals’ personal information for misuse not only through “dumpster diving,” but also through accessing information that was originally collected for an authorized purpose. The information is accessed either by employees of the company or of a third party that is authorized to access

the accounts in the normal course of business, or by outside individuals who hack into computers or steal paperwork likely to contain personal information.

In one such case, the Justice Department charged a 33-year-old customer service representative from Long Island, New York, with identity theft and fraud for using his position at a company that provided computer software and hardware to banks and lending companies to access personal consumer credit information from three credit reporting agencies. The scheme allowed him to access the personal information of over 30,000 victims.

The insider threat from identity theft and identity fraud is a threat to personal security as well as national security. The United States Attorney in Atlanta charged 28 people with participating in a fraud ring that supplied over 1,900 individuals with fraudulent Social Security cards. The cards were supplied by a Social Security Administration clerk in exchange for \$70,000 in payoffs.

Under current law, many perpetrators of identity theft receive little or no prison time. That has become a tacit encouragement to those arrested to continue to pursue such crimes. The following are examples of instances in which persons involved in identity theft received little or no prison time:

U. S. v. Amry. On October 15, 2003, Mohamed Amry, a former employee of a Bally's Health Club in Cambridge, Massachusetts, pleaded guilty to a multi-count indictment charging him with conspiracy to commit bank fraud (18 U.S.C. § 371), bank fraud (18 U.S.C. § 1344), conspiracy to commit access device fraud and access device fraud (18 U.S.C. § 1029), and conspiracy to commit identity theft (18 U.S.C. § 1028). Amry, using a skimmer to obtain credit-card data from members of the health club, provided stolen names, Social Security numbers, and credit-card information of at least 30 people to Abdelghani Meskini, who pleaded guilty to conspiracy in connection with the plot to blow up Los Angeles International Airport in 1999. Using victims' names, Amry reportedly assisted Meskini in creating false green cards and Social Security cards. Meskini used the information to open bank accounts in New York, where he deposited counterfeit checks. Amry was not charged with knowledge of the terrorists' intentions in obtaining and using the stolen identities. On January 17, 2003, Amry was sentenced to 15 months imprisonment.

U. S. v. Scheller. Suzanne M. Scheller was a financial institution employee. Scheller accessed the financial institution's computer system and searched for potential customers for a friend who was starting a real estate business. After identifying prospects, Scheller then provided the friend with the customer account information. Scheller admitted that she knew her unauthorized access was against the policy of the financial institution. The investigation established that some of the information provided by Scheller was actually used by another individual unknown to her as part of an identity theft scheme. Imposters used the customer account information to steal the identity of the customers and conduct transactions at the financial institution. Scheller pleaded guilty to one count of obtaining unauthorized computer access to customer account information from a financial institution, in violation of 18 U.S.C. §§ 2, 1030(a)(2)(A), 1030(c)(2)(B)(i), 1030(c)(2)(B)(iii). On November 30, 2001, Scheller was sentenced to 36 months probation.

U. S. v. Opara. On February 7, 2002, Chuck Opara, after having pleaded guilty to multiple counts of submitting false claims and identity theft, was sentenced to 15 months imprisonment. According to court documents filed in this case, Opara engaged in a multi-million dollar fraud scheme. As part of the scheme, Opara stole the identities of 24 people, and he submitted bogus Federal income tax returns for those people that sought average refunds of \$50,000. The fraudulent tax returns asked that refunds be mailed to two dozen mail-drops that Opara had acquired.

U. S. v. Maxfield. On five separate occasions between 1996 and 1998, William K. Maxfield used the Social Security number of a William E. Maxfield (no relation) to obtain loans and lines of credit. He was able to obtain the false Social Security number through his employment at an auto dealership. Maxfield defaulted on some of the loans but was timely on others. Ultimately, most of the lenders were paid; however, the more significant injury was to William E. Maxfield, who suffered harm to his credit rating and had great difficulty in clearing what appeared to be delinquent accounts. On January 9, 2003, William K. Maxfield was sentenced to 10 months imprisonment.

U. S. v. Rodriguez. While receiving Title II disability benefits, Dolores Rodriguez worked as a science teacher at a school under her husband's Social Security number. She received over \$80,000 in disability benefits. She pled guilty to a violation of 18 U.S.C. § 641. She was sentenced to 12 months home confinement, 5 years probation, and restitution.

U. S. v. Fergerson. Diana Fergerson had stolen the identity of another person years earlier. She used the stolen identity to apply for and receive Social Security benefits. She also used the stolen identity to establish credit. She received over \$45,000 in Social Security disability benefits. She pled guilty to several charges including violations of 18 U.S.C. § 641 and 18 U.S.C. § 1028(a)(7). She was sentenced to 5 years probation and restitution.

U. S. v. Benavides-Holguin. Porfirio Benavides-Holguin, a resident of Chihuahua, Mexico, received Title XVI benefits under the name and Social Security number of his former brother-in-law, a U.S. citizen. He pled guilty to both counts of a 2 count indictment alleging violations of 42 U.S.C. § 1383(a)(2). He was sentenced to 10 months confinement, 3 years of non-reporting supervised release, and restitution.

U. S. v. Green-Jones. Arnetta Green-Jones received SSI benefits under her actual Social Security number while working as a seasonal temporary worker employed by the IRS using the Social Security number of another individual. She pled guilty to a violation of 42 U.S.C. § 408(a)(7)(B), 42 U.S.C. § 1383a(a)(3)(A) and 18 U.S.C. § 1028(a)(4). She was ordered to serve 5 years probation and pay restitution.

COMMITTEE AMENDMENTS

Amendments to this legislation were adopted both at Subcommittee and full Committee and incorporated into the version of the bill the Committee ordered reported. The Subcommittee adopted an amendment to allow the aggravated identity theft penalties to be applied to individuals who used fraudulent identities, in addi-

tion to those who used the identities of other persons, to commit a terrorist offense.

The full Committee adopted two amendments. The first amendment added several Social Security fraud crimes and theft or embezzlement by a bank officer or employee to the list of crimes for which the enhanced penalties may be applied. Additionally, this amendment clarified that a crime prosecuted under 18 U.S.C. § 641 that involved more than one incident could be aggregated for purposes of determining the penalties.

Currently there is a split among the Federal district courts as to whether 18 U.S.C. § 641 allows such aggregation. In those courts which do not allow aggregation, the use of this section has been limited to the prosecution of individuals who have fraudulently received public money, property, or records. The most common instance in which this has been a problem is in the improper receipt of monthly Federal benefits. Many times the individual monthly Federal benefit checks are less than \$1,000, the threshold for a felony. This amendment clarifies that 18 U.S.C. § 641 applies and provides for the aggregation of a series of such payments to the individual.

The first amendment also included a directive to the United States Sentencing Commission to require that the Federal Sentencing Guideline § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) be amended to apply to employees or directors who use access to information at their place of business to commit identity theft or fraud. This amendment will help address the problem of insiders who use their employment position to commit fraud or help others commit fraud. It will allow judges to apply additional penalties to these individuals under the sentencing guidelines.

The second amendment adopted by the Committee authorized \$2 million per year for 5 years for the Department of Justice to investigate and prosecute identity theft and identity fraud cases.

Significantly, the Committee rejected amendments which would have removed the mandatory consecutive sentences from the bill. At the Subcommittee and full Committee mark-ups Crime Subcommittee Chairman Coble noted, "opponents of mandatory minimums would have a more compelling case if they could assure the Congress that the judges were faithfully following the Federal Sentencing Guidelines. And I think, sadly, there's evidence that doesn't support that."

HEARINGS

The Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on H.R. 1731 and H.R. 3693 on March 23, 2004. Testimony was received from four witnesses, representing four organizations, with additional material submitted.

COMMITTEE CONSIDERATION

On March 30, 2004, the Subcommittee on Crime, Terrorism, and Homeland Security met in open session and ordered favorably reported the bill H.R. 1731, as amended, by a voice vote, a quorum being present. On May 12, 2004, the Committee met in open ses-

sion and ordered favorably reported the bill H.R. 1731 with an amendment by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that there were no recorded votes during the Committee consideration of H.R. 1731.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R.1731, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 20, 2004.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1731, the "Identity Theft Penalty Enhancement Act."

If you wish further details on his estimate, we will be pleased to provide them. The CBO staff contact is Lanette J. Walker, who can be reached at 226-2860.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1731—Identity Theft Penalty Enhancement Act.

H.R. 1731 would authorize the appropriation of \$2 million each of years 2005 through 2009 for the investigation and prosecution of identity theft and related credit card fraud. The estimated budgetary impact of H.R. 1731 is shown in the following table. CBO estimates that implementing H.R. 1731 would cost \$10 million over

the 2005–2009 period, subject to the appropriation of the specified amounts.

By Fiscal Year, in Millions of Dollars

	2005	2006	2007	2008	2009
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Authorization Level	2	2	2	2	2
Estimated Outlays	2	2	2	2	2

H.R. 1731 also would create new criminal penalties for knowingly possessing another person’s means of identification and would increase the criminal fines for other acts of identity theft. Collections of criminal penalties are recorded in the budget as revenues. Under current law, those funds are deposited in the Crime Victims Fund and later spent. Therefore, enacting the bill could increase revenues and direct spending. CBO expects, however, that any additional revenues and direct spending as a result of enacting this bill would not be significant because of the relatively small number of cases involved.

H.R. 1731 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on State, local, or tribal governments.

On February 6, 2003, CBO transmitted a cost estimate for S. 153, the Identity Theft Penalty Enhancement Act, as reported by the Senate Committee on the Judiciary on January 30, 2003. That bill did not authorize appropriations for investigation and prosecution of identity theft and other related credit card fraud; our cost estimates reflect that difference.

The CBO staff contact for this estimate is Lanette J. Walker, who can be reached at 226–2860. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R.1731, is intended to reduce the incidence of identity theft and fraud and address the most serious criminals by providing stronger penalties for those who would commit such crimes in furtherance of other more serious crimes.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Unless otherwise noted, this discussion describes the bill as reported.

Section 1. Short Title. Table of Contents

This section provides that this Act may be cited as the “Identity Theft Penalty Enhancement Act.”

Section 2. Aggravated Identity Theft

This section amends Title 18 to provide for a mandatory consecutive penalty enhancement of 2 years for any individual who knowingly transfers, possesses, or uses the means of identification of another person in order to commit a serious Federal predicate offense (listed in the bill and including immigration violations, false citizenship crimes, firearms offenses, and other serious crimes). This 2-year penalty enhancement is in addition to any term of imprisonment for the underlying offense.

This section also amends Title 18 to provide for a mandatory consecutive penalty enhancement of 5 years for any individual who knowingly transfers, possesses, or uses the means of identification of another person in the commission of any terrorism offense. This 5 year penalty enhancement is in addition to any term of imprisonment for the underlying offense.

