

# FEDERAL PROSECUTION TRENDS IN WASHINGTON



by Patrick Preston and Jack Guthrie

**F**ormer United States Attorney Mike McKay has a saying about his prior post as the top federal prosecutor

for the Western District of Washington: “There is this much federal crime out there,” he emphasizes as he spreads his arms wide, “but only this much the U.S. Attorney’s Office can prosecute,” bringing his hands back together and forming a tight circle with his fingertips and thumbs. True to this illustration, the prosecution trends of any federal district reflect the use of finite governmental resources to target a U.S. attorney’s chosen areas of emphasis — consistent with national priorities, the law enforcement priorities of federal agencies, and the congressional intent behind laws that spur prosecution of specific crimes.

Washington state is divided by the Cascade Mountains into the Eastern and Western federal districts. Each has a U.S. attorney who guides the prosecutorial discretion of career assistant U.S. attorneys. Criminal Division assistants may prosecute diverse federal crimes ranging from abortion clinic access offenses to insurance fraud to wildlife violations and everything in between.

While office units include complex crimes, criminal enterprises, general crimes, and terrorism and violent crimes, specific criminal conduct investigated by federal agencies such as the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Customs and Border Protection (CBP), Drug Enforcement Administration (DEA), Health and Human Services (HHS), Immigration & Customs Enforcement (ICE), and the Federal Bureau of Investigation (FBI) may fall into multiple categories. Although there are approximately 4,500 federal crimes, around 80% of federal prosecutions involve one of four categories that typically implicate interstate conduct or national monetary or security concerns: drugs, immigration, firearms, and fraud.<sup>1</sup>

The resources of the U.S. Department of Justice (DOJ), which oversees 93 U.S. attorney offices across the nation and U.S. territories, often seem boundless to those targeted for federal criminal investigation and their defense counsel. But federal prosecutors must choose which matters they will seek to charge on the strength of the evidence and the federal interests served in light of the

above policy objectives. Even when both criteria are satisfied, DOJ authorizes a federal prosecutor to decline to seek charges if the target is subject to effective prosecution in another jurisdiction, such as state court, considering whether appropriate sentencing consequences exist there or “an adequate non-criminal alternative to prosecution” exists. While uniformity might be expected in charging and case dispositions within Washington’s relatively small geographic area — compared, for example, to the broad expanse of the Ninth Circuit — this is not always true, as notable prosecution trends in Washington’s federal districts illustrate.

## Rethinking the War on Drugs?

A widespread public perception is that the “War on Drugs,” a 45-year-old relic of the Nixon administration and the Comprehensive Drug Abuse Prevention and Control Act of 1970, has failed its primary objective of reducing illegal drug trade and consumption. Among the war’s notable detractors, in 2004 then-U.S. Senate candidate Barack Obama declared: “The

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war on drugs has been an utter failure. We need to rethink and decriminalize our marijuana law. We need to rethink how we're operating the drug war."<sup>2</sup> Such rethinking has been evident in the subsequent decriminalization of marijuana in states such as Washington, Alaska, Colorado, and Oregon, and authorization of some form of medical marijuana in the District of Columbia and the majority of states.

But federal drug prosecutions nationally have seen only a slight decrease over the past decade, with drugs consistently comprising the largest single federal offense type, including marijuana sentencings as a quarter of all drug cases. According to statistics by the U.S. Sentencing Commission (USSC), federal guideline sentences involving drugs as the primary offense category constituted 34.2% of all sentences nationally in 2005.<sup>3</sup> For the same year, Washington had even higher percentages of federal drug sentences statewide, with 36.4%

in the Eastern District of Washington (EDWA) and 37.4% in the Western District of Washington (WDWA).

By 2015, the EDWA saw only a modest decrease to 34.2% of defendants sentenced for drug crimes. The most common drugs in these cases were methamphetamine and other substances, including pain medications such as Oxycontin, with the overwhelming majority involving trafficking instead of simple possession. Likewise, the WDWA saw 31.7% of drug offenders sentenced the same year, with methamphetamine and heroin as the most common illegal drugs. Both districts were comparable to 31.9% nationally and the predominance of methamphetamine as the single most commonly targeted drug.

In 2012, Washington voters approved Initiative 502 to legalize possession of small amounts of marijuana by adults 21 and older and to provide a licensing scheme for producers, processors, and retailers. Historically,

marijuana cases represented a large portion of federal drug prosecutions in Washington, in keeping with the national trend. In 1995, the USSC reported that 19.8% of the EDWA's drug sentencings and 25% in the WDWA involved marijuana crimes. A decade later, those numbers had grown to 29.3% for the EDWA and 26.4% for the WDWA in 2005. While the passage of I-502 did not end federal marijuana prosecutions, a significant downward trend was noticeable by 2015 with only 9.2% of EDWA drug sentencings and 9.3% for the WDWA, in stark contrast to 24.8% nationally. The five-year trend in the EDWA was the most precipitous, falling from 37.4% of drug sentencings in 2011 prior to state decriminalization.

