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*Report to the Congress:*

# **DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES**

(in response to section 401(m) of Public Law 108-21)

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UNITED STATES SENTENCING COMMISSION  
October 2003

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# DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES

(in response to section 401(m) of Public Law 108-21)



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# EXECUTIVE SUMMARY

## A. INTRODUCTION

The United States Sentencing Commission submits this report in direct response to section 401(m) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 [the “PROTECT Act”], and as part of its overall fifteen year review of the federal sentencing guidelines. The PROTECT Act was enacted on April 30, 2003, and directed the Commission, not later than 180 days after the enactment of the Act, to promulgate appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure, among other things, that the incidence of downward departures is substantially reduced.

## B. FINDINGS

In preparing this report, the Commission: (1) considered the legislative history of the Sentencing Reform Act of 1984 and other sentencing legislation, with particular emphasis on the role of departures (*see* Appendix B); (2) identified particular concerns regarding downward departures as raised by Congress in the PROTECT Act; (3) conducted an extensive empirical study of frequently cited reasons for downward departures during fiscal year 2001; (4) reviewed departure case law and literature; (5) solicited and weighed public comment; and (6) held two public hearings at which the Commission received testimony from the Department of Justice, judges, federal defenders and prosecutors, and experts in the criminal law on downward departures generally and early disposition or “fast track” programs specifically.

Using this information and data, the Commission: (1) considered the general purposes of sentencing identified by Congress in the Sentencing Reform Act (*see* 18 U.S.C. § 3553(a)(2)); (2) identified specific congressional concerns regarding departure decisions; and (3) evaluated departure provisions throughout the *Guidelines Manual* in light of those general and specific concerns.

### 1. Departures Perform Important Functions in the Guideline System

The balance that the Sentencing Reform Act sought to strike between the goals of certainty and uniformity in sentencing and the need to retain sufficient flexibility to individualize sentences is reflected in part by 18 U.S.C. § 3553(b) (Application of guidelines in imposing a sentence), which codifies the limited authority of sentencing courts to impose a sentence outside the sentencing guideline range:

The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or

mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

Departures play an important role in the federal sentencing guidelines system for several reasons. There may be offense guidelines that do not specify a sentence adjustment for a particular circumstance because either it occurs infrequently in connection with a particular offense, is difficult to quantify, or is truly unique. When such a circumstance does occur, however, it may be important and could be accounted for only by permitting the court to depart from the guidelines.

Departure decisions also provide the Commission with important feedback from courts regarding the operation of the guidelines and improve its ability to make ongoing refinements to the sentencing guidelines. Frequent or increasing use of departures for a particular offense, for example, might indicate that the guideline for that offense does not adequately take into account a particular recurring circumstance.

## **2. Statutory Requirements Enacted by the PROTECT Act Are Expected to Have a Broad Impact on Departure Practices**

The PROTECT Act enacted several procedural requirements that should have a broad and substantial impact on departure practices.

First, the PROTECT Act amended 18 U.S.C. § 3553(c) (Imposition of a sentence) to require the court to include specific *written* reasons for departures in the judgment and commitment order (unless the court relied on *in camera* evidence under Fed. R. Crim. P. 32).

Second, the PROTECT Act amended 28 U.S.C. § 994(w) to require the Chief Judge of each district court to ensure that, within 30 days following entry of judgment, the sentencing court submits to the Commission certain sentencing documents, including the Statement of Reasons for the sentence imposed, which must include, in the case of a departure, the reason for departure. The potential effect of these documentation requirements on the Commission's data collection and reporting is discussed in Chapter 2 of this report.

Third, by amending 18 U.S.C. § 3742 (Review of a sentence), the PROTECT Act specifically requires sentencing courts to base departures on a factor that advances the statutory purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Fourth, the PROTECT Act modifies appellate review for departure decisions. The PROTECT Act now generally requires *de novo* review of a district court's departure decision.

Fifth, the PROTECT Act adds restrictions to limit the district courts' discretion when sentencing upon remand. Newly enacted 18 U.S.C. § 3742(g) prohibits the district court, upon remand, from sentencing outside the applicable guideline range, except upon a ground that was

(i) “specifically and affirmatively” included in the written statement of reasons given by the district court pursuant to section 3553(c) in connection with sentencing of the defendant prior to the appeal *and* (ii) was held by the court of appeals, in remanding the case, to be a permissible ground for departure.

The implications of these statutory changes are discussed in more detail in Chapter 4. The noticeable increase in documentation submissions to the Commission since enactment of the PROTECT Act and comments received by the Commission in recent months suggest that the impact of these new statutory requirements on the incidence of downward departures will be significant.

### **3. Newly Implemented Policies by the Department of Justice Are Expected to Impact Departure Practices Significantly**

The PROTECT Act directed the Department of Justice to adopt policies that, among other things, ensure prosecutors oppose unjustified downward departures and vigorously pursue appropriate appeals of adverse departure decisions. In response, the Department of Justice has adopted several policies that could significantly impact departure practices.

First, Attorney General John Ashcroft issued a memorandum to all federal prosecutors underscoring prosecutors’ “affirmative obligation to oppose any sentencing adjustments, including downward departures, that are not supported by the facts and the law.” The memo further directs prosecutors to “take all steps necessary to ensure that the district court record is sufficient to permit the possibility of an appeal” of an improper departure. The Department of Justice also set in place mandatory procedural mechanisms to facilitate appeals of departure decisions.

Second, the Attorney General issued a revised policy concerning charging and plea bargaining practices. The policy generally requires that prosecutors charge and pursue “the most serious, readily provable offense or offenses that are supported by the facts of the case” and provides that any sentencing recommendation contained in a plea agreement “must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant’s history and conduct.”

With respect to departures specifically, the policy states that the circumstances in which prosecutors will request or accede to downward departures in the future will be “properly circumscribed” and “rare.” The Department of Justice also seeks to make those instances in which departures are agreed to by prosecutors more transparent, providing that “[i]n those cases where federal prosecutors agree to support departures, they are expected to identify departures for the courts.”

Third, the Attorney General issued a memorandum outlining the criteria for authorization of early disposition or “fast track” programs. The memorandum provides that fast track

programs are “reserved for exceptional circumstances” and are “not to be used simply to avoid the ordinary application of the Guidelines to a particular class of cases.” The policy sets forth specific criteria that must be met in order for a fast track program to be approved. With the exception of certain minimum requirements, however, the policy leaves discretion to the United States Attorney to decide whether the benefit to the defendant under a fast track program is granted by departure or by agreeing not to charge or pursue the most serious readily provable offense.

The implications of these newly implemented Department of Justice policies and specific concerns regarding fast track programs are discussed in more detail in Chapter 4.

#### **4. Missing and Unclear Sentencing Documentation Limits the Ability to Draw Conclusions from Commission Departure Data**

In preparing this report, the Commission became more acutely aware of the need for greater specificity and standardization in departure documentation. The Commission is concerned that historically it has not received a significant percentage of sentencing documents from a handful of judicial districts. Furthermore, with respect to departures, Statements of Reasons submitted by sentencing courts often provide only general categorical reasons for departure (*e.g.*, plea agreement) with insufficient specificity to enable the Commission to understand fully the sentencing court’s underlying substantive reason for departure.

To emphasize the importance of written specificity regarding departure decisions, the Commission added specific documentation requirements in the *Guidelines Manual* to three policy statements, §5K2.0 (Grounds for Departure), §4A1.3 (Departures Based on Inadequacy of Criminal History Category), and §6B1.2 (Standards for Acceptance of Plea Agreements). Requiring sentencing courts to document reasons for departure with greater specificity will complement the findings and documentation required of sentencing courts by the PROTECT Act, facilitate appellate review of departure decisions, and improve the Commission’s future ability to monitor departure decisions and refine the guidelines as necessary.

The Commission’s data collection process is discussed in more detail in Chapter 2.

#### **5. Government Initiated Departures and Southwest Border Districts Comprise a Significant Portion of Downward Departures**

During consideration of the PROTECT Act, members of Congress expressed concern regarding the increasing incidence of downward departures as reported in Commission data sources. The downward departure rate for reasons other than substantial assistance to the government (the “nonsubstantial assistance departure rate”) has increased from 5.8 percent in fiscal year 1991 to 18.1 percent in fiscal year 2001.

Based on analyses conducted for this report, the Commission estimates that the government initiated approximately 40 percent of the nonsubstantial assistance downward

departures granted in fiscal year 2001. *See* Chapter 3. If all the government initiated downward departures are excluded, the remaining downward departure rate is estimated to be about 10.9 percent.

The Commission believes that fast track programs account for a substantial proportion of government initiated downward departures. Fast track programs were established in judicial districts along the southwest border to accommodate burgeoning immigration related caseloads, and sentencing data confirm that the number of federal immigration offenses increased dramatically from 2,300 in fiscal year 1991 to 10,458 in fiscal year 2001.

The Commission is unable to estimate from its sentencing data the full impact of fast track programs on the departure rate for several reasons. Most important, the Commission cannot isolate fast track departures from downward departures generally because sentencing courts do not report this information in a uniform manner.

The Commission's sentencing data, however, do indicate that the combined departure rate for judicial districts along the southwest border has increased almost four-fold, from 10.2 percent in fiscal year 1991 to 38.2 percent in fiscal year 2001. *See* Chapter 3. Furthermore, southwest border districts account for a disproportionate number of departures. Although the national departure rate was 18.1 percent in fiscal year 2001, if southwest border districts are excluded, the national departure rate was 10.4 percent in fiscal year 2001. Therefore, circumstances unique to the southwest border appear to be driving the overall national departure rate significantly higher than it otherwise would be.

Even excluding the southwest border from consideration due to its unique circumstances, the Commission is concerned about the unmistakable steady increase in the departure rate for the rest of the nation, from 5.8 percent in fiscal year 1991 to 10.4 percent in fiscal year 2001. In recent years, the Commission has had a heightened awareness about the increasing incidence of downward departures and has taken action to address several specific areas of concern, including specifying minimum requirements for departures based on "aberrant behavior," prohibiting departures for post-sentencing rehabilitative efforts, and extensively revising the illegal reentry guidelines.

### **C. COMMISSION IMPLEMENTATION OF THE PROTECT ACT**

The PROTECT Act made direct congressional amendments to the sentencing guidelines to restrict the availability of departures for certain child crimes and sex offenses. The Commission implemented those changes and, as directed, distributed those guideline amendments on April 30, 2003.

On October 8, 2003, the Commission unanimously adopted an emergency amendment effective October 27, 2003, implementing the PROTECT Act directives. The emergency amendment is discussed in more detail in Chapter 5 and is set forth in its entirety in Appendix A

of this report. The amendment prohibits several factors as grounds for departure, restricts the availability of certain other departures, clarifies when certain departures are appropriate, and limits the extent of departure permissible for certain offenders.

Among the newly forbidden grounds for departure are:

- the defendant's acceptance of responsibility for the offense;
- the defendant's aggravating or mitigating role in the offense;
- the defendant's decision, by itself, to plead guilty to the offense or to enter into a plea agreement with respect to the offense;
- the defendant's fulfillment of restitution obligations only to the extent required by law, including the guidelines;
- the defendant's addiction to gambling;
- the defendant's aberrant behavior if the defendant has any significant prior criminal behavior, even if the prior conduct was not a federal or state felony conviction;
- the defendant's aberrant behavior if the defendant is subject to a mandatory minimum term of imprisonment of five years or more for a drug trafficking offense, regardless of whether the defendant meets the "safety valve" criteria at §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases);
- the overrepresentation by the defendant's criminal history category of the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, if the defendant is an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and
- the overrepresentation by the defendant's criminal history category of the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, if the defendant is a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

The amendment also imposes increased restrictions on the availability of departures based on:

- multiple circumstances (previously referred to as a combination of factors);

- the defendant’s family ties and responsibilities, particularly if the basis for consideration is financial or caretaking responsibilities;
- victim’s conduct;
- coercion and duress; and
- diminished capacity.

In addition, the amendment impacts sentencing courts’ authority in more general ways by restructuring departure authority throughout the *Guidelines Manual*, particularly in §5K2.0 (Grounds for Departure), to track more closely both the statutory criteria for imposing a sentence outside the guideline sentencing range and the newly enacted statutory requirement that reasons for departure be stated with specificity in the written order of judgment and commitment.

The Commission also added a new policy statement regarding early disposition programs, §5K3.1 (Early Disposition Programs), that restates the language contained in the directive at section 401(m)(2)(B) of the PROTECT Act. The new policy statement provides that, upon motion of the Government, the court may depart downward not more than four offense levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides. The Commission determined that implementing the directive in this unfettered manner is appropriate at this time, notwithstanding several concerns discussed in Chapter 4 and pending further study and monitoring of the implementation of such programs.

The Commission believes that the actions taken in this amendment will complement the many statutory and guideline changes enacted by the PROTECT Act, and the recent policies regarding appeals, fast track, and plea bargaining implemented by the Department of Justice, to substantially reduce the incidence of downward departures. The Commission worked diligently within the 180 day time frame established by the PROTECT Act to implement the directive, but its efforts in this area will continue.

The Commission is continuing to work on several specific areas that affect the incidence of departures, including potential refinements to the criminal history calculations to take into account data now becoming available from the Commission’s multi-year recidivism study, possible elimination of aberrant behavior departures, consideration of general collateral consequences of incarceration, and amendments to immigration guidelines. More generally, the Commission continues to review departure provisions throughout the *Guidelines Manual* and to consider whether circumstances warranting departure should be incorporated as guideline adjustments.

## INTRODUCTION

### A. AUTHORITY

The United States Sentencing Commission submits this report in direct response to section 401(m) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 [the “PROTECT Act”], and as part of its overall fifteen year review of the federal sentencing guidelines. The PROTECT Act was enacted on April 30, 2003, and directed the Commission, not later than 180 days after the enactment of the Act, to:

(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and

(2) promulgate, pursuant to section 994 of title 28, United States Code –

(A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are [sic] substantially reduced;

(B) a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney; and

(C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by this Act, including a revision of paragraph 4(b) of part A of chapter 1 and a revision of section 5K2.0.

In addition, section 401(j)(2) of the PROTECT Act directs that the Commission, on or before May 1, 2005, “shall not promulgate any amendment to the sentencing guidelines, policy statements, or official commentary of the Sentencing Commission that . . . adds any new grounds for departure to Part K of Chapter 5.”

The PROTECT Act directives do not require an accompanying report, but the Commission submits this report pursuant to both its general statutory authority under 28 U.S.C.

§§ 994–95 and its specific responsibility under 28 U.S.C. § 995(a)(20) to advise Congress on sentencing policy.<sup>1</sup>

## **B. DEPARTURE AUTHORITY IN THE FEDERAL SENTENCING GUIDELINES SYSTEM**

### **1. Statutory Authority Prior to the PROTECT Act**

The overarching principles of the federal sentencing guideline system were outlined by Congress in the Sentencing Reform Act of 1984.<sup>2</sup> The Sentencing Reform Act directed the Commission to establish sentencing policies and practices for the federal criminal justice system that:

provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices . . . .<sup>3</sup>

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<sup>1</sup> The Sentencing Reform Act of 1984 created the Commission as an independent agency in the judicial branch of government. Pub. L. No. 98-473, 98 Stat. 1837 (1984). The Sentencing Reform Act directed the Commission to establish and maintain sentencing policies and practices for the federal criminal justice system through a detailed framework of sentencing guidelines. *See generally* 28 U.S.C. § 994 (Duties of the commission) (West Supp. 2003). In addition, the Sentencing Reform Act requires the Commission to monitor and report periodically on the operation of the sentencing guidelines and gives the Commission ongoing sentencing and crime policy research responsibilities. *See* 28 U.S.C. § 995(a)(8), (9), (12)(A), (13)–(16), (21) (2003). The Commission also is required to “make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary to carry out an effective, humane, and rational sentencing policy.” *See* 28 U.S.C. § 995(a)(20) (2003). The Commission’s duties and authorities are set forth fully in chapter 58 of title 28, United States Code.

<sup>2</sup> A detailed legislative history of the Sentencing Reform Act of 1984, focusing in particular on matters relating to departures from the sentencing guidelines, and subsequent relevant legislation, is set forth in Appendix B.

<sup>3</sup> 28 U.S.C. § 991(b) (2003). The statutory purposes of sentencing are set forth at 18 U.S.C. § 3553(a)(2) as follows:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

In promulgating guidelines and policy statements, the Commission was directed to pay particular attention to the requirements of providing certainty and fairness in sentencing and reducing unwarranted sentencing disparities.<sup>4</sup> Built into the Sentencing Reform Act, however, was a recognition that the Commission could not possibly establish guidelines that would adequately take into account every conceivable set of offense and offender characteristics. As a result, the Sentencing Reform Act sought to strike some balance between the goals of certainty and uniformity in sentencing and the need to retain sufficient flexibility to individualize sentences.

This balance is reflected in part in 18 U.S.C. § 3553(b) (Application of the guidelines in imposing a sentence), which codified the limited authority of sentencing courts to impose a sentence outside the sentencing guideline range:

[T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.<sup>5</sup>

## **2. Guideline Authority**

When promulgating the initial set of guidelines in 1987, the Commission observed that, because of the criteria prescribed by 18 U.S.C. § 3553(b), by specifying that it had adequately considered a particular factor, the Commission in principle could prevent a court from using it as ground for departure.<sup>6</sup> After careful deliberation, the Commission chose not to adopt this approach. Like Congress, the Commission recognized that departures play an important role in the guideline system because of the “difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.”<sup>7</sup> The Commission provided the following guidance on the use of departures at that time:

The Commission intends the sentencing courts to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular

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(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

<sup>4</sup> See 28 U.S.C. § 994(f) (West Supp. 2003).

<sup>5</sup> 18 U.S.C. § 3553(b) (West Supp. 2003).

<sup>6</sup> USSG, Ch.1, Pt.A (4)(B), intro. comment. (Apr. 13, 1987).

<sup>7</sup> USSG, Ch.1, Pt.A (4)(B) (Apr. 13, 1987)

guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.<sup>8</sup>

The Commission recognized that, similar to the difficulty noted in establishing guidelines to cover every possible offender and offense characteristic, “[c]ircumstances that may warrant a departure from the guidelines cannot . . . by their very nature, be comprehensively listed and analyzed in advance.”<sup>9</sup> Therefore, when the Commission promulgated the initial set of guidelines, with some specific exceptions,<sup>10</sup> it did not restrict the kinds of factors, whether or not mentioned in the guidelines, that could constitute grounds for departure in an unusual case.<sup>11</sup>

Pursuant to 28 U.S.C. § 994(d)<sup>12</sup> and (e),<sup>13</sup> the Commission did, however, adopt several policy statements limiting the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range in Chapter Five, Parts H and K. The Commission determined that certain factors, particularly those listed in 28 U.S.C. § 994(e), “are not ordinarily relevant” to the determination of whether a sentence should be outside the applicable guideline range but did not foreclose them from consideration in an exceptional case.

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<sup>8</sup> *Id.*

<sup>9</sup> USSG §5K2, p.s. (General Provisions) (Apr. 13, 1987).

<sup>10</sup> USSG §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of §5K2.12 (Coercion and Duress) list factors that the court cannot take into account as grounds for departure. The Commission subsequently promulgated amendments prohibiting the court from considering additional factors as grounds for departure in §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances) and §5K2.19 (Post-Sentencing Rehabilitative Efforts).

<sup>11</sup> USSG, *supra* note 7.

<sup>12</sup> 28 U.S.C. § 994(d) directs the Commission to take into account, “only to the extent that they do have relevance,” the defendant’s: (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant’s culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood.

Section 994(d) further directs the Commission to “assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”

<sup>13</sup> 28 U.S.C. § 994(e) directs the Commission to “assure that the guidelines and policy statements . . . reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”

The original Commission foresaw that departures could perform important functions. The initial guidelines, offense by offense, sought to take into account those factors that the Commission's data indicated were empirically important in relation to the particular offense (*e.g.*, the presence of physical injury in the case of robbery or assault). The Commission acknowledged at the time, however, that there are guidelines that do not specify a sentence adjustment for a factor because it infrequently occurs in connection with a particular offense, but that the factor may be important in the rare case in which it does occur.<sup>14</sup> Such a circumstance, therefore, could be adequately accounted for only by permitting the court to depart from the guidelines in such an atypical case.

In addition, departures were considered an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines. The Commission envisioned that such feedback from the courts would enhance its ability to fulfill its ongoing statutory responsibility under the Sentencing Reform Act to periodically review and revise the guidelines.<sup>15</sup>

The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.<sup>16</sup>

The Commission, therefore, foresaw that a high or increasing rate of departures for a particular offense, for example, might indicate that the guideline for that offense does not take into account adequately a particular recurring circumstance and should be amended accordingly.

### **3. *Koon v. United States***

The Supreme Court's 1996 decision in *Koon v. United States*<sup>17</sup> was a significant decision in guidelines jurisprudence. *Koon* provided the analytical basis for many subsequent court

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<sup>14</sup> USSG, *supra* note 7.

<sup>15</sup> See 18 U.S.C. § 994(o) (West Supp. 2003) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.").

<sup>16</sup> USSG, *supra* note 7.

<sup>17</sup> *Koon v. United States*, 518 U.S. 81 (1996).

opinions regarding departures and was cited by sponsors of the PROTECT Act in its legislative history.<sup>18</sup>

In *Koon*, the Supreme Court held that departure decisions by district courts were due deference and that appellate courts should use an abuse of discretion standard in reviewing trial courts' application of the guidelines to the facts.<sup>19</sup> In reaching its conclusion, the Court suggested that Congress "did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions."<sup>20</sup> It pointed to 18 U.S.C. § 3742(e)(4), as enacted by the Sentencing Reform Act, which provided that "[t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous."<sup>21</sup> It further noted that the statute was amended in 1988 to require courts of appeals to "give due deference to the district court's application of the guidelines to the facts."<sup>22</sup>

The Court also commented on the "institutional advantage" district courts hold over appellate courts in making the factual findings necessary to determining whether a particular case warrants departure, particularly because the district courts "see so many more Guidelines cases than appellate courts do."<sup>23</sup>

The Court also considered the standard by which courts should determine whether as a categorical matter a factor is a permissible basis for departure. The Court held that:

a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer is no . . . the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline.<sup>24</sup>

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<sup>18</sup> See *infra*, Appendix B, at p. B-31 to B-33 (setting forth legislative history of the PROTECT Act).

<sup>19</sup> *Koon*, *supra* note 17, at 91.

<sup>20</sup> *Id.* at 97.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (quoting 18 U.S.C. § 3742(e)).

<sup>23</sup> *Koon*, *supra* note 17, at 98.

<sup>24</sup> *Id.* at 109.

Since the “statute says nothing about requiring each potential departure factor to advance” one of the statutory purposes of sentencing, the Court reasoned that any factor not explicitly disapproved by the Commission could potentially serve as a ground for departure, “[s]o long as the overall sentence is ‘sufficient, but not greater than necessary, to comply’ with those goals.”<sup>25</sup>

### C. THE PROTECT ACT

The PROTECT Act contains the most significant legislation enacted since the Sentencing Reform Act of 1984 in the area of sentencing court departure authority and appellate review of departure decisions. The legislative history of the PROTECT Act, which is more fully set forth in Appendix B, expresses congressional concern that the increasing rate of downward departures from the sentencing guidelines is undermining the goals of the Sentencing Reform Act, particularly the goals of certainty and uniformity in sentencing and of avoiding unwarranted disparity.