Additionally, this section contains several provisions to ensure the intent of this legislation is carried out. It mandates that the enhancement be imposed as a consecutive sentence and expressly prohibits a judge from ordering the sentence to run concurrently with that of the underlying offense. It prohibits the court from sentencing a convicted defendant to probation and from reducing the underlying term of imprisonment. It does, however, allow the court to impose concurrent sentences for additional violations of this section.

Section 3. Amendments to Existing Identity Theft Prohibition

This section amends the existing identity theft laws to clarify that possession of the means of identification of another person with intent to commit an unlawful act can constitute a crime. This section will make it easier for prosecutors to convict identity thieves by allowing prosecution for simply possessing false identity documents with the intent to commit a crime.

Currently, § 1028(a)(7) prohibits only the knowing use or transfer, without lawful authority, of another person's means of identification. This means that § 1028(a)(7) addresses only those situations in which a defendant can be proved to have obtained someone else's means of identification and actually put that means of identification to use, or to have transferred it to another person or location where it can be put to use. In some situations, however, law enforcement authorities may apprehend someone who has wrongly acquired another's means of identification, but has not yet put it to use or transferred it elsewhere.

This section amends 18 U.S.C. § 1028(a)(7) to allow prosecution of an individual who transfers, uses, or possesses the means of identification of another individual "in connection with" a violation of Federal law or a state felony law. Currently, section 1028(a)(7) requires proof, among other things, that the person engaged in an unauthorized use or transfer of another person's means of identification "with the intent to commit, or to aid or abet, any unlawful activity. . . ." Proof of specific intent to commit or aid and abet the unlawful activity in question may be less difficult in cases where the person engaging in identity theft can be shown to have received direct financial benefits through the use of the means of identification. In a number of cases, however, it may be difficult to prove that the person who wrongly used or transferred another's means

of identification did so with the specific intent to engage in particular crimes such as fraud.

The addition of the words “in connection with” would broaden the reach of section 1028(a)(7) in two important ways. First, it will make possible the prosecution of persons who knowingly facilitate the operations of an identity-theft ring by stealing, hacking, or otherwise gathering in an unauthorized way other people’s means of identification, but who may deny that they had the specific intent to engage in a particular fraud scheme. Second, it will provide greater flexibility for the prosecution of section 1028(a)(7) offenses. With this proposed change, prosecutors would have the option of proving that the defendants either had the requisite specific intent to commit a particular unlawful activity or engaged in the prohibited use, transfer, or possession of others’ means of identification in connection with that unlawful activity.

Additionally, this section increases the possible penalty for certain identity theft crimes from three to 5 years and clarifies that the section allowing for increased penalties for identity theft related to international terrorism can also be applied to acts of domestic terrorism as defined in Title 18.

Section 4. Aggregation of Value for Purposes of Section 641

This section clarifies that in a crime prosecuted under 18 U.S.C. § 641 that involves more than one incident, the values of the losses can be aggregated for purposes of determining the penalties. It amends 18 U.S.C. § 641 to allow for the aggregation of all counts for which the defendant is convicted in a single case.

Currently, there is a split among the Federal district courts as to whether 18 U.S.C. § 641 allows such aggregation. In those courts which do not allow aggregation, the use of this section has been limited to the prosecution of individuals who have fraudulently received public money, property, or records. The most common instance in which this has been a problem is in the improper receipt of monthly Federal benefits. Many times the individual monthly Federal benefit checks are less than \$1,000, the threshold for a felony. This amendment clarifies that 18 U.S.C. § 641 applies and provides for the aggregation of a series of such payments to the individual.

Section 5. Directive to the United States Sentencing Commission

This section directs the United States Sentencing Commission to require that the Federal Sentencing Guideline §3B1.3 (Abuse of Position of Trust or Use of Special Skill) be amended to apply to employees or directors who use access to information at their place of business to commit identity theft or fraud. It will help to address the problem of insiders who use their employment position to commit fraud or help others commit fraud. It will allow judges to apply additional penalties to these individuals under the sentencing guidelines.

Section 6. Authorization of Appropriations

This section authorizes \$2 million per year for 5 years for the Department of Justice to investigate and prosecute identity theft and identity fraud cases.

AGENCY VIEWS



U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 13, 2004

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This presents the views of the Department of Justice on H.R. 1731, the "Identity Theft Penalty Enhancement Act." For the reasons stated in the testimony of Mr. Daniel P. Collins, Associate Deputy Attorney General, before the Subcommittee on Technology, Terrorism, and Government Information, Committee on the Judiciary, United States Senate, on July 9, 2002, concerning S. 2541, an identical proposal, the Department strongly supports enactment of H.R. 1731. We urge the Subcommittee to give early and favorable consideration to this measure. (We note that, on March 19, 2003, the Senate passed S. 153, which is also identical to H.R. 1731, by a unanimous vote.)

A copy of Mr. Collins' testimony is enclosed for your reference. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

William E. Moschella
William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Bobby Scott
Ranking Minority Member

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * *

PART I—CRIMES

* * * * *

CHAPTER 31—EMBEZZLEMENT AND THEFT

* * * * *

§ 641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property *in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case*, does not exceed the sum of \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.

The word “value” means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

* * * * *

CHAPTER 47—FRAUD AND FALSE STATEMENTS

Sec.

1001. Statements or entries generally.

* * * * *

1028A. *Aggravated identity theft.*

* * * * *

§ 1028. Fraud and related activity in connection with identification documents, authentication features, and information

(a) Whoever, in a circumstance described in subsection (c) of this section—

(1) * * *

* * * * *

(7) knowingly transfers, *possesses*, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, *or in connection with*, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law; or

(b) The punishment for an offense under subsection (a) of this section is—

(1) except as provided in paragraphs (3) and (4), a fine under this title or imprisonment for not more than 15 years, or both, if the offense is—

(A) * * *

* * * * *

(D) an offense under paragraph (7) of such subsection that involves the transfer, *possession*, or use of 1 or more means of identification if, as a result of the offense, any individual committing the offense obtains anything of value aggregating \$1,000 or more during any 1-year period;

(2) except as provided in paragraphs (3) and (4), a fine under this title or imprisonment for not more than [three] 5 years, or both, if the offense is—

(A) * * *

* * * * *

(4) a fine under this title or imprisonment for not more than 25 years, or both, if the offense is committed to facilitate *an act of domestic terrorism (as defined under section 2331(5) of this title)* or an act of international terrorism (as defined in section 2331(1) of this title);

* * * * *

(d) In this section *and section 1028A*—

(1) * * *

* * * * *

§ 1028A. Aggravated identity theft

(a) *OFFENSES.*—

(1) *IN GENERAL.*—Whoever, 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 shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

(2) *TERRORISM OFFENSE.*—Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

(b) *CONSECUTIVE SENTENCE.*—Notwithstanding any other provision of law—

(1) a court shall not place on probation any person convicted of a violation of this section;

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28.

(c) *DEFINITION.*—For purposes of this section, the term “felony violation enumerated in subsection (c)” means any offense that is a felony violation of—

(1) section 641 (relating to theft of public money, property, or rewards), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 (relating to theft from employee benefit plans);

(2) section 911 (relating to false personation of citizenship);

(3) section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm);

(4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);

(5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);

(6) any provision contained in chapter 69 (relating to nationality and citizenship);

(7) any provision contained in chapter 75 (relating to passports and visas);

(8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);

(9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);

(10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or

(11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a–7b(a),

and 1383a) (relating to false statements relating to programs under the Act).

* * * * *

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Congress of the United States

U.S. House of Representatives
COMMITTEE ON WAYS AND MEANS

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May 11, 2004

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JANICE MAYES
MINORITY CHIEF COUNSEL

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner:

I am writing concerning H.R. 1731, the "Identity Theft Penalty Enhancement Act," which the Committee on the Judiciary has scheduled for markup on Wednesday, May 12, 2004.

As you know, the Committee on Ways and Means has jurisdiction over matters concerning the Social Security Act. Section 2 of H.R. 1731 would increase penalties when identity theft and felonies under the Social Security Act are committed in connection with each other, and thus falls within the jurisdiction of the Committee on Ways and Means. However, we will not take action on this particular proposal. This is being done with the understanding that it does not in any way prejudice the Committee with respect to the appointment of conferees or its jurisdictional prerogatives on this or similar legislation.

I would appreciate your response to this letter, confirming this understanding with respect to H.R. 1731, and would ask that a copy of our exchange of letters on this matter be included in your committee report.

Best regards,



Bill Thomas
Chairman

cc: The Honorable J. Dennis Hastert
The Honorable Tom DeLay
The Honorable Roy Blunt
The Honorable Nancy Pelosi
The Honorable Steny Hoyer
The Honorable John Conyers, Jr.
The Honorable Charles B. Rangel
Mr. Charles W. Johnson, III, Parliamentarian

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ONE HUNDRED EIGHTH CONGRESS

Congress of the United States
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COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

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May 13, 2004

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LINDA T. SANCHEZ, California

The Honorable Bill Thomas
Chairman
Committee on Ways and Means
United States House of Representatives
Washington, D.C. 20515

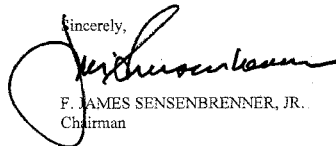
Dear Chairman Thomas:

Thank you for your letter regarding H.R. 1731, the "Identity Theft Penalty Enhancement Act." As you noted, some of the provisions of § 2 of the bill relating to crimes under the Social Security Act fall within the Rule X jurisdiction of the Committee on Ways and Means. I appreciate your willingness to forgo consideration of the bill, and I acknowledge that by agreeing to waive its consideration of the bill, the Committee on Ways and Means does not waive its jurisdiction over these provisions.

I will include a copy of your letter and this response in the Judiciary Committee's report on H.R. 1731 and in the *Congressional Record* during consideration of H.R. 1731 on the House floor.

Thank you for your assistance in this matter.

Sincerely,



F. JAMES SENSENBRENNER, JR.
Chairman

cc: The Honorable J. Dennis Hastert
The Honorable John Conyers, Jr.
The Honorable Charles Rangel
The Honorable Charles Johnson, Parliamentarian

MARKUP TRANSCRIPT
BUSINESS MEETING
WEDNESDAY, MAY 12, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order. A quorum is present.

The first item on the agenda is H.R. 1731, the "Identity Theft Penalty Enhancement Act." The Chair recognizes the gentleman from North Carolina, Mr. Coble, the Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security.

Mr. COBLE. Mr. Chairman, the Subcommittee on Crime, Terrorism, and Homeland Security reports favorably the bill H.R. 1731, with a single amendment in the nature of a substitute and moves its favorable recommendation to the full House.

Chairman SENSENBRENNER. Without objection, the bill will be considered as read and open for amendment at any point, and the Subcommittee amendment in the nature of a substitute, which the Members have before them, will be considered as read, considered as the original text for purposes of amendment, and open for amendment at any point.

