

mother of two children) and *United States v. Rubashkin*, 08-CR-1324 (N.D. Iowa) (involving a 27-year (within-guideline) sentence in bank fraud case for first-time offender with 10 children).

In the *Rubashkin* case, six former U.S. Attorneys General, two former U.S. Deputy Attorneys General, a former U.S. Solicitor General, and 14 former U.S. Attorneys submitted a letter to the sentencing judge stating their concerns about the severity of the fraud Guideline. They wrote that the “potential absurdity” of the Guidelines was “on full display,” as the government’s proposed Guideline calculation would have resulted in a recommended life sentence for Mr. Rubashkin – “a 51-year-old, first-time, non-violent offender whose case involved many mitigating factors and whose personal history and extraordinary family circumstances suggested that a sentence of a modest number of years could and would be more than sufficient to serve any and all applicable sentencing purposes.” In the *Gozes-Wagner* case, more than 130 former officials, including six U.S. Attorneys General, an FBI director, two U.S. Solicitors General, two state Governors, a Member of Congress, several Deputy, Associate, and Assistant Attorneys General, scores of U.S. Attorneys, and more than three dozen Judges and Justices, submitted an *amicus curiae* brief to the Fifth Circuit Court of Appeals. In their brief, *amici* pointed to “the district court’s excessive concern with the Guidelines range” and wrote that “given the effect of the calculated ‘loss’ on the Guideline range in this case and the lack of a rational relation to Ms. Gozes-Wagner’s level of culpability, it was particularly problematic that the district court entirely failed to discharge its obligation to ‘filter the Guidelines’ general advice through § 3553(a)’s list of factors.” *Rita*, 551 U.S. at 357-58.”

Notably, the injustice of such extreme prison terms in these two cases resulting from this problematic Guideline prompted the President of the United States to grant clemency in the form of prison commutations.

More generally, it is a telling and disconcerting reality that, in recent years, sentencing courts are granting downward variances in more than 42% of all fraud/theft cases. *See* U.S. Sentencing Commission, *Quick Facts – Theft, Property Destruction, & Fraud* (August 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Theft_Property_Destruction_Fraud_FY22.pdf. These data document not only how often federal judges consider the fraud guideline unduly severe to comply with statutory sentencing instructions, but also that there is a heightened risk of unwarranted sentencing disparity in this arena where judges are so often compelled to sentence outside the terms of the Commission’s guidance.

A Thoughtful Proposal from the American Bar Association

Though there have been many ideas for how to improve federal sentencing for fraud offenses, we see value in and support this Commission looking to work already completed a decade ago by the Task Force on the Reform of Federal Sentencing of Economic Crimes created by the Criminal Justice Section of the American Bar Association (“ABA Proposal”). That impressive Task Force, which consisted of five professors, three judges, six practitioners, two organizational representatives, and observers from the U.S. Department of Justice and the Federal Defenders, drafted a comprehensive and thoughtful proposed new federal sentencing guideline to effectuate needed reforms. The work of the Task Force, starting with the specifics of the ABA Proposal, is