Members of Congress cited Commission sentencing data indicating that the rate of downward departures for reasons other than the defendant’s substantial assistance in the investigation or prosecution of other crimes had increased from 5.8 percent in fiscal year 1991 to 18.1 percent in fiscal year 2001. This trend was considered particularly troublesome in the area of certain sexual and kidnapping crimes, cases for which Commission statistics showed downward departures granted in 19.2 percent of sexual abuse cases, 21.4 percent of pornography and prostitution cases, and 12.8 percent of kidnapping cases in fiscal year 2001.<sup>26</sup>

Although the legislative history does not suggest similarly urgent congressional concern regarding substantial assistance departures pursuant to §5K1.1 (Substantial Assistance to Authorities),<sup>27</sup> the increase in the substantial assistance departure rate from 11.9 percent in fiscal year 1991 to 17.4 percent in fiscal year 2001 also contributed to the decline in the percentage of cases sentenced within the guideline sentencing range. In fiscal year 2001, less than two-thirds (63.9%) of cases were sentenced within the guideline sentencing range, compared to 80.7 percent in 1991.

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<sup>25</sup> *Id.* at 108 (quoting 18 U.S.C. § 3553(a)(2)).

<sup>26</sup> *See infra*, Appendix B, at p. B-29, and note 175 (citing Commission departure statistics).

<sup>27</sup> USSG §5K1.1 provides in pertinent part that “[u]pon motion of the government that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.” *See also* 18 U.S.C. § 3553(e) (Limited authority to impose a sentence below a statutory minimum) (West Supp. 2003) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

## 1. Kidnapping and Child Sex Offenses

In response to these concerns, the PROTECT Act contains several provisions aimed at reducing the incidence of downward departure from the sentencing guidelines. The most direct action relates to certain child abduction and child sex offenses, specifically for offenses under section 1201 (Kidnapping), involving a minor victim, and any offense under section 1591 (Sex trafficking of children or by force, fraud or coercion), or chapters 71 (Obscenity), 109A (Sexual abuse), 110 (Sexual exploitation and other abuse of children), or 117 (Transportation for illegal sexual activity and related crimes) of title 18, United States Code.

For these enumerated offenses, the PROTECT Act amended 18 U.S.C. § 3553(b) to permit the sentencing court to impose a sentence below the applicable sentencing guideline range only if the court finds that there exists a mitigating circumstance of a kind or to a degree that has been *affirmatively and specifically identified* as a permissible ground of downward departure in the sentencing guidelines or policy statements, taking account of any amendments to such sentencing guidelines or policy statements by Congress.<sup>28</sup>

The PROTECT Act also made direct amendments to the *Guidelines Manual* that further restrict the availability of downward departures for these enumerated offenses. The PROTECT Act directly amended §5K2.0 (Grounds for Departure) to provide that “the grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of departure” in these child abduction and sex offenses.<sup>29</sup> Departure grounds provided elsewhere in the *Guidelines Manual* therefore cannot apply in these cases.

In addition, the PROTECT Act directly amended sections 5H1.6 (Family Ties and Responsibilities), 5K2.13 (Diminished Capacity), and 5K2.20 (Aberrant Behavior) to prohibit consideration of these factors as grounds for departure for defendants convicted under the statutes enumerated above. The PROTECT Act also enacted a new policy statement, section 5K2.22 (Specific Offender Characteristics as Grounds for Departure in Child Crimes and Sexual Offenses), which permits sentencing courts to depart in these cases for age and extraordinary physical impairment to the extent permitted by sections 5H1.1 (Age) and 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), respectively, with the exceptions

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<sup>28</sup> 18 U.S.C. § 3553(b)(2) (Child crimes and sex offenses) (West Supp. 2003) (emphasis added). A court also may depart if it finds on motion of the government that the defendant has provided substantial assistance in the investigation or prosecution of another person and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission that should result in a sentence lower than prescribed by the guidelines. *Id.*

<sup>29</sup> Pub. L. No. 108-21, § 401(b), 117 Stat. 650 (2003).

of impairments based on drug, alcohol, or gambling dependence or abuse. These statutory and guideline amendments became effective April 30, 2003.<sup>30</sup>

## 2. Statutory Procedural Requirements

The PROTECT Act also enacted several additional provisions effective April 30, 2003 that will have a less direct, but significantly broader, effect on departure practices. First, the PROTECT Act amended 18 U.S.C. § 3553(c) (Imposition of a sentence) to require the court to include specific *written* reasons for departures in the judgment and commitment order (unless the court relied on *in camera* evidence under Fed. R. Crim. P. 32) and to provide these written reasons to the Sentencing Commission.<sup>31</sup> The potential impact of these statutory requirements on the incidence of downward departures and their potential effect on the Commission's data collection and reporting are discussed in Chapter 2.

Second, by amending 18 U.S.C. § 3742 (Review of a sentence), the PROTECT Act specifically requires sentencing courts to base departures on a factor that advances the statutory purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Third, the PROTECT Act requires *de novo* review of the district court's departure decision in a case in which:

(A) the district court failed to provide the written statement of reasons required under section 3553(c); [or]

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case.<sup>32</sup>

The appellate court shall set aside the sentence and remand the case with specific instructions if it finds that the district court failed to provide the required statement of reasons in the judgment and commitment order, the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.<sup>33</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at § 401(c) (emphasis added).

<sup>32</sup> *Id.* at § 401(d). In reviewing the reasonableness of the extent of departure, however, the appellate court is to give due deference to the district court's determination. *Id.*

<sup>33</sup> *Id.*

Fourth, the PROTECT Act also provides new safeguards to ensure appellate decisions regarding departures are followed by the lower courts. Newly enacted 18 U.S.C. § 3742(g) prohibits the district court, upon remand, from sentencing outside the applicable guideline range, unless it is based on a ground that was (i) “specifically and affirmatively” included in the written statement of reasons given by the district court pursuant to section 3553(c) in connection with sentencing of the defendant prior to the appeal *and* (ii) was held by the court of appeals, in remanding the case, to be a permissible ground for departure.<sup>34</sup> The implications of these statutory changes on the incidence of downward departures are discussed in more detail in Chapter 5.

### **3. Directives to the Department of Justice**

Congress intended that the Department of Justice’s prosecution, sentencing, and appeal policies would complement and further the goals of the Sentencing Reform Act. This congressional intent was implicit in the Sentencing Reform Act of 1984, through the provision making the Attorney General or the Attorney General’s designee an *ex officio* nonvoting member of the Commission, and explicit in the PROTECT Act’s specific directives to the Department of Justice. These directives in turn have resulted in the recent issuance of several policies that could significantly impact departure practices. The PROTECT Act directed the Department of Justice to adopt detailed policies and procedures to:

(A) ensure that the Department of Justice attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law;

(B) ensure that the Department of Justice attorneys in such cases make a sufficient record so as to permit the possibility of an appeal;

(C) delineate objective criteria, specified by the Attorney General, as to which such cases may warrant consideration of an appeal, either because of the nature or magnitude of the sentencing error, its prevalence in the district, or its prevalence with respect to a particular judge;

(D) ensure that the Department of Justice attorneys promptly notify the designated Department of Justice component in Washington concerning such adverse sentencing decisions; and

(E) ensure the vigorous pursuit of appropriate and meritorious appeals of such adverse decisions.<sup>35</sup>

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<sup>34</sup> *Id.* at § 401(e) (emphasis added).

<sup>35</sup> *Id.* at § 401(l).

The congressional directive required the Department of Justice to adopt such policies and procedures within 90 days of the enactment of the PROTECT Act, or alternatively to comply with more stringent reporting provisions.<sup>36</sup>

#### 4. Objections to and Appeals of Downward Departures

In response to the PROTECT Act, on July 28, 2003, Attorney General John Ashcroft issued a memorandum to all federal prosecutors underscoring the importance Congress attaches to objections to and appeals of unjustified downward departures. “The Department of Justice has a responsibility to litigate vigorously in the district courts, and to pursue appeals in appropriate cases, so as to ensure that the policies of the Sentencing Reform Act and the PROTECT Act are faithfully implemented.”<sup>37</sup>

With respect to objections to and appeals of downward departures, the memorandum states in further detail that:

Department attorneys have an affirmative obligation to *oppose* any sentencing adjustments, including downward departures, that are not supported by the facts and the law . . . . Department attorneys must take all steps necessary to ensure that the district court record is sufficient to permit the possibility of an appeal with respect to the improper adjustment. . . .<sup>38</sup>

The memorandum establishes four mandatory procedural mechanisms to facilitate appeals of unjustified downward departures. First, the memorandum lists categories of adverse decisions that prosecutors must report within 14 days of judgment to the appropriate officials at “Main Justice.” Among the departure categories required to be reported by prosecutors are:

- (1) departures that reduce the sentencing range from Zone C or D to a lower zone in cases in which no term of imprisonment is imposed;

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<sup>36</sup> Those alternative reporting provisions would have required the Attorney General, within 15 days after a district court’s grant of a nonsubstantial assistance downward departure in any case, to submit a report to the House and Senate Judiciary Committees identifying the case, the facts involved, the identity of the district court judge, the district court’s stated reasons, whether the district court provided the government with advance notice of its intent to depart, the position of the parties with respect to the downward departure, and whether the government filed or intended to file a motion for reconsideration. The Attorney General further would have been required, within five days after a decision by the Solicitor General regarding the authorization of an appeal of departure, to submit to the House and Senate Judiciary Committees a report describing that decision and the basis for such decision. *Id.*

<sup>37</sup> Memorandum from Attorney General John Ashcroft, United States Department of Justice, to All Federal Prosecutors 4 (July 28, 2003) (regarding Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals) [hereinafter Ashcroft Appeals Memo].

<sup>38</sup> *Id.* at 3 (emphasis added).

(2) departures of two or more criminal history categories based on over representation of the seriousness of the defendant's criminal history (*see* USSG §4A1.3);

(3) departures of three or more offense levels based on a “discouraged” factor, an “unmentioned” factor, a combination of factors where no single factor justifies departure, or an “impermissible” factor as defined in 18 U.S.C. § 3742(j)(2), for an offense which, prior to the departure, resulted in an offense level of level 16 or greater;

(4) departures in child victim or sexual abuse cases governed by 18 U.S.C. § 3553(b)(2), as amended by the PROTECT Act (*i.e.*, “an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapters 71, 109A, 110, or 117”);

(5) departures granted on remand that do not comply with the new requirements for sentencing after remand set forth at 18 U.S.C. § 3742(g); and

(6) departures not otherwise required to be reported that are improperly granted in a manner that has become prevalent in the district or with a particular judge.<sup>39</sup>

Second, the memorandum directs prosecutors to protect the government's right of appeal by filing a timely notice of appeal when a government appeal is under consideration.

Third, the memorandum provides for review upon notification of adverse departure decisions by the appropriate division at Main Justice. If an appeal is recommended by Main Justice or the United States Attorney, the Solicitor General's Office must review the case to determine whether an appeal would be appropriate and meritorious.

Finally, in cases in which an appeal is authorized, the memorandum requires prosecutors to “vigorously and professionally” pursue the appeal.

On September 22, 2003, the Attorney General issued another memorandum addressing downward departures, among other things.<sup>40</sup> The memorandum states that the circumstances in which federal prosecutors will request or accede to downward departures in the future will be “properly circumscribed” and “rare” and directs prosecutors to “affirmatively oppose downward

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<sup>39</sup> *See id.* at A-1 to A-2 (Amendment to section 9-2.170(B) of the U.S. Attorney's Manual) (effective July 28, 2003).

<sup>40</sup> Memorandum from Attorney General John Ashcroft, United States Department of Justice, to All Federal Prosecutors 6–7 (Sept. 22, 2003) (regarding Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing) [hereinafter Ashcroft Charging Memo].

adjustments that are not supported by the facts and the law,” and not “stand silent” with respect to such departures.<sup>41</sup>

Furthermore, the Attorney General’s memorandum seeks to make those instances in which departures are agreed to by prosecutors more readily transparent. Reiterating existing policies, the memorandum states that “[i]n those cases where federal prosecutors agree to support departures, they are expected to identify departures for the courts. For example, it would be improper for a prosecutor to agree that a departure is warranted, without disclosing such agreement, so that there is neither a record of nor judicial review of the departure.”<sup>42</sup>

The implications of these Department of Justice policies on the incidence of downward departures are discussed in more detail in Chapter 4 of this report.

## **5. Charging and Plea Bargaining Policies**

The Attorney General’s September 22, 2003 memorandum also sets forth revised policies concerning charging and plea bargaining practices. The Attorney General stated:

The fairness Congress sought to achieve by the Sentencing Reform Act and the PROTECT Act can be attained only if there are fair and reasonably consistent policies with respect to the Department’s decisions concerning what charges to bring and how cases should be disposed. Just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case.<sup>43</sup>

Some commentators have referred to charge bargaining and fact bargaining as giving rise to “hidden departures.”<sup>44</sup>

The policy generally requires prosecutors to charge and pursue “the most serious, readily provable offense or offenses that are supported by the facts of the case.”<sup>45</sup> The most serious

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<sup>41</sup> *Id.* at 7.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2.

<sup>44</sup> *See, e.g., infra* ch. 4, at note 159.

<sup>45</sup> Ashcroft Charging Memo, *supra* note 40, at 2.

offense or offenses are those that generate the most substantial sentence under the sentencing guidelines or mandatory minimum sentences, and a charge is considered to be not “readily provable” if the prosecutor has a good faith doubt, for legal or evidentiary reasons, as to the government’s ability to prove a charge at trial.<sup>46</sup>

The policy also provides that any sentencing recommendation contained in a plea agreement “must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant’s history and conduct.”<sup>47</sup> Furthermore, prosecutors must disclose to the court “readily provable facts [that] are relevant to calculations under the Sentencing Guidelines,” and cannot “fact bargain” or enter a plea agreement that results in the sentencing court having “less than a full understanding of all readily provable facts relevant to sentencing.”<sup>48</sup>

## **6. Early Disposition or Fast Track Programs**

As set forth above, the PROTECT Act directs the Commission to promulgate a policy statement authorizing a downward departure of not more than four offense levels if the Government files a motion for such departure pursuant to an early disposition program

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<sup>46</sup> *Id.* The policy provides six limited exceptions to this general policy:

- (1) readily provable charges that would not affect the applicable guideline range or mandatory minimum sentence;
- (2) readily provable charges not pursued pursuant to an authorized early disposition or “fast-track” program;
- (3) a most serious offense that, post-indictment and in good faith, is determined to be not readily provable because of a change in the evidence or some other justifiable reason (*e.g.*, the unavailability of a witness);
- (4) “rare circumstances” in which a prosecutor agrees to decline to charge or to pursue a readily provable charge as part of a plea agreement that properly reflects substantial assistance provided by the defendant in the investigation or prosecution of another person;
- (5) statutory enhancements, specifically 18 U.S.C. §§ 851 and 924(c), that would result in statutory sentences exceeding the applicable sentencing guidelines range, but only in the context of a negotiated plea agreement and subject to additional limitations; and
- (6) other “rare” exceptional circumstances, with the approval of the Assistant Attorney General, United States Attorney, or designated supervisory attorney. *Id.* at 2–5.

<sup>47</sup> *Id.* at 5.

<sup>48</sup> *Id.*

authorized by the Attorney General and the United States Attorney.<sup>49</sup> On September 22, 2003, the Attorney General issued a memorandum outlining the criteria for authorization of early disposition or fast track programs.<sup>50</sup>

The premise on which fast track programs are based is that defendants who promptly agree to participate in such a program save the government significant scarce resources that can be used in prosecuting other defendants and demonstrate acceptance of responsibility above and beyond what is taken into account under §3E1.1 (Acceptance of Responsibility).<sup>51</sup> The Attorney General cautioned, however, that:

These programs are properly reserved for exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by the large volume of a particular category of cases. Such programs are not to be used simply to avoid the ordinary application of the Guidelines to a particular class of cases.<sup>52</sup>

Accordingly, the policy sets forth specific criteria which must be met in order for a fast track program to be approved. The United States Attorney must demonstrate that:

- (1) the district either (i) confronts an exceptionally large number of a specific class of offenses within the district, and failure to handle such cases on an expedited basis would significantly strain prosecutorial and judicial resources in the district, or (ii) confronts some other exceptional local circumstance with respect to a specific class of cases that justifies expedited disposition of such cases;
- (2) state prosecution of such cases is either unavailable or unwarranted;
- (3) the specific class of cases are comprised of highly repetitive and substantially similar fact scenarios; and

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<sup>49</sup> Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003).

<sup>50</sup> Memorandum from Attorney General John Ashcroft, United States Department of Justice, to All United States Attorneys 5 (Sept. 22, 2003) (regarding Department Principles for Implementing an Expedited Disposition or “Fast-Track” Prosecution Program in a District) [hereinafter Ashcroft Fast Track Memo].

<sup>51</sup> *Id.* at 1.

<sup>52</sup> *Id.* at 1–2.

(4) the cases do not involve an offense designated by the Attorney General as a “crime of violence.”<sup>53</sup>

The policy requires that, at a minimum, the defendant must enter into a written plea agreement that includes an accurate description of the defendant’s offense conduct. In addition, the defendant must agree (1) not to file any of the motions described in Rule 12(b)(3) of the Federal Rules of Criminal Procedure; (2) to waive appeal; and (3) to waive the opportunity to challenge the conviction under 28 U.S.C. § 2255, except with respect to ineffective assistance of counsel.<sup>54</sup>

Beyond these minimum requirements, the policy leaves discretion to the United States Attorney to decide whether the benefit to a defendant under a fast track program is an agreement to a departure or an agreement not to charge or pursue the most serious readily provable offense. An early disposition plea agreement may leave the extent of any departure to the discretion of the sentencing court, or the parties may agree to bind the district court to a departure of a specific number of levels, not to exceed four, pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. A fast track program that uses charge bargaining instead of downward departures is to provide commensurate sentencing reductions.<sup>55</sup>

The implications of early disposition or fast track programs on the incidence of downward departures are discussed in more detail in Chapter 4 of this report.

#### **D. COMMISSION IMPLEMENTATION OF THE PROTECT ACT**

##### **1. Commission Actions Prior to Enactment of the PROTECT Act**

The Commission has been aware of and concerned about the increasing incidence of downward departures and has taken several actions to address specific areas of concern prior to enactment of the PROTECT Act. These actions, which are discussed briefly here, are covered in more detail in Chapter 5.

The Commission, as reconstituted in November 1999, promulgated two amendments during its initial amendment cycle aimed at reducing the incidence of certain types of departures. Addressing a circuit conflict, the Commission created a new policy statement, §5K2.19 (Post-Sentencing Rehabilitative Efforts), that strictly prohibits departures upon resentencing based on a defendant’s post-sentencing rehabilitative efforts, even if exceptional.<sup>56</sup> The Commission

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<sup>53</sup> *Id.* at 2 (referencing 28 C.F.R. § 28.2).

<sup>54</sup> Ashcroft Fast Track Memo, *supra* note 50, at 3.

<sup>55</sup> *Id.*

<sup>56</sup> *See* USSG App. C, amend. 602.

determined that departures based on such post-sentencing rehabilitative measures are inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person, and inequitably benefit only those offenders who gain the opportunity to be resentenced *de novo*.

During that initial amendment cycle of the newly reconstituted Commission, the Commission also addressed another specific departure of concern, aberrant behavior. The Commission resolved a circuit conflict regarding when a departure based on aberrant behavior may be warranted by creating a new policy statement, §5K2.20 (Aberrant Behavior). The Commission rejected the “totality of circumstances approach” endorsed by some circuits at the time, concluding that it was overly broad and vague. Instead, the Commission structured the new policy statement to limit consideration of aberrant behavior to certain types of offenses and offenders, and categorically prohibited offenders convicted of certain serious offense conduct or who have significant prior criminal records from being considered for a departure premised on the aberrant nature of their behavior.<sup>57</sup>

In 2001, the Commission took action to reduce departures in another category of concern, illegal reentry offenses. The Commission acted to reduce departures in illegal reentry cases by making comprehensive revisions to the guideline covering illegal reentry, §2L1.2 (Unlawfully Entering or Remaining in the United States), to provide more graduated enhancements for prior convictions, depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant. Equally important, the Commission deleted the application note that had invited a downward departure based on the seriousness of the prior aggravated felony.<sup>58</sup> The revised guideline became effective November 1, 2001, and data is not yet available to determine the extent to which it has reduced the incidence of departures.

Also during this time, the Commission began to study departures more comprehensively as part of its fifteen year review of the operation of the federal sentencing guideline system. The timeline for completion of this project obviously was shortened significantly by enactment of the PROTECT Act.

## **2. Commission Actions within 180 Days of Enactment of the PROTECT Act**

The PROTECT Act includes a number of provisions aimed at reducing the incidence of departures, among them stricter sentencing documentation and submission requirements and other procedural reforms. The Commission already has observed a noticeable impact from these changes, including a surge in the volume of sentencing documents it receives. Although empirical evidence is not available, the Commission has received comments at recent training sessions and conferences suggesting courts understand the concerns expressed in the PROTECT Act and are reacting accordingly.

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<sup>57</sup> See *id.*, amend. 603.

<sup>58</sup> See *id.*, amend. 632.

The PROTECT Act also made direct congressional amendments to the sentencing guidelines to restrict the availability of departures for certain child crimes and sex offenses. The Commission implemented those changes and, as directed, distributed those guideline amendments to the federal criminal justice community on April 30, 2003.

The PROTECT Act directs the Commission to take steps to ensure that the incidence of downward departures is substantially reduced more broadly. The Commission was created by the Sentencing Reform Act to serve as an expert body on federal sentencing policy and a national clearinghouse for federal sentencing data, and it has worked diligently and drawn on its considerable expertise to implement the directives in a timely manner. During its deliberative process, the Commission: (1) considered the legislative history of the Sentencing Reform Act of 1984 and other sentencing legislation, with particular emphasis on the role of departures; (2) identified particular concerns regarding downward departures raised by Congress in the PROTECT Act; (3) conducted an extensive empirical study of frequently cited reasons for downward departures; (4) reviewed departure case law and literature; (5) solicited and weighed public comment;<sup>59</sup> and (6) held two public hearings at which the Commission received testimony from the Department of Justice, judges, federal defenders and prosecutors, and experts in the criminal law on downward departures generally, and early disposition or fast track programs specifically.

On October 8, 2003, the Commission unanimously adopted an emergency amendment implementing the PROTECT Act directives effective October 27, 2003. The emergency amendment is discussed in more detail in Chapter 5 and is provided in its entirety in Appendix A. The amendment prohibits several factors as grounds for departure, restricts the availability of certain departures, clarifies when certain departures are appropriate, and limits the extent of departure permissible for certain offenders.

The Commission added provisions that prohibit or restrict departures in §5K2.0 (Grounds for Departure), §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), §5H1.6 (Family Ties and Responsibilities), §5H1.7 (Role in the Offense), §5H1.8 (Criminal History), §5K2.10 (Victim's Conduct), §5K2.12 (Coercion and Duress), §5K2.13 (Diminished Capacity), §5K2.20 (Aberrant Behavior), §4A1.3 (Departures Based on Inadequacy of Criminal History Category), and §6B1.2 (Standards for Acceptance of Plea Agreements), among other changes.