[The Subcommittee Amendment in the Nature of a Substitute follows:]

**SUBCOMMITTEE AMENDMENT IN THE NATURE OF
A SUBSTITUTE TO H.R. 1731**

[Showing the text as ordered reported by the Subcommittee
on Crime, Terrorism, and Homeland Security on 30 MARCH
2004]

Strike all after the enacting clause and insert the
following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the “Identity Theft Penalty
3 Enhancement Act”.

4 SEC. 2. AGGRAVATED IDENTITY THEFT.

5 (a) IN GENERAL.—Chapter 47 of title 18, United
6 States Code, is amended by adding after section 1028, the
7 following:

8 “§ 1028A. Aggravated identity theft

9 “(a) OFFENSES.—

10 “(1) IN GENERAL.—Whoever, during and in re-
11 lation to any felony violation enumerated in sub-
12 section (c), knowingly transfers, possesses, or uses,
13 without lawful authority, a means of identification of
14 another person shall, in addition to the punishment
15 provided for such felony, be sentenced to a term of
16 imprisonment of 2 years.

1 “(2) **TERRORISM OFFENSE.**—Whoever, during
2 and in relation to any felony violation enumerated in
3 section 2332b(g)(5)(B), knowingly transfers, pos-
4 sesses, or uses, without lawful authority, a means of
5 identification of another person or a false identifica-
6 tion document shall, in addition to the punishment
7 provided for such felony, be sentenced to a term of
8 imprisonment of 5 years.

9 “(b) **CONSECUTIVE SENTENCE.**—Notwithstanding
10 any other provision of law—

11 “(1) a court shall not place on probation any
12 person convicted of a violation of this section;

13 “(2) except as provided in paragraph (4), no
14 term of imprisonment imposed on a person under
15 this section shall run concurrently with any other
16 term of imprisonment imposed on the person under
17 any other provision of law, including any term of im-
18 prisonment imposed for the felony during which the
19 means of identification was transferred, possessed,
20 or used;

21 “(3) in determining any term of imprisonment
22 to be imposed for the felony during which the means
23 of identification was transferred, possessed, or used,
24 a court shall not in any way reduce the term to be
25 imposed for such crime so as to compensate for, or

1 otherwise take into account, any separate term of
2 imprisonment imposed or to be imposed for a viola-
3 tion of this section; and

4 “(4) a term of imprisonment imposed on a per-
5 son for a violation of this section may, in the discre-
6 tion of the court, run concurrently, in whole or in
7 part, only with another term of imprisonment that
8 is imposed by the court at the same time on that
9 person for an additional violation of this section,
10 provided that such discretion shall be exercised in
11 accordance with any applicable guidelines and policy
12 statements issued by the Sentencing Commission
13 pursuant to section 994 of title 28.

14 “(c) DEFINITION.—For purposes of this section, the
15 term ‘felony violation enumerated in subsection (c)’ means
16 any offense that is a felony violation of—

17 “(1) section 664 (relating to theft from em-
18 ployee benefit plans);

19 “(2) section 911 (relating to false personation
20 of citizenship);

21 “(3) section 922(a)(6) (relating to false state-
22 ments in connection with the acquisition of a fire-
23 arm);

1 “(4) any provision contained in this chapter (re-
2 lating to fraud and false statements), other than this
3 section or section 1028(a)(7);

4 “(5) any provision contained in chapter 63 (re-
5 lating to mail, bank, and wire fraud);

6 “(6) any provision contained in chapter 69 (re-
7 lating to nationality and citizenship);

8 “(7) any provision contained in chapter 75 (re-
9 lating to passports and visas);

10 “(8) section 523 of the Gramm-Leach-Bliley
11 Act (15 U.S.C. 6823) (relating to obtaining cus-
12 tomer information by false pretenses);

13 “(9) section 243 or 266 of the Immigration and
14 Nationality Act (8 U.S.C. 1253 and 1306) (relating
15 to willfully failing to leave the United States after
16 deportation and creating a counterfeit alien registra-
17 tion card);

18 “(10) any provision contained in chapter 8 of
19 title II of the Immigration and Nationality Act (8
20 U.S.C. 1321 et seq.) (relating to various immigra-
21 tion offenses); or

22 “(11) section 208, 1107(b), or 1128B(a) of the
23 Social Security Act (42 U.S.C. 408, 1307(b), and
24 1320a-7b(a)) (relating to false statements relating
25 to programs under the Act).”.

1 (b) AMENDMENT TO CHAPTER ANALYSIS.—The table
2 of sections for chapter 47 of title 18, United States Code,
3 is amended by inserting after the item relating to section
4 1028 the following new item:

“1028A. Aggravated identity theft.”.

5 (c) APPLICATION OF DEFINITIONS FROM SECTION
6 1028.—Section 1028(d) of title 18, United States Code,
7 is amended by inserting “and section 1028A” after “In
8 this section”.

9 **SEC. 3. AMENDMENTS TO EXISTING IDENTITY THEFT PRO-**
10 **HIBITION.**

11 Section 1028 of title 18, United States Code, is
12 amended—

13 (1) in subsection (a)(7)—

14 (A) by striking “transfers” and inserting
15 “transfers, possesses,”; and

16 (B) by striking “abet,” and inserting
17 “abet, or in connection with,”;

18 (2) in subsection (b)(1)(D), by striking “trans-
19 fer” and inserting “transfer, possession,”;

20 (3) in subsection (b)(2), by striking “three
21 years” and inserting “5 years”; and

22 (4) in subsection (b)(4), by inserting after “fa-
23 cilitate” the following: “an act of domestic terrorism
24 (as defined under section 2331(5) of this title) or”.

Chairman SENSENBRENNER. The Chair recognizes the gentleman from North Carolina, Mr. Coble, to strike the last word and for 5 minutes.

Mr. COBLE. I thank the Chairman.

Mr. Chairman and colleagues, recently the Subcommittee on Crime, Terrorism, and Homeland Security conducted a hearing and markup on H.R. 1731, the "Identity Theft Penalty Enhancement Act," to examine the growing problem of identity theft. This legislation will establish penalties for aggravated identity theft when the theft is related to or in the furtherance of certain other criminal acts. Identity theft and identity fraud are terms used to refer to all types of crimes in which an individual's personal or financial data is misused, typically for economic gain or to facilitate another criminal activity. Identity crime is not directed at one demographic. It affects all types of individuals, regardless of age, gender, nationality, or race.

In 1998, at the direction of Congress, the Federal Trade Commission established a central repository for identity theft complaints. In 2002, the FTC received 161,819 victim complaints of compromised personal information. The FTC estimates that the loss to businesses and financial institutions due to identity theft to be approximately \$47.6 billion. The costs to individual consumers are estimated to be approximately \$5 billion. Additionally, victims have a difficult time consuming an expensive task of repairing a damaged credit history as well as their respective reputations.

As identity crime increases, we must find new ways to protect consumers from the compromise of their personal information. I believe this legislation is an important step forward in addressing the problem. I thank our colleagues on this Subcommittee, Representative Carter, the distinguished gentleman from Texas, and Representative Schiff, the distinguished gentleman from California, for having introduced the bill and bringing this important matter to our attention. I hope the colleagues—my colleagues can support this important bill and with—I ask unanimous consent, Mr. Speaker, to—Mr. Chairman, to include in the record a statement from the National President of the Grand Lodge of Fraternal of Police.

Chairman SENSENBRENNER. Without objection.

[The information follows:]



CHUCK CANTERBURY
NATIONAL PRESIDENT

**GRAND LODGE
FRATERNAL ORDER OF POLICE®**

309 Massachusetts Ave., N. E.
Washington, DC 20002
Phone 202-547-8189 • FAX 202-547-8190

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

11 May 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman,

I am writing on behalf of the membership of the Fraternal Order of Police to advise you of our support for H.R. 1731, the "Identity Theft Penalty Enhancement Act," which was the subject of a 23 March hearing before the Subcommittee on Crime, Terrorism, and Homeland Security at which the F.O.P. testified. The bill was approved by the Subcommittee and is now pending before the full Committee.

This legislation builds upon and strengthens the important identity theft legislation enacted by Congress in 1998 with the support of the Fraternal Order of Police by creating a new offense category--"aggravated identity theft"--which will provide significantly enhanced penalties for the most serious and harmful forms of identity crimes. In defining this new offense, the legislation correctly uses the concept of a predicate offense because, generally speaking, identity theft is committed for the purpose of committing another State or Federal offense. Under H.R. 1731, the "aggravated" forms of identity theft are defined by the nature of the predicate offense. Thus, anyone who uses another person's identity to commit one of the serious predicate offenses enumerated in the legislation will be guilty of "aggravated identity theft." Compared to current law, this legislation applies to a narrower, more focused set of predicate offenses.

In addition to creating the new offense, the legislation also expands the existing identity theft prohibition to close several gaps in the existing law by criminalizing the possession of stolen identification with intent to commit or further another crime. The bill also increases the penalties for violations of current law and for identity thefts which are used to facilitate acts of terrorism.

On behalf of the more than 312,000 members of the Fraternal Order of Police, I want to thank you for your leadership on this issue. If I can be of any further assistance, please do not hesitate to contact me or Executive Director Jim Pasco through my Washington office.

Sincerely,


Chuck Canterbury
National President

Mr. COBLE. And I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, I'm opposed to H.R. 1731, the "Identity Theft Penalty Enhancement Act," because of its mandatory minimum sentences which deny probation and concurrent sentences, and by doing so, the bill imposes unnecessary and unproductive restrictions on the ability of the Sentencing Commission and judges in individual cases to assure a rational and just system of sentencing as a whole and for individuals.

Congress is not in a better position to determine what the appropriate sentences is in individual cases before the crime occurs than a judge is when he has heard the evidence and applies the guidelines established in—established by sentencing professionals.

Mandatory minimum sentences not only defeat the rational sentencing system that Congress adopted, but make no sense in our separation of powers scheme of governance. Moreover, the notion that mandating a 2- or 5-year sentence to someone who is willing to risk a 15-year sentence already is not likely to add any deterrence.

Mandatory minimum sentences violate common sense. If the sentence required by the mandatory minimum is the appropriate sentence, then it will—then it can be imposed. On the other hand, even if it makes no sense in the particular case, it has to be imposed, anyway.

Mandatory minimum sentences have been studied extensively and have been shown to be ineffective in preventing crime. They distort the sentencing process, discriminate against minorities in their application, and they waste money. In a study report entitled "Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money," the Rand commission concluded that mandatory minimum sentences were less effective than either normal, traditional discretionary sentencing or drug treatment in reducing drug-related crime and far more costly than either. And the Judicial Conference of the United States has reiterated its opposition to mandatory minimum sentences over a dozen times to Congress, noting that they severely distort and damage the Federal sentencing system, undermine the Sentencing Guideline regime established by Congress to promote fairness and proportionality, and destroy honesty in sentencing by encouraging charge, in fact, plea bargains.

