

February 11, 2003

Re: Amend or Oppose the Identity Theft Penalty Enhancement Act (S. 153)

Dear Senator:

The undersigned organizations write to oppose certain sentencing provisions in the Identity Theft Penalty Enhancement Act (S. 153), which may come before the full Senate this week. 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 sentence. This problem would be magnified by the mandatory *consecutive* sentences in S. 153.

We urge that S. 153 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 Julie Stewart at FAMM (202-822-6700) if you have any questions.

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cc: Full Senate