Included among the newly forbidden grounds for departure are:

- the defendant's acceptance of responsibility for the offense;
- the defendant's aggravating or mitigating role in the offense;

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<sup>59</sup> 68 Fed. Reg. 39,173 (July 1, 2003).

- the defendant’s decision, by itself, to plead guilty to the offense or to enter into a plea agreement with respect to the offense;
- the defendant’s fulfillment of restitution obligations only to the extent required by law, including the guidelines;
- the defendant’s addiction to gambling;
- the defendant’s aberrant behavior if the defendant has any significant prior criminal behavior, even if the prior conduct did not result in a federal or state felony conviction;
- the defendant’s aberrant behavior if the defendant is subject to a mandatory minimum term of imprisonment of five years or more for a drug trafficking offense, regardless of whether the defendant meets the “safety valve” criteria at §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases);
- the overrepresentation by the defendant’s criminal history category of the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, if the defendant is an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and
- the overrepresentation by the defendant’s criminal history category of the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, if the defendant is a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

The amendment also imposes increased restrictions on the availability of departures based on:

- multiple circumstances (previously referred to as a combination of factors);
- the defendant’s family ties and responsibilities, particularly if the basis for consideration is financial or caretaking responsibilities;
- victim’s conduct;
- coercion and duress; and
- diminished capacity.

The amendment will impact the incidence of departures more generally by restructuring departure provisions throughout the *Guidelines Manual*, particularly in §5K2.0 (Grounds for Departure), to track more closely both the statutory criteria for imposing a sentence outside the guideline sentencing range and the newly enacted statutory requirement that reasons for departure be stated with specificity in the written order of judgment and commitment.<sup>60</sup>

To emphasize the importance of specific written reasons for departure decisions, the Commission added specific documentation requirements in three policy statements, sections 5K2.0 (Grounds for Departure), 4A1.3 (Departures Based on Inadequacy of Criminal History Category), and 6B1.2 (Standards for Acceptance of Plea Agreements). The Commission determined that requiring sentencing courts to document reasons for departure with greater specificity will complement the findings and documentation required of sentencing courts by the PROTECT Act, facilitate appellate review, and improve the Commission's ability to monitor departure decisions and refine the guidelines as necessary.

The need for greater specificity and standardization in departure documentation was particularly brought to light by certain data limitations the Commission encountered when conducting the empirical analysis for this report. In particular, the Commission is concerned that the Statements of Reasons often do not provide sufficient detail to enable the Commission to understand the sentencing court's substantive reasons for departure. In such instances the usefulness of departure decisions as a feedback mechanism regarding the operation of the guidelines is lessened. The Commission's data collection process is discussed in more detail in Chapter 2 of this report.

The Commission also added a new policy statement, §5K3.1 (Early Disposition Programs), that restates the language contained in the directive at section 401(m)(2)(B) of the PROTECT Act. The new policy statement provides that, upon motion of the government, the court may depart downward not more than four offense levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides. The Commission determined that this action is appropriate at this time despite several concerns that are discussed in Chapter 4 and pending further study.

The Commission is unable to determine the full impact of early disposition programs (often referred to as fast track programs) on the departure rate, but the impact is believed to be significant. The Commission estimates that in fiscal year 2001 the government initiated approximately 40 percent of all nonsubstantial assistance downward departures. The Commission, however, cannot isolate which departures were pursuant to a fast track program because courts in districts with fast track programs frequently cite reasons other than fast track when granting a government initiated departure, and fast track programs are not exclusive to

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<sup>60</sup> See 18 U.S.C. §§ 3553 (Imposition of a sentence) and 3742(e) (Review of a sentence) (Consideration) (West Supp. 2003).

districts along the southwest border. When government initiated departures are excluded, the downward departure rate is 10.9 percent, which is significantly lower than the overall reported downward departure rate of 18.1 percent.<sup>61</sup>

An alternative method of estimating the impact of fast track programs is to exclude from the departure analysis the judicial districts along the southwest border, which are coping with significantly increased caseloads of immigration and immigration related offenses. In fiscal year 2001, the southwest border districts had a combined departure rate of 38.2 percent. In contrast, the departure rate for the rest of the nation was 10.4 percent, which also is significantly lower than the overall departure rate of 18.1 percent.<sup>62</sup> Circumstances unique to the southwest border thus appear to be driving the overall national departure rate significantly higher than it otherwise would be.

### **3. Ongoing Commission Review**

The Commission believes that its emergency amendment will work together with the many statutory and guideline changes enacted by the PROTECT Act, and the recently implemented Department of Justice policies regarding appeals, fast track, and plea bargaining to reduce substantially the incidence of downward departures. The Commission worked diligently to implement the directive, but its efforts in this area are ongoing and will extend beyond the 180 day time period established by the PROTECT Act.

The Commission is continuing to work on several specific areas that affect the incidence of departures. This nonexhaustive list includes possible refinements to the criminal history calculations to take into account data that is now becoming available from the Commission's multi-year comprehensive recidivism study. Refinements to the criminal history calculations would enable the Commission to restrict even further criminal history departures, and perhaps eliminate aberrant behavior departures. The Commission has furthered this process by voting to publish an issue for comment in the *Federal Register* regarding whether aberrant behavior departures should be prohibited.

The Commission also has identified immigration offenses as a priority for the current amendment cycle.<sup>63</sup> Immigration offenses account for a substantial proportion of downward departures – one-third of all downward departures in fiscal year 2001 – and data regarding the impact of the Commission's 2001 illegal reentry amendment on the departure rate for such offenses will be available soon. Further refinements to the guidelines for immigration offenses may further reduce the incidence of departures.

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<sup>61</sup> See *infra* ch. 4, fig. 14.

<sup>62</sup> See *infra* ch. 4, fig. 16.

<sup>63</sup> Sentencing Guidelines for the United States Courts, 68 Fed. Reg. 52264–65 (Sep. 2, 2003).

Related to immigration offenses, the Commission intends to study and monitor closely the operation of early disposition programs and the new policy statement at §5K3.1 (Early Disposition Programs). As explained in Chapter 4, early disposition programs and the departure provision as promulgated have the potential to increase unwarranted sentencing disparity based on geography, which gives cause for further study.

In addition, the Commission intends to study whether collateral consequences such as inmate classification and facility designation decisions, crediting policies for previous time served and satisfactory behavior, correctional employment and other program opportunities or policies, furlough and work release policies, post-release incarceration policies, and similar factors relating to the place and manner in which a sentence is to be served and the defendant's eligibility for release thereafter, should be prohibited grounds for departure.

More generally, the Commission continues to review departure provisions throughout the *Guidelines Manual* and to consider whether any circumstances warranting departure should be incorporated as guideline adjustments.

## **E. ORGANIZATION OF REPORT**

Chapter 2 describes the Commission's overall data collection processes and some of its limitations.

Chapter 3 presents findings from the Commission's data analysis of downward departures.

Chapter 4 discusses various contributors to the increasing incidence of downward departures.

Chapter 5 discusses Commission actions to reduce the incidence of downward departures taken both in the recent past and in direct response to the PROTECT Act, and sets forth the specific plans for continued work in this area in the near future.

Appendix A sets forth the emergency amendment, effective October 27, 2003, promulgated by the Commission in direct response to the directives contained in the PROTECT Act.

Appendix B presents a detailed legislative history of sentencing reform provisions, focusing on the role of departures in the guideline sentencing system.

Appendix C explains the data methodology used in preparation of this report.

## SENTENCING DATA COLLECTION

Members of Congress and others in support of the PROTECT Act often cited Commission sentencing data as evidence that the downward departure rate should be substantially reduced in order to better achieve the purposes of sentencing. This chapter discusses some of the issues the Commission encounters in collecting sentencing data, particularly data on departures.

### A. SENTENCING DOCUMENTATION SUBMISSION

The Commission maintains a comprehensive, computerized data collection system that forms the basis for its clearinghouse of federal sentencing information.<sup>64</sup> The Commission relies on this database in its ongoing monitoring and evaluation of the guidelines, for many of its research projects, and for responding to the hundreds of data requests received from Congress and other criminal justice entities each year.

Pursuant to a longstanding Memorandum of Understanding between the Administrative Office of the United States Courts and the Commission, and subsequent joint memoranda to the courts,<sup>65</sup> the sentencing courts in each district were requested to submit to the Commission the following documents for every case sentenced under the Sentencing Reform Act:

- Charging Document (Indictment/Information)
- Presentence Report (PSR)
- Report on the Sentencing Hearing (Statement of reasons for imposing sentence as required by 18 U.S.C. § 3553(c)) (Statement of Reasons)<sup>66</sup>
- Written Plea Agreement (if applicable)
- Judgment and Commitment Order
- Amended Judgments or Orders that Change a Sentence (*e.g.*, Reductions in

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<sup>64</sup> See 28 U.S.C. § 995(a)(14–15) (2003).

<sup>65</sup> See Memorandum from the Administrative Office of the United States Courts, to All Federal Judges, Clerks, Probation Officers and Court Reporters (Mar. 7, 1988) (regarding Documentation to be Sent to the United States Sentencing Commission) [hereinafter AO Memo of Understanding]; see also Letter from Leonidas Ralph Mecham, Director, Administrative Office of the United States Courts, to Judge William W. Wilkins, Jr., Chair, United States Sentencing Commission (June 22, 1988) (regarding maintenance of confidentiality of sentencing information transferred to the Sentencing Commission) [hereinafter Mecham-Wilkins Letter]; Memorandum from the Administrative Office of the United States Courts, to All Federal Judges, Clerks, Probation Officers and Court Reporters (July 7, 1993) (regarding Documentation to be Sent to the Sentencing Commission) [hereinafter Mecham-Conaboy Letter].

<sup>66</sup> 18 U.S.C. § 3553(c) (prior to its amendment by the PROTECT Act).

## Sentence Orders pursuant to Fed. R. Crim. P. 35(b))

For each case for which the Commission receives sentencing documentation, the Commission extracts and enters into its database more than 250 pieces of information, including:

- case identifiers (*e.g.*, date of sentence, judicial district, defendant)
- sentence imposed
- demographic information
- statute of conviction information (including statutory minimum and maximum penalties)
- the complete range of court guideline application decisions
- departure information.

The completeness and accuracy of the Commission's sentencing data are directly dependent on the documentation it receives from the sentencing courts. The judicial districts generally are highly compliant with document submission requirements, and in fiscal year 2001 the Commission received court documents for approximately 60,000 cases sentenced under the Sentencing Reform Act between October 1, 2000, and September 30, 2001.<sup>67</sup>

For purposes of collecting departure information, the Commission uses only the Statement of Reasons to extract such information. The Commission does not rely on other sentencing documents it receives, for example, presentence reports, because they are prepared prior to the sentencing hearing and may not reflect the sentence ultimately imposed by the court or the court's reasons. Accordingly, for any particular case, if the Commission receives case documents indicating that the sentence is outside the guideline range, but if the Commission does not receive a Statement of Reasons, it does not enter departure information for that case into its sentencing database.

The overwhelming majority of judicial districts submitted Statements of Reasons to the Commission for well over 90 percent of their cases sentenced in fiscal year 2001.<sup>68</sup> There are a handful of judicial districts, however, for which the Commission routinely has not received Statements of Reasons. In fiscal year 2001, for example, the Commission did not receive Statements of Reasons for 70.7 percent of the cases sentenced in the Central District of California, 56.5 percent of the cases sentenced in the District of Utah, and 42.1 percent of the cases sentenced in the Eastern District of Virginia. Departure information for a substantial proportion of cases sentenced in those districts, therefore, is missing in the Commission's database, and as a result, the departure rates (for both substantial assistance and nonsubstantial assistance departures) reported in the Commission's Sourcebook of Federal Sentencing Statistics

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<sup>67</sup> USSC 2001 Sourcebook of Federal Sentencing Statistics, tbl 1.

<sup>68</sup> *Id.*

for such judicial districts may be less reliable.<sup>69</sup>

The Commission has taken measures to reduce the number of missing sentencing documents, including sending a letter annually to the courts identifying those cases in which there appear to be missing documents. The Commission generates this list in part by matching cases contained in its database with cases in a database maintained by the Administrative Office of the United States Courts.

## **B. DEPARTURE INFORMATION CONTAINED IN STATEMENT OF REASONS**

Even for cases in which the Statement of Reasons is submitted, the usefulness of the Commission's departure data is directly determined by the specificity and extent of the information set forth in the Statement of Reasons. With respect to departures, ideally the Statement of Reasons would provide information with sufficient specificity to enable a clear understanding of the court's substantive reasons for departing from the guideline sentencing range. Such detailed information not only would assure that departures are properly reported by reason in the Commission's annual Sourcebook of Federal Sentencing Statistics,<sup>70</sup> but also would facilitate the Commission's monitoring and refinement of the guidelines in light of departure decisions.<sup>71</sup>

Although a clear and detailed reason for departure may be expressed by the court elsewhere (*e.g.*, orally at the sentencing hearing), such information often is lacking on the Statement of Reasons. For example, in preparing this report the Commission examined 120 cases sentenced in fiscal year 2001 in which the Statement of Reasons cited "overrepresentation of criminal history" as the reason for downward departure. In only 21 of those 120 cases (17.5%) did the Statement of Reasons specify *how or why* the criminal history score as calculated under the guidelines overrepresented the defendant's criminal history. Similarly, in less than one-third (30.3%) of the 178 cases examined in which the Statement of Reasons cited a "plea agreement" as the reason for departure was the underlying reason specified in either the Statement of Reasons or the plea agreement.<sup>72</sup> Only 51.1 percent of the 223 cases citing "general

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<sup>69</sup> *See id.* at tbl 26, fn. 1.

<sup>70</sup> *See id.* at tbl 24.

<sup>71</sup> *See* USSG, Ch.1, Pt.A (4)(B), intro. comment. (2002) ("By monitoring when courts depart from the guidelines and analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted."); *see also infra* Appendix C, p. C-1 (discussing Commission's data collection).

<sup>72</sup> *See, e.g.*, Letter from Cathy A. Battistelli, Chair, Probation Officers Advisory Group, to Judge Diana E. Murphy, Chair, U.S. Sentencing Commission 1 (Aug. 1, 2003) (regarding public comment on PROTECT Act implementation) stating POAG's belief that more specific information from courts is needed to justify downward departure pursuant to a "plea agreement."

mitigating circumstances” (§5K2.0) specified what those underlying substantive circumstances were.<sup>73</sup> Furthermore, in fiscal year 2001 the Commission received 219 Statements of Reasons that indicated a downward departure was granted but failed to state any reason for the departure.

### **C. PROTECT ACT REMEDIES**

The PROTECT Act establishes new statutory documentation requirements aimed at improving the Commission’s ability to collect and report complete and accurate sentencing data. Section 401(h), entitled “Improved Data Collection,” amended 28 U.S.C. § 994(w) to state:

The Chief Judge of each district shall ensure that, within 30 days following entry of judgment in every criminal case,<sup>74</sup> the sentencing court submits to the Commission a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include –

- (A) the judgment and commitment order;
- (B) the statement of reasons for the sentence (which shall include the reason for any departure from the otherwise applicable guideline range);
- (C) any plea agreement;
- (D) the indictment or other charging document;
- (E) the presentence report; and
- (F) any other information as the Commission finds appropriate.<sup>75</sup>

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<sup>73</sup> See, e.g., Letter from Barry Boss & Jim Felman, Co-chairs, Practitioners’ Advisory Group, to Judge Diana E. Murphy, Chair, U.S. Sentencing Commission 6 (Aug. 4, 2003) (regarding July 1, 2003 Request for Comment (PROTECT Act)) advocating elimination of general mitigating circumstances as basis for downward departure “without a more specific reason or combination of reasons that comply” with revised guidance in USSG §5K2.0.

<sup>74</sup> The Commission, based on discussions with congressional staff, understands that sentencing documentation is required to be submitted only for cases sentenced under the guidelines, and not for petty offenses as defined in 18 U.S.C. § 19 (2003), which is consistent with the statutory requirements prior to enactment of the PROTECT Act.

<sup>75</sup> Pub L. No. 108-21, § 401(h)(1), 117 Stat. 650 (2003). Section 994(w) previously did not contain a 30 day deadline for submission of the documents and did not impose a duty on the Chief Judge of each district to ensure compliance with this section. Additionally, the only document specifically required by statute to be submitted to the Commission prior to the PROTECT Act was a “written report of the sentence.”

Pursuant to the PROTECT Act, on June 17, 2003, the Commission Chair and the Chair of the Criminal Law Committee of the Judicial Conference of the United States issued a joint memorandum to all Chief Judges of United States District Courts, District Court Executives, Clerks of United States District Courts, and Chief Probation Officers, reiterating the new statutory requirements, which require substantially the same documents to be sent as did the prior joint memoranda from the Commission and the Administrative Office of the United States Courts.<sup>76</sup>

The PROTECT Act also requires the Commission to submit to Congress at least annually an “accounting of those districts that it believes have not submitted the appropriate information and documents required by this section.”<sup>77</sup>

The PROTECT Act also amended 18 U.S.C. § 3553(c) (Statement of reasons for imposing a sentence) to require the sentencing court, if imposing a sentence outside the prescribed guideline range, to state “the specific reason” for departing from the guidelines “with specificity in the written order of judgment and commitment . . . .”<sup>78</sup>

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<sup>76</sup> See Memorandum from the Administrative Office of the United States Courts, to All Federal Judges, Clerks, Probation Officers, and Court Reporters (June 17, 2003) (regarding Documentation Required by Congress to be Sent to the Sentencing Commission) [hereinafter the Murphy-Lake Letter]; see also Mecham-Wilkins Letter, *supra* note 65 and Mecham-Conaboy Letter, *supra* note 65 (setting forth documents required to be transferred to the Commission by courts).

<sup>77</sup> Pub. L. No. 108-21, § 401(h)(3), 117 Stat. 650 (2003). Section 401(h)(2) of the PROTECT Act also requires the Commission, upon request, to provide to the House and Senate Committees on the Judiciary “the written reports and all underlying records accompanying those reports described in this section, as well as other records received from the courts.” Concerns have been raised by judges, prosecutors, defense attorneys, and probation officers that this provision has the potential to put sensitive court documents into the public domain. The Commission raises this issue because *ad hoc* responses to this concern risk undermining the congressional intent behind the other provisions of section 401(h) of the PROTECT Act to improve the Commission’s data collection. In its annual report to the Commission required by 28 U.S.C. § 994(o), the Department of Justice recognized similar concerns:

We believe it is critical both that the Commission receive documentation of all cases sentenced under the guidelines and that the confidentiality of sensitive court information be maintained. As to confidentiality, we are especially concerned that making available to the public defendant cooperation agreements may, in certain cases, jeopardize the cooperating defendant as well as law enforcement officers and public safety generally.

Letter from Eric Jaso, Counselor to the Assistant Attorney General of the United States, Department of Justice, to Judge Diana E. Murphy, Chair, United States Sentencing Commission 3–4 (Aug. 1, 2003). The Department of Justice further urged the Commission to work with Congress and others to ensure that the congressional intent of improving the Commission’s data collection is achieved in a manner that appropriately protects confidentiality. *Id.*

<sup>78</sup> Pub. L. No. 108-21, § 401(c)(1), 117 Stat. 650 (2003).

In addition, on September 22, 2003, the Judicial Conference of the United States adopted a more detailed Statement of Reasons that should enhance the sentencing court's ability to provide additional specificity in that document. The Conference's Criminal Law Committee previously had considered and incorporated input from the Commission regarding a revised Statement of Reasons. Use of the new standardized form in all judicial districts also will improve the Commission's ability to collect and report sentencing data, although the Commission has no authority to require its use. The Commission, working with the Administrative Office of the United States Courts and the Federal Judicial Center, is planning to provide greater training and instruction to sentencing courts and court personnel on the importance of using and submitting the standardized, more detailed Statement of Reasons.<sup>79</sup>

Notwithstanding the data collection issues raised in this chapter, the Commission's current sentencing data provide the most complete and reliable information regarding the use of departures available to policy makers. The recent actions taken by the Commission and the Judiciary to improve and standardize sentencing documentation and to increase submissions of such documents to the Commission will advance the overall goals of the PROTECT Act.<sup>80</sup>

The Commission expects that the new statutory requirements enacted by Congress and the courts' responses to them will enhance its ability to collect and report complete and accurate sentencing data. In addition, the greater specificity in the Statement of Reasons will provide the Commission more useful feedback from the courts regarding the operation of the guidelines. As envisioned when the initial guidelines were promulgated, such detailed feedback from the courts will facilitate the Commission's periodic review of the guidelines as required by the Sentencing Reform Act and over time enable it to "create more accurate guidelines that specify precisely where departures should and should not be permitted."<sup>81</sup>

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<sup>79</sup> See Letter from Judge Diana E. Murphy to the General Accounting Office (Oct. 2003) (discussing Commission data collection).

<sup>80</sup> Pub L. No. 108-21, § 401, 117 Stat. 650 (2003).

<sup>81</sup> See USSG, *supra* note 7.

## ANALYSIS OF COMMISSION SENTENCING DATA

This chapter presents findings from the Commission's data analysis of downward departures. In preparing this analysis, the Commission supplemented data from its comprehensive, computerized data collection system described in Chapter 2 (the "Monitoring" database) with additional data specifically collected from sentencing documents to better understand the incidence of downward departures in cases sentenced under the federal guidelines.

This analysis presents trends in rates and reasons cited for downward departures and examines the relationships between trends and caseload composition, offender characteristics, and judicial districts. Findings also are presented from the Commission's special data collection effort that focused on six frequently cited downward departure reasons. A detailed explanation of the methodology used for this analysis is contained in Appendix C.