The U.S. Sentencing Commission indicated its opposition to the sentencing—the U.S. Sentencing Commission indicated its opposition to the Senate bill, which is virtually identical to the bill before us for similar reasons. Both the Judicial Center and its study entitled "General Effects of Mandatory Minimums Prison Terms," a longitudinal study of Federal sentences imposed, and the U.S. Sentencing Commission in its report entitled "Mandatory Minimum Penalties in the Federal Criminal Justice System" found that minorities are substantially more likely than whites in the comparable situations to receive mandatory minimum sentences. The Sentencing Commission study also reflected that mandatory minimum sentences increased the disparity in sentencing for like offenders with no—with no evidence that mandatory minimum sen-

tences had any more crime reduction impact than discretionary sentences. That's why Chief Justice Rehnquist has spoken so often and loudly about these wasteful cost increases: "Mandatory minimums are perhaps a good example the law of unintended consequences."

H.R. 1731 does nothing to address the consumer identity theft. We have here, Mr. Chairman, a—and I'll ask unanimous consent to have it introduced in the record.

Chairman SENSENBRENNER. Without objection.

[The information follows:]

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699



7 October 2002

Tom Oscherwitz
Counsel
Technology, Terrorism, and Government Information Subcommittee
Senate Committee on the Judiciary
Washington, D.C. 20510

Re: S. 2541 – Identity Theft Penalty Enhancement Act of 2002

This letter is a follow up to our conversation last Monday with you and Dan Collins and Peter Owens of the Department of Justice. We appreciate your efforts to address our concerns directly with the Department, but we are still concerned about the introduction of new mandatory minimum penalties into a statutorily mandated sentencing guideline structure. I have described other approaches the Commission could possibly take that could address the concerns S. 2541 seeks to address. All of these approaches have been used by the Commission in other contexts and supported by the Department of Justice in the past.

Chapter Two Enhancement:

Although the proposed offense of aggravated identity theft is drafted as a derivative offense, the guidelines could be amended to provide additional punishment without using the approach taken with 18 U.S.C. § 924(c) offenses. For example, Congress previously enacted a statutory enhancement providing additional five and ten year penalty increases when enumerated fraud offenses involved telemarketing conduct. See 18 U.S.C. § 2326 (Enhanced penalties). Ultimately, the Commission responded more broadly to this new statute by requiring a sentencing increase whenever any fraud offense involved mass marketing regardless of whether the defendant was convicted under that specific statute (18 U.S.C. § 2326).¹

¹The Commission also recommended for two reasons that Congress amend section 2326 to include conspiracy to commit an enumerated fraud offense listed in the statute. First, findings of an empirical study by the Commission found that in the majority of cases in which the timing and nature of the offense conduct appeared to warrant application of the statutory enhancement,

Another act (the Identity Theft and Assumption Deterrence Act of 1998, Pub. L. 105-318) criminalized the unauthorized use or transfer of a means of identification with the intent to commit or to aid or abet any federal violation or state felony, and provided varying maximum sentences of up to three, 15, 20, or 25 years depending on whether statutorily enumerated factors are present. This extremely broad statute, codified at 18 U.S.C. § 1028(a)(7), can apply to a wide range of offense conduct, which also can be independently prosecuted under numerous existing statutes.

The Commission responded in a similar manner by adding an enhancement to the fraud guideline that applies regardless of whether the defendant is convicted under section 1028(a)(7). Once a statutory violation is sent to a particular guideline, the sentencing guidelines generally apply on the basis of the offense conduct, rather than the statute of conviction. Thus, as long as a conviction is obtained under any of the many federal criminal laws that refer to the fraud and theft guidelines, the identity theft enhancement will apply. For example, a conviction under the mail fraud statute at 18 U.S.C. § 1341 that involves identity theft offense conduct will receive the enhancement.

Chapter Two Guideline

The Commission could promulgate a new Chapter Two guideline to specifically cover aggravating identity theft and could do so in a manner that would provide more serious sentences than currently provided for the underlying felony offenses. The money laundering guideline, USSG §2S1.1, is an example of this approach. This guideline refers to the underlying offense for the base offense level for money laundering, and adds sentencing enhancements as appropriate. In all money laundering cases, however, the guideline sentence is greater than the sentence for the underlying offense if the defendant laundered the proceeds of his own illegal activity.

Chapter Three Adjustment

The Commission could also promulgate a Chapter Three adjustment, which would apply whenever an offense involved aggravated identity theft. An example of this approach would be the terrorism adjustment at USSG §3A1.4. This guideline requires a 12 level increase, with a minimum offense level of level 32, whenever a felony offense involved, or was intended to

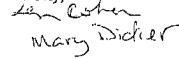
the enhancement nevertheless was not assessed. Plea bargaining practices, including dismissal of substantive fraud counts in favor of a guilty pleas to a conspiracy count under 18 U.S.C. § 371 (to which the statutory enhancement was inapplicable) appeared to be the most frequent explanation for this result. Second, the sentencing guidelines generally treat conspiracy to commit an offense the same as the substantive offense. *See* USSG §2X1.1. Subsequently, conspiracy to violate was added to section 2326.

promote, a federal crime of terrorism.²

We have one final concern regarding the terrorism provision in S. 2541. This bill would require a consecutive five year mandatory minimum penalty for unlawfully using a means of identification in relation to any felony violation enumerated in section 2332b(g)(5)(B). These felony violations are predicate offenses for the statutory purpose of a "federal crime of terrorism." S. 2541, however, does not include the accompanying motive language that *must* be present for an offense to be a federal crime of terrorism. We are concerned that without *any* motive requirement, this provision will disproportionately affect any defendant who committed one of the numerous and disparate offenses listed as a predicate in connection with identity theft, but who did not have any intent to coerce or influence the government, or the civilian population (as required for domestic or international terrorism). This is of particular concern because most often these offenses will be committed without any connection to terrorism. Also, definitions for a "federal crime of terrorism," international terrorism, and domestic terrorism all contain motive requirements.

I hope you find this information helpful. Please call if you have any questions.

Sincerely,



Ken Cohen and Mary Didier

cc: Scott Frick
Ed Haden
Tara Magner
Richard Phillips

²Prior to USSG § 3A1.4 and the identity theft enhancements, there were two cases that involved an act of international terrorism. One involved the world trade center bombing defendant and the other involved violence against commercial U.S. aircraft in East Asia. The World Trade Center defendant used, and was in possession of, numerous false identification documents such as photographs, bank documents, medical histories, education records, and photographs from which numerous false identities could have been created. The defendant, who was found guilty of a number of offenses that caused injury or death, was sentenced to life plus 240 years imprisonment. The defendant in the second case, who was found guilty of using explosives against U.S. commercial aircraft serving East Asia, also used false identification and travel documents, and was sentenced to life plus 60 years of imprisonment.

SEC. 2. AGGRAVATED IDENTITY THEFT.

"§ 1028A. Aggravated identity theft

"(2) Definition.—For purposes of paragraph (1), 'felony violation enumerated in paragraph (2)' means any offense that is a violation of—

"(H) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823)

(relating to obtaining customer information by false pretenses);

"(I) section 243 of the Immigration and Nationality Act (8 U.S.C. 1253) or section 266 of such Act (8 U.S.C. 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);

"(J) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or

"(K) section 208 of the Social Security Act (42 U.S.C. 408), section 1107(b) of such Act (42 U.S.C. 1307(b)), or section 1128B(a) of such Act (42 U.S.C. 1320a-7b(a)) (relating to false statements relating to programs under such Act).

"(b) **Terrorism offenses.**—Whoever, during or in connection with any felony violation enumerated in section 2332b(g)(5)(b) that is calculated to effect a purpose described in section 2332b(g)(5)(a), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to any punishment imposed for such felony violation, be fined under this title, imprisoned for not more than a term of imprisonment that is 10 years greater than the maximum term of imprisonment authorized for such felony violation, or both."

(b) **CONFORMING AMENDMENT.**—The table of sections for chapter 47 of title 18, United States Code, is amended by inserting after the item relating to section 1028 the following new item:

"1028A. Aggravated identity theft."

(c) **DIRECTIVE TO SENTENCING COMMISSION.**—Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and policy statements to ensure that the guideline penalty for an offense under section 1028A of title 18, United States Code, as added by subsection (a), is substantially greater than the guideline penalty that would apply to a comparable defendant convicted only of the felony violation underlying such offense.

AMENDMENT TO S. 2541
OFFERED BY _____
 (Page and line numbers refer to S. 2541, as introduced)

Page 2, line 12, insert after "2332b(g)(5)(B)" the following:

- 1 "that is calculated to effect a purpose described in section 2332b(g)(5)(A)".

Page 2, strike lines 19 and 20.

Page 2, line 21, strike "(2)" and insert "(1)".

Page 3, line 3, strike "(3)" and insert "(2)".

Page 3, line 10, insert after "of this section" the following:

- 1 ", except as authorized by any applicable guidelines and policy statements issued by the
- 2 Sentencing Commission pursuant to section 994 of title 28".

Page 3, line 11, strike "(4)" and insert "(3)".

Page 3, lines 15 and 16, strike "by the court at the same time on that person".

Mr. SCOTT. A report on the identity theft case in which Senator Domenici was the victim. It involves about \$800 worth of fraudulent credit card purchases, and we've checked with the FBI. No action was taken in that case because of resource limitations. If you think what we do or don't do sends a message to criminals, what do you think that message is? It is important that we continue—it is that you can continue to scam people, no matter who they are, with impunity. This bill does nothing to discourage consumer identity theft, which the FTC reports bilked almost 30 million Americans out of approximately \$50 billion over the last 5 years, with about \$5 billion of that out-of-pocket, unrecovered losses to consumers.

We had a bill before the consumer—before the Subcommittee, H.R. 3693, cosponsored by myself and the rank—and the Chairman, Mr. Coble, and Ranking Member of the full Committee, Mr. Conyers, and several others which will provide money for the Department of Justice for consumer identity theft investigation and prosecution. I'll offer an amendment to provide \$10 million to DOJ to send a message to identity theft—to identity thieves that you will be prosecuted because you will be pursued.

We did this to discourage corporate copyright and trademark infringement. We can do it for consumers.

Thank you, Mr. Chairman. I yield back the balance of my time.

Chairman SENSENBRENNER. Without objection, all Members may insert opening statements in the record at this point.

[The prepared statement of Ms. Jackson Lee follows:]

SHEILA JACKSON LEE
 1814 DREHET, TEXAS

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STATEMENT BY

CONGRESSWOMAN SHEILA JACKSON LEE

JUDICIARY COMMITTEE

**H.R. 1731: THE IDENTITY THEFT PENALTY
 ENHANCEMENT ACT**

MARKUP HEARING

MAY 12, 2004



Mr. Chairman and Mr. Ranking Member, I thank you for
 your efforts to organize today's proceedings regarding the

“Identity Theft Penalty Enhancement Act.” This crime is a huge concern for the United States as well as the international community because it not only allows perpetrators to profit from a victim’s personal information, but it can and has been used as an instrument to commit terrorism. Looking toward its legislative intent, this bill amends the federal code to “enhance” penalties for aggravated identity theft. The provisions of this legislation call for sentences of two years for “knowingly transferring, possessing, or using, without lawful authority, a means of identification of another person during and in relation to specified felony violations” and five years for knowingly performing these acts in the course of and in relation to specified felony violations the pertain to terrorist acts.