Yet the "War against Marijuana" remains federal law for now, with cannabis still classified as a Schedule I controlled substance alongside heroin and LSD and subject to harsh criminal penalties. Notably, the DEA in August 2016 refused a petition by the governors of Washington and New Mexico to change the Schedule I classification of marijuana, maintaining its view that marijuana has no currently accepted medical use, remains unsafe even under medical supervision, and has a high potential for abuse.

Even if rethinking the war on drugs continues at a glacial pace, reforms are underway and the legal landscape is changing. For example, individuals charged with certain drug crimes now may participate in the Drug Reentry Alternative Model (DREAM) program in U.S. District Court for the WDWA by successfully completing drug rehabilitation to obtain case dismissal. In the EDWA, probationers may participate in the Sobriety Treatment and Education Program or STEP. From an agency perspective, the DEA is broadening eligibility for medical marijuana research licenses, a decision that may one day cause the agency to reclassify marijuana as a regulated medicine on par with prescribed pharmaceuticals. And a 2014 congressional appropriations rider that prohibited DOJ's use of funds to prosecute people for marijuana crimes when they are compliant with state medical marijuana laws was recently upheld by the Ninth Circuit Court of Appeals.<sup>4</sup>



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## Immigration Crimes: The Revolving Door of Illegal Re-entry

Immigration crime sentencing was 29.3% of the national total in 2015, second only to drug sentencing. The significant federal emphasis on prosecuting immigration offenders parallels the standing of ICE as the second-largest criminal investigative agency in U.S. government behind the FBI. Roughly two-thirds of all defendants in federal court last year were sentenced for either immigration or drug crimes.

In 2015, Washington's percentages for immigration sentencing were significantly lower than the national totals, with 11.6% reported for the EDWA and 10.4% for the WDWA. Each federal immigration prosecution, however, represents an exercise in prosecutorial discretion that consumes a portion of the U.S. District Court docket, U.S. Marshals Office services, U.S. Probation and Pretrial Services resources, and federal public defender workload.

In the EDWA, immigration sentencing has fallen dramatically over the past five years. In 2011, 40.8% of EDWA federal sentencing involved immigration crimes, surpassing even drug prosecutions. By 2015, however, that number stood at 11.6%, following an apparent exercise in prosecutorial discretion to direct resources to other cases. By comparison, WDWA immigration sentencing has experienced a gradual decline from 15.8% in 2011 to 10.4% in 2015.

For Washington's federal districts, the vast majority of immigration convictions were for illegal re-entry, which constituted all of the EDWA immigration prosecutions last year. Defendants prosecuted for this crime previously entered or attempted to enter the U.S. illegally or had been deported. The federal emphasis on prosecution of illegal re-entry, according to an analysis of USSC data by the Pew Research Center, included a precipitous 28-fold increase from 690 cases in 1992 nationally to 19,463 in 2012. Spiraling recidivism rates match this prosecution trend, according to a 2015 USSC report that found: "[T]he average illegal reentry offender was deported 3.2 times before his instant illegal reentry prosecution, and over one-third (38.1%) were previously de-

ported after a prior illegal entry or illegal reentry conviction."<sup>5</sup>



## Firearms

Federal prosecution of firearm crimes generates a consistent caseload, tracking the investigative priorities of several agencies including the ATF. Federal law imposes enhanced and mandatory prison time for armed and repeat offenders often involved in a broad variety of crime, ranging from narcotic traffickers to violent gangs to domestic and international arms traffickers. Frequently, convictions involve possession of a firearm by felons or people otherwise prohibited from having a firearm.

Federal firearm prosecutions in Washington recently outpaced the national average. Compared to 10% of firearm crime sentencing nationally in 2015, the EDWA saw 12.1% and the WDWA 13.2% for the same period. While the WDWA's trend has tracked steadily upward from a mere 3.8% in 1995 to 7.7% in 2005, the EDWA has remained stable at 13.7% in 1995 and 13.8% in 2005.



## White-Collar Crime and Fraud

White-collar crimes include bribery, counterfeiting, embezzlement, forgery, money laundering, and criminal tax offenses for USSC statistical purposes. The distinct USSC category of fraud

includes offenses designated as such under the federal criminal code, including bank, healthcare, mail, and wire fraud.

The prosecution of white-collar crime and fraud has fluctuated over the past two decades in Washington. While defendants sentenced for fraud comprised only 3.3% of the EDWA sentencing and 12.5% in the WDWA in 1995, a decade later the EDWA had risen to 5.8%, but the WDWA decreased to 9.9%. Last year, the EDWA showed a continued increase to 12.6%, while the WDWA continued to decrease to 8.5%.

Likewise, non-fraud white-collar crimes lacked uniformity in 2015, with the EDWA reporting a slight decrease to 5.8% compared to 6.1% a decade earlier. The WDWA caseload shrank to 3% compared to 8.5% a decade earlier.

