COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

UNITED STATES SENTENCING COMMISSION

Concerning

STATUTORY MINIMUM MANADATORY PENALTIES IN FEDERAL SENTENCING

IN RESPONSE TO THE COMMISSION'S
INVITATION TO SUBMIT WRITTEN COMMENTS

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Re: Statutory Minimum Mandatory Penalties in Federal Sentencing

Dear Commissioners:

The Washington Legal Foundation (WLF) hereby submits these comments to the U.S. Sentencing Commission on statutory minimum mandatory penalties in federal sentencing. In short, WLF considers the rise of mandatory minimum sentences to be part of the larger problem of overfederalization. An undue emphasis on federal criminal laws undermines the careful balance struck by federalism, and many minimum mandatory sentences are attached to crimes that the states are perfectly capable of handling without federal involvement. WLF agrees with the growing consensus of sentencing experts that the current minimum mandatory sentencing regime is in need of reform. WLF favors expanding the "safety valve" mechanism to other non-violent offenses so as to provide district judges with meaningful opportunities to avoid harsh and unintended sentencing results. Finally, although WLF shares common cause with those who seek to reform the current mandatory minimum sentencing regime, WLF does not favor a wholesale elimination of mandatory minimum penalties in all cases.

I. *Interests of WLF*

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center based in Washington, D.C., with supporters in all fifty states. WLF regularly appears before federal and state courts and administrative agencies to promote economic liberty, free enterprise, and a limited and accountable government. WLF has a longstanding interest in the work of the Sentencing Commission and its determination of the appropriate sentences that should be established for various categories of offenses.

Since the Commission's formation over twenty-five years ago, WLF has regularly submitted written comments and testified before the Commission on a variety substantive issues. WLF has supported strict sentences for certain violent *malum in se* crimes, but more lenient sentences for others, particularly *malum prohibitum* violations such as minor environmental

regulatory infractions. For minor regulatory offenses, the underlying conduct is subject to myriad and often confusing rules and regulations, and would best be remedied by administrative and civil enforcement rather than by the heavy hand of criminal prosecution.

In earlier comments submitted to the Commission, WLF argued that the prison sentences mandated by the guidelines for environmental offenses are often draconian, arbitrary, flawed, and the result of double-counting offense characteristics. WLF has previously represented U.S. seafood dealers who were sentenced as first offenders under the guidelines to an excessive 97 months in prison for importing seafood in violation of the Lacey Act, merely because the seafood was shipped in plastic bags instead of cardboard boxes. In a similar case litigated by WLF, a Honduran seafood exporter also received a 97-month sentence. *See McNab v. United States*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004); s*ee also* Tony Mauro, *Lawyers Seeing Red Over Lobster Case*, LEGAL TIMES (Feb. 16, 2004).

WLF has frequently litigates cases raising corporate criminal liability issues, particularly the growing and disturbing trend by the Justice Department to prosecute corporate employees and officers under the so-called "responsible corporate officer" doctrine, which impermissibly allows the *mens rea* requirement to be diluted or ignored altogether. *See, e.g., Hansen v. United States*, 262 F.3d 1217 (11th Cir. 2001), *cert. denied*, 535 U.S. 1111 (2002); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996); *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993), *cert. denied,* 513 U.S. 1128 (1995). WLF also consistently urges the Commission and its advisory committees to operate in a transparent manner when formulating Commission policy and has taken the Commission to task (and to court) for failing to do so. *See Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996); *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993).

Most recently, on March 22, 2010, WLF submitted comments to the Commission on proposed amendments to the Organizational Guidelines. In doing so, WLF outlined its general concerns about the organizational guidelines and objected to the expansion of the possible conditions for probation under Section 8D1.4. At the same time, WLF favored aspects of the proposal that would provide greater flexibility in the guidelines for reducing an organization's culpability score.

In addition, WLF's Legal Studies Division has published numerous studies, reports, and analyses on corporate criminal liability and related issues. *See, e.g.*, Dick Thornburgh, Eric Grannon, et al., *SPECIAL REPORT: FEDERAL EROSION OF CIVIL BUSINESS LIBERTIES* (WLF Report, March 2010); Joe D. Whitley, *et al*., *The Case For Reevaluating DOJ Policies On Prosecuting White Collar Crime* (WLF Working Paper, May 2002); George J. Terwilliger, III, *Corporate Criminal Liability: A Handbook For Protection Against Statutory Violations* (WLF Monograph, 1998); William C. Hendricks, III and J. Sedwick Sollers, III, *Corporate Vicarious Criminal Liability* (WLF Contemporary Legal Note, April 1993); Alan Yuspeh, *Developing Compliance Programs Under The U.S. Corporate Sentencing Guidelines* (WLF Contemporary Legal Note, July 1992); Irvin B. Nathan and Arthur N. Levine, *Understanding And Complying With The U.S. Corporate Sentencing Guidelines* (Contemporary Legal Note, May 1992); Joseph R. Creighton, *New Corporate Sentencing Guidelines Are Vulnerable To Constitutional And Statutory Non-*

Compliance Challenges (WLF Legal Backgrounder, March 6, 1992).