The Subcommittee on Crime, Terrorism, and Homeland Security had an opportunity to apply its scrutiny; however, the Subcommittee on Immigration and Claims, a very relevant body to the provisions contained within the bill, will have no such opportunity. For this reason, I ask for my colleagues’ support in

preventing severe and significant immigration implications to pass without necessary review by the body within the House charged with these duties.

This bill's reference to the Immigration and Nationality Act (INA) in defining a new class of felony violations substantively changes the current immigration laws and therefore require the scrutiny and review of the Judiciary Subcommittee on Immigration and Claims.

With the melding of the Immigration and Naturalization Service into the Bureau of Immigration and Citizenship Enforcement (BICE), immigration enforcement has become much stricter.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) expanded the criminal grounds for which an alien could be found inadmissible or deportable and reduced the avenues of relief.

Under Section 305 of IIRIRA (8 U.S.C. 1227), an alien is deportable for having committed a criminal offense under the following circumstances:

(a) Classes of Deportable Aliens.-Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal offenses.-

(A) General crimes.-

(i) Crimes of moral turpitude.-Any alien who-

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j)) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed.

(ii) Multiple criminal convictions.-Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony.-Any alien who is convicted of an aggravated felony at any time after admission is deportable.

An aggravated felony can range from crimes as serious as murder, rape, or sexual abuse to petty crimes of theft, money laundering and violence. Anyone convicted of an aggravated felony presently or even in the distant past can be removed from the United States forever with no hope of rejoining their family.

The legislation that we have before this Committee changes the nature of immigration offenses to transform crimes that may only be punishable by a fine into aggravated felonies. Under the INA, aggravated felonies are deportable offenses if a sentence of more than one year of imprisonment is given, regardless of parole.

Moreover, under H.R. 1731, mandatory minimums are imposed upon airlines or other passenger vessels that transport aliens using false documentation into the United States; employers

who hire illegal aliens; and aliens who have already received deportation orders but who failed to show up for deportation.

This legislation should be amended to remove all provisions that deal with immigration matters because of the serious implications that these provisions will have on individuals if it is passed as drafted and without proper subcommittee review and markup.

With respect to the terrorist bombings which occurred in Madrid on March 11, 2004, a form of identity fraud may have been one of the things that facilitated the attackers' success. Allegedly, the perpetrators of that horrible act detonated the explosives that were placed in a backpack by means of falsified cell phone SIM cards.

Furthermore, let us not forget, it was identity fraud that allowed the 9/11 criminals to board the aircrafts and to guide them into the Twin Towers. We definitely need legislative answers to this problem while at the same time preserving the civil rights of everyone.

H.R. 1731, Identity Theft Penalty Enhancement Act of 2004

This bill aggressively addresses our urgent need to capture many perpetrators with one initiative. However, in Section 2, it takes parole away from *all* individuals who have been charged and convicted with certain other crimes in addition to crimes associated with identity fraud.

Unfortunately, this bill may suffer from overbreadth because there is no “second chance” for charged and convicted individuals despite the fact that it does not call for a study of the recidivism rate of those charged and convicted of identity. The individual who commits the fraud along with a felony as set forth in

subsection 4(c) is differentiated from the individual who commits the felony along with a crime of terrorism by the mandatory sentencing – 2 years and 5 years respectively. However, these convicted individuals are both denied parole.

In Houston a few months ago, two men, Richard L. Craig, 35 and Robin L. Ross, 40 were sentenced to 8 and 5 years in prison respectively without parole for conspiracy to commit money laundering and to possess stolen mail, and with possession of stolen mail.

A Texas law makes it a felony to steal another person's identity, and then the person who commits the offense can be imprisoned and ordered to reimburse the victim for lost income or other expenses, but not for attorney's fees. This demonstrates that there are a myriad of legislative controls set to punish the identity

thief. The task for us as legislators is to streamline the legislative tools that we arm our prosecutors with and design punishment very carefully after study is conducted. Mr. Scott's proposal authorizes funds to DOJ in order to initiate studies that would aid in drafting a streamlined bill to enhance penalties.

Identity theft victims now spend an average of 600 hours – often over a period of years – recovering from the crime. Being a victim costs an average of \$1,400 in out-of-pocket expenses, and 185 percent increase from years before.

We must craft legislation that will not only punish the perpetrator of the identity theft but also encourage the disclosure of information that will facilitate the re-establishment of the victim's credit-worthiness.

Thank you.

Chairman SENSENBRENNER. Are there amendments? And the Chair recognizes the gentleman from Texas, Mr. Carter, for an amendment.

Mr. CARTER. Thank you, Mr. Chairman.

Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the Subcommittee amendment in the nature of a substitute to H.R. 1731, offered by Mr. Carter. Page 3, line 17—

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

**AMENDMENT TO THE SUBCOMMITTEE AMEND-
MENT IN THE NATURE OF A SUBSTITUTE TO
H.R. 1731**

OFFERED BY MR. CARTER

Page 3, line 17, insert “section 641 (relating to theft of public money, property, or rewards), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or” before “section 664”.

Page 4, line 22, insert “811,” after “208,”.

Page 4, line 22, strike “or 1128B(a)” and insert “1128B(a), or 1632”.

Page 4, beginning in line 23, strike “1307(b), and 1320a–7b(a)” and insert “1011, 1307(b), 1320a–7b(a), and 1383a”

Add at the end the following:

**1 SEC. 4. AGGREGATION OF VALUE FOR PURPOSES OF SEC-
2 TION 641.**

3 The penultimate paragraph of section 641 of title 18
4 of the United States Code is amended by inserting “in
5 the aggregate, combining amounts from all the counts for

1 which the defendant is convicted in a single case,” after
2 “value of such property” .

3 **SEC. 5. DIRECTIVE TO THE UNITED STATES SENTENCING**
4 **COMMISSION.**

5 (a) IN GENERAL.—Pursuant to its authority under
6 section 994(p) of title 28, United States Code, and in ac-
7 cordance with this section, the United States Sentencing
8 Commission shall review and amend its guidelines and its
9 policy statements to ensure that the guideline offense lev-
10 els and enhancements appropriately punish identity theft
11 offenses involving an abuse of position.

12 (b) REQUIREMENTS.—In carrying out this section,
13 the United States Sentencing Commission shall do the fol-
14 lowing:

15 (1) Amend U.S.S.G. section 3B1.3 (Abuse of
16 Position of Trust or Use of Special Skill) to apply
17 to and punish offenses in which the defendant ex-
18 ceeds or abuses the authority of his or her position
19 in order to obtain unlawfully or use without author-
20 ity any means of identification, as defined section
21 1028(d)(4) of title 18, United States Code.

22 (2) Ensure reasonable consistency with other
23 relevant directives, other sentencing guidelines, and
24 statutory provisions.

1 (3) Make any necessary and conforming
2 changes to the sentencing guidelines.

3 (4) Ensure that the guidelines adequately meet
4 the purposes of sentencing set forth in section
5 3553(a)(2) of title 18, United States Code.

Chairman SENSENBRENNER. The gentleman from Texas is recognized for 5 minutes.

Mr. CARTER. Thank you, Mr. Chairman.

Mr. Chairman, I'd like to thank you for allowing my legislation, H.R. 1731, the "Identity Theft Penalty Enhancement Act," to be considered by the Committee. I would also like to thank my colleague Mr. Schiff for his support as lead cosponsor of this bill.

Identity theft is a very serious problem. For 4 years in a row, the Federal Trade Commission has reported identity theft as the number one consumer-reported complaint filed with the Commission; 214,905 identity theft complaints were reported in 2003, an increase of 161,836 complaints over the year 2002.

Just as concerning—just as concerning, the traffic of identity aids terrorist crimes. Terrorists can move more freely in the United States with illicit IDs, credit cards, and other documentation. Insufficient legislation and prosecution has allowed a situation to arise where identities are easy to steal without any fear of reprisal.

The Identity Theft Penalty Enhancement Act gives prosecutors greater power in convincing—in convicting and sentencing an identity thief. First, it creates a new and separate crime—an aggravated identity theft—for any person who uses the identity of another person to commit certain felonies, including terrorist acts.

Second, if the thief uses a stolen identity in connection with another Federal crime and the intent of the underlying Federal crime is proven, the prosecutor need not prove the intent to use the false identity in a crime. This lessens the burden on the prosecution, making convictions easier.

Mr. Chairman, my amendment addresses the use of ID theft to receive Social Security, Medicare, and other Federal benefits and to commit bank theft and embezzlement. My amendment also addresses the prevalent occurrence of insider identity theft. First, my amendment adds 18 U.S.C. section 641 and sections 811 and 1632 to the Social Security Act as felonies that can be considered as aggravated identity theft. These sections would address those individuals who provide another person means of identification in order to fraudulently receive Social Security, Medicare, disability, veterans, and other Federal benefits.

Second, my amendment allows for the aggregation of any Social Security payments illegally obtained as a result of ID theft. This is a particular problem whereas many Social Security monthly payments are under \$1,000. Without the ability to aggregate the payments, the enhanced penalties of my legislation would not apply.

Last, my amendment addresses a prevalent mode of identity theft which is committed by insiders of organizations who illegally use or transfer individuals' identity information which has been entrusted to them. A recent report by researchers at Michigan State University estimates about half of all identity crimes are the result of personal information being stolen from corporate databases. While I am sure many companies are doing what they can to stem the risk by investing in new data firewall technologies, insider theft is an increasing problem which we must protect all consumers from.

Consumers create literally millions of records shopping on the Internet and using their credit cards. All of this information is stored in databases which thousands of employees can access. It

takes only a few clicks on a keyboard to steal thousands of identities and send them around the world in seconds on the Internet. My amendment directs the U.S. Sentencing Commission to amend its guidelines to appropriate punishment ID theft offenses involving an abuse of position.

I urge my fellow colleagues to favorably support this amendment, and I thank you, Mr. Chairman, for bringing this legislation before the Committee. I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, to save time, I'd like here to incorporate by reference my comments against mandatory minimums, and this is more of the same. And so for the same reasons, I would oppose this amendment.

Chairman SENSENBRENNER. Without objection, the comments are incorporated.

The question is on the adoption of the amendment offered by the gentleman from Texas, Mr. Carter.

Mr. SCHIFF. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from California, Mr. Schiff.

