112TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
112–202

IDENTITY THEFT IMPROVEMENT ACT OF 2011

SEPTEMBER 8, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2552]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2552) to amend title 18, United States Code, to change the state of mind requirement for certain identity theft offenses, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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99–006

Purpose and Summary

H.R. 2552, the "Identity Theft Improvement Act of 2011," corrects a problem created by the Supreme Court in the case of *Flores-Figueroa v. United States,* _____ U.S. _____, 129 S.Ct. 1886 (2009). The Act specifically alters the state of mind requirements of the identity theft statute, Title 18, United States Code, Section 1028 so that the Government need not prove that the defendant knew the means of identification was of another person in order to prosecute for identity theft. The concern that this bill addresses arose when the Supreme Court interpreted section 1028 as requiring proof that an individual using a fake or stolen identification have knowledge that the identification belonged to another person.

Background and Need for the Legislation

Federal law prohibits identity theft and identity fraud, specifically the knowing possession, production, transfer, or use of an identification document, a false identification document, or a means of identification without lawful authority. Penalties for violating this law range from up to 5 years for garden-variety identity theft to up to 20 years if the identity theft facilitates a drug offense, crime of violence, or is a second offense, or up to 30 years if the identity theft facilitates an act of terrorism. This statute was enacted in 1998 at 18 U.S.C. § 1028.

In 2004, the law was expanded to add a provision known as "aggravated identity theft." Codified at 18 U.S.C. § 1028A, this statute provides for a consecutive 2-year sentence for

> "Whoever, during and in relation to any felony enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person . . ."

Subsection (c) contains a list of "predicate" felonies that if accompanied by identity theft can result in the consecutive 2-year sentence that is in addition to the sentence for the predicate felony. These felonies include theft, embezzlement, fraud, false statements, wire fraud, and false statements in connection to acquiring a firearm.

Subsection (c) also includes several immigration-related offenses in the list of predicate felonies, including fraud relating to citizenship, fraud relating to alien registration cards, failure to leave the U.S. following deportation, and harboring and unlawful employment offenses under the Immigration and Nationality Act.

Ignacio Flores-Figueroa is a citizen of Mexico. In 2006, Flores presented his employer with counterfeit Social Security and alien registration cards. But the numbers on both cards were in fact numbers assigned to other people. Flores' employer reported his request to U.S. Immigration and Customs Enforcement (ICE). ICE discovered that the numbers on Flores' new documents belonged to other people. The United States then charged Flores with two predicate felonies—entering the United States without inspection, 8 U.S.C. § 1325(a), and misusing immigration documents, 18 U.S.C. § 1546(a). It also charged him with aggravated identity theft, 18 U.S.C. § 1028A.

Flores moved for a judgment of acquittal on the "aggravated identity theft" counts. He claimed that the Government could not prove that he *knew* that the numbers on the counterfeit documents were numbers assigned to other people.

As noted above, the aggravated identity theft statute applies to a person who *"knowingly* transfers, possesses, or uses, without lawful authority, a means of identification *of another person."* At issue in this case was whether the statute requires the Government to prove beyond a reasonable doubt that the defendant knew that the identification he transferred, possessed, or used belonged to another person.

In *Flores-Figueroa v. United States,* _____ U.S. _____, 129 S.Ct. 1886, (2009), the Supreme Court held 9–0 that the aggravated identity theft statute requires the government to prove that the defendant knew the means of identification belonged to another person.

The Supreme Court's decision raised several issues. First, how does the government prove that the defendant knows the identification belongs to another person? Is it sufficient to introduce testimony from the victim that he or she is the "owner" of that identification and that the defendant did not have permission? Or does the government now have to introduce statements by the defendant that he knows the identification belongs to someone else? This is much more difficult to accomplish. Without this legislative fix, it would be a simple matter for a defendant to escape responsibility by asserting that while the documents he possessed were improper, he did not have knowledge that they belonged to an actual person.

Hearings

The Committee on the Judiciary held no hearings on H.R. 2552.

Committee Consideration

On July 20, 2011, the Committee met in open session and ordered the bill H.R. 2552 favorably reported without amendment, by recorded vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 2552.