### A. TRENDS IN DOWNWARD DEPARTURES

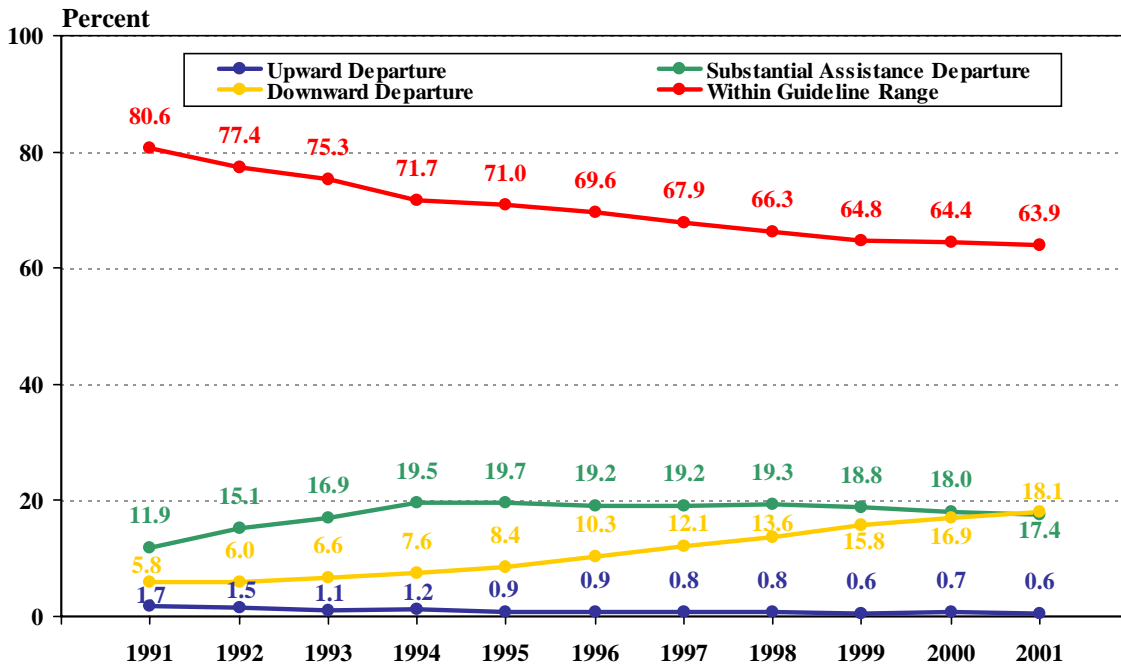
A decreasing majority of cases sentenced under the federal sentencing guidelines were sentenced within the applicable guideline range from fiscal year 1991 (80.6%) to fiscal year 2001 (63.9%).<sup>82</sup> See Figure 1. The decline in the rate of within range sentences has been gradual and primarily is reflected in the corresponding increase in the nonsubstantial assistance downward departure rate. Between fiscal years 1991 and 2001, the downward departure rate increased from 5.8 percent to 18.1 percent, increasing an average of 1.2 percentage points in any given year. Substantial assistance departures, pursuant to section 5K1.1, increased at a slower rate during this time from 11.9 percent to 17.4 percent.

*The data analyses presented in this chapter are for nonsubstantial assistance downward departures only.*

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<sup>82</sup> Data from fiscal years 1991-1998 are from the Commission's Monitoring datafiles. Data from fiscal years 1999-2001, however, are from the Commission's revised fiscal year datafiles. See *infra* Appendix C for further information on the revised datafiles.

**Figure 1**  
**Trends in Departure Status**  
**Fiscal Year 1991-Fiscal Year 2001**



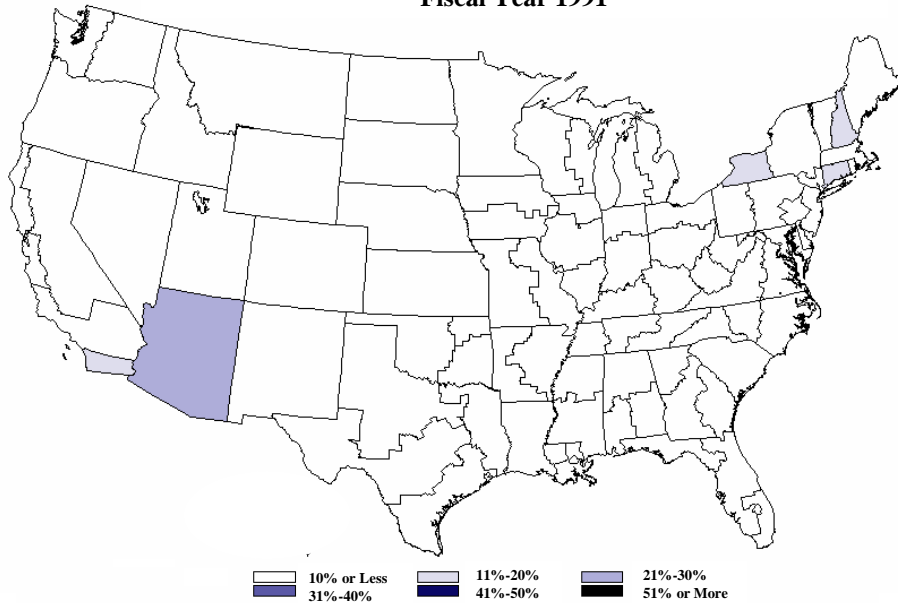
SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

## 1. Judicial Districts

The average rate of downward departures for all 94 federal judicial districts was 18.1 percent in fiscal year 2001. There was, however, wide variation across districts, with downward departure rates ranging that year from 1.4 percent in the Eastern District of Kentucky to 62.6 percent in the District of Arizona.

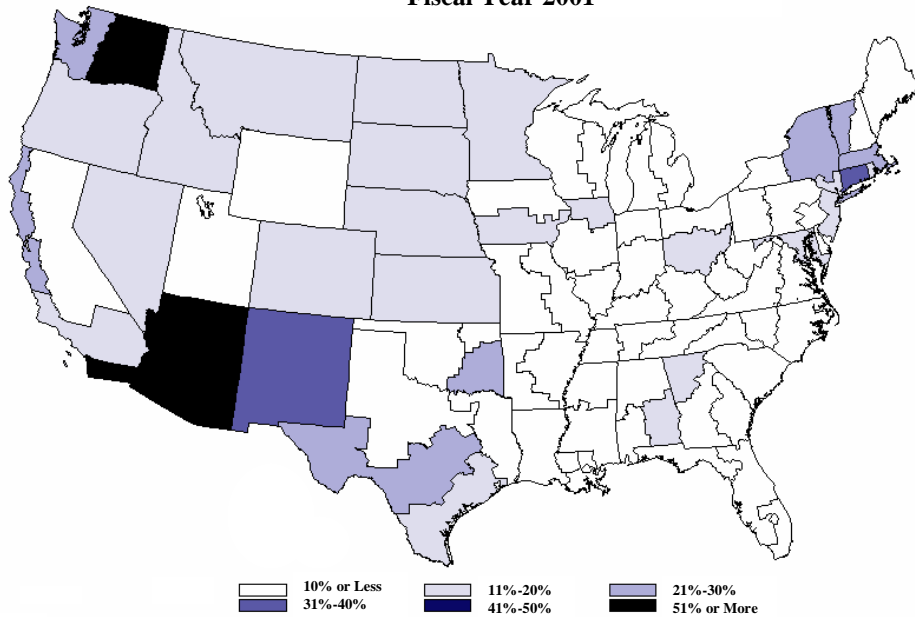
Figure 2 shows the vast majority (94.6%) of federal judicial districts had downward departure rates of 10 percent or less in fiscal year 1991. In 2001, the downward departure rates remained at or below 10 percent in most districts (60.6%), however, 25.5 percent of districts had departure rates between 10 and 20 percent. *See* Figure 3. A small number of districts had much higher downward departure rates by fiscal year 2001. For example, downward departures were granted in more than half of the cases sentenced in the District of Arizona (62.6%), the Eastern District of Washington (51.5%), and the Southern District of California (50.1%).

**Figure 2**  
**Downward Departure Rates by Judicial District**  
**Fiscal Year 1991**



Of the 33,419 cases, 553 cases with no analogous guidelines were excluded. Of the remaining 32,866 cases, 1,099 were excluded due to missing departure information.  
 SOURCE: U.S. Sentencing Commission 1991 Datafile, USSCFY1991.

**Figure 3**  
**Downward Departure Rates by Judicial District**  
**Fiscal Year 2001**



Of the 59,897 cases, 332 cases with no analogous guidelines were excluded. Of the remaining 59,565 cases, 4,461 were excluded due to missing departure information.  
 SOURCE: U.S. Sentencing Commission Revised 2001 Datafile, NEWUSSCFY2001.

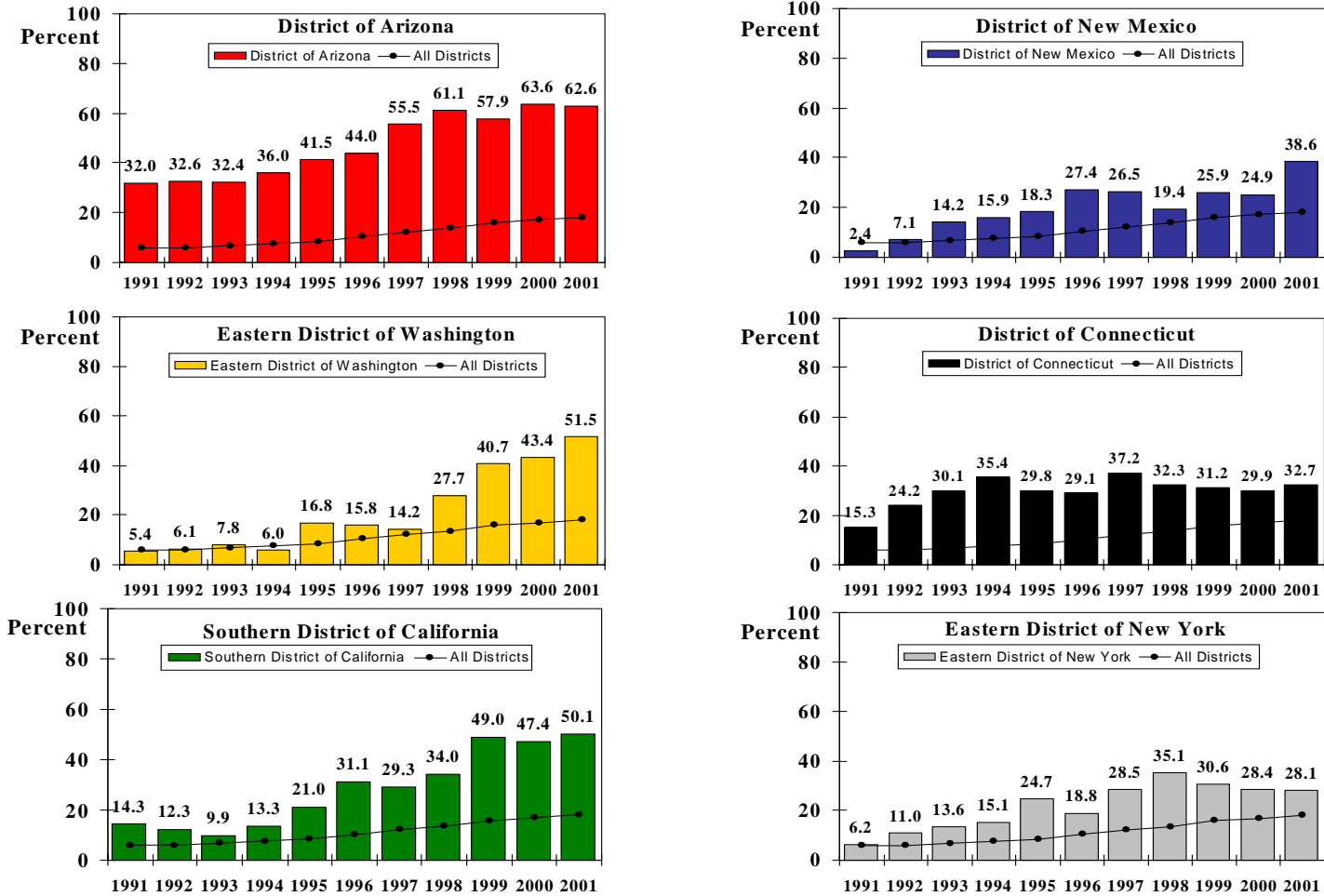
Districts classified as having relatively high downward departure rates, and districts having relatively low downward departure rates generally remain in those categories from year to year. Figure 4 shows trends for the six districts with the highest downward departure rates in fiscal year 2001. These six districts together accounted for 47.3 percent of all downward departures granted in fiscal year 2001. From 1991 to 2001, two of these districts, Arizona and Connecticut, consistently had high downward departure rates, averaging 52 percent and 33 percent, respectively. Downward departure rates varied, however, in the other high rate districts of Eastern Washington, Southern California, New Mexico, and Eastern New York during the same period.

Districts with the lowest downward departure rates show even greater consistency over time. Downward departure rates between fiscal years 1991 and 2001 consistently have been less than ten percent for the six districts with the lowest downward departure rates (Eastern Kentucky, South Carolina, Western Virginia, Maine, Western Arkansas, and Southern West Virginia).<sup>83</sup> See Figure 5.

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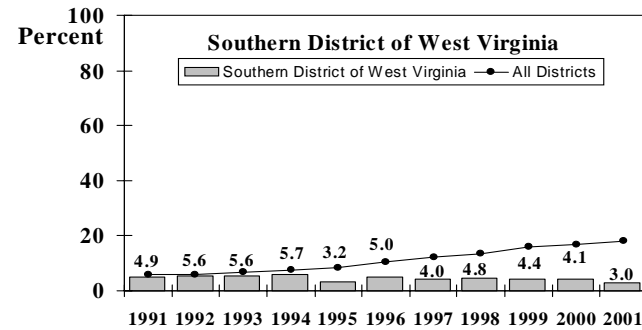
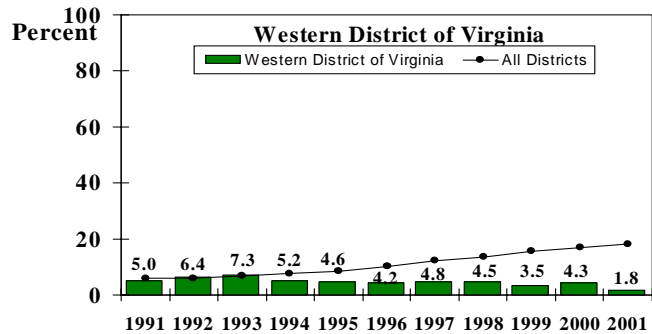
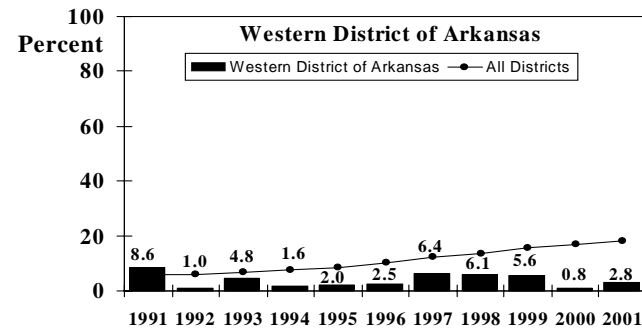
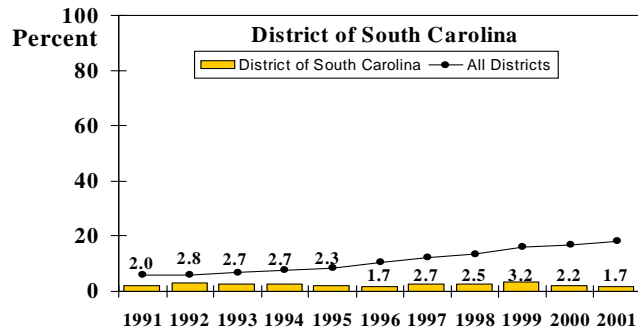
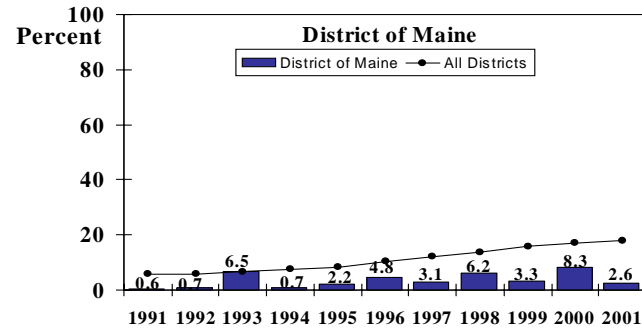
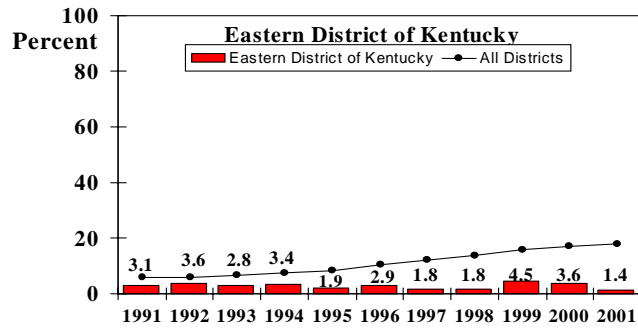
<sup>83</sup> Due to their very small caseloads, the districts of Guam and the Northern Mariana Islands (80 cases and 15 cases, respectively, in fiscal year 2001) were excluded from the analysis for Figures 4 and 5. Their downward departure rates were 1.4 percent and 0.0 percent, respectively, in fiscal year 2001.

**Figure 4**  
**Trends in Districts with Relatively High Downward Departure Rates**  
**Fiscal Year 1991-Fiscal Year 2001**



SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

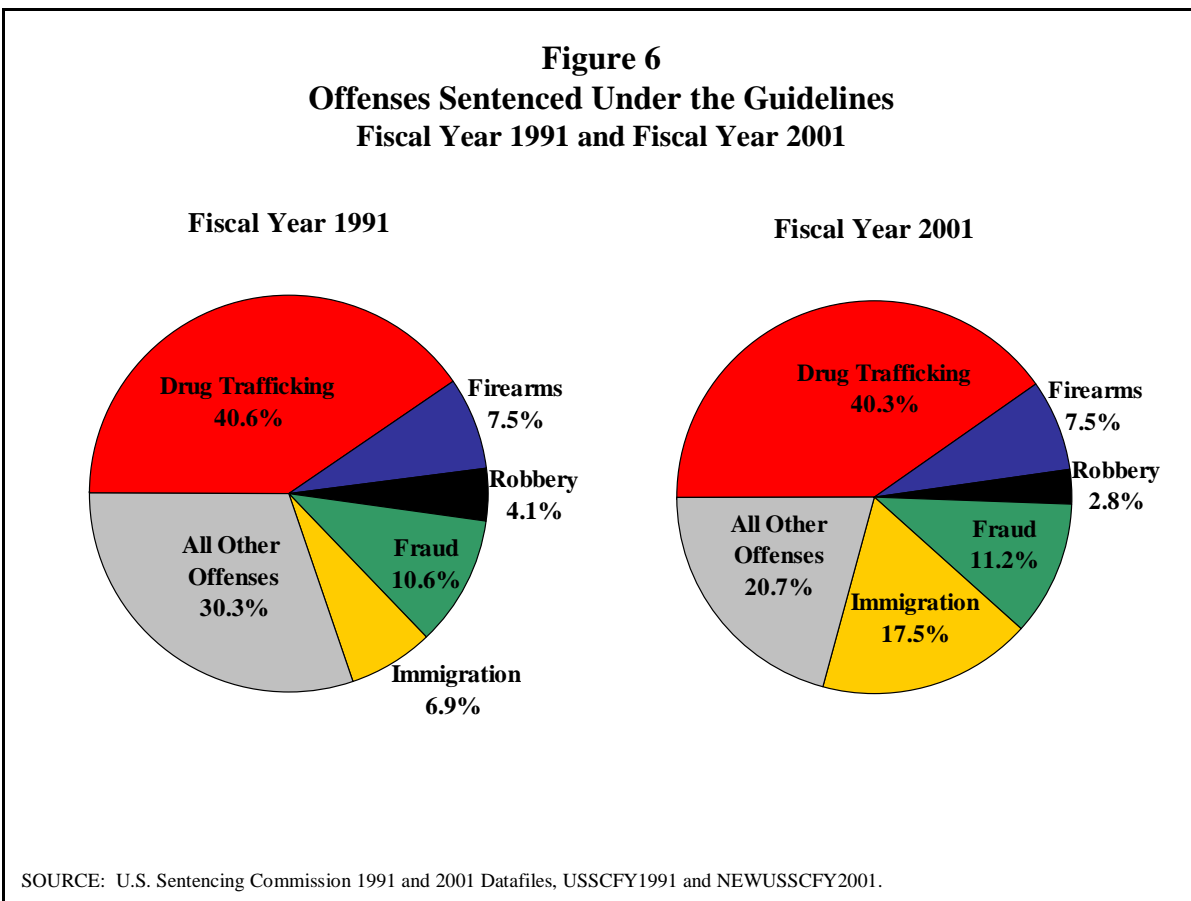
**Figure 5**  
**Trends in Districts with Relatively Low Downward Departure Rates**  
**Fiscal Year 1991-Fiscal Year 2001**



SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

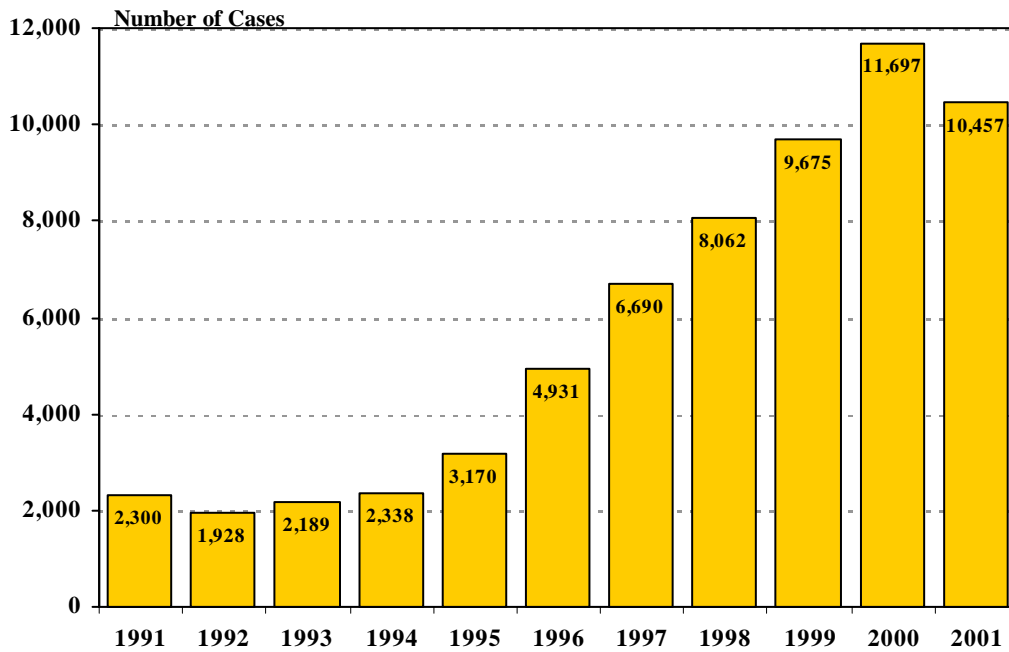
## 2. Offense Type

Figure 6 shows that the composition of offense types sentenced under the federal guidelines generally has been consistent over time. Drug trafficking, fraud, and firearms offenses combined accounted for approximately the same proportion of all offenses in both fiscal years 1991 (58.7%) and 2001 (59%). The proportion of immigration offenses, however, more than doubled during that period, increasing from 6.9 percent in fiscal year 1991 to 17.5 percent in fiscal year 2001.<sup>84</sup> Figure 7 depicts the growth in the absolute number of immigration offenses sentenced under the guidelines over the relevant period. By fiscal year 2001, 10,457 immigration offenses were sentenced under the guidelines compared to 2,300 in fiscal year 1991.



<sup>84</sup> This increase in immigration offenses corresponded with moderate decreases in other offense types. For example, the proportion of robbery, larceny, embezzlement, and simple drug possession offenses declined by a few percentage points during this period.