Mr. SCHIFF. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. I'd like to thank the distinguished Chairman, Mr. Sensenbrenner, for allowing this legislation that I joined Mr. Carter in introducing to be before the Committee today. Identity theft has topped the list of consumer complaints filed with the FTC for the last 4 years in a row, impacting millions of Americans and costing consumers and businesses billions of dollars. In fact, the home States of several Members of the Committee are at the top of the list of identity theft victims in 2003, with Arizona ranking one, Texas ranking four, Florida ranking five, and New York ranking six nationally. My own home State of California ranks number three in the number of victims of identity theft per capita, with over 37,000 complaints reported by consumers costing over \$40 million last year.

Nationally, California cities crowd the top ten list of metropolitan areas with the highest per capita rates of identity theft reported. L.A.-Long Beach metropolitan area that includes my district is particularly prone to such crimes, ranking number two nationally, with over 13,000 victims.

A victim of identity theft usually spends a year and a half working to restore his or her identity and good name. Many of my constituents and, I know, many of yours have urged Congress to act and crack down on this growing epidemic. For that reason, I have joined with my colleague Mr. Carter in introducing the Identity Theft Penalty Enhancement Act, legislation that will make it easier for prosecutors to target those identity thieves who steal an identity for the purpose of committing other serious crimes. The bill will stiffen penalties to deter such offenses and strengthen the ability of law enforcement to go after identity thieves and prove their case.

I'm very mindful of the reservations that my colleague Mr. Scott has expressed about mandatory minimums in general. From my

point of view, this case made an appropriate exception both because of the epidemic nature of the crime and because of the fact that this sentencing enhancement is based on the fact that identity theft requires a predicate offense to be an aggravated theft. It has to be committed in connection with some other offense. And, generally, for the purposes of sentencing, the predicate, the underlying offense, and the identity theft are merged, giving prosecutors little incentive to charge identity theft and having little impact on the ultimate sentence. And I think this sentencing practice doesn't reflect the impact on the victims, but more only affects the value of the loss of the financial institution.

This legislation also makes changes to close a number of gaps identified in current Federal law. Identical legislation was introduced by Senators Feinstein and Kyl, passing by unanimous consent in the Senate in January of last year. H.R. 1731 has also been endorsed by the Justice Department and FTC.

I was pleased to work with Mr. Carter, as well as the Senate sponsors, to make some additional improvements to the bill that are offered by Mr. Carter's amendment. These improvements respond to specific concerns that were raised by the Social Security Administration. In addition, they respond to the ever growing problem of insider theft. A peer-reviewed study will be coming out later this year that will show that around half of identity theft cases that were tracked were facilitated through the workplace.

In order to protect against homeland security concerns, to protect the good credit and reputation of hard-working Americans, the time for stronger legislation cracking down on identity theft is now, and I want to thank the Chairman again and urge my colleagues to support this measure.

I yield back the balance of my time.

Mr. SMITH. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

The amendment in the nature of a substitute offered by my Texas colleague, Congressman Carter, deserves our support, Mr. Chairman. In 2003, over a million and a half consumers were a victim of fraud and identity theft complaints. The Federal Trade Commission, in fact, indicated that identity theft is one of the fastest growing crimes in America.

Identity theft occurs when an individual's personal information is stolen and then used fraudulently for economic gain. Identity thieves easily obtain personal information in numerous ways. They can steal documents from the trash, hack into computers to steal personal information, or even steal mail.

Once an identity theft has the personal information of another, the possibilities for abuse are endless. Identity thieves often open up credit cards or bank accounts in another person's name, go on spending sprees, and leave the victim with damaged credit. Identity theft is a serious crime and should be punished accordingly.

Mr. Chairman, this amendment enhances the penalties for identity theft and fraud. It ensures that the enhanced provisions are actually enforced so that identity thieves cannot get off easily.

Mr. Chairman, I urge my colleagues to support the amendment in the nature of a substitute and yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the amendment—

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

I certainly don't question the sincerity of Mr. Carter or Mr. Schiff, the introducers of the bill, or this proposed amendment. And I don't question the magnitude of the problem related to identity theft.

The concern I have is that every time we have passed mandatory minimum sentences or enhanced mandatory minimum sentences, the identical arguments could have been made, were made. There was some kind of emergency, there was some kind of exigent circumstances that justified the Judiciary Committee in micromanaging and imposing our judgment to the exclusion of the judgment of judges who hear the evidence in these cases. If there are exigent circumstances—and certainly the use of identity theft as a means for terrorism or as an enhancement to the opportunity for terrorism would be an exigent circumstance—the judge will take that into account and exercise discretion to do that.

The question is whether we ought mandate in every single case where there might not be an exigent circumstance or where there might be some other circumstances that ought to be taken into account, the use of mandatory minimums. And that's the problem that we have gotten ourselves into and the problem that judges are now expressing themselves about, people who administer the jails are expressing themselves about. Mandatory minimums are having unintended consequences. When they have the intended consequences and punish people, those are the circumstances where the court would acknowledge that they should be the intended consequence. The unintended consequences are always coming in circumstances where we have taken discretion away from judges, and I think we owe it to ourselves and owe it to our prison systems and owe it to our criminal justice system to continue to allow these judgments to be more personalized and to force ourselves to—not to micromanage everything that's going on in the world, sitting here on these chairs in the Judiciary Committee.

It is clear every single study that has been done about mandatory minimums confirmed the deleterious effect on the judicial system, on the criminal justice system, and yet every time it seems politically expedient and convenient for us to do so, we express ourselves by doing something that we know has been documented to be a bad idea. And I think we are doing that yet again today, and I encourage us not to do that in this case and to restrain ourselves from continuing to try to micromanage the court system in this way.

I yield back.

Chairman SENSENBRENNER. The question is now—

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. I share some of the concerns that were expressed by the gentleman from North Carolina, and I'd like to ask my friend and colleague, Mr. Schiff, or for that matter Mr. Carter: Has it been—has there been a problem with the sentences imposed regarding identity theft that you've been able to ascertain? And I yield to the gentleman.

Mr. SCHIFF. I thank the gentleman for yielding. I don't think the sentences have been sufficient to even slow the rate of acceleration of identity theft. So they have not had the desired impact, and I think part of the problem is that identity theft, as we've defined it, really requires a predicate offense, that it's identity theft committed in connection with a subsequent crime, for the purpose of facilitating another crime.

When the Sentencing Commission reviews a situation like that, it looks at the underlying conduct to determine the guideline range. It doesn't consider one guideline for this, a second guideline for the identity theft, which doesn't give prosecutors much of an incentive to charge identity theft and doesn't make much of a difference in the ultimate sentence or the discharge.

Mr. DELAHUNT. Reclaiming my time, is there any empirical data at all, has there been a study done on this particular issue? If you're aware of any.

Mr. SCHIFF. You know, there have been studies done in terms of the frequency, the amount of time that it takes a victim to clear their name. A study that determines the—what role sentencing plays in the number of these cases, I don't think there is any. And I'm not sure that would be easily ascertainable.

Mr. DELAHUNT. Have you had a—have you had an opportunity to consult with the Sentencing Commission or anyone regarding this particular proposal?

Mr. SCHIFF. I haven't consulted with the Sentencing Commission. I did meet with the Judicial Conference just this morning, although not on this issue per se, but on the issue of mandatory minimums and other issues.

Mr. DELAHUNT. Did this issue come up during that meeting?

Mr. SCHIFF. No. But, you know, I would say, if I could very briefly, if the gentleman would yield further, I think the issue you raise is a very legitimate one. I think we should be very circumspect about mandatory minimums. In some cases—and I realize there's—it requires some restraint by the Committee, but in the case of 924(c), mandatory minimums for carrying a firearm, in the case where we have sort of out-of-control proliferation of a crime, and this compressing of the predicate crime and the identity theft, I think there are appropriate exceptions from my point of view. I think this is one of them. But I certainly understand the other point of view.

Mr. DELAHUNT. Yielding further to the gentleman, why the—what was the methodology used to ascertain the number of—the penalty itself, the 2 years, the 5 years?

Mr. SCHIFF. Well, this is something that we've worked with the Senate on to arrive at an adequate deterrent but not an excessive deterrent. We don't want to clog the prisons—

Mr. DELAHUNT. I understand that, but was there any particular basis, rationale for the penalty itself? Or was this just done because the Senate indicated they felt it was a good number?

Mr. SCHIFF. Well, you know, I think it was a common conclusion with a number that would provide a sufficient deterrent but not be out of proportion to the nature of the crime.

Mr. DELAHUNT. I yield back. I thank the gentleman.

Chairman SENSENBRENNER. Does the gentleman from Massachusetts yield back?

The question, once again, is on adopting the Carter amendment to the amendment in the nature of a substitute. Those in favor will say aye? Opposed, no?

The ayes appear to have it. The ayes have it, and the amendment to the amendment is agreed to.

Are there further amendments? The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, I have an amendment at the desk, number 45.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 1731, offered by Mr. Scott. Section 4, In addition to any other sums authorized to be appropriated for this purpose, there is authorized to be appropriated to the Department of Justice, \$10 million for the investigation and prosecution of identity theft and—

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

Amendment To H.R. 1731
Offered By Mr. Scott #45

Section 4

In addition to any other sums authorized to be appropriated for this purpose, there is authorized to be appropriated to the Department of Justice, \$10,000,000 for the investigation and prosecution of identity theft and related credit card and other fraud cases constituting felony violations of law.

Chairman SENSENBRENNER. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, earlier in the discussion, I entered by unanimous consent an article involving Senator Domenici. Let me just read two or three sentences out of that article.

“New Mexico Senator Pete Domenici’s credit card bill took a hit after he lost his wallet during a visit to Albuquerque last month. A spokesman for the well-known Republican said today that two or three credit cards were in his wallet. Before Domenici could cancel the cards, someone purchased a \$500 appliance, charged \$300 worth of groceries, and bought a tank of gasoline.”

Mr. Chairman, an appliance was probably delivered somewhere, but that, in fact, to solve that crime would take investigation and resources. At a hearing on the bill, the Department of Justice admitted that they do not have resources for cases like this, and we have ascertained from the Department of Justice that, to the best of their knowledge, this case has not been investigated. The credit

card companies have decided not to hold the Senator responsible for the money charged to his credit cards.

Mr. Chairman, this bill provides an increase in penalties. It only applies to those who have been investigated, arrested, prosecuted, convicted, and then kicks in at sentencing. It cannot be effective for cases that aren't even investigated to begin with. This amendment will provide resources so that we could begin that process.

Thank you, Mr. Chairman. I yield back.

Mr. SCHIFF. Would the gentleman yield?

Mr. SCOTT. I'm sorry. I yield to the gentleman from California.

Mr. SCHIFF. I thank the gentleman for yielding.

Very briefly, Mr. Chairman, I just wanted to add my voice of support for this amendment by Mr. Scott. One approach that we've taken in the base bill is to augment the penalties as a way of deterring the commission of the crime. But, of course, the penalties are only one facet. Having the resources to actually investigate and prosecute these cases is another issue. And for that reason, I would join in support of the gentleman's amendment.

Mr. COBLE. Mr. Chairman?

Mr. SCOTT. I thank the gentleman, and I yield back.