1. An amendment offered by Mr. Scott to exclude cases of Aggravated Identity Theft from the bill. Defeated 16 to 10.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot		X	
Mr. Issa			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Cohen			
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez			
Total	10	16	

2. Motion to report H.R. 2552 favorably, without amendment. Passed 16 to 10.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Chabot	X		
Mr. Issa			
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy	X		
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle	X		
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman			
Mr. Nadler		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters		X	
Mr. Cohen			
Mr. Johnson		X	
Mr. Pierluisi		X	
Mr. Quigley		X	
Ms. Chu		X	
Mr. Deutch			
Ms. Sánchez			
Total	16	10	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises 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

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. 2552, 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, August 1, 2011.

Hon. LAMAR SMITH, 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. 2552, the "Identity Theft Improvement Act of 2011."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 2552—Identity Theft Improvement Act of 2011.

H.R. 2552 would eliminate the state-of-mind requirement in certain identity theft cases. Under current law, prosecuting attorneys in identity theft cases must prove that the defendant knew that the means of identification belonged to another individual. Based on information from the Department of Justice, CBO estimates that H.R. 2552 would not have a significant impact on the Federal budget because the bill would probably affect only a small number of cases.

Enacting H.R. 2552 could affect direct spending and revenues; therefore, pay-as-you-go procedures apply. However, CBO estimates that the net effects would be insignificant for each year.

Those convicted under H.R. 2552 would be subject to criminal fines; therefore, the Federal Government might collect additional fines if the bill is enacted. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent. CBO expects that any additional revenues and direct spending would not be significant.

Persons prosecuted and convicted under the bill also could be subject to the seizure of assets by the Federal Government. Proceeds from the sale of such assets are recorded as revenues, deposited into the Assets Forfeiture Fund, and spent mostly in the same year. Thus, enacting H.R. 2552 could increase both revenues deposited into those funds and direct spending from them. However, CBO expects that any increase in revenues or spending would be negligible.

H.R. 2552 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.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by Theresa Gullo, 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. 2552 is intended to clarify the statutory authority for the longstanding practice of the Department of Justice of providing investigatory assistance on request of State and local authorities with respect to certain violent crimes.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2552 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title. This section cites the short title of the bill as the "Identity Theft Improvement Act of 2011."

Section 2. State of Mind Requirement for Identity Theft and Aggravated Identity Theft. This section amends Title 18, United States Code, Section 1028, subsection (j), to alter the elements necessary for the Government to prove the crimes of Identity Theft and Aggravated Identity Theft. The section specifically states that the Government need not prove that the defendant knew that the means of identification was of another person.

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 (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

PART I—CRIMES

* * * * * * *

CHAPTER 47—FRAUD AND FALSE STATEMENTS

* * * * * * *

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

(a) * * *

* * * * * * *

(j) STATE OF MIND PROOF REQUIREMENT.—In a prosecution under subsection (a)(7) or under section 1028A(a), the Government need not prove that the defendant knew the means of identification was of another person.

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Dissenting Views

There is no doubt that identity theft is a serious problem confronting American citizens. The crime of identity theft is very damaging to consumers and is particularly harmful during a time when so many Americans are facing financial uncertainty. While H.R. 2552 purports to strengthen identity theft laws, it does so in a manner that raises serious policy concerns.

H.R. 2552 expands the category of persons subject to counterproductive mandatory minimum sentences. Specifically, by lessening the showing necessary for prosecutors to obtain convictions for aggravated identity theft offenses under 18 U.S.C. § 1028A, the bill expands the category of persons subjected to a counterproductive 2-year mandatory minimum sentence. In addition, H.R. 2552 is a thinly veiled attempt to make felons of undocumented immigrants without regard for whether they knew that the identification documents they were using belonged to another person.

For these reasons, and those stated below, we respectfully dissent and urge our colleagues to oppose this misguided legislation.

I. H.R. 2552 EFFECTUATES POOR SENTENCING POLICY

Proponents of H.R. 2552 argue that the bill is necessary to respond to the Supreme Court's decision in *Flores-Figueroa v. U.S.*[1] That case interpreted 18 U.S.C. § 1028A, which imposes a mandatory additional penalty of 2 years imprisonment on anyone who, in the course of committing certain other crimes, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person[.]" The issue in the case was whether a defendant could be convicted of violating this statute if he knew the means of identification was not his own, but did not know that it actually belonged to someone else (e.g., using a Social Security number that does not belong to you, but that may or may not be assigned to someone). The Court ruled that the *mens rea* of "knowingly" requires the prosecution to prove that the defendant knew that the identification being used was actually that of another person.