**Figure 7**  
**Trend in Immigration Offenses Sentenced Under the Guidelines**  
**Fiscal Year 1991-Fiscal Year 2001**



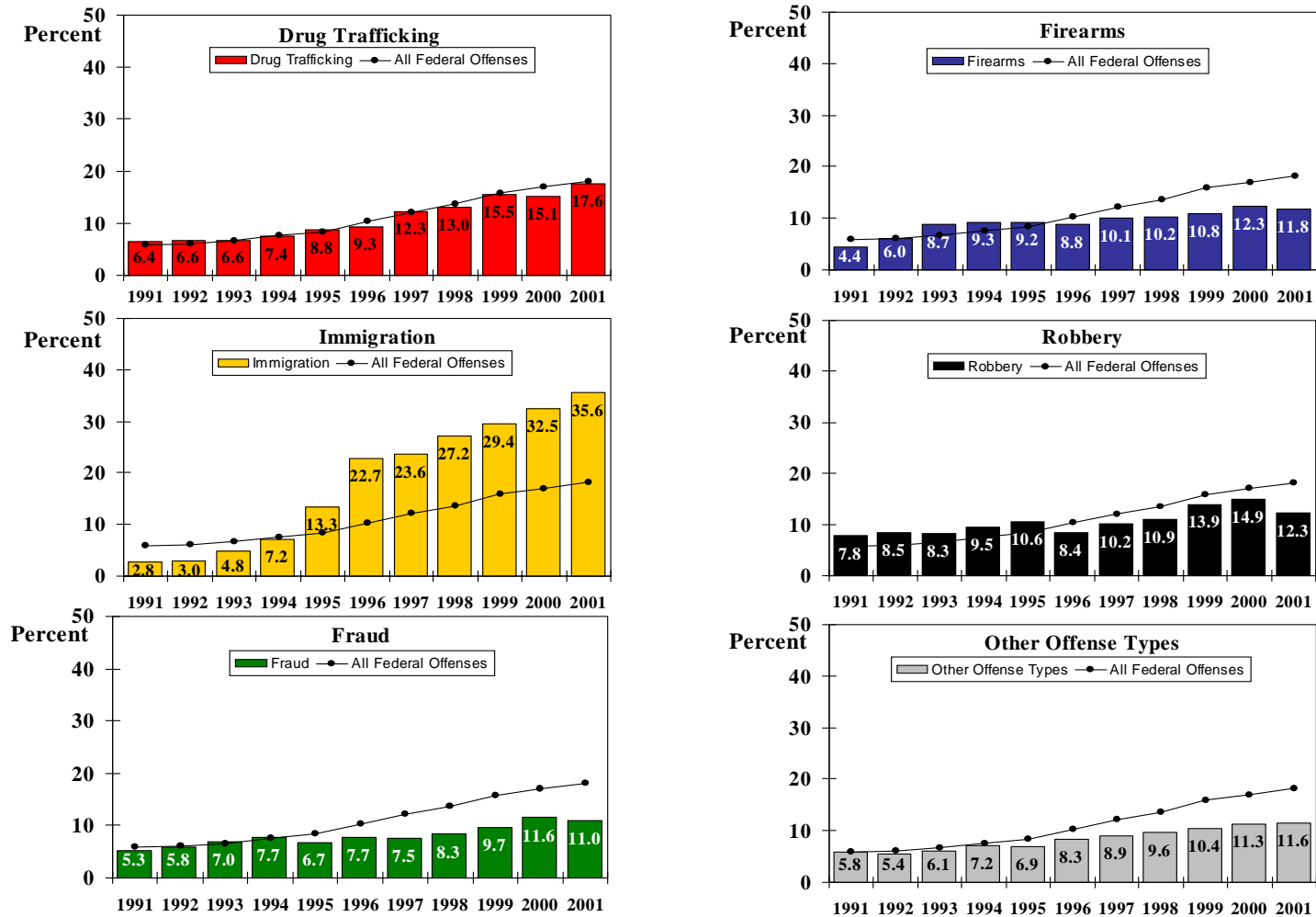
SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

Downward departure rates increased for nearly all offense types between fiscal years 1991 and 2001, but to varying degrees. Figure 8 shows the trends in downward departure rates for each of the five major offense categories between fiscal years 1991 and 2001.<sup>85</sup> While the number of immigration offenses increased at a faster rate than the overall federal caseload, the downward departure rate for immigration offenses accelerated much faster than rates for other offense types. While downward departure rates approximately doubled for most offenses and nearly tripled for drug trafficking offenses, downward departure rates for immigration offenses increased by *1,171 percent*.

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<sup>85</sup> These five offense categories accounted for 69.8 percent of all federal guidelines cases in fiscal year 1991 and 79.2 percent in 2001.

**Figure 8**  
**Trends in Downward Departure Rates for Selected Offense Types**  
**Fiscal Year 1991-Fiscal Year 2001**

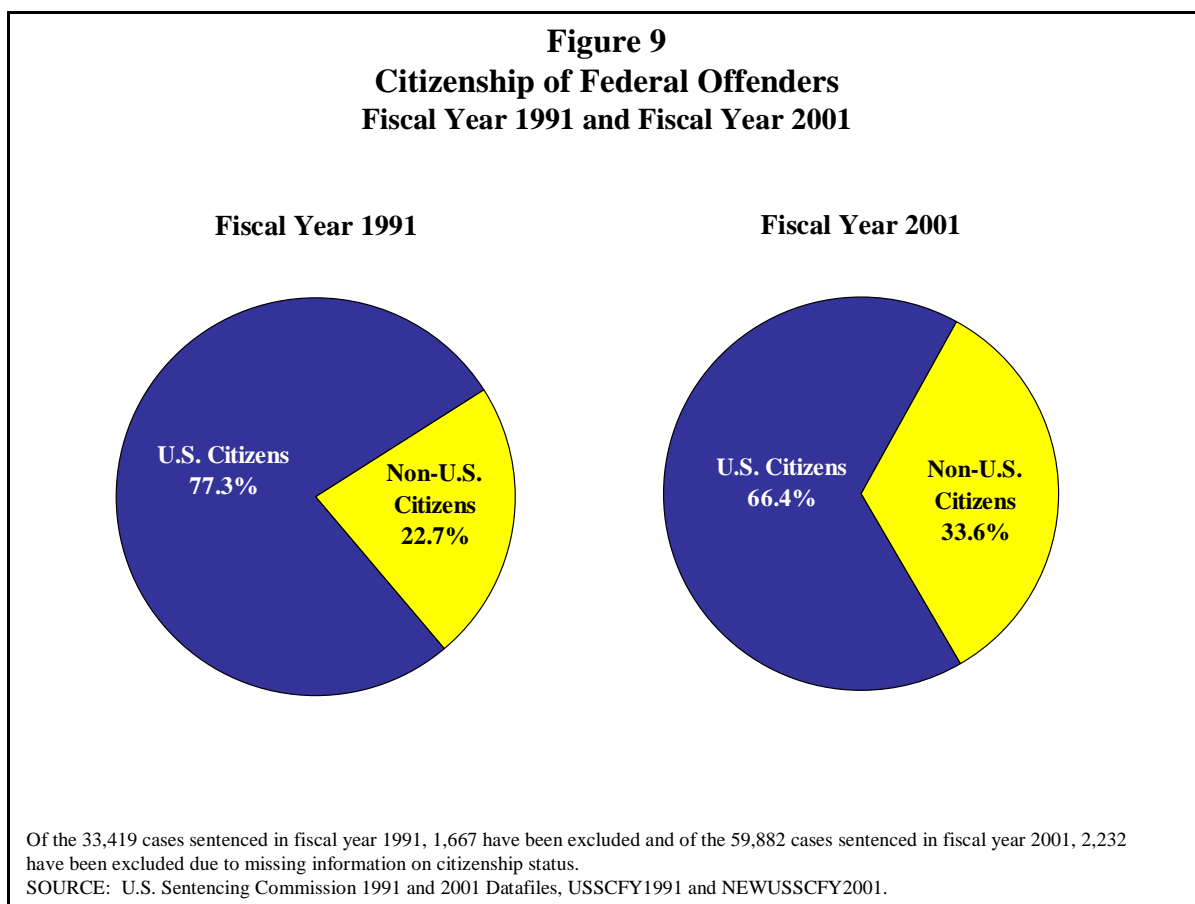


SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

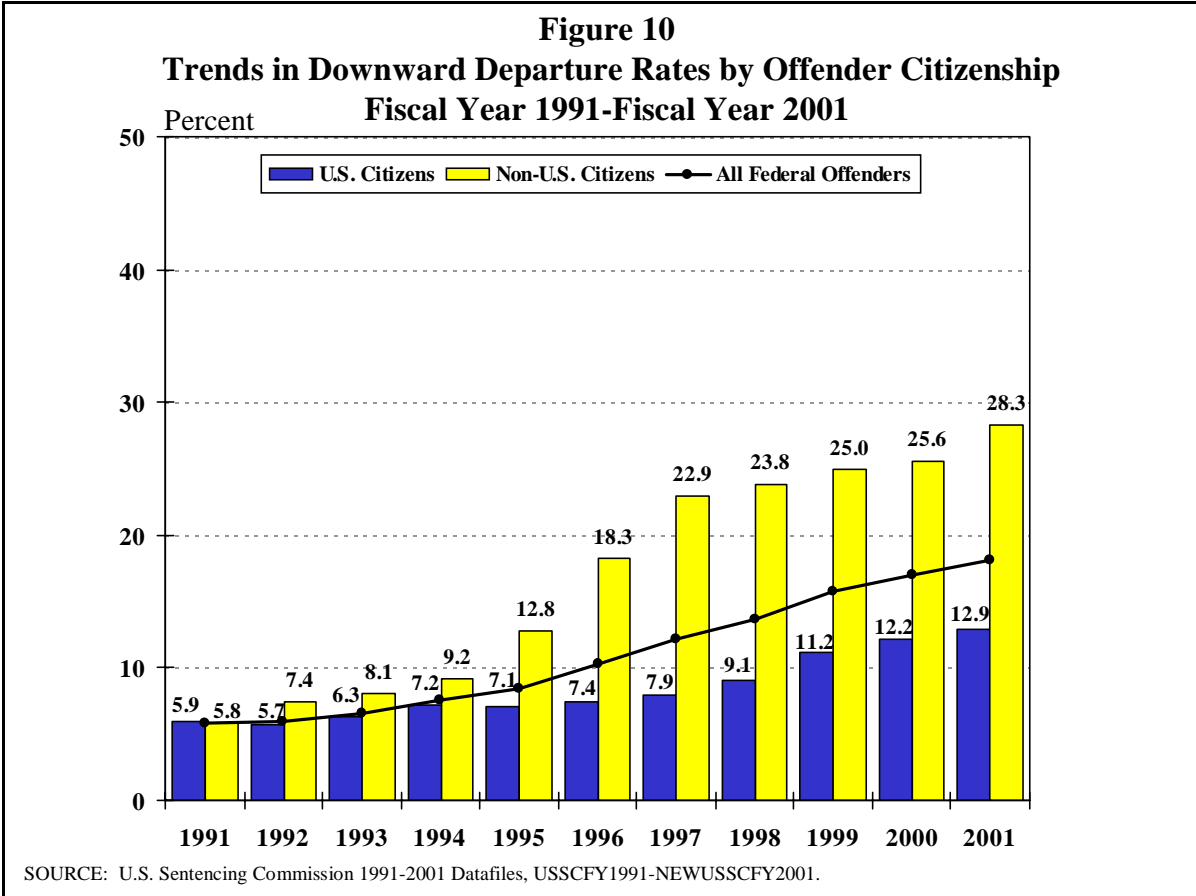
The corresponding increases in both the number of immigration cases and their downward departure rate combined to result in immigration offenses accounting for a steadily increasing proportion of all downward departures. In 1991, downward departures for immigration offenses accounted for about three percent (60 of 1,833) of all downward departures. By 2001, however, downward departures for immigration offenses accounted for one-third (3,310 of 9,972) of all downward departures.

### 3. Citizenship

As would be expected given the increasing number of federal immigration offenses, the proportion of non-U.S. citizens sentenced under the federal guidelines also increased between 1991 and 2001. Non-U.S. citizens accounted for 33.6 percent of all federal offenders sentenced under the guidelines in fiscal year 2001, an almost 50 percent increase from 22.7 percent in 1991. See Figure 9.



This increase is important in light of the different trends in downward departure rates for U.S. citizen and non-U.S. citizen offenders. While the downward departure rate for U.S. citizens increased gradually, from 5.9 percent to 12.9 percent, the rate for non-U.S. citizens increased from 5.8 percent to 28.3 percent between 1991 and 2001, a five-fold increase. See Figure 10.



#### 4. Downward Departure Reasons

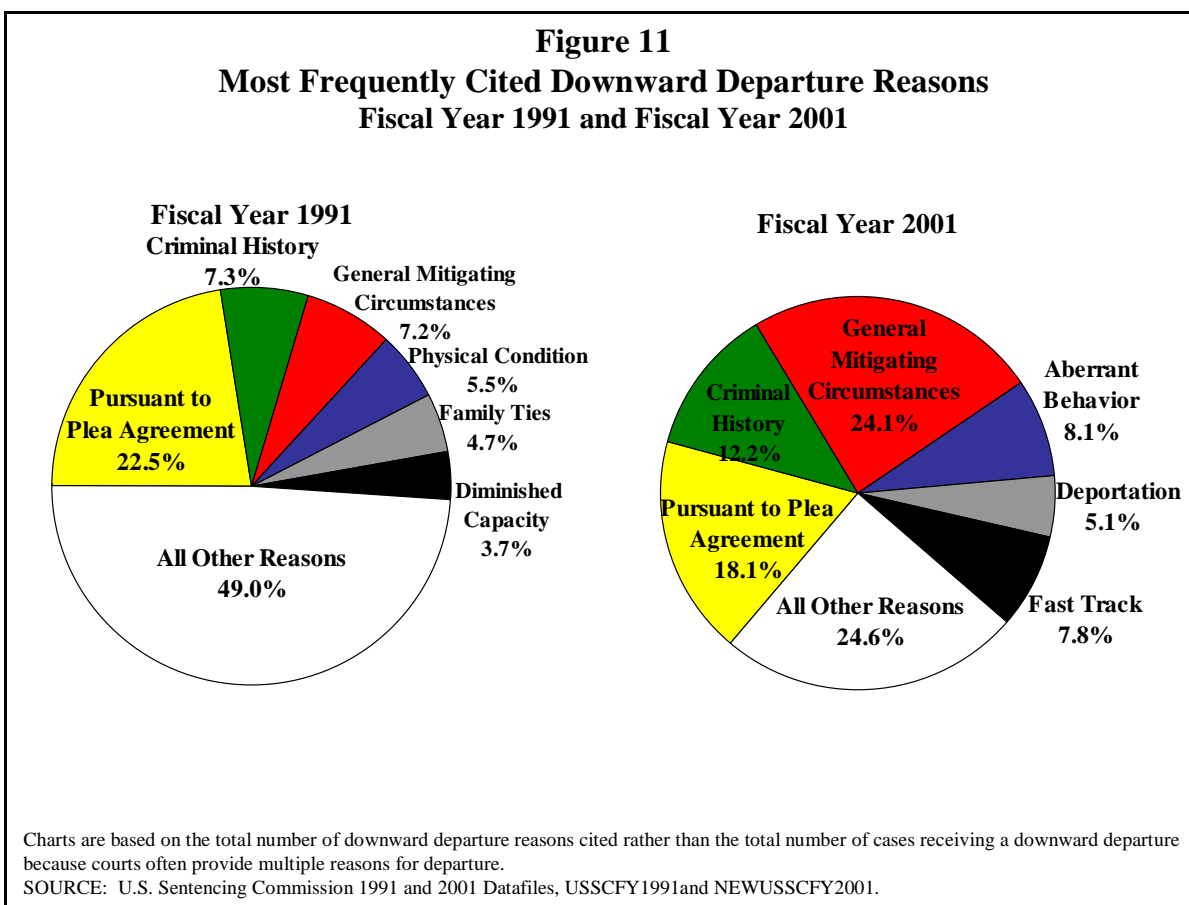
Historically, a small number of reasons have accounted for the majority of downward departure reasons.<sup>86</sup> The specific mix of those reasons, however, changed substantially between 1991 and 2001.<sup>87</sup> In fiscal year 1991, six downward departure reasons accounted for half (51.0%)

<sup>86</sup> Because courts often cite multiple departure reasons in a single case, statistics for individual downward departure reasons are reported as a percentage of all downward departure reasons rather than all downward departure cases. For example, the 9,972 downward departure cases cited 10,814 reasons in fiscal year 2001.

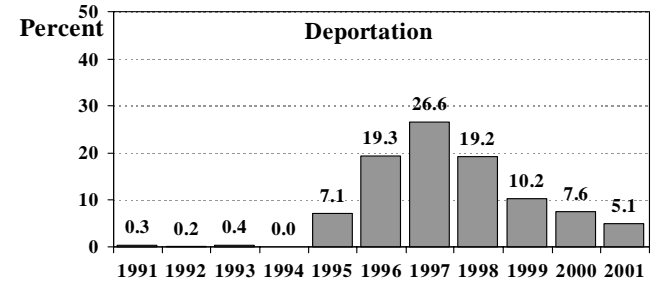
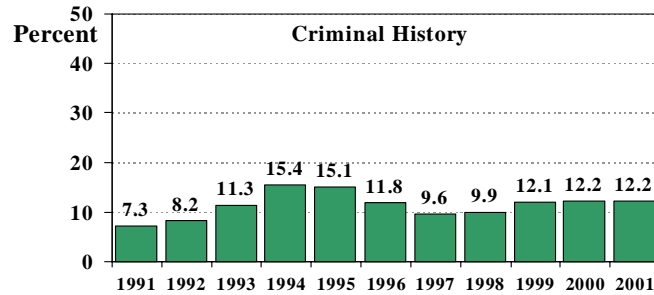
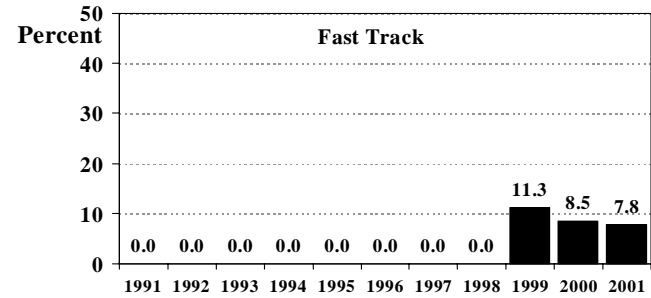
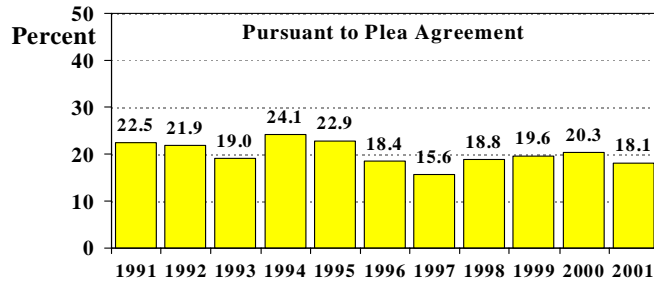
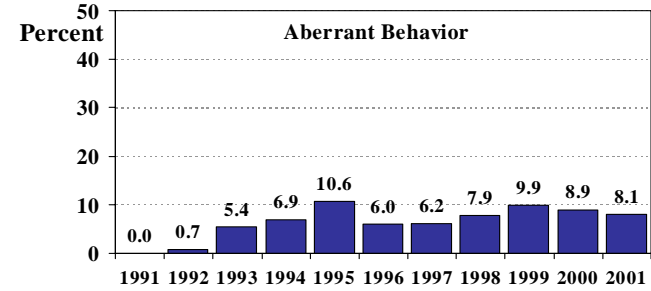
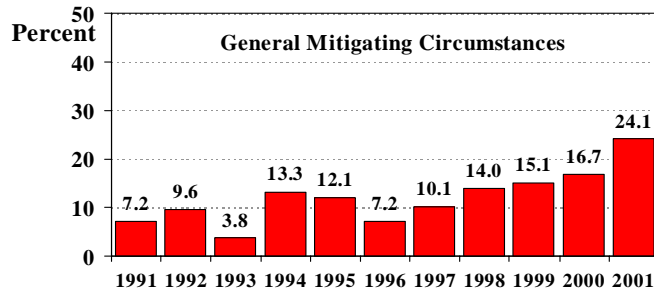
<sup>87</sup> The fiscal year 2001 downward departure reason data is from the revised datafile. See *infra* Appendix C for more information.

of all reasons cited: Pursuant to plea agreement (22.5%), overrepresentation of criminal history (7.3%), general mitigating circumstances (7.2%), physical condition (5.5%), family ties and responsibilities (4.7%), and diminished capacity (3.7%).

Six reasons accounted for three-quarters of all downward departure reasons in fiscal year 2001, but only three of the reasons cited in 1991 continued their relative prominence a decade later. Plea agreement, criminal history, and general mitigating circumstances continue to account for more than half (54.4%) of all downward departure reasons cited, but by 2001 three different downward departure reasons rounded out the six most frequently cited reasons: aberrant behavior (8.1%), fast track (7.8%), and deportation (5.1%). See Figure 11. Usage trends for these six downward departure reasons appear in Figure 12.



**Figure 12**  
**Trends in Most Frequently Cited Downward Departure Reasons**  
**Fiscal Year 1991- Fiscal Year 2001**



SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

The significance of the changing mix of downward departure reasons is their interrelationship with high departure rate districts and offense types. In order to understand the factors considered by the court when citing these frequently cited reasons, the Commission undertook an empirical study of court documents. Results of that review are presented in the following section.

## **B. ANALYSIS OF DOWNWARD DEPARTURE REASONS**

To complement the preceding analysis, the Commission reviewed sentencing documents and collected additional information from a random sample of cases that received downward departures. The Commission reviewed a ten percent sample of each of six frequently cited downward departure reasons (more than 600 downward departure cases): general mitigating circumstances, pursuant to plea agreement, criminal history, aberrant behavior, family ties and responsibilities, and diminished capacity.

Findings from the analysis of cases citing these six departure reasons, as well as information about departures citing fast track and deportation, are described below and underscore the concentration of downward departures in a small number of districts and offense types.

### **1. Fast Track**

Cases that specifically cited fast track on the Statement of Reasons accounted for 7.8 percent of all downward departure reasons in fiscal year 2001. The Commission did not review a sample of downward departure cases citing fast track because existing data and anecdotal evidence indicated that fast track departures operate similarly to the early disposition programs outlined by Congress in the PROTECT Act and the criteria for authorization of early disposition or “fast track” policies included in the Attorney General’s September 22, 2003 memorandum.<sup>88</sup>

Cases citing fast track as a reason for departure are almost exclusive to the Southern District of California, which accounted for 92.4 percent of departures for this reason in fiscal year 2001. The overwhelming majority, 81.6 percent, of fast track departures involved drug trafficking offenses. Non-U.S. citizens accounted for 58.2 percent of offenders granted fast track departures, a rate nearly two times greater than their proportion in the federal offender population (33.6%).

### **2. Deportation**

Cases that specifically cited agreement to deportation on the Statement of Reasons comprised 5.1 percent of all downward departure reasons in fiscal year 2001. The Commission did not include cases with these departures in its sample because, similar to fast track, downward

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<sup>88</sup> Ashcroft Fast Track Memo, *supra* note 50 .

departures for deportation seem to be related to early disposition programs and subject to the criteria outlined in the Attorney General's September 22, 2003 memorandum.<sup>89</sup> The Districts of Arizona (55.9%) and Eastern Washington (16.8%) granted 72.7 percent of deportation departures in fiscal year 2001. The overwhelming majority (84.3%) of deportation departures involved immigration offenses. Drug trafficking offenses, however, accounted for nearly all of the remaining (13.2%) offenses.

