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August 26, 2011

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs - Priorities Comment

Re: Proposed priorities for amendment cycle ending May 1, 2012.

Dear Judge Saris:

The Constitution Project (TCP) submits these comments in response to the United States Sentencing Commission (USSC) notice of proposed priorities for the amendment cycle ending May 1, 2010. TCP strongly urges the USSC to include a review of the fraud offense guidelines in this amendment cycle.

TCP is a nonprofit organization in Washington, D.C., that promotes and defends constitutional safeguards through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. The Constitution Project's Sentencing Committee¹ (Sentencing Committee) was created to respond to the general sense among informed observers that the federal sentencing regime instituted in the mid-1980s was in need of careful study and some reform, and to address the particular challenges presented by the Supreme Court's decisions in *Blakely v. Washington*² and *United States v. Booker*³. Our bipartisan committee comprises a variety of stakeholders in the criminal justice system, including prosecutors and judges, defenders and advocates. The Committee issued recommendations for the structure and function of sentencing guidelines in two reports, *Principles for the Design and Reform of Sentencing: A Background Report*,⁴ and *Recommendations for Federal Criminal Sentencing in a Post-Booker World*.⁵

TCP commends the USSC for proposing to continue its examination of statutory mandatory minimum penalties. However, TCP is dismayed by the absence of a comprehensive review of the federal sentencing guidelines for fraud offenses. The USSC has indicated that it intends to study the sentencing guidelines for child pornography possession for the upcoming amendment cycle, but not the guidelines for fraud offenses, which also deserve review. The

¹ A list of The Constitution Project's Sentencing Committee members is attached as Appendix A.

² 542 U.S. 296 (2004).

³ 543 U.S. 220 (2005).

⁴ SENTENCING COMMITTEE OF THE CONSTITUTION PROJECT, PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING: A BACKGROUND REPORT (Frank O. Bowman and David Yellen reporters, The Constitution Project 2000).

⁵ SENTENCING COMMITTEE OF THE CONSTITUTION PROJECT, RECOMMENDATIONS FOR FEDERAL CRIMINAL SENTENCING IN A POST-BOOKER WORLD (Frank O. Bowman and David Yellen reporters, The Constitution Project 2006).

current guidelines for fraud offenses rely too heavily on quantifiable factors, such as monetary loss, the unintended consequence of which results in disparate sentencing outcomes for first-time fraud offenders as compared to violent offenders. Moreover, the rigid fraud offense sentencing guidelines do not account for different degrees of moral culpability among fraud offenders. The USSC should undertake a review of the fraud offense sentencing guidelines to address these and other concerns.

In passing the Sentencing Reform Act (SRA), Congress “sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.”⁶ In *Principles for the Design and Reform of Sentencing*, the Sentencing Committee recommends against overreliance on quantifiable factors such as monetary loss because of the high risk of adversely affecting sentence proportionality.⁷ Unfortunately, the current fraud offense guidelines rely too heavily on actual or intended monetary loss. Predictably, this undermines the goal of achieving proportionality in sentencing and results in rigid sentencing guidelines that fail to account for many factors related to individual culpability. Although monetary loss might sometimes reflect an offender’s blameworthiness, there are other, often more relevant factors that reflect culpability, such as actual benefit to the offender, scope and duration of the offense, or evidence of mental illness or diminished capacity, that are not accounted for in the guidelines. Because the current fraud offense guidelines do not account for these critical individual characteristics of an offender, differently situated offenders often receive similar sentences. A first-time, non-violent fraud offender can receive a sentence similar to those who commit serious violent crimes, including armed robbery, rape, and murder.⁸ This sort of unwarranted parity is no less noxious to the goal of the SRA than the unwarranted disparities that drove Congress to act in the first place. A study of the fraud offense sentencing guidelines is an important first step toward reducing their rigidity and achieving greater proportionality in sentencing.

A USSC review of the fraud offense sentencing guidelines during the current amendment cycle would also be timely. The guideline’s flaws are increasingly evident in the growing number of downward departures in federal fraud cases.⁹ In 2010, in light of this trend, which reveals that the sentencing guidelines have “lost the backing of the federal judiciary,” the Department of Justice recommended that the USSC undertake a study of the guidelines, beginning with child pornography possession offenses and fraud offenses.¹⁰ The USSC has indicated that it will study the guidelines for child pornography possession, but has omitted such a study of fraud offense guidelines. We urge the USSC to revise its priorities for the current amendment cycle to include this necessary and timely review.

Thank you for the opportunity to submit these comments. If you have any questions, please feel free to contact me at 202-580-6920.

Sincerely yours,



Virginia E. Sloan
President, The Constitution Project

⁶ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt (2010).

⁷ “The Committee believes that the existing Guidelines regime places undue weight on quantifiable factors such as loss in economic crime cases or drug quantity in drug cases.” PRINCIPLES, *supra* n.4, at 32.

⁸ Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97:3 J. OF CRIMINAL LAW AND CRIMINOLOGY, 758 (2007).

⁹ Criminal Division, U.S. Dept. of Justice, Annual Letter to U.S. Sentencing Commission (2010), at 5.

¹⁰ *Id.*, at 3.

APPENDIX A

The Sentencing Initiative's Blue-Ribbon Committee

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Thomas Perez (2004-2009; resigned when sworn in as Assistant Attorney General for Civil Rights Division, United States Department of Justice); Assistant Professor and Director of Clinical Law Programs, University of Maryland Law School, 2001-2007; United States Deputy Assistant Attorney General for Civil Rights, 1988-1999

REPORTERS

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