In order to contravene the Court's requirement, H.R. 2552 sets forth a rule of construction for 18 U.S.C. §§ 1028 and 1028A. It provides that, "In a prosecution under subsection [1028](a)(7) [identity theft] or under section 1028A(a) [aggravated identity theft], the Government need not prove that the defendant knew that the means of identification was of another person." Because section 1028A provides for the mandatory additional 2-year penalty, relaxing the *mens rea* requirement reduces the showing necessary to obtain such a mandatory sentence. Consequently, the reduced *mens rea* requirement expands the category of defendants subject to

[1] 129 S. Ct. 1886 (2009)

mandatory minimum sentences to include even those who did not know that the identification they were using belonged to another person.

Mandatory minimum sentences take a charge-centered approach to sentencing. Conviction for certain crimes results in a pre-determined and generally inescapable sentence. Historically, they have been adopted to deter would-be criminals, incapacitate offenders, and combat disparity by promoting uniformity of punishment for similarly situated defendants. Nevertheless, mandatory minimum sentencing has not lived up to its promise, it is plagued with problems, and has led to extraordinary injustice, prison overcrowding and excess costs to taxpayers.

While criminologists of all stripes agree that greater reliance on prison has some impact on the crime rate, there is no evidence that sentence length or lengthy mandatory minimums have had any impact.[2] The Pennsylvania Sentencing Commission, for example, was ordered by the state legislature to study its mandatory minimum laws and concluded that "neither length of sentence nor the imposition of a mandatory minimum sentence alone was related to recidivism."[3]

Intended to, among other things, reduce unwarranted disparity among similarly situated defendants, mandatory minimum sentencing has instead produced both unwarranted uniformity and disparity. For example, in drug offenses, the type and weight of a drug are alone sufficient to trigger a mandatory minimum sentence. The type and quantity of drugs are, however, poor proxies for culpability, because very different offenders, with varying degrees of culpability, can be subject to the same mandatory minimum sentence. This unwarranted uniformity means that a drug "mule" carrying a backpack filled with drugs on several occasions, for relatively small amounts of remuneration, receives the same sentence as the drug kingpin, who arranges the trips and enjoys enormous profits. In its 1991 study of mandatory minimums, the United States Sentencing Commission called the exaggerated role of drug quantity the "tariff" effect, and criticized it for prohibiting the consideration of traditional sentencing factors.

At the same time, the mandatory minimum sentencing regime has had the effect of transferring discretion from judicial to prosecutorial control, creating unwarranted disparity in application. Prosecutors control what crime to charge and which sentencing factors to bring to the court's attention, whether to drop a charge or "fact bargain" sentencing elements, and whether to charge a crime that carries a mandatory minimum sentence or one that does not. All of those decisions are made away from the public record and are unreviewable. This has the result of treating similarly situated people differently based not on the offense committed but on the prosecutor in charge.

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[2] *See* Andrew von Hirsch, et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing,* 34 CRIME AND JUSTICE: A REVIEW OF RESEARCH 28–29 (2006); David Weisburd et. al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes,* 33 CRIMINOLOGY 587 (1995).

[3] Pennsylvania Commission on Sentencing: Report to the House of Representatives, House Resolution 12, Session of 2007, *A Study on the Use and Impact of Mandatory Minimum Sentences,* (Harrisburg, PA: October 2009) 3, *available at* http://pcs.la.psu.edu/HR__12__FINAL__REPORT__WEB.pdf.

There are 172 statutes with mandatory minimums in the Federal code. In 2008, 21,023 individuals were sentenced to 31,239 counts of conviction carrying mandatory minimum sentences at an average cost of $28,000 per individual per year.[4] Mandatory minimums cause other unintended, but very real, consequences beyond the daily and personal injustice of subjecting many defendants to sentences that are too long. They contribute to over-incarceration.

As Federal Public Defender Michael Nachmanoff testified before the U.S. Sentencing Commission in 2009:

> The Federal prison population is currently at 206,786 inmates, a nearly five-fold increase since mandatory minimums and mandatory guidelines became law. The major cause of the prison population explosion is the increase in sentence length for drug trafficking, from 23 months before the guidelines to 73 months in 2001. About 75% of this increase was due to mandatory minimums, and 25% was due to guideline increases above mandatory minimum levels. Today, the average sentence length for drug trafficking is even higher than in 2001, at 83.2 months.[5]

Since Mr. Nachmanoff delivered his testimony 2 years ago, the Federal prison population has climbed more than 210,000 and the annual average cost to incarcerate an offender is more than $28,000.

