INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights

18 August 2003

H.E. Mr. George W. Bush
President of the United States of America
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500
United States of America

Fax: +1 202-456-2461

Mr. President,

The International Commission of Jurists (ICJ) consists of jurists who represent all the regions and legal systems in the world working to uphold the rule of law and the legal protection of human rights. The ICJ's Centre for the Independence of Judges and Lawyers is dedicated to promoting the independence of judges and lawyers throughout the world.

We are writing to you regarding a directive from Attorney General John Ashcroft contained in a July 28 memorandum to federal prosecutors to report to the Department of Justice all "downward departure" sentencing decisions from U.S. sentencing guidelines that meet certain criteria. We are extremely concerned that the Attorney General's directive to federal prosecutors to compile for the Justice Department, in effect, a "blacklist" of lenient federal judges and jurisdictions constitutes a serious infringement on the independence of the judiciary and the rule of law.

As you know, this directive follows the "Feeney Amendment" that was included in child protection legislation that you signed into law in April. The Feeney Amendment, which was drafted by the Department of Justice, makes it difficult for federal judges to depart from federal sentencing guidelines and makes it easier to appeal "downward departures" even if, in the discretion of a judge, a lower sentence is justified.

Despite the stated purpose of sentencing guidelines to reduce crime and generate more uniformity in judicial sentencing, if strictly interpreted, guidelines do not take into account mitigating factors. It is for this very reason that sentencing

should, to a large degree, remain within the discretion of judges who, as part of their judicial function, take into account the totality of circumstances before issuing a ruling.

The authority of judges to use their discretion in imposing lighter sentences was confirmed by the U.S. Supreme Court in *Koon v. United States* wherein Justice Kennedy wrote that, the

> *"federal tradition is for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment."*

Moreover, Chief Justice William Rehnquist expressed in a letter to the Senate Judiciary Committee, that the Feeney provision "would seriously impair the ability of courts to impose just and reasonable sentences." The American Bar Association, the National Association of Criminal Defense Lawyers, and the U.S. Sentencing Commission, an independent agency created by Congress in 1984 to set mandatory minimum sentences for federal crimes, also oppose the current provision. It is particularly worrying that the Sentencing Commission was not even notified of this measure in advance.

Other judges throughout the country have been also critical of the Feeney amendment. As reported by the *Wall Street Journal*, U.S. District Judge Joyce Hens Green, of the District of Columbia stated that,

> *"as a consequence of the mandatory sentences, we [judges] know that justice is not always done. [You] cannot dispense equal justice by playing a numbers game. Judgement and discretion and common sense are essential."*

Another U.S. District Judge, John S. Martin Jr., criticized Congress in an op-ed in the *New York Times*, for adopting the sentencing measure without any public debate or study. He wrote that Congress is attempting to "intimidate judges" and resigned after writing the op-ed. The intimidation of judges has, in fact, already occurred; the Justice Department has reportedly threatened to subpoena the sentencing records of U.S. District Judge James Rosenbaum of Minnesota.

Creating lists of judges and subpoenaing those who issue lower sentences constitutes an unacceptable interference in the independence of the judiciary which is a fundamental principle of liberal democracies in general, and of the United States in particular. Furthermore, access to an "***independent and impartial tribunal***" is an important attribute of a fair trial pursuant to the *International Covenant on Civil and Political Rights* to which the United States is a party. When judges are dissuaded from issuing sentences based upon a consideration of the facts and the law before them and are instead pushed by the Executive into giving sentences that they deem excessive, then their independence has been compromised.

In this regard, we would like to draw your attention to the *United Nations Basic Principles on the Independence of the Judiciary*, which provide that:

> *Principle 1 "…It is the duty of all government and other institutions to respect and observe the independence of the judiciary."*

> *3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.*

As explained by the former United Nations Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy,

> *It is beyond dispute that sentencing in a criminal trial is part of the judicial process in the same trial. Sentencing therefore is an "issue of a judicial nature." Hence any law restrictive of this issue must necessarily violate Principle 3 of the U.N. Basic Principles. A trial court seen to be a rubber stamp of the legislature in that process cannot possibly be perceived as independent.*

A sentence regime is also undesirable, as it tends to have a racially discriminatory impact. According to the U.S. Sentencing Commission in 2000,

> *"blacks are much more likely than whites or Hispanic defendants to receive heightened mandatory minimum penalties, and the difference in the likelihood increases as the penalty increases…in 1998 black defendants comprised only 30 percent of cases subject to a five year mandatory minimum. However, they comprise over 40 percent of cases subject to a ten-year mandatory minimum, over 60 percent of cases subject to a 20 year mandatory minimum, and almost* ***80 percent of cases subject to a mandatory life terms****."*[1]

In this regard, the *Convention on the Elimination of Racial Discrimination* that your Government ratified states that,

> *1. (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.*

Moreover, Article 26 of the aforementioned *International Covenant on Civil and Political Rights* provides that,

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The *U.N. Committee on the Elimination of all Forms of Discrimination* has also voiced its criticism of minimum mandatory sentencing schemes for their negative effect on minorities. Vis-à-vis Australia, the Committee stated,

> *The mandatory sentencing schemes appear to target offences that are committed disproportionately by indigenous Australians, especially juveniles, leading to a*

[1] Statement by John R. Steer, Member and Vice Chair of the United Sates Sentencing Commission Before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources, May 11, 2000.

racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends to the State party to review all laws and practices in this field." (CERD/C/304/Add.10).

Hence, in light of your Government's obligations under the *Convention on the Elimination of Racial Discrimination*, there is an affirmative duty to ensure that the sentencing guidelines do not lead to a racially discriminatory impact.

We would like to reiterate that imposing minimum sentencing guidelines on judges without allowing them a modicum of discretion and creating a list of those who depart from the said minimum guidelines constitutes a grave infringement upon the independence of the judiciary and jeopardizes the rule of law.

We therefore urge the Attorney General to revoke the directive for prosecutors to report judges who fall afoul of the guidelines and we request that your Government not apply any judicial guidelines in a manner that would compromise judicial independence or lead to a racially discriminatory impact.

Please accept the assurances of my highest consideration.

Yours sincerely,

Ernst Lueber
Acting Secretary-General

Cc: H.E. Ambassador Kevin Moley
United States Permanent Mission
Route de Pregny 11
1292 Chambésy

Fax: 022 749 48 80

Mr. John Ashcroft,
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
USA