Mr. COBLE. Would the gentleman yield to me?

Mr. SCOTT. I'm sorry. I yield.

Mr. COBLE. Mr. Chairman, I thank the gentleman for yielding. I would urge the Members on the Committee to accept this, but I say to the gentleman from Virginia, I think we should include the caveat that in the event that the Budget Committee may express concerns about the increase in spending, we may have to visit it another time. But for the moment, I'd be willing to accept this.

Mr. SCOTT. Reclaiming my time—Mr. Chairman, reclaiming my time, this would be an authorization. If it doesn't fit in the budget, it would not be appropriated.

Mr. CARTER. Mr. Chairman?

Chairman SENSENBRENNER. Does the gentleman from Virginia yield back?

Mr. SCOTT. I yield back. Thank you.

Mr. CARTER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Carter.

Mr. CARTER. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CARTER. And it won't take 5 minutes. I, too, join in this. I think this is a good idea, but subject to the same caveat that the Chairman of the Subcommittee talked about, Mr. Coble, subject to the Budget Committee.

I'm always for things that help the prosecutors do their job so we can call them on the carpet when they don't, so I can support this.

Chairman SENSENBRENNER. Does the gentleman yield back? Does the gentleman yield back?

Mr. CARTER. Yes.

The question is on the amendment of the gentleman from Virginia, Mr. Scott, to the amendment in the nature of a substitute. Those in favor will say aye? Opposed, no?

The ayes appear to have it. The ayes have it, and the amendment to the amendment is agreed to.

Are there further amendments? The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. SCOTT. Number 42.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 1731, offered by Mr. Scott of Virginia. On the first page, line 16, strike "2" and insert "up to 5." Page 2, line 8, strike "5" and insert "up to 10."

[The amendment follows:]

AMENDMENT TO H.R. 1731

OFFERED BY MR. SCOTT OF VIRGINIA

On the first page, line 16, strike "2" and insert "up to 5".

Page 2, line 8, strike "5" and insert "up to 10".

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, very simply, this amendment increases the total time, but eliminates the mandatory minimum nature—or the mandatory time to be given. This means that only in tough cases can you be at least—in tough cases, you can be twice as tough as under the mandatory sentence in the underlying bill.

One of the primary difficulties for those who propose mandatory sentences to be tough on crime is they impose ceilings on toughness. This means that in the worst cases, the worst offenders are required to get less time than they deserve, while lesser offenders are required to get more than they deserve. This socks it to the bit player while giving the ring leader a huge discount. What sense does that make for a tough-on-crime advocate?

Such a crackdown on lesser offenders while discounting sentences for the hard—for the worst offenders has no place in any rational sentencing scheme. These sentencing schemes are not only irrational but also seem to be counterproductive.

In the 1984 Sentencing Reform Act, which eliminated parole, good-time credits, and individualized sentences based on the seriousness of the crime and criminal history and role of offender in favor of a one-size-fits-all determinant sentencing. Just before the Act took place, we had approximately 25,000 Federal prisoners. Today, 20 years later, 177,000 Federal prisoners, a seven-fold increase. The increase of prisoners for the 50 years prior to the mandatory minimums was 4,000 prisoners, despite hippies, marijuana,

LSD, heroin, cocaine, and everything else that happened in the 1960's, 1970's, and 1980's.

So what do we think happened to the crime rate after all of this new incarceration? The fact is crime has increased significantly over the past 20 years and remains high—drug offenses, for example. Prior to mandatory minimum sentences, drug offenders made up less than 15 percent of the Federal prison population. Today, more than half of the Federal prisoners are there for drug offenses, and drugs are more plentiful, more potent, more pure, and cheaper than they were before.

Despite the clear reasons for questioning the effectiveness of mandatory minimum sentences and all of the evidence from credible studies, with no credible studies on the contrary, proponents put blinders on and continue to pass mandatory minimum sentences. We owe future victims of crime and the taxpayer a better rationale for socking it to them than it sounds good and therefore it must be good.

I would hope that we would now consider to show in the face of clear evidence of what not to do, at least not do more of it. I would hope that we would pass this amendment to allow the application of a rational sentencing policy so that the more serious offenders will get more time and then less punishment for the lesser offenders.

Thank you, Mr. Chairman. I yield back.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Mr. Chairman, I will be very brief, but I will have to—

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. COBLE.—oppose this amendment. I'm revisiting our markup, and I believe it was Mr. Feeney, the distinguished gentleman from Florida, I believe was the one who addressed this, and I recall that he said that the opponents of mandatory minimum sentences would have a more compelling case if they could assure the Congress that the judges were faithfully following the Federal Sentencing Guidelines. And I think, sadly, there's evidence that doesn't support that.

I believe I'm correct, I say to my friend from Virginia, I think this bill sponsored by Senator Feinstein in the other body, I think it passed by unanimous consent, so that's a pretty good message we get from them, which rarely is the case.

Mr. SCOTT. Would the gentleman yield?

Mr. COBLE. I'll yield to my friend.

Mr. SCOTT. Either that's a pretty good indication or a pretty bad indication. [Laughter.]

Mr. COBLE. No comment. I thank the gentleman. I yield back my time.

Chairman SENSENBRENNER. The Chair admonishes Members to resist temptations to cast aspersions on the other body, even though they may be true. [Laughter.]

The question is on the amendment to the amendment in the nature of a substitute offered by the gentleman from Virginia, Mr. Scott. Those in favor will say aye? Opposed, no?

The noes appear to have it. The noes have it, and the amendment is not agreed to.

Are there further amendments? The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, I have an amendment at the desk, number 43.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 1731, offered by Mr. Scott of Virginia. Beginning on page 2, strike subsection (b) and redesignate subsections accordingly.

[The amendment follows:]

AMENDMENT TO H.R. 1731

OFFERED BY MR. SCOTT OF VIRGINIA

Beginning on age 2, strike subsection (b) and redesignate subsections accordingly.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Very simply, this removes the section prohibiting probation and concurrent sentence applications. Like mandatory minimums, this measure also circumvents the established system of sentencing by those in the best position to do so, the Sentencing Commission and the judges, and has Congress sentencing everybody on the front end without regard to the differences and facts and circumstances of the case and the roles and backgrounds of the individual defendants. There is no reason to have this because basically with this provision in here, you essentially have the sentencing done by the prosecutor in leveling the charges. Whatever he charges you with will be the sentence at the end, and he can decide by adding on charges or eliminating charges what the penalty will be. That sentencing decision really ought to be with the judge, with the direction of the Sentencing Commission, and not by the prosecutor. And I would hope that the amendment would, therefore, be adopted.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Mr. Chairman, I'll be brief again. I speak in opposition. The current penalties for identity theft and identity fraud will still be available.

I said the current penalties for identity theft and identity fraud will still be available for prosecution of individuals in other less serious cases under 18 U.S.C. 1028. However, this legislation recognizes that the perpetrators of identity theft in certain cases are simply stealing another identity with the intent to commit in many instances a much more serious crime. The mandatory minimums,

consecutive sentences, and limit on probation are all designed to send a message that Congress believes those who steal identities to commit further crimes should be dealt with more harshly than those who commit a regular identity theft. And I oppose it and yield back my time, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Mr. Chairman, I rise in support of the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you. I won't spend 5 minutes.

You know, Mr. Coble says this is intended to send a message about the severity of the crime, and crimes may indeed be severe and they may deserve severe punishment. But certain discretion has to be left to judges because a given crime may have extenuating circumstances; a given crime may not be as severe as a different crime described in the same statutory language; a certain crime may be more severe than a different crime described by the same statutory language.

Now, what this language really does without Mr. Scott's amendment is to shift power from the judge to the prosecutors. We elect or appoint judges to exercise judgment. That's why they're called judges. That's why we have them. To give the prosecutor the power to determine the sentence by his determining the charges, he can determine whether to charge four identity thefts or five identity thefts. And if you say no concurrent sentences, the same crime might have different consequences, very different consequences, determining—he can determine the severity of the charge. He can determine the number of counts of the charge, and that would govern the sentence. I think you have to leave some discretion to a judge; otherwise, why bother having judges at all.

So we can express our message and our statutory decision as to the severity of a crime by what the sentence—by what the penalty for a crime is. But whether sentences are concurrent or are consecutive, whether probation can be imposed, what the circumstances are in a given case, you have to leave that to a judge because, otherwise, you impose an inhuman system, and we will all find cases where there are inhuman results. We have—and there's no reason and there's no ability to make the system so specific by law as to fit individual cases.

So I support Mr. Scott's amendment, and I urge its adoption.

Mr. SCOTT. Would the gentleman yield?

Mr. NADLER. Yes, I will yield.

Mr. SCOTT. I would say to the gentleman that the discussion that he just had about the prosecutor actually doing the sentencing occurred in the Enron case when a plea bargain was struck with a defendant based on certain charges, and the judge rejected the plea bargain. The prosecutor went back, dismissed those cases, indicted—re-indicted the person on other charges for which the guidelines produced the desired result, and the person was sentenced under that new indictment.

That gives the prosecutor the ability, essentially, to beat the sentencing authority, not the judge who ought to have that authority.

I thank the gentleman for his support.

Mr. NADLER. I thank the gentleman. I thank him for offering the amendment, and I hope the Committee Members will see the wisdom of this amendment, and I yield back.

Chairman SENSENBRENNER. The question is on the Scott amendment to the amendment in the nature of a substitute. Those in favor will say aye? Opposed, no?

The noes appear to have it. The noes have it; the amendment is not agreed to.

Are there further amendments? If there are no further amendments, without objection, the Subcommittee amendment in the nature of a substitute laid down as the base text as amended is adopted. A reporting quorum is present. The question occurs on the motion to report the bill H.R. 1731 favorably as amended. Those in favor will say aye? Opposed, no?

The ayes appear to have it. The ayes have it; the motion to report favorably is adopted.


Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the amendments adopted here today. Without objection, the Chairman is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes——







Mr. SCOTT. Mr. Chairman? Mr. Chairman, reserving the right to object, do we have time to insert other items into the record at this point on the bill?

Chairman SENSENBRENNER. If the gentleman would like to ask unanimous consent.

Mr. SCOTT. I'd ask unanimous consent that a statement from—two statements be entered into the record.

Chairman SENSENBRENNER. Without objection.
[The statements follow:]


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04.17.04

NM senator's lost credit cards used on shopping spree

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New Mexico Senator Pete Domenici's credit card bill took a hit after he lost his wallet during a visit to Albuquerque last month.

A spokesman for well known Republican said today that two or three credit cards were in the wallet. Before Domenici could cancel the cards, someone purchased a \$500 appliance, charged \$300 worth of groceries and bought a tank of gasoline.

Speaking to a business group this week, Domenici expressed surprise that none of the cashiers involved in the transactions questioned when the buyer signed Domenici's name on the credit card charges.

Domenici said he thought everyone knew him.

The credit card companies won't hold him responsible for the money charged to his credit cards, Domenici said.