### **3. General Mitigating Circumstances (§5K2.0)**

General mitigating circumstances accounted for 24.1 percent of all downward departure reasons cited in fiscal year 2001. More than half (59.3%) of the cases citing general mitigating circumstances were sentenced in three districts on the southwest border of the United States, the Districts of Southern California (24.9%), Western Texas (24.6%), and Arizona (9.8%). Drug trafficking (43.2%) and immigration offenses (32.3%) comprised three-quarters of the offenses receiving downward departures for general mitigating circumstances. Non-U.S. citizens accounted for slightly more than half (50.9%) of offenders with downward departures for this reason.<sup>90</sup>

The Commission's analysis of the general mitigating circumstances departure sample attempted to discern the specific substantive factor the court found mitigating in each case.<sup>91</sup> Figure 13 shows that the specific mitigating factor, however, was documented in only half (51.1%) of the sample cases. When case documentation did indicate the substantive mitigating factors considered by the court, nearly half (48.3%) identified factors relating to departures initiated by the government (*e.g.*, early plea, deportation, procedural waivers, fast track, etc.). An additional 40.3 percent of the general mitigating circumstances departure sample cited departure factors identified elsewhere in the *Guidelines Manual* (*e.g.*, family ties, aberrant behavior, mental and emotional conditions, etc.). The mitigating factors in the remaining 11.4 percent were unique to the specific case and not mentioned elsewhere in the guidelines as grounds for downward departure.

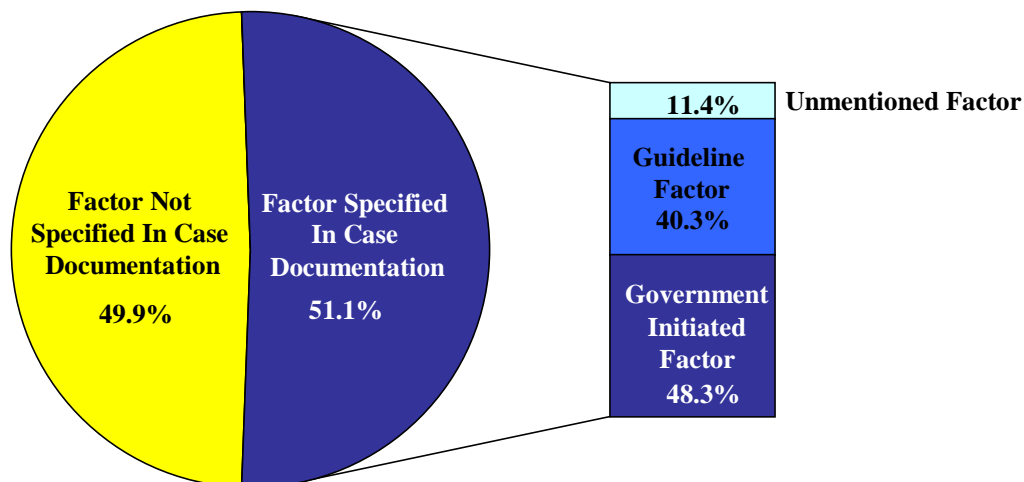
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<sup>89</sup> *Id.*

<sup>90</sup> Non-U.S. citizens also accounted for more than half (54%) of the drug trafficking offenders granted downward departures for general mitigating circumstances in these three districts.

<sup>91</sup> The ten percent sample of general mitigating circumstances departures consisted of 223 cases.

**Figure 13**  
**Factors Underlying General Mitigating Circumstances Departures**  
**2001 Downward Departure Sample**



The pie chart represents the 223 downward departure cases coded for the general mitigating circumstances sample.  
 SOURCE: U.S. Sentencing Commission 2001 Departure Sample.

#### **4. Pursuant to Plea Agreement**

Pursuant to plea agreement comprised 18.1 percent of all downward departure reasons cited in fiscal year 2001. Two southwest border districts, Arizona (54.3%) and New Mexico (21.9%), accounted for more than three-quarters of plea agreement departures. Immigration (52.4%) and drug trafficking (34.7%) comprised 87 percent of offenses citing this downward departure reason, and the offenders were predominantly (72.1%) non-U.S. citizens.

The overwhelming majority (91.2%) of plea agreements in the sample<sup>92</sup> involved agreements pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C).<sup>93</sup> In these binding plea agreements, the government typically agreed to either a specific sentence or guideline range, or the applicability of a particular guideline provision or sentencing factor.

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<sup>92</sup> The ten percent sample of downward departures pursuant to plea agreement consisted of 178 cases.

<sup>93</sup> Rule 11(e)(1)(C) was redesignated as Rule 11(c)(1)(C) in 2002.

In a substantial majority (69.7%) of the plea agreement cases neither the Statement of Reasons nor the plea document indicated an underlying reason for the departure. Among the less than one-third (30.3%) of the plea agreement cases that did specify an underlying reason for the downward departure, stipulation to a particular criminal history category was the most common (44.1%). Two factors beneficial to the government, stipulation to deportation and prompt plea/savings to the government, combined to account for 22 percent of the reasons underlying departures pursuant to plea agreements. *See* Table 1.

**Table 1**  
**Underlying Reasons for Downward Departures**  
**Citing Pursuant to Plea Agreement**

Criminal History	44.1%
Combination of Factors	14.4%
Deportation	12.7%
Role in the Offense	10.2%
Prompt Plea/Savings to the Government	9.3%
Other Reasons	9.3%

SOURCE: U.S. Sentencing Commission 2001 Downward Departure Sample.

## 5. Criminal History (§4A1.3)

Overrepresentation of criminal history category<sup>94</sup> accounted for 12.2 percent of all downward departure reasons in fiscal year 2001. Criminal history departures were evenly distributed across judicial districts. Drug trafficking (36.9%) and immigration offenses (29.8%) comprised two-thirds of the criminal history related downward departures. Non-U.S. citizens accounted for 36.9 percent of offenders with criminal history departures, similar to their proportion in the federal offender population (33.6%).

Offenders who received criminal history departures were indistinguishable from other

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<sup>94</sup> Section 4A1.3 (Adequacy of Criminal History) provides that a downward departure may be warranted in a case in which the court concludes that “a defendant’s criminal history category significantly overrepresents the seriousness of a defendant’s criminal history or the likelihood that the defendant will commit further crimes.”

federal offenders in terms of guideline criminal history factors. Excluding offenders in criminal history Category I,<sup>95</sup> the distribution of offenders who received criminal history departures across criminal history categories was similar to the distribution of other federal offenders. *See* Table 2. Offenders receiving criminal history departures were slightly underrepresented in the lower categories and slightly overrepresented in the higher categories. Both groups of offenders also received additional criminal history points at the same rate for commission of the instant offense while under any criminal justice sentence (USSG §4A1.1(d)), commission of the instant offense less than two years after a counted imprisonment sentence (USSG §4A1.1(e)), and uncounted prior violent offenses (USSG §4A1.1(f)).

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<sup>95</sup> Pursuant to §4A1.3(e), downward departures below the lower limit of the guideline range on the basis of the adequacy of criminal history categorically are not permitted for offenders in criminal history Category I.

**Table 2**  
**Comparison of Guideline Criminal History Factors For Offenders with Criminal**  
**History Downward Departures and All Other Federal Offenders**  
**(Criminal History Category I Excluded)**

<b>Criminal History Category</b>	<b>Offenders With Criminal History Departures</b>	<b>All Other Federal Offenders</b>
II	15.1%	22.8%
III	28.2%	29.9%
IV	19.7%	17.9%
V	13.7%	10.3%
VI	23.3%	19.1%
<b>Additional Criminal History Points</b>		
Criminal Justice Sentence §4A1.1(d)	35.4%	31.8%
Recency of Other Conduct §4A1.1(e)	7.2%	7.3%
Prior Violent Offense §4A1.1(f)	0.1%	0.1%
Combination of Any Above Reasons	26.8%	24.4%

SOURCE: U.S. Sentencing Commission 2001 Datafile, NEWUSSCFY2001.

Analysis of the criminal history departure sample<sup>96</sup> attempted to identify the specific components of the criminal history computation that the court determined warranted departure.<sup>97</sup> The courts provided sufficiently specific information on the Statement of Reasons to permit such an analysis in only 17.5 percent of the sample. Among this small subgroup, approximately 90 percent of the prior offenses involved drug trafficking or immigration. Reasons cited for their exclusion included age of the conviction, drug possession without intent to distribute, and the effect of the career offender provision.

<sup>96</sup> The ten percent sample of criminal history departures consisted of 120 cases.

<sup>97</sup> The Commission currently is conducting an extensive research project on recidivism among federal offenders. This analysis will address in detail computation of criminal history categories under the guidelines and the utility of different aspects of criminal history in predicting future criminal behavior.

In contrast, courts specified the new criminal history category deemed applicable after departure in the majority (79.2%) of the criminal history sample. A reduction of one criminal history category was the most common (75.8%). Twenty-one percent of criminal history departures exceeded a single category.<sup>98</sup>

## **6. Aberrant Behavior (§5K2.20)**

Aberrant behavior accounted for approximately eight percent of all downward departure reasons cited in fiscal year 2001. More than half of aberrant behavior departures were granted in two southwest border districts, Southern California (36.7%) and Arizona (19.3%). Slightly more than half (58.2%) were for drug trafficking offenses and involved non-U.S. citizens (54.1%).

Sixty-five percent of the offenders in the aberrant behavior departure sample<sup>99</sup> were sentenced using the *Guidelines Manual* in effect on or after November 1, 2000 and, therefore, received the departure pursuant to §5K2.20.<sup>100</sup> The case review indicates that, as one would expect, none of the cases involved the exclusionary criteria of serious bodily injury, firearm use, or a serious drug trafficking offense, as then defined in §5K2.20. Furthermore, none of the offenders had a prior federal or state felony conviction, but two of the cases in the sample had more than one criminal history point, as determined in Chapter Four (Criminal History and Criminal Livelihood). In both of these cases the court found that criminal history overrepresented the seriousness of the offender's conduct. Case documentation indicated that most offenses involved minimal, if any, planning (95.9%).

## **7. Family Ties and Responsibilities (§5H1.6)**

In fiscal year 2001, family ties and responsibilities comprised nearly four percent of all downward departure reasons cited.<sup>101</sup> The Eastern District of New York had the largest proportion (21.9%) of family ties departures. Drug trafficking (34.5%) and fraud offenses (17.9%) accounted for slightly more than half of such departures. Female offenders accounted for a substantial proportion (40.6%) of family ties and responsibilities departures, a proportion nearly three times greater than the federal female offender population. The family ties and

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<sup>98</sup> The remaining 3.2 percent (three cases) of criminal history departures received offense level reductions rather than criminal history category reductions.

<sup>99</sup> The ten percent sample of aberrant behavior departures consisted of 72 cases.

<sup>100</sup> Case reviews indicate that the terms "aberrant behavior" and "isolated incident" historically had been used to address similar offender circumstances prior to the promulgation of the aberrant behavior departure. Fiscal year 2001 is the first available data regarding the new departure provision.

<sup>101</sup> Although community ties was part of §5H1.6 (Family Ties & Responsibilities), it typically has been cited separately on Statements of Reasons and collected as a separate reason in the Commission's data collection process. Community ties accounted for 0.2 percent of all downward departure reasons in fiscal year 2001.

responsibilities departures received by non-U.S. citizens (31.2%) is virtually identical to the proportion of the overall federal offender population (33.6%).

Almost all (90%) of offenders in the family ties departure sample<sup>102</sup> provided caregiving and/or financial support to family members. Nearly two-thirds (61.9%) of these offenders, however, were not the sole provider of such support to dependents.

## **8. Diminished Capacity (§5K2.13)**

Diminished capacity accounted for 2.6 percent of all downward departure reasons cited in fiscal year 2001. The majority (81.4%) of offenders who received sentence reductions for this reason were U.S. citizens, and close to one-third (29.1%) were female (twice the proportion of female offenders in the federal population). The distributions of both offense type and judicial district were substantially similar to their distributions in the federal caseload.

Case documentation for all of the diminished capacity departures reviewed in the sample specified the offender's reduced mental capacity.<sup>103</sup> The majority (77.3%) of offenders who received diminished capacity departures had chronic, severe mental illnesses such as schizophrenia, depression, and bipolar disorder. The remaining 22.7 percent had low intelligence quotients. Although case documentation clearly specified diagnoses for these offenders, the link, if any, between the diagnosis and the offense conduct was rarely documented.

## **9. Chapter Two Departures**

Application notes in ten Chapter Two guidelines provide downward departure reasons relevant to those offense guidelines.<sup>104</sup> These departure reasons are rarely cited, and the most frequently cited Chapter Two departures recently either have been deleted from the guidelines or amended.

In fiscal year 2001, the most frequently cited Chapter Two departure reason, Application Note 5 in §2L1.2 (Unlawfully Entering or Remaining in the United States), accounted for one

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<sup>102</sup> The ten percent sample of family ties departures consisted of 42 cases.

<sup>103</sup> The ten percent sample of diminished capacity departures consisted of 27 cases.

<sup>104</sup> §2A1.1 (First Degree Murder); §2A3.4 (Abusive Sexual Conduct); §2B1.1 (Theft, Property Destruction, Fraud); §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking in Drugs); §2D1.7 (Unlawful Sale or Transportation of Drug Paraphernalia; Attempt or Conspiracy); §2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government); §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated License); §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury); §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product); §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification).

percent of all downward departure reasons. This application note provided that downward departures may be warranted for an offender receiving the 16 level sentence enhancement for a prior conviction for an aggravated felony if (1) the prior offense (excluding violent and firearms offenses) was a single instance and (2) the defendant received a sentence of no more than one year for the prior offense. This downward departure provision was deleted from section 2L1.2 as part of an amendment rewriting the guideline effective November 1, 2001, and as a result, this ground for departure should not be cited in the future.

Downward departures citing §2F1.1 (Fraud and Deceit; Forgery), Application Note 8(b) (relating to the amount of loss overstating the seriousness of the defendant's conduct), accounted for 0.2 percent of all downward departure reasons cited in fiscal year 2001. The consolidation of the theft and fraud guidelines, part of the Commission's Economic Crimes Package effective November 1, 2001, substantially restructured the departure provisions for these offenses. The consolidated guideline includes a list of seven upward departure considerations at §2B1.1 (Theft, Property Destruction and Fraud), Application Note 15(A), and one downward departure consideration at Application Note 15(B), stating that a downward departure may be warranted in "cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense." This change in the downward departure provision, combined with other elements of the consolidation (*e.g.*, amendments to the loss definition), may have some impact on downward departures for cases sentenced under the new guideline.

Downward departures citing §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce), Application Note 4 (negligent record keeping), and §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), Application Note 5 (low risk of endangering public health), combined to account for a mere 0.07 percent of all downward departure reasons cited in fiscal year 2001.

## CONTRIBUTIONS TO THE INCREASING RATE OF CASES SENTENCED BELOW THE GUIDELINE RANGE

The preceding chapter demonstrates that the downward departure rate has increased measurably from fiscal year 1991 to fiscal year 2001. During Congress's consideration of the PROTECT Act, several reasons were cited as causes for the increased departure rate. This chapter discusses some of those reasons cited as contributing to the increased use of downward departures.

### A. APPELLATE REVIEW OF SENTENCES

One of the concerns expressed by Congress in enacting the PROTECT Act is that sentencing courts are exercising their authority to depart inappropriately, thereby contributing to the increasing departure rate.<sup>105</sup> Some members of Congress suggested that the increased departure rate reflected excessive leniency and less rigorous adherence to the guidelines on the part of sentencing courts.<sup>106</sup>

By statute, sentencing courts can depart from the guideline sentencing range only in cases in which the “court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”<sup>107</sup> Evaluating whether sentencing courts adhere to this statutory standard is a very complicated inquiry.

The Commission's data collection is designed to reveal national trends and statistics, but is not well suited to assess the appropriateness of departures in particular cases. As described in Chapter 2, the Commission relies solely on the Statement of Reasons to collect departure information, and the Statement of Reasons often does not permit a meaningful analysis of the appropriateness of the court's substantive reason for departure. Lack of specificity on a Statement of Reasons could reflect a less rigorous analysis than envisioned by the Sentencing Reform Act, or the sentencing court's full analysis could be set forth elsewhere in the record (*e.g.*, in the transcript of the sentencing proceeding). For the Commission to delve further into the sentencing record to measure the appropriateness of departures would require substantially greater resources and information than the Commission has available.

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<sup>105</sup> See *infra* Appendix B, at pp. B-28 to B-33.

<sup>106</sup> *Id.*

<sup>107</sup> 18 U.S.C. § 3553(b) (2003).

As contemplated by the Sentencing Reform Act and reaffirmed in the PROTECT Act, however, the courts of appeals are best situated to judge the appropriateness of departures in particular cases. In enacting the sentencing appeal provisions of the Sentencing Reform Act, codified at 18 U.S.C. § 3742, Congress envisioned that parties would object to and appeal departure decisions by sentencing courts not supported by the law or facts of the case.<sup>108</sup> Through this appellate process, Congress gave initial responsibility to the appellate courts for ensuring that the lower courts adhere to the guideline system and deviate from the sentencing guideline ranges only when appropriate to meet the goals of sentencing.

### **1. Impact of *Koon v. United States***

During its consideration of the PROTECT Act, Congress received testimony that the increase in the departure rate was due in part to lack of oversight by the courts of appeals. According to the Department of Justice, this lack of oversight was directly traceable to the Supreme Court's decision in *Koon v. United States*.<sup>109</sup> In *Koon*, the Supreme Court held that appellate courts are to apply an abuse of discretion standard when reviewing a district court's decision to depart from the guidelines, relying in part on the lower courts' "institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts."<sup>110</sup>

The impact of *Koon* on the departure rate is unclear. Although the rate of increase in the departure rate generally is higher post-*Koon* than pre-*Koon*, the rate of increase actually began to accelerate in 1994, almost two years prior to *Koon*, and has been relatively consistent thereafter.<sup>111</sup> See Figure 14.

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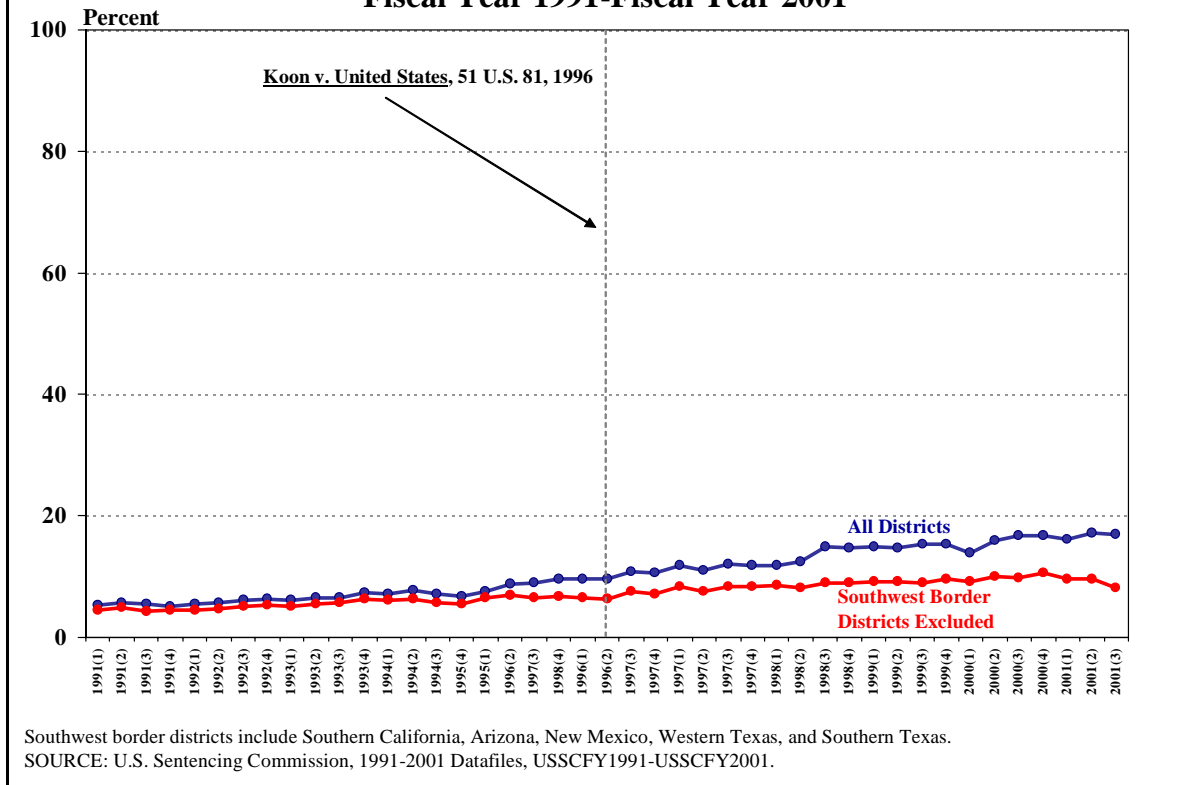
<sup>108</sup> See *infra* Appendix B, at pp. B-12 to B-13.

<sup>109</sup> See *infra* Appendix B, at p. B-30 (discussing Department of Justice position on *Koon*).

<sup>110</sup> *Koon*, *supra* note 17, at 98.

<sup>111</sup> See also Paul Hofer *et al.*, *Departure Rates and Reasons After Koon v. U.S.*, 9 FSR 284–91 (1997).

**Figure 14**  
**Quarterly Trends in Downward Departure Rates**  
**Fiscal Year 1991-Fiscal Year 2001**



Previous testimony before Congress on the impact of *Koon* did not discuss in detail the impact of significantly increasing immigration caseloads in southwest border districts on the national departure rate.<sup>112</sup> If southwest border districts are eliminated from consideration, the national rate of increase in the departure rate is substantially the same during the pre-*Koon* and post-*Koon* eras, and actually declines during the most recent year for which such data is available.

Appellate courts can exercise their oversight authority regarding downward departure decisions only to the extent that the government appeals unjustified departures. Congress received testimony from the Department of Justice that the standards of review set by *Koon* hindered the government's ability to appeal downward departures.<sup>113</sup> The government appealed

<sup>112</sup> See, e.g., *Oversight of the U.S. Sentencing Commission: Are the Guidelines Being Followed?: Hearing Before the Subcommittee on Criminal Justice Oversight of the Senate Judiciary Committee, 106th Cong., 2d Sess. (Oct. 13, 2000)* (statement of John R. Steer, Vice Chair, United States Sentencing Commission).