The DOJ sought to implement white-collar reform in September 2015 through the issuance of a new policy entitled "Individual Accountability for Corporate Wrongdoing."<sup>6</sup> Also known as the Yates Memo, this policy conditions cooperation credit for companies under investigation for white-collar criminal and civil misconduct upon disclosure of all relevant facts about people involved in misconduct. Although the policy provides a strong incentive for such companies to identify wrongdoers, only time will tell whether it spurs an uptick in white-collar and fraud prosecutions at the federal level in Washington.

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### Other Prosecution Trends

Other categories of federal prosecution emphasis include child pornography, environmental crime, public corruption, and terrorism.

While the USSC combined child pornography with prostitution offenses in its reports two decades ago, the increase in child pornography prosecution now merits its own category and constituted 6.6% of EDWA sentencing last year and 3.9% in the WDWA. These cases, although small in volume compared to the previously mentioned crimes, often require significantly more work for investigators, attorneys, and the courts,

including analysis of computer forensics and weighing of mitigation and risk issues from detailed psychosexual evaluations.

Although several environmental statutes contain criminal penalties based on strict liability, environmental prosecutions have hovered at or below 1% in both of Washington's districts in the past five years. Notably, the Washington Attorney General's Office recently increased its emphasis on prosecuting environmental crimes under parallel state statutes.

The prosecution of public corruption cases, including federal indictment of state

and local officials and employees, has not generated significant caseloads compared to the offense categories explored above. Prosecution of foreign and domestic terrorism involves issues of national security and widespread public concern, including heightened media attention on prosecution of the "Millennium Bomber," Ahmed Ressaam, and the 2011 attempted bombing of the Martin Luther King Jr. memorial march in Spokane. Again, however, such prosecutions have not generated significant trends by volume.

Lastly, for fiscal year 2015, the USSC reported receiving information on 71,184 federal sentencing guideline cases, of which only 181 involved a corporation or other organizational offender. In Washington, the rare sentencing of a corporation after federal prosecution has not deviated from this trend.

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### Eastern and Western Filing and Trial Trends

Overall, the EDWA and WDWA have seen a dramatic drop in felony filings over the last five years.<sup>7</sup> According to statistics maintained by the Judicial Council of the Ninth Circuit U.S. District Court, the EDWA had approximately 26% fewer felony criminal case filings per judge for a 12-month period ending in June 2015 than during the 12-month period ending in June 2013 (a five-year high mark). More dramatically, the WDWA experienced a 39% drop since its five-year high mark in mid-2012.<sup>8</sup> These statistics also show that felony cases are consistently pending longer each year, with a median last year of 11.8 months in the EDWA compared to 8.6 months in the WDWA.

At the same time, criminal trials were down to a mere 2.6% of the WDWA criminal caseload and 5% in EDWA. Twenty years ago, the reverse was true, with 6% in the WDWA and 3% in EDWA.

### Conclusion

Federal prosecution trends in Washington largely mirror the national prosecution of drug, immigration, firearms, and fraud crimes. While a statistical pie may be sliced many different ways, Washington's federal prosecutors are demonstrably continuing to fight the national war on drugs, in-

dict recidivist illegal immigrants, and pursue armed felons. Whether those priorities shift over time to get tough on other offense categories, such as white-collar crime or environmental enforcement, will depend upon the ever-changing executive branch, including U.S. attorney appointments after the presidential election and evolving agency directives. **NWL**



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*The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or the WSBA. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

#### NOTES

1. See S. Klein and I. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 Emory L.J. 1, 6 (2012) (citing data from the Statistics Div., Admin. Office of the U.S. Courts).
2. President Obama as a U.S. Senate candidate, debate at Northwestern University, Jan. 21, 2004.
3. The United States Sentencing Commission maintains online annual sentencing statistics based for each U.S. fiscal year (Oct.

1 through Sept. 30) dating back to 1995 for the nation and all federal districts. See [www.uscourts.gov/topic/data-reports](http://www.uscourts.gov/topic/data-reports).

4. See *United States v. McIntosh*, --- F.3d ---, 2016 WL 4363168 (9th Cir., Aug. 16, 2016). Robert R. Fischer, an EDWA federal public defender, successfully argued on behalf of the Washington defendants in *McIntosh*.
5. See "Illegal Reentry Offenses", USSC report (April 2015) ([www.uscourts.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015\\_Illegal-Reentry-Report.pdf](http://www.uscourts.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf)).

6. Available at <https://www.justice.gov/dag/file/769036/download>.

7. An outlier difference between Washington's districts is the significant volume of misdemeanor offenses from Western Washington's military bases and heavily used national parks and forests. For example, the WDWA saw 204 misdemeanor traffic cases commenced in 2015, while there were none in the EDWA.

8. See "Judicial Council of the Ninth Circuit, U.S. District Court, Caseloads and Statistics" ([www.ce9.uscourts.gov/statistics/district\\_court.html](http://www.ce9.uscourts.gov/statistics/district_court.html)).



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