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March 29, 2004

The Honorable Howard Coble
House of Representatives
Subcommittee on Crime, Terrorism and Homeland Security
Washington, D.C. 20515

The Honorable Robert C. Scott
House of Representatives
Subcommittee on Crime, Terrorism and Homeland Security
Washington, D.C. 20515

Re: The Identity Theft Penalty Enhancement Act (H.R. 1731)

Dear Mr. Coble and Mr. Scott:

The undersigned organizations write to oppose certain sentencing provisions in the Identity Theft Penalty Enhancement Act (H.R. 1731), which is scheduled for mark up by the subcommittee on March 30. Section 2(a) of this bill would create new mandatory sentences (18 U.S.C. Sec. 1028A(a)) and require that they run consecutively to any other sentence imposed (18 U.S.C. Sec. 1028A(b)). Mandatory minimum sentencing laws are unnecessary, harmful to the administration of justice and cause racial disparity.

In the Sentencing Reform Act of 1984, Congress established a sentencing guideline system that limits judicial discretion. The U. S. Sentencing Commission has promulgated detailed guidelines for federal offenses, including identity theft. Mandatory minimums are unnecessary now that there is a fully functioning guideline system in the federal courts.

It is well documented that mandatory sentencing leads to unjust punishment and racial disparity. U.S. Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); Leadership Conference on Civil Rights, *Justice on Trial* (2000). For these reasons, Chief Justice William Rehnquist has called mandatory sentencing "a good example of the law of unintended consequences" and all 12 federal judicial circuits have urged the repeal of mandatory minimum sentences. Indeed, Senator Hatch has questioned the need for mandatory sentencing laws now that there is a federal guideline system. Orrin G. Hatch, *The Role of Congress in Sentencing*, 28 Wake Forest L. Rev. 185 (1993).

While most criticism of mandatory minimum sentences has focused on federal drug statutes, these laws are wrong for reasons that apply without regard to offense type. Mandatory minimum sentencing deprives judges of the ability to impose sentences that fit the particular offense and offender. The sentencing guidelines are better able to take into account the range of factors relevant to the sentencing decision and exclude factors that give rise to unwarranted sentencing disparities. In transferring sentencing discretion from judges to prosecutors, mandatory minimums transfer the sentencing decision from open courtroom to closed prosecutor's office and allow factors such as race, age and gender to influence the ultimate

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Page 2

sentence. This problem would be magnified by the mandatory *consecutive* sentences in H.R. 1731.

We urge that H.R. 1731 be amended to replace the mandatory sentencing provisions with general directives to the Sentencing Commission, instructing that agency to assure appropriate sentences for the targeted types of identity theft. Congress could amplify the directives enacted as part of the Identity Theft and Assumption Deterrence Act of 1998. This approach would further the goals of this legislation without undermining the uniformity and fairness that Congress sought in establishing the guideline system.

Thank you for considering our views on the Identity Theft Penalty Enhancement Act. Please contact Kyle O'Dowd at NACDL (202-872-8600, ext. 226) or Mary Price at FAMM (202-822-6700) if you have any questions.

Wade Henderson
Executive Director
Leadership Conference on Civil Rights

Raul Yzaguirre
President
National Council of La Raza

E.E. (Bo) Edwards
President
National Association of Criminal Defense Lawyers

Julie Stewart
President
Families Against Mandatory Minimums

Scott Wallace
Of Counsel
National Legal Aid and Defender Association

Laura W. Murphy
Director
ACLU Washington Legislative Office

cc: House Committee on the Judiciary

Chairman SENSENBRENNER. All Members will be given 2 days, as provided by House rules, in which to submit additional, dissenting, supplemental, or minority views.

DISSENTING VIEWS

These views are in dissent to the Judiciary Committee Report on H.R. 1731, the "Identity Theft Penalty Enhancement Act."

The bill prescribes a mandatory minimum sentence of 2 years' imprisonment for knowingly transferring, possessing, or using, without lawful authority, a means of identification of another person during and in relation to specified felony violations (including felonies relating to theft from employee benefit plans, Social Security benefit programs and various fraud and immigration offenses), in addition to the sentence for the underlying crime or crimes. It also provides for a mandatory minimum sentence of 5 years' imprisonment for knowingly taking such action during and in relation to specified felony violations pertaining to terrorist acts, in addition to the punishments provided for such felonies.

Moreover, the bill prohibits a court from: (1) placing any person convicted of such a violation on probation; (2) reducing any sentence for the related felony to take into account the sentence imposed for such a violation; or (3) providing for concurrent terms of imprisonment for a violation of this Act and any other violation, except, in the court's discretion, an additional violation of this section.

Further, the bill expands the existing identify theft prohibition to: (1) cover possession of a means of identification of another with intent to commit specified unlawful activity; (2) increase penalties for violations; and (3) include acts of domestic terrorism within the scope of a prohibition against facilitating an act of international terrorism.

By adding mandatory minimum sentences and denying probation and concurrent sentences, the bill imposes unnecessary and unproductive restrictions on the ability of the Sentencing Commission and the judges in individual cases to assure a rational and just system of sentencing as a whole and for individuals. Congress is not in a better position to determine what the appropriate sentence is in individual cases, before the crime occurs, than the judge who has heard the case, applying guidelines established by sentencing professionals. Mandatory minimum sentences not only defeat the rational sentencing system that Congress adopted, but make no sense in our separation of powers scheme of governance. Moreover, the notion that mandating a 2-year or 5-year sentence to someone who is willing to risk a 15-year sentence is not likely to add any deterrence.

Mandatory minimum sentences violate common sense. If the sentence required by the mandatory minimum is the appropriate sentence, it will be the sentence imposed. On the other hand, even if it makes no sense in the particular case, it still must be imposed.

Mandatory minimum sentences have been studied extensively and have been shown to be ineffective in preventing crime. They

distort the sentencing process, discriminate against minorities in their application and waste money. In a study report entitled "*Mandatory Minimum Drug Sentences: Throwing Away the Key or the Tax Payers Money?*," the Rand Commission concluded that mandatory minimum sentences were less effective than either discretionary sentencing or drug treatment in reducing drug related crime, and far more costly than either. And the Judicial Conference of the U.S. has reiterated its opposition to mandatory minimum sentencing schemes over a dozen times to the Congress, noting that they "severely distort and damage the Federal sentencing system, . . . undermine the Sentencing Guideline regimen" established by Congress to promote fairness and proportionality, and "destroy honesty in sentencing by encouraging charge and fact plea bargains." The U.S. Sentencing Commission indicated its opposition to the Senate bill, which is virtually identical to H.R. 1731, for similar reasons.

Both the Judicial Center in its study report entitled "*The General Effects of Mandatory Minimum Prison Terms: A longitudinal Study of Federal Sentences Imposed*," and the United States Sentencing Commission in its study report entitled "*Mandatory Minimum Penalties in the Federal Criminal Justice System*," found that minorities were substantially more likely than whites under comparable circumstances to receive mandatory minimum sentences. The Sentencing Commission study also reflected that mandatory minimum sentences increased disparity in sentencing of like offenders, with no evidence that mandatory minimum sentencing had anymore crime reduction impact than discretionary sentences. Chief Justice Rehnquist has spoken often and loudly about these wasteful cost increases:

"Mandatory minimums are perhaps a good example of the law of unintended consequences . . .".

Not only do such sentencing schemes violate common sense, but they appear to be counter productive. The 1984 Sentencing Reform Act eliminated parole, good time credits and individualized sentences based on the seriousness of the crime and the criminal history and role of the offender in the crime, in favor of one-size-fits-all determinate sentencing. In the two decades since, we have passed a slew of harsher and harsher mandatory minimum sentences to add to even more time to sentences. Just before the Act took effect, we had approximately 25,000 Federal prisoners. Today, 20 years later, we have over 177,000 Federal prisoners, a seven-fold increase. Take drug offenses, as an example. Prior mandatory minimum sentences, drug offenders made up less than 15 percent of the Federal prison population. Today, drug offenders make up 54 percent of the prison population, and drugs of all types have never been more plentiful, more potent or pure, or cheaper. The increase in the prison population for the 50 years prior to the Act and mandatory minimum sentences was 4,000 prisoners, despite the "Hippie", Marihuana, LSD, Heroine and Cocaine binges of the 60's, 70's and 80's. Yet, the crime rate over the past 20 years, compared to the prior 50 years, has increased significantly and remains high.

Despite these clear reasons for questioning the effectiveness of mandatory minimum sentencing, and all the evidence from credible

studies with no credible studies to the contrary, proponents put on blinders and continue to pass mandatory minimum sentences because they sound good. We owe the future victims of crime and the taxpayer a better rationale for socking it to them than "it sounds good, so it must be good." During the Committee markup of the bill, Subcommittee Ranking Member Scott offered an amendment to replace the 2-year and 5-year mandatory minimum sentences with 5-year and 10-year maximum sentences, respectively. This would mean that on the tough cases, the additional sentence could be at least two times tougher than the mandatory sentence. One of the primary difficulties for those who propose mandatory sentences as a way to show they are tough on crime is that such sentences impose ceilings, as well as floors, on toughness. The impact of this is that the worse offenders are required to get LESS time than they deserve, while the lesser offenders are required to get MORE time than they deserve. This socks it to the bit player while giving the ringleader a huge sentencing discount. What sense does that make for a tough on crime advocate, or anybody else? Such a crack down on lesser offenders while discounting sentences for hard worse offenders has no place in any rational sentencing scheme.

Identity theft is a huge problem in this country. The FTC reports that identity thieves bilked almost 30 million Americans out of approximately \$50 billion dollars over the past 5 years, with about \$5 billion of that out-of-pocket and unrecovered losses to the victims. During the markup, Ranking Member Scott introduced an article on an identity theft case in which U.S. Senator Pete Domenici was the victim. The case involved about \$800 worth of fraudulent credit card purchases. Yet, the FBI reported that no action is being taken on this case because of resource limitations. If what the Congress does or doesn't do sends any message to criminals, the message this sends is that criminals can continue to scam people, no matter who they are, with impunity. A bill before the Subcommittee, H.R. 3693, sponsored by Ranking Member Scott, Chairman Coble, Ranking Member Conyers and nine other members, which would provide \$100 million to the Department of Justice for consumer identity theft investigation and prosecution, was not scheduled for markup.

However, while much of the bill does little, if anything, to address consumer identity theft, the Committee did adopt an amendment offered by Ranking Member Scott which would provide \$10 million to the Department of Justice, \$2 million over each of the next five fiscal years, to investigate and prosecute consumer identity theft. While this does not overcome the counterproductive impact of the mandatory minimum sentences in the bill, the \$10 million would at least let identity thieves know they can no longer assume impunity.

JOHN CONYERS, JR.
JERROLD NADLER.
ROBERT C. SCOTT.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MAXINE WATERS.
WILLIAM D. DELAHUNT.
TAMMY BALDWIN.