<sup>113</sup> See *infra* Appendix B, at p. B-30 (discussing testimony from Department of Justice representatives).

downward departure decisions in only 25 cases in fiscal year 2001,<sup>114</sup> which is 0.25 percent of the 9,985 cases in which a downward departure was granted that year.<sup>115</sup> In the few cases that the government has appealed a downward departure decision, it usually has been successful, having received favorable decisions in 19 of the 25 cases appealed in fiscal year 2001.<sup>116</sup>

Commission sentencing data suggest that *Koon* also may not have had a substantial impact on government appeals practices. According to Commission data, even prior to *Koon*, the government rarely appealed downward departure decisions, averaging less than 50 appeals per year from fiscal year 1993 to fiscal year 1996.<sup>117</sup>

## 2. PROTECT Act Remedies

The PROTECT Act included a number of provisions aimed at reinvigorating the role of the appellate process in sentencing and enhancing appellate oversight of the use of departures by lower courts. First, as discussed above,<sup>118</sup> in order to facilitate meaningful appellate review, Congress amended 18 U.S.C. § 3553(c) (Statement of reasons for imposing a sentence) by requiring the sentencing court, if imposing a sentence outside the prescribed guideline range, to state “the specific reason” for departing from the guidelines “with specificity in the written order of judgment and commitment . . . .”<sup>119</sup>

Second, the PROTECT Act amended 18 U.S.C. § 3742 (Review of a sentence) to require appellate courts to review *de novo* a district court’s departure decision in cases in which:

(A) the district court failed to provide the written statement of reasons required under section 3553(c); [or]

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

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<sup>114</sup> USSC, *supra* note 67, tbl 58.

<sup>115</sup> *Id.* at tbl 26. This 0.25 percent figure is not a true appeals rate because the 25 cases that were appealed in fiscal year 2001 did not necessarily involve cases sentenced that same fiscal year. However, it is a reasonable approximation.

<sup>116</sup> *Id.*

<sup>117</sup> The Department of Justice appealed 33, 40, 43, and 36 downward departure decisions in fiscal years 1993, 1994, 1995, and 1996, respectively, according to Commission data.

<sup>118</sup> *See supra* ch. 1, at pp. 9–10.

<sup>119</sup> Pub L. No. 108-21, § 401(c)(1), 117 Stat. 650 (2003).

- (ii) is not authorized under section 3553(b); or
- (iii) is not justified by the facts of the case.<sup>120</sup>

The appellate court shall set aside the sentence and remand the case with specific instructions if it finds that the district court failed to provide the required statement of reasons in the judgment and commitment order, the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.<sup>121</sup>

Third, the PROTECT Act adds restrictions to limit the district courts' discretion when sentencing cases upon remand. This change requires the sentencing court on remand to adhere to the guideline provisions in effect at the time of the original sentencing and to consider only grounds for departure included in the original statement of reasons and deemed permissible by the appellate court.<sup>122</sup> The Department of Justice subsequently has conformed its policies and procedures to the PROTECT Act's statutory restrictions by requiring prosecutors to report to Main Justice all sentences imposed on remand that do not comply with the requirements of new 18 U.S.C. § 3742(g) for consideration of possible appeal.<sup>123</sup>

Fourth, and perhaps the provision that will have the greatest impact on departure practices, the PROTECT Act contains a directive to the Department of Justice aimed in part at furthering the role of appellate review as originally envisioned by Congress. Section 401(l) of the PROTECT Act directed the Department of Justice to adopt detailed policies and procedures "to ensure the vigorous pursuit of appropriate and meritorious appeals of . . . adverse decisions" regarding downward departures that are not supported by the facts and the law, among other things.<sup>124</sup>

### **3. Greater Emphasis on Appeals by the Department of Justice**

In response to the congressional directive, on July 28, 2003, Attorney General John Ashcroft issued a memorandum to all federal prosecutors underscoring the importance Congress attaches to effectively opposing and appealing unjustified downward departures. "The Department of Justice has a responsibility to litigate vigorously in the district courts, and to

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<sup>120</sup> Pub. L. No. 108-21, § 401(d), 117 Stat. 650 (2003), codified at 18 U.S.C. § 3742(e)(3). In reviewing the reasonableness of the extent of departure, however, the appellate court is to give due deference to the district court's determination. *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *See supra* ch. 1, at pp. 9–10 for further discussion of this issue.

<sup>123</sup> Ashcroft Appeals Memo, *supra* note 37, at A-2.

<sup>124</sup> *See supra* ch. 1, at pp. 10–11 (presenting the directive in its entirety).

pursue appeals in appropriate cases, so as to ensure that the policies of the Sentencing Reform Act and the PROTECT Act are faithfully implemented.”<sup>125</sup>

With respect to objections to and appeals of downward departures, the memorandum states in further detail that:

Department attorneys have an affirmative obligation to *oppose* any sentencing adjustments, including downward departures, that are not supported by the facts and the law. . . . Department attorneys must take all steps necessary to ensure that the district court record is sufficient to permit the possibility of an appeal with respect to the improper adjustment . . . .<sup>126</sup>

The memorandum also sets in place four procedural mechanisms to facilitate appeals of unjustified downward departures and delineates a detailed list of categories of adverse decisions that prosecutors must promptly report to the appropriate officials at Main Justice.<sup>127</sup> If the appeal is approved by the Solicitor General, the memorandum requires prosecutors to “vigorously and professionally” pursue the appeal.<sup>128</sup>

New statutory requirements and other changes directed by the PROTECT Act reaffirmed Congress’s belief in the importance of a robust appellate process to a properly functioning guideline system. The new statutory requirements for review of departure decisions enacted by Congress, coupled with rigorous adherence to the strict new policies and procedures established by the Attorney General, should reinvigorate the role of the appellate process in monitoring compliance with the guidelines as originally intended under the Sentencing Reform Act. The Department of Justice reports that these changes already are having a favorable impact, citing several recent holdings employing the new *de novo* standard of review.<sup>129</sup>

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<sup>125</sup> Ashcroft Appeals Memo, *supra* note 37, at 5.

<sup>126</sup> *Id.* at 3.

<sup>127</sup> *See supra* ch. 1, at pp. 11–12 (discussing new requirements for appeals of departures).

<sup>128</sup> Ashcroft Appeals Memo, *supra* note 37, at 4.

<sup>129</sup> Statement of William W. Mercer, United States Attorney, District of Montana, to the United States Sentencing Commission, regarding Implementation of the PROTECT Act of 2003 (August 19, 2003) at 11–12 (citing *United States v. Thurson*, \_\_ F.3d \_\_, 2003 U.S. App. Lexis 15516, 2003 WL 21782339 (1<sup>st</sup> Cir. 2003) (reversing downward departure decision); *United States v. Swick*, 334 F.3d 784 (8<sup>th</sup> Cir. 2003) (same); *United States v. Smith*, 331 F.3d 292 (2<sup>nd</sup> Cir. 2003) (same); *United States v. Jones*, 332 F.3d 1294 (10<sup>th</sup> Cir. 2003) (upholding upward departure decision); *United States v. Tarantola*, 332 F.3d 498 (8<sup>th</sup> Cir. 2003) (same); *United States v. Flores*, \_\_ F.3d \_\_, 2003 U.S. App. Lexis 14438, 2003 WL 21673619 (8<sup>th</sup> Cir. 2003) (same); *United States v. Semsak*, \_\_ F.3d \_\_, 2003 U.S. App. Lexis 14923, 2003 WL 21730615 (9<sup>th</sup> Cir. 2003) (same)); *see also* *United States v. Mallon*, \_\_ F.3d \_\_, 2003 WL 22285302 (7<sup>th</sup> Cir. 2003) (reversing downward departure decision).

## **B. ROLE OF THE GOVERNMENT AT SENTENCING**

Commission sentencing data indicate that the government also plays a significant direct role in sentencing court departure decisions. In particular, the extent to which sentencing courts depart *sua sponte* or without the agreement of the government may not be as great as perceived.

### **1. Government Initiated Downward Departures**

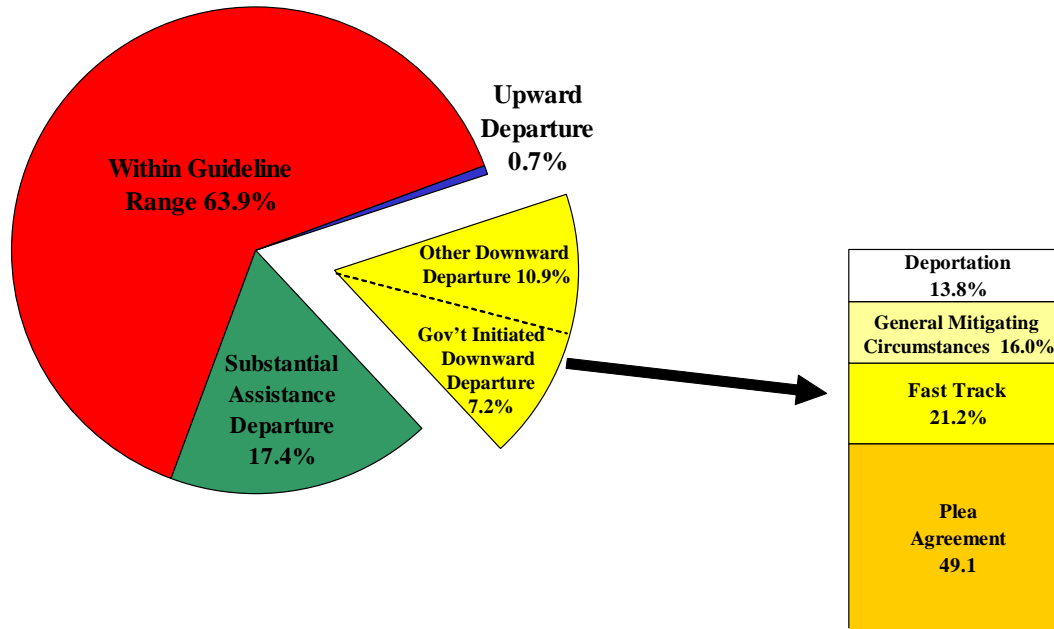
Based on review of the Commission's Monitoring database and the results of the coding project conducted for this report, Commission sentencing data suggest that the government initiated approximately 40 percent of the nonsubstantial assistance downward departures granted in fiscal year 2001. *See* Figure 15. This "government initiated downward departure rate" consists of cases for which one of four departure reasons are cited in the Statement of Reasons: all cases citing "Fast Track" (842 cases), "Deportation" (553 cases), and "Plea Agreement" (1,960 cases), and one-quarter of the cases citing "General Mitigating Circumstances" (641 cases).<sup>130</sup>

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<sup>130</sup> The number of cases attributed to "Fast Track," "Deportation," and "Plea Agreement," reflect the total number of cases reported in the Commission's 2001 Monitoring database as citing those specific reasons. The number of cases attributed to "General Mitigating Circumstances," however, is an extrapolation based on the results of the Commission's coding project undertaken for this report. The Commission examined 223 cases sentenced in fiscal year 2001 that cited "General Mitigating Circumstances" in the Statement of Reasons as a basis for downward departure. Of the 114 cases for which the case file conclusively indicated the underlying mitigating circumstance with specificity, 24.6 percent relied upon an "early plea," "savings to government," "waiver of indictment," "stipulation to deportation order," "fast track," or other similar reasons indicating that the government initiated the departure as a result of receiving some type of benefit from the defendant. These 55 cases comprise 24.6% of the overall sample. The Commission applied the same 24.6 percent figure to the total number of cases in the 2001 Monitoring Database citing "General Mitigating Circumstances" to estimate the total number of "General Mitigating Circumstances" departures initiated by the government.

The Commission's coding project revealed that cases citing other reasons for departure, such as aberrant behavior and family ties and responsibilities, sometimes also may represent departures initiated by the government through fast track programs. Departures based on aberrant behavior and family ties, for example, occur disproportionately in a few districts along the southwest border. Because the Commission could not conclusively determine that these departures in those districts were the result of fast track programs, these cases were excluded from this calculation of government initiated departures in order to be conservative in the estimation of such departures.

**Figure 15**  
**Departure Status and Classification**  
**Fiscal Year 2001 Downward Departure Sample**



The percentage of government initiated general mitigating circumstances departures was estimated based on the finding from the case review that 24.6% of general mitigating circumstances departures in the sample were government initiated.  
 SOURCE: U.S. Sentencing Commission 2001 Departure Sample.

If the 3,996 government initiated downward departures are subtracted and considered separately from the 9,985 downward departures granted by sentencing courts in fiscal year 2001, the remaining downward departure rate is 10.9 percent. Obviously, this 10.9 percent figure is substantially lower than the 18.1 percent overall downward departure rate derived from the Commission’s Monitoring database. *See* Figure 1.

The number of government initiated downward departures may not reflect fully the extent to which the government acquiesces to downward departures granted by sentencing courts. The Commission was able to determine the government’s position regarding a downward departure in only one-half of the 658 cases it reviewed in preparation of this report. Of the cases in which the government’s position was documented, the government expressly supported all or some of the grounds for departure in 77.5 percent of the cases. The extremely high rate of guilty pleas – 96.6 percent in fiscal year 2001 – coupled with the low number of government appeals also suggests that the 40 percent figure is a conservative estimate of the extent to which the government initiates or acquiesces to downward departures.

The government also affects sentencing court decisions regarding the extent of departures in many cases. Over 90 percent of the cases reviewed for this report citing “Plea Agreement” as

the reason for departure involved plea agreements pursuant to Fed. R. Crim. P. 11(e)(1)(C).<sup>131</sup> Based on this figure the Commission estimates that sentencing courts cited binding plea agreements as the reason for departure in 1,788 cases in fiscal year 2001. Such plea agreements typically include agreements between the government and the defendant regarding sentencing ranges, maximum sentences, guideline calculations, and even precise sentence lengths, which, if the court accepts the plea agreement, are binding on the court.<sup>132</sup> The sentencing court granted a departure of the exact magnitude specified in 84.8 percent of the Rule 11(e)(1)(C) agreements reviewed for this analysis.

## **2. PROTECT Act Remedy**

The impact of plea agreements on the departure rate may decrease with enactment of the PROTECT Act. Pursuant to the directive to the Department of Justice contained in section 401(l) of the PROTECT Act, the Attorney General has told prosecutors that a recommendation for a particular sentence under Rule 11(c)(1)(B), or an agreement to a specific sentence under Rule 11(c)(1)(C) “must not vitiate relevant portions of the Sentencing Guidelines.”<sup>133</sup>

Furthermore, subsequent to enactment of the PROTECT Act, the Attorney General issued a memorandum setting forth revised charging and plea bargaining policies requiring that any sentencing recommendation contained in a plea agreement, including departure recommendations, “be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant’s history and conduct.”<sup>134</sup> Adherence to these new Department of Justice policies could affect a reduction in the incidence of downward departures.

## **C. EARLY DISPOSITION OR FAST TRACK PROGRAMS**

Early disposition or fast track programs apparently account for a substantial portion of the government initiated downward departures discussed above. During its consideration of the PROTECT Act, Congress received correspondence attributing a substantial proportion of the

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<sup>131</sup> Fed. R. Crim. P. 11(e)(1)(C) was redesignated as Fed. R. Crim. P. 11(c)(1)(C) in 2002.

<sup>132</sup> USSG §6B1.2 (Standards for Acceptance of Plea Agreements) provides that the court may accept a plea agreement that includes a specific sentence if the court is satisfied either that (1) the agreed sentence is within the applicable guideline range, or (2) the agreed sentence departs from the applicable guideline range for justifiable reasons.

<sup>133</sup> Ashcroft Appeals Memo, *supra* note 37, at 3.

<sup>134</sup> Ashcroft Charging Memo, *supra* note 40, at 5; *see supra* ch. 1, at pp. 10–16 (discussing Attorney General’s memoranda).

downward departure rate to fast track programs established in judicial districts along the southwest border of the United States.<sup>135</sup>

## 1. Impact of Increasing Immigration Offense Caseload

According to these submissions, fast track programs were established in judicial districts along the southwest border to accommodate burgeoning immigration offense and immigration related caseloads.<sup>136</sup> Commission sentencing data confirm that the number of federal immigration offenses increased dramatically from 2,300 in fiscal year 1991 to 10,458 in fiscal year 2001. *See* Figure 7. The increase in the number of immigration offenses has put enormous caseload pressures on the districts along the southwest border. The Southern District of California alone, for example, sentences more defendants under the guidelines (4,213) than do all of the district courts in each of the First Circuit (1,645), Second Circuit (4,147), Third Circuit (2,636), Seventh Circuit (2,450), Eighth Circuit (3,568), Tenth Circuit (3,415), and District of Columbia Circuit (276).<sup>137</sup>

The Commission is unable to estimate from its sentencing data the full impact of fast track programs with sufficient reliability for several reasons. Most important, sentencing courts do not report this information in a uniform manner. Courts in only one judicial district, the Southern District of California, typically cite “Fast Track” as a reason for downward departure on the Statement of Reasons.<sup>138</sup>

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<sup>135</sup> *See e.g.*, Letter from Alfred P. Carlton, Jr., American Bar Association, to Sen. Orrin G. Hatch, Chairman, Committee on the Judiciary, United States Senate (Apr. 1, 2003), stating that the increased rate of nonsubstantial assistance departures is attributable to tripling of the number of departures in five fast track border districts from 1996 to 2001, *reprinted at* 149 CONG. REC. (daily ed. Apr. 10, 2003); Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States, to Sen. Orrin G. Hatch, Chairman, Committee on the Judiciary, United States Senate (Apr. 3, 2003), attributing 70 percent of nonsubstantial departure increase to five southwest border districts, *reprinted at* 149 CONG. REC. S5121 (daily ed. Apr. 10, 2003); 149 CONG. REC. S5133–34 (daily ed. Apr. 10, 2003) (statement of Sen. Edward Kennedy, discussing letter from eight former United States Attorneys attributing increase in nonsubstantial assistance departure rate to southwest border districts).

<sup>136</sup> *Id.*

<sup>137</sup> Letter from Marilyn L. Huff, Chief Judge, United States District Court for the Southern District of California, to Judge Diana E. Murphy, Chair, United States Sentencing Commission 1 (Aug. 1, 2003) citing “recent published statistics” from the Commission indicating the Southern District of California sentenced more defendants under the guidelines than seven other circuits in their entirety.

<sup>138</sup> The Southern District of California accounted for 92.4 percent of departure cases citing fast track in fiscal year 2001.

The Commission’s review of its sentencing data suggests that departures in other judicial districts that routinely cite “Pursuant to Plea Agreement” or “General Mitigating Circumstances” on Statement of Reasons may be fast track departures. For example, more than half (59.3%) of the downward departure cases citing general mitigating circumstances were sentenced in three districts on the southwest border: the Southern District of California (24.9%), the Western District of Texas (24.6%), and the District of Arizona (9.8%). In those three districts combined, 92.4 percent of the offenders receiving downward departures based on general mitigating circumstances were convicted of drug trafficking offenses (53.6%) or immigration offenses (38.8%), and 63.2 percent were non-U.S. citizens. These factors suggest that in those three districts general mitigating circumstances may be cited as a reason for departure in cases that in fact involve fast track dispositions.

Similarly, two districts on the southwest border, Arizona (54.3%) and New Mexico (21.9%), accounted for more than three-quarters of the downward departure cases citing “Pursuant to Plea Agreement.” In those two districts combined, 94.7 percent of offenders receiving a downward departure pursuant to a plea agreement were convicted of an immigration offense (60.4%) or drug trafficking offense (34.3%), and 82.5 percent were non-U.S. citizens. These factors suggest that in those two districts plea agreements may be cited as a reason for departure in cases that in fact involve fast track dispositions.

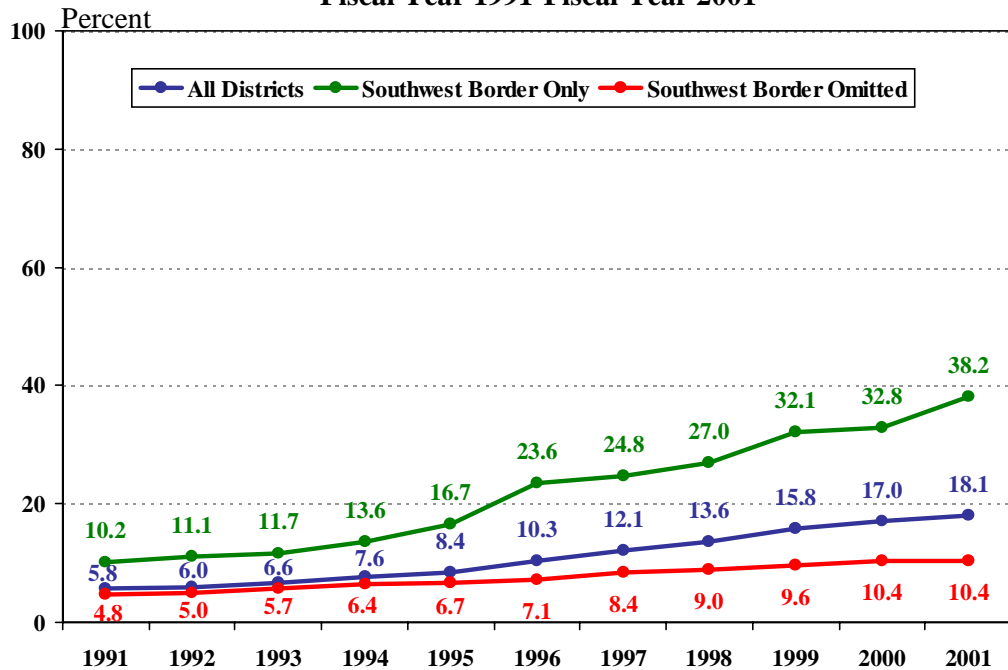
Because of the difficulties in determining from Statements of Reasons the existence of a fast track departure, the Commission requested and the Department of Justice provided information regarding fast track programs so that the Commission could better interpret its data.<sup>139</sup> Included in the information provided were details regarding such programs in five judicial districts along the southwest border: the District of Arizona, the Southern District of California, the District of New Mexico, the Southern District of Texas, and the Western District of Texas.<sup>140</sup> Each of these southwest border districts reported that its fast track program was established in response to overwhelming caseloads, and such programs generally covered illegal reentry, alien smuggling, and certain drug trafficking offenses. The specific criteria and benefits to the defendants in each district, however, vary significantly.

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<sup>139</sup> See Letter from Judge Diana E. Murphy, Chair, United States Sentencing Commission, to Larry D. Thompson, Deputy Attorney General, United States Department of Justice (May 13, 2003) requesting information on early disposition programs.

<sup>140</sup> See Letter from Eric Jaso, Counselor to the Assistant Attorney General, United States Department of Justice, to Judge Diana E. Murphy, Chair, United States Sentencing Commission (Aug. 1, 2003) [hereinafter Jaso Fast Track Letter] setting forth information on fast track programs. The Department of Justice also provided information regarding two additional districts, the District of Idaho and the Eastern District of Washington, that had established fast track programs for illegal reentry cases. The program was discontinued in the Eastern District of Washington in May 2002.

**Figure 16**  
**Trends in Downward Departure Rates**  
**Fiscal Year 1991-Fiscal Year 2001**



Southwest border districts include Southern California, Arizona, New Mexico, Western Texas, and Southern Texas.  
 SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

Southwest border districts combined have experienced a significant increase in the departure rate from 10.2 percent in fiscal year 1991 to 38.2 percent in fiscal year 2001, an almost four-fold increase. *See* Figure 16. Furthermore, southwest border districts account for a disproportionate number of departures. The national departure rate was 18.1 percent in fiscal year 2001. If southwest border districts are excluded, however, the national departure rate has increased more modestly from 4.8 percent in fiscal year 1991 to 10.4 percent in fiscal year 2001. Therefore, fast track programs in districts along the southwest border appear to drive the national departure rate significantly higher than it otherwise would be.