Mandatory minimums make no pretense of accommodating the factors in 18 U.S.C. § 3553(a) that account for individual characteristics at sentencing. They are impervious to the studied inquiry of that law, and wholly unable to honor parsimony. They are frequently longer than needed to comply with the purposes of punishment, only crudely reflect the seriousness of the offense, and completely fail to account for individual characteristics of the offense or the offender.[6]

For all of these reasons, opposition to mandatory minimum sentencing laws is growing, including in some unexpected quarters. In the past couple of years, numerous high-profile national conservative leaders have expressed opposition to mandatory minimum sentencing laws. Americans for Tax Reform President Grover Norquist, American Civil Rights Institute President Ward Connerly, National Rifle Association President David Keene, and Justice Fellowship President Pat Nolan have called mandatory minimum sentences into question.

More recently, these conservative leaders joined former House Speaker Newt Gingrich, former Attorney General Ed Meese, Family Research Council President Tony Perkins, and former drug czar Bill Bennett and others to form Right on Crime, a group dedicated

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[4] "Overview of Statutory Mandatory Minimum Sentencing," United States Sentencing Commission. http://www.ussc.gov/Legislative—and—Public—Affairs/Congressional__Testimony__and__Reports/Submissions/20090710__StC__Mandatory__Minimum.pdf

[5] *The Sentencing Reform Act of 1984: 25 Years Later,* Public Hearing Before the U.S. Sentencing Commission, New York, New York, July 9, 2009 (Statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia), available at http://www.fd.org/pdf__lib/Statement%20of%20Michael%20Nachmanoff%20USSC%20Regional%20Hearing%207.9.09.pdf. Public Hearing Before the United States Sentencing Commission, The Sentencing Reform Act of 1984: 25 Years Later http://www.fd.org/pdf__lib/Statement%20of%20Michael%20Nachmanoff%20USSC%20Regional%20Hearing%207.9.09.pdf

[6] Mary Price, *Everything Old is New Again,* NEW ENGLAND JOURNAL ON CRIMINAL AND CIVIL CONFINEMENT, 83 (Winter 2010).

to achieving a cost-effective criminal justice system that "protects citizens, restores victims, and reforms wrongdoers."[7] Included in the group's proposals for reform is a call to consider "eliminating many mandatory minimum sentencing laws for nonviolent offenses. These laws remove all discretion from judges who are the most intimately familiar with the facts of a case and who are well-positioned to know which defendants need to be in prison because they threaten public safety and which defendants would in fact not benefit from prison time."[8]

II. H.R. 2552 MAKES FELONS OUT OF UNDOCUMENTED IMMIGRANTS

Although H.R. 2552 purports to address identity theft, it is really intended to make felons out of undocumented immigrants. Current law already makes it a crime to knowingly use or possess a false identification document, Social Security number, or passport.[9] The crime of aggravated identity theft further penalizes the knowing use of another person's identifying information in connection with an additional criminal offense.[10] By removing the requirement that a person know that the identifying information he or she is using belongs to another person, H.R. 2552 adds additional criminal charges and mandatory minimum punishment on top of behavior that already is criminalized.

If H.R. 2552 were to become law, an individual could be guilty of aggravated identity theft and subject to a 2-year mandatory minimum sentence in prison even if such individual did not know that he or she used identifying information that belonged to someone else. In essence, the bill takes the theft out of identity theft, and subjects undocumented immigrants who use a false identification document for employment purposes only—even if they do not know that the identification document belongs to another person—to mandatory prison time.

III. CONCLUSION

Because this bill expands the reach of mandatory minimum sentences, with particularly serious concerns with respect to its application to undocumented immigrants, it does not constitute an advance in the fight against the serious problem of identity theft. Rather, it would reduce the ability of courts to apply appropriate, case-specific sentences and would waste scarce resources through over-incarceration. We respectfully dissent.

JOHN CONYERS, JR.
ROBERT C. "BOBBY" SCOTT.
SHEILA JACKSON LEE.
HENRY C. "HANK" JOHNSON, JR.

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[7] The Conservative Case for Reform: Fighting Crime, Prioritizing Victims, and Protecting Taxpayers. http://www.rightoncrime.com/priority-issues/prisons/
[8] *Id.*
[9] 18 U.S.C. § 1546; 42 U.S.C. § 408(a)(7)(B); 18 U.S.C. § 1542.
[10] 18 U.S.C. § 1028A.