WLF Comments

1. Mandatory Minimum Sentences Further Contribute To The Problem of Overfederalization.

In the early days of the republic, shortly after the ratification of the Constitution, only three federal crimes existed: (1) piracy, (2) treason, and (3) counterfeiting. In contrast, today there are approximately 4,500 federal criminal laws scattered throughout the U.S. Code (although even the Congressional Research Service has admitted that it cannot say for certain how many federal crimes exist). What is most remarkable is that roughly half of these approximately 4,500 crimes have been added to the books in only the last 35 years. By federalizing conduct that otherwise would be addressed by state governments, federal criminal laws carrying minimum mandatories are symptomatic of this increasing (and disturbing) trend of overfederalization. Traditionally under our system of government, criminal conduct was punished by the states and only the rarest cases were prosecuted by the federal government. The problem of overfederalization unnecessarily converts what are ordinary state offenses into federal crimes.

An unhealthy emphasis on federal criminal laws also undermines the careful balance struck by federalism. State governments are often more creative, flexible, and responsive than the federal government, and states can tailor criminal laws to local needs and community norms without consequence to the rest of the nation. Such a decentralized approach allows for greater innovation and experimentation in criminal and social policy than does a centralized, "one-size-fits-all" federal solution. Perhaps the best case for encouraging the states to function as laboratories of democracy and experimentation was made by Justice Louis Brandeis in his famous dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), in which he observed that "[d]enial of the right to experiment may be fraught with serious consequence to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Brandeis went on to explain that, because they are closer to their constituencies, states are often able to react to social problems much more swiftly and responsively than the federal government. Nowhere is state experimentation more vital today than in the area of criminal justice.

Even for many of the federal crimes that carry a mandatory minimum sentence, the same offense is already covered by the fifty states. If Congress were to reduce or eliminate the federal mandatory minimum for these overlapping crimes, nothing would prevent the people of any given state, acting through their elected representatives in the legislature, from deciding that the crime is so pernicious that it warrants a mandatory minimum. Other states may disagree, but that

is how true pluralism is intended to work. Under a federal law, however, the citizens of all fifty states are equally subject to the same mandatory minimum sentence. Although WLF is unaware of any state in the union that has ever legalized armed carjacking, Congress nevertheless felt the need in 1992 to enact a federal carjacking statute. *See* 19 U.S.C. § 2119. Likewise, many current federal white-collar crimes that target business misconduct are crimes that are already outlawed unanimously by the states, each of which is perfectly capable of policing and enforcing its own laws without federal supervision.

2. Sentencing Judges Should Be Given More Statutory Tools By Which To Sentence Defendants Below Statutory Mandatory Minimum Provisions.

Mandatory minimum sentences statutorily prescribe a term of imprisonment that automatically attaches upon conviction of certain criminal conduct. Absent very narrow criteria for relief, a sentencing judge is powerless to impose a term of imprisonment below the mandatory minimum. To date, Congress has provided sentencing judges with only two mechanisms by which they may sentence criminal defendants below otherwise binding statutory mandatory minimum provisions. First, 18 U.S.C. § 3553(e) permits the district judge, solely upon the government's motion, to impose "a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Commonly referred to as "substantial assistance," this reduction may be applied to any qualifying offender, regardless of the type of offense charged.

Second, 18 U.S.C. 3553(f) provides an additional mechanism by which a district judge may sentence drug offenders below otherwise binding statutory mandatory minimum provisions. Commonly referred to as the "safety valve," this provision permits the district judge, under narrowly prescribed circumstances, to reduce an otherwise mandatory sentence for a drug offender who is among the least culpable participants in drug trafficking. The "safety valve" essentially provides protection against harsh punishment for first-time offenders without a prior criminal history who do not use the threat of violence in committing their drug offense. But this mechanism is strictly limited to non-violent drug offenses.

Expanding such mechanisms to other non-violent offenses would allow Congress to maintain the current mandatory minimum sentencing structure while providing district judges with meaningful opportunities to avoid harsh and unintended sentencing results. One idea would be to expand the "safety valve" concept to all non-violent first-time offenders with a Criminal History Category of One. Another idea worth considering is to grant district judges the authority to impose a sentence below a statutory minimum for a nonviolent offense if the court finds that it is necessary to do so to avoid violating the requirements of 18 U.S.C. § 3553(a). This would allow the judge to consider the seriousness of the offense, the role of the defendant in the offense, the defendant's criminal history, and the full factual context surrounding the crime. At

the same time, it would obligate the judge to articulate why the minimum mandatory sentence would violate § 3553(a). Such a sentence would then be subject to appeal by the government if unreasonable or insufficient.

WLF also supports the Commission's proposal to "unstack" subsequent penalties under 18 U.S.C. § 924(c) to permit the statute to operate as a true recidivist statute. As originally enacted, § 924(c) gave judges considerable sentencing discretion and was not nearly as harsh as it has become. Although the 25-year recidivist enhancement appears designed to punish true recidivists convicted of previously using a firearm once and who have served their sentence only to use a weapon again, this provision has increasingly been used on first time offenders. In 1993, the Supreme Court ruled in *Deal v. United States*, 508 U.S. 129 (1993), that the 25-year enhancement applies to defendants convicted of two or more separate instances of possessing a firearm, even though the defendant sustains his first conviction in the same proceeding as the second. Specifically, *Deal* held that the word "conviction" in the § 924(c) statute meant "verdict," so that in a case where the jury returns more than one guilty verdict on several § 924(c) counts, the first verdict is a "prior conviction" and therefore subsequent guilty verdicts (in the same trial) result in escalating, stacking mandatory minimums. This is an especially harsh result in those instances where the offender merely "carries" but does not brandish or otherwise "use" the firearm to accomplish the crime—in other words, nonviolent offenders.

3. Mandatory Minimum Sentences Are Appropriate In Some Instances And Should Not Be Eliminated Entirely.

While most mandatory minimums should be re-evaluated and even eliminated in certain instances, it would be a mistake to return to the kind of arbitrary disparity Judge Marvin Frankel decried in his classic book, *Criminal Sentences: Law Without Order* (Hill & Wang, New York: 1972). Speaking from the favorable vantage of an experienced and respected district judge (with a rhetorical flair), Judge Frankel lambasted the practice of criminal sentencing in the United States, which he viewed as horribly plagued by arbitrarily disparate sentences for similarly situated offenders, that is, those committing similar crimes and presenting comparable histories. Judge Frankel's polemic caught the attention of many, including Senator Edward M. Kennedy, who became the principal sponsor of the Sentencing Reform Act of 1984, a bill that enjoyed broad bipartisan support and which was signed into law by President Ronald Reagan. Of course, the Sentencing Reform Act of 1984 begat the Sentencing Commission, which in turn begat the Sentencing Guidelines. The rest, as they say, is history.[1]

[1] Although a leading catalyst of reform, Judge Frankel developed certain reservations about the structure and content of the Sentencing Commission/Sentencing Guidelines regime. Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L. J. 2043 (1992). See also Jon O. Newman, *Remembering Marvin Frankel: Sentencing Reform But Not These Guidelines*, 14 FED. SENT'G. REP. 319 (2002), a tribute and commentary after Judge Frankel's death on March 3, 2002.

Although WLF shares common cause with those who seek to reform the current mandatory minimum sentencing regime, WLF does not favor the sweeping elimination of mandatory minimum penalties in all cases. Mandatory minimum sentencing provisions do not *necessarily* result in unfair and excessive sentences in all cases. Indeed, our laws *should* require longer sentences for true recidivists. Repeat offenders and hardened criminals who fail to learn from the punishments imposed for their first and subsequent crimes are responsible for a disproportionately high amount of crime. By incapacitating repeat offenders, minimum mandatory penalties help citizens avoid being victimized by career criminals. As the current sentencing guidelines acknowledge, criminal history has a proper role in determining an appropriate sentence. And minimum mandatory sentences can play an important role in combating the most egregious crimes.

If a minimum sentence is too high, it should be lowered by Congress. As urged above, some "safety valve" mechanism should be available for most non-violent crimes to avoid harsh results in the least culpable cases. But some crimes are so serious and pose such a pervasive threat to the nation's citizenry that tough minimum mandatory sentences are entirely appropriate. WLF supports, for example, the myriad mandatory minimum penalties that exist for child sexual trafficking, exploitation, and abuse. WLF also supports all minimum mandatory penalties imposed for recidivist illegal immigration under 8 U.S.C. §§ 1324 and 1326. Likewise, WLF supports the imposition of a minimum mandatory sentence for the crime of treason as provided under 19 U.S.C. § 283 (although five years seems a bit low).

The grave threat of terrorism is another area where WLF believes that American citizens are well served by mandatory minimum sentencing laws. Accordingly, WLF supports the current mandatory minimum sentences for airplane hijacking under 49 U.S.C. § 46502, violations of prohibitions regarding atomic weapons under 42 U.S.C. § 2272(b), and the use of chemical weapons resulting in the death of another under 18 U.S.C. § 229A(a)(2). Congress should continue to examine the effectiveness of these sentences for the corresponding crimes to ensure that they adequately safeguard the public's safety through appropriate punishment and deterrence. Such criminal conduct is so unambiguous and heinous in nature that no examination of any fact other than the commission of the crime itself is necessary to establish that the mandatory penalty is appropriate. Although most criminal conduct does not lend itself to such limited scrutiny and ubiquitous scorn, WLF urges the Commission not to throw the proverbial baby out with the bathwater.

Conclusion

There is a strong, bipartisan support for meaningful reform of mandatory minimum sentences. WLF appreciates the opportunity to provide these comments and thanks the Commission for the opportunity to provide meaningful feedback to Congress.

Respectfully submitted,

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