## 2. Extent of Fast Track Programs

Fast track programs apparently are not limited to the districts along the southwest border. The Department of Justice indicated that fast track programs exist in some form in up to one-half of the 94 judicial districts.<sup>141</sup> The widespread nature of fast track programs would suggest that

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<sup>141</sup> *See* Letter from Judge Diana E. Murphy, Chair, United States Sentencing Commission, to Eric Jaso, Counselor to the Assistant Attorney General, United States Department of Justice (Aug. 25, 2003) requesting further clarification of fast track and early disposition programs.

factors in addition to the burgeoning number of immigration related offenses are the impetus for some of these programs.

Further complicating the analysis is the fact that the majority of fast track programs “do not employ agreed-upon or Government-requested downward departures, but instead rely upon accepting pleas to lesser charges.”<sup>142</sup> As discussed in Chapter 2, the Commission generally compiles sentencing information regarding only the statutes of conviction and the sentencing guidelines applicable to those statutes, and, as a result, the Commission cannot estimate the impact of this type of fast track program.

In sum, data constraints and the apparent widespread use of a variety of early disposition programs across the nation prevent the Commission from isolating fast track departures from downward departures generally. Accordingly, the Commission cannot fully estimate the contribution of such programs to the increasing downward departure rate.

### **3. Early Disposition Programs Pursuant to the PROTECT Act**

Congress has recognized the importance of fast track or early disposition programs by sanctioning their use in section 401(m) of the PROTECT Act. Section 401(m) directs the Commission to promulgate “a policy statement authorizing a downward departure of not more than four levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney.”<sup>143</sup> The underlying premise of fast track programs, as articulated by the Attorney General, is that defendants who promptly agree to participate in such a program save the government significant scarce resources that can be used in prosecuting other defendants and demonstrate acceptance of responsibility above and beyond what is taken into account under §3E1.1 (Acceptance of Responsibility).<sup>144</sup>

The Commission also received testimony underscoring the importance of fast track programs in certain judicial districts. The Chief Judge of the Southern District of California testified that, because of the overwhelming caseload in that district, in great part comprised of immigration related offenses, fast track programs are essential to the efficient and effective administration of the courts in that district.<sup>145</sup> Furthermore, the Commission received testimony from the United States Attorney from the District of Arizona that the fast track program in that

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<sup>142</sup> See Jaso Fast Track Letter, *supra* note 140.

<sup>143</sup> Pub. L. 108-21, § 401(m)(2)(B), 117 Stat. 650 (2003).

<sup>144</sup> See *supra* ch. 1, at pp. 14–16.

<sup>145</sup> Written statement by Hon. Marilyn L. Huff, Chief Judge, United States District Court for the Southern District of California, to the United States Sentencing Commission regarding necessity of fast track or early disposition programs within the Southern District of California (Sept. 23, 2003).

district advances the statutory goal of deterrence, particularly regarding immigration offenses. Even with its fast track program, the United States Attorney stated that the District of Arizona can prosecute only a small fraction of the hundreds of thousands of illegal entries committed in that judicial district. In the absence of a fast track program, he stated that prosecutions of immigration offenses would significantly decrease, thereby reducing the deterrent effect of current prosecutorial practices.<sup>146</sup>

On September 22, 2003, the Attorney General issued a memorandum outlining the criteria for authorization of such programs.<sup>147</sup> In order to receive authorization for a fast track program, a district must demonstrate, among other criteria, that (1) the district handles an exceptionally large number of a specific class of offenses within the district; (2) failure to handle such cases on an expedited basis would significantly strain prosecutorial and judicial resources in the district; and (3) state prosecution of such cases is either unavailable or unwarranted.<sup>148</sup> The memorandum, however, specifies no requirements regarding the type (*i.e.* downward departure or charge bargaining) or extent of the benefit to be received by a defendant pursuant to a fast track program, other than the statutory requirement that a benefit in the form of a departure not exceed four offense levels.<sup>149</sup>

The Department of Justice requested that the Commission implement the directive regarding the early disposition programs in section 401(m) of the PROTECT Act in a similar unfettered manner by merely restating the legislative language and “leav[ing] to the sentencing court the extent of the departure under these early disposition programs.”<sup>150</sup> The Commission notes that implementation of the directive in this manner has the potential to create unwarranted sentencing disparity.

The new statutory requirement that the Attorney General approve all early disposition programs hopefully will bring about greater uniformity and transparency among those districts that implement authorized programs. Defendants sentenced in districts without authorized early disposition programs, however, can be expected to receive longer sentences than similarly-

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<sup>146</sup> Written statement by Paul Charlton, United States Attorney, District of Arizona, to the United States Sentencing Commission regarding fast track programs in Arizona (Sept. 23, 2003).

<sup>147</sup> See Ashcroft Fast Track Memo, *supra* note 50.

<sup>148</sup> The criteria are discussed in more detail in ch. 1, at pp. 14–16.

<sup>149</sup> See Ashcroft Fast Track Memo, *supra* note 50.

<sup>150</sup> See Letter from Eric H. Jaso, Counselor to the Assistant Attorney General, U. S. Department of Justice, to Judge Diana E. Murphy, Chair, United States Sentencing Commission 19 (Aug. 1, 2003), submitting 18 U.S.C. §994(o) report commenting on the operation of the sentencing guidelines and requesting that the Commission “simply restate the legislative language” contained in the PROTECT Act regarding early disposition programs.

situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted sentencing disparity among similarly-situated offenders.

Furthermore, sentencing courts in districts without early disposition programs, particularly those in districts that adjoin districts with such programs, may feel pressured to employ other measures – downward departures in particular – to reach similar sentencing outcomes for similarly situated defendants. This potential response by sentencing courts could undermine the goal of the PROTECT Act to reduce the incidence of downward departures.

Finally, sentencing courts within districts that establish authorized early disposition programs may not have sufficient guidance to apply the departure provision in a uniform manner. Without greater specifications to the sentencing court regarding the circumstances warranting an early disposition departure, and the appropriate extent of departure, sentencing courts may vary in their application of the policy statement. Such variation could result in undesirable sentencing disparity.

Accordingly, the Commission agrees with the Department of Justice’s comment that “[i]t may be appropriate at some later date to review how these early disposition programs are actually being implemented and whether further guidance to the courts might be useful.”<sup>151</sup>

#### **D. ASSESSING DOWNWARD DEPARTURES IN A BROADER CONTEXT**

Less than two-thirds of cases sentenced in fiscal year 2001 – 63.9 percent – were sentenced within the guideline sentencing range. *See* Figure 1. This represents a significant decrease since fiscal year 1991, when 80.7 percent of cases were sentenced within the guideline sentencing range. This decreased percentage of within guideline range sentences, however, reflects an increase in both the number of substantial assistance departures pursuant to §5K1.1 (Substantial Assistance to Authorities),<sup>152</sup> which are granted only pursuant to a government motion, and nonsubstantial assistance departures.

The substantial assistance departure rate increased from 11.9 percent in fiscal year 1991 to 17.3 percent in fiscal year 2001, and accounted for almost one half (48.1%) of all departures below the guidelines in fiscal year 2001. *See* Figure 1. When substantial assistance departures

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<sup>151</sup> *Id.*

<sup>152</sup> Section 5K1.1 provides in pertinent part that “[u]pon motion of the government that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.” *See also* 18 U.S.C. § 3553(e) (West Supp. 2003) (Limited authority to impose a sentence below a statutory minimum) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

are combined with the other government initiated downward departures identified in the case review discussed above, the government accounts for over two-thirds (69.3%) of all departures below the guidelines. Substantial assistance departures and other government initiated downward departures considered together comprise a national 24.6 percent departure rate.

Substantial assistance departures have been subject to some of the same criticisms as other downward departures.<sup>153</sup> For example, substantial assistance departure rates vary widely by district. The Central District of Illinois (41.6%), the Eastern District of Pennsylvania (40.7%), the Western District of North Carolina (38.2%), the Western District of Missouri (37.2%) and the Middle District of Alabama (36.8%) had substantial assistance departure rates in fiscal year 2001 dramatically higher than the District of Utah (1.0%), the Eastern District of Oklahoma (2.2%), the District of South Dakota (6.0%), the Northern District of West Virginia (6.0%), and the District of New Mexico (6.6%).<sup>154</sup> The differences in substantial assistance rates are even more stark between some adjoining districts, such as the Western District of Virginia (30.2%) and the Eastern District of Virginia (7.0%), and the Central District of Illinois (41.6%) and the Southern District of Illinois (11.2%).

Additionally, the percent of offenders who receive a sentence reduction for substantial assistance is not fully reflected by the 17.4 percent substantial assistance rate reported by the Commission. In addition to section 5K1.1, subsequent to sentencing the government can invoke Rule 35(b) of the Federal Criminal Rules of Procedure to move the court to reduce a sentence below the guidelines to reward substantial assistance.<sup>155</sup>

The Commission understands that some districts rely heavily on Rule 35 (b) motions instead of substantial assistance motions under section 5K1.1 to reward cooperation,<sup>156</sup> but cannot report reliable empirical data on the use of such motions. Despite a longstanding

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<sup>153</sup> See, e.g., Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 564 (1999) (“Cooperation is unevenly distributed and subject to wide variations in local practices and policies. . . . The system is rife with individual and district-to-district disparities . . . .”); Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* (January 1998); Ilene Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992).

<sup>154</sup> USSC, *supra* note 67, at tbl 26; see also NEWUSSCFY2001 (discussed *infra* Appendix C).

<sup>155</sup> Fed. R. Crim. P. 35(b) (Correcting or reducing a sentence).

<sup>156</sup> See, e.g., Daniel C. Richman, *The Challenges of Investigating Section 5K1.1 in Practice*, 11 FED. SENT. R. 75 (1998) (“The relatively low section 5K1.1 departure rate in the Eastern District of Virginia reflects the fact that prosecutors in that district dispense with substantial assistance motions by filing Rule 35(b) motions in order to comply with time limitations set by local court practice.”).

request,<sup>157</sup> the Commission does not receive sentencing documentation for Rule 35(b) sentencing reductions with sufficient regularity to permit an assessment of the impact of Rule 35(b) resentencings. The Commission expects that the most recent joint memoranda sent to the courts pursuant to the PROTECT Act will improve document submission in this area.<sup>158</sup>

Other districts may use charge bargaining to achieve sentencing outcomes below the otherwise applicable guideline sentencing range. Several commentators refer to this practice as “hidden departures.”<sup>159</sup> As discussed above in the context of fast track programs, the Department of Justice confirms that some districts use charge bargaining, at least in some circumstances, to reduce the otherwise applicable guideline sentencing range.<sup>160</sup> The Commission’s sentencing data generally is collected solely based on the statute of conviction, which does not permit an analysis of the impact of such charge bargaining for this report. The impact, if any, of charge bargaining on achieving the statutory purposes of sentencing may be mitigated by the Attorney General’s recent memorandum regarding such practices.<sup>161</sup>

This report does not attempt to examine the reasons for, or the appropriateness of, the increasing substantial assistance departure rate, the use of Rule 35(b) motions, or charge bargaining practices. These issues are mentioned merely to underscore the difficulties in drawing conclusions regarding the impact of downward departures on achieving the goals of

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<sup>157</sup> See AO Memo of Understanding, Mecham-Wilkins Letter, Mecham-Conaboy Letter, *supra* note 65 (letters between AO and USSC regarding documents to be submitted by courts).

<sup>158</sup> See Murphy-Lake Letter, *supra* note 76 (discussing new document submission requirements under PROTECT Act.)

<sup>159</sup> See, e.g., Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 63 (November 2000), citing Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1312 (1997) (“[H]idden departures’ are highly problematic, because ‘circumvention, unlike overt downward departure, is hidden and unsystematic. . . . By comparison to explicit departures, circumvention is far more likely to involve unwarranted disparity, and it occurs in a context that precludes oversight and obscures accountability.’”); Paul J. Hofer *et. al.*, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Disparity*, 90 J. CRIM L. & CRIMINOLOGY 239, 258 (1999), citing Hon. Joseph F. Weis *et. al.*, *Report of the Federal Courts Study Committee* (1990) (“Some district judges report feeling enormous pressure to accept pleas even though they clearly do not comport with the guidelines.”); Statement of Hon. Mark Wolf and Hon. Vincent L. Broderick before the United States Sentencing Commission, 3 FED. SENT. R. 287 (March 1991/April 1991) (“[W]e would like to see the guidelines encourage candor, discourage hidden departures through improper plea bargains . . . .”); Paul Hofer *et. al.*, *supra* note 8.

<sup>160</sup> Jaso Fast Track Letter, *supra* note 140; Murphy, *supra* note 141.

<sup>161</sup> See *supra* ch. 1, at pp. 13–14.

sentencing reform. There are many different ways in which similar sentencing outcomes below those prescribed by a strict application of the sentencing guidelines can be achieved.

Assessing the degree to which the increasing use of one mechanism – nonsubstantial assistance downward departures – evidences unwarranted disparity or excessive leniency ideally would include measuring the extent to which the remaining mechanisms are used by various districts to reach similar sentencing outcomes for similarly situated defendants.<sup>162</sup> Given the limitations of sentencing data available to the Commission and the time frame established by the directive in the PROTECT Act, the Commission cannot fully disentangle the overlapping effects of these several means of reducing sentences below the otherwise applicable guideline range.

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<sup>162</sup> See Lisa Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV 569 (1998).

## COMMISSION ACTIONS TO REDUCE THE INCIDENCE OF DOWNWARD DEPARTURES

### A. RECENT COMMISSION ACTIONS PRIOR TO ENACTMENT OF THE PROTECT ACT

The Commission has been aware of and concerned about the increasing incidence of downward departures. Prior to enactment of the PROTECT Act, the Commission took several actions to address specific areas of concern.

The Commission, as reconstituted in November 1999, promulgated two amendments during its initial amendment cycle aimed at reducing the incidence of certain types of departures. The Commission created a new policy statement, §5K2.19 (Post-Sentencing Rehabilitative Efforts), that prohibits departures based on a defendant's post-sentencing rehabilitative efforts, even if exceptional, upon resentencing. This amendment, effective November 1, 2000, was prompted by a circuit conflict regarding whether the sentencing court may consider an offender's post-offense rehabilitative efforts while in prison or on probation as a basis for downward departure at resentencing following an appeal. The Commission determined that departures based on such post-sentencing rehabilitative measures are inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person, and inequitably benefit only those offenders who gain the opportunity to be resentenced *de novo*.<sup>163</sup> The Commission strictly prohibited departures on this basis.

Also during that initial amendment cycle, the Commission addressed another specific departure of concern, aberrant behavior. The Commission resolved a circuit conflict regarding when a departure based on aberrant behavior may be warranted by creating a new policy statement, §5K2.20 (Aberrant Behavior). The Commission rejected the "totality of circumstances approach" endorsed by some circuits at the time, concluding that it was overly broad and vague, and instead structured the new policy statement to restrict consideration of aberrant behavior to cases in which the offense (1) was committed without significant planning; (2) was of limited duration; and (3) represented a marked deviation by the defendant from an otherwise law-abiding life.<sup>164</sup>

Furthermore, the Commission categorically prohibited aberrant behavior departures for several types of offenses and offenders. Specifically, an aberrant behavior departure was forbidden if (1) the offense involved serious bodily injury or death; (2) the defendant discharged

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<sup>163</sup> See USSG App. C, amend. 602.

<sup>164</sup> See *id.* at amend. 603.

a firearm or otherwise used a firearm or a dangerous weapon; (3) the offense of conviction was a serious drug trafficking offense; (4) the defendant had more than one criminal history point, as determined under *Guidelines Manual* Chapter Four (Criminal History and Criminal Livelihood); or (5) the defendant had a prior federal or state felony conviction, regardless of whether the conviction is countable under Chapter Four.<sup>165</sup>

In 2001, the Commission took action to reduce departures in another category of concern, illegal reentry offenses. Judges, probation officers, and defense attorneys, particularly in judicial districts along the southwest border, had raised concerns that the guideline for illegal reentry offenses, §2L1.2 (Unlawfully Entering or Remaining in the United States), sometimes resulted in disproportionate penalties because of a 16 level enhancement that was triggered by any prior conviction for an aggravated felony.

The Commission was concerned that sentencing courts appeared to be addressing this problem on an *ad hoc* basis by increased use of downward departures in illegal reentry cases, often pursuant to a departure provision in an application note accompanying the guideline.<sup>166</sup> In fiscal year 2001, 40.6 percent (2,371 cases) sentenced under section 2L1.2 received a downward departure. The Commission also was aware of congressional concerns regarding the departure rate raised at a recent Senate oversight hearing.<sup>167</sup>

The Commission acted to reduce departures in illegal reentry cases by making comprehensive revisions to section 2L1.2, particularly by providing a more graduated enhancement for prior convictions that varies depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant. Equally important, the Commission deleted the application note that had invited downward departures based on the seriousness of the prior aggravated felony.<sup>168</sup> Significantly, one percent of all cases receiving a nonsubstantial assistance departure in fiscal year 2001 cited this application note on the Statement of Reasons, but the note should not be cited in subsequent years. The revised guideline became effective November 1, 2001, and data are not yet available to determine the extent to which the incidence of departure may have been reduced for illegal reentry offenses.

## **B. IMPLEMENTATION OF THE PROTECT ACT WITHIN 180 DAYS OF ENACTMENT**

On October 8, 2003, the Commission unanimously approved an emergency amendment implementing the congressional directives in section 401(m) of the PROTECT Act. The

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<sup>165</sup> *Id.*

<sup>166</sup> *See id.* at amend. 632.

<sup>167</sup> *See infra* Appendix B, at pp. B-22 to B-25 (discussing 2000 Senate hearing and subsequent action.)

<sup>168</sup> *See* USSC, App. C, amend. 602

amendment, effective October 27, 2003,<sup>169</sup> is based on the legislative history, empirical analysis, public comment, hearing testimony, case law, and literature that the Commission reviewed and analyzed in preparing this report. The Commission believes that the actions taken in this amendment will complement the many statutory and guideline changes enacted by the PROTECT Act, and the recent policies established by the Department of Justice, to reduce substantially the incidence of downward departures.

With this emergency amendment, the Commission continues its ongoing work in the area of departures. The Commission previously implemented congressional amendments to the sentencing guidelines that restrict the availability of departures for defendants convicted of certain child crimes and sex offenses. As directed in the PROTECT Act, the Commission distributed those amendments to the federal criminal justice community on April 30, 2003.

## **1. General Features of the Emergency Amendment**

The emergency amendment prohibits several factors as grounds for departure, restricts the availability of certain departures, clarifies when certain departures are appropriate, and limits the extent of departure permissible for certain offenders. The amendment also generally restructures departure provisions throughout the *Guidelines Manual* to track more closely both the statutory criteria for imposing a sentence outside the guideline sentencing range and the newly enacted statutory requirement that reasons for departure be stated with specificity in the written order of judgment and commitment.<sup>170</sup>

To emphasize the critical importance of specific written reasons for departure decisions as contemplated by the PROTECT Act, the Commission added specific documentation requirements in three policy statements, §5K2.0 (Grounds for Departure), §4A1.3 (Departures Based on Inadequacy of Criminal History Category), and §6B1.2 (Standards for Acceptance of Plea Agreements). The Commission determined that requiring sentencing courts to document reasons for departure with greater specificity will complement the findings and documentation required of sentencing courts by the PROTECT Act, facilitate appellate review of downward departures, and improve the Commission's ability to monitor departure decisions and refine the guidelines as necessary. The need for greater specificity and standardization in sentencing documentation was underscored by data limitations encountered in preparing this report, which are discussed in Chapter 2.

## **2. Revisions to §5K2.0 (Grounds for Departure)**

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<sup>169</sup> See *infra* Appendix A.

<sup>170</sup> See 18 U.S.C. §§ 3553 (Imposition of a sentence) and 3742(e) (Review of a sentence) (West Supp. 2003).

The Commission made several significant modifications to the policy statement that provides the general grounds for departure, §5K2.0 (Grounds for Departure). These modifications limit and, in certain circumstances, prohibit downward departures. The Commission generally restructured section 5K2.0 to clarify the standards governing departures in order to facilitate and emphasize the analysis required of the court. The amendment does so by: (1) integrating throughout the policy statement the statutory language of 18 U.S.C. §§ 3553(b) and 3742(e), as amended by the PROTECT Act, which provide the statutory criteria for sentencing outside the guideline range; (2) adopting where provided a single qualitative description of the type of case in which a departure may be warranted, the “exceptional case;” (3) restating in application notes and background commentary to section 5K2.0 longstanding commentary in the *Guidelines Manual*, which was reaffirmed by the PROTECT Act, that the frequency of departures under section 5K2.0 generally should be rare, and that certain types of departures under section 5K2.0 should be extremely rare.

Section 5K2.0(a) now includes the general governing principle that, in cases other than child crimes and sexual offenses, the sentencing court may depart if the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission pursuant to 18 U.S.C. § 3553(b)(1) and that should result in a sentence different than the applicable guideline range in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2).

The Commission amended section 5K2.0 to prohibit several grounds for departure, to the departure prohibitions in section 5K2.0 for child crimes and sexual offenses enacted by the PROTECT Act, and other prohibitions elsewhere in the *Guidelines Manual*. A new subsection, section 5K2.0(d), clearly lists the forbidden departure grounds. This list of forbidden grounds includes longstanding prohibitions as well as new prohibitions added by the amendment, specifically: (1) the defendant’s acceptance of responsibility; (2) the defendant’s aggravating or mitigating role in the offense; (3) the defendant’s decision, in itself, to plead guilty to the offense or to enter into a plea agreement with respect to the offense; and (4) the defendant’s fulfillment of restitution only to the extent required by law, including the guidelines. The Commission determined that these circumstances are never appropriate grounds for departure.

The Commission also revised section 5K2.0 to restrict the availability of departures based on multiple circumstances, often referred to as a “combination of factors.” The Commission determined that heightened criteria are appropriate for cases in which no single offender characteristic or other circumstance independently is sufficient to provide a basis for departure. Under new section 5K2.0(c), a departure based on multiple circumstances can be based only on offender characteristics or other circumstances that are identified in the guidelines as permissible grounds for departure. Circumstances unmentioned in the guidelines, therefore, can no longer be used for a departure based on multiple circumstances pursuant to section 5K2.0(c). In addition, in order to support a departure based on a combination of circumstances, each offender characteristic or other circumstance must be present individually to a substantial degree and must make the case exceptional when considered together. The accompanying

application note states that departures under section 5K2.0(c) based on a combination of not ordinarily relevant circumstances should occur extremely rarely and only in exceptional cases.

The Commission also clarified when a departure may be based on a circumstance present to a degree not adequately taken into consideration. New section 5K2.0(a)(3) provides that a departure may be warranted in an exceptional case even though the circumstance that forms the basis for the departure is accounted for in the guidelines, but only if the court determines that such circumstance is present to a degree substantially different than that which ordinarily is involved in that kind of offense.

The Commission modified section 5K2.0 in two additional ways to underscore the need for courts to state reasons for departure with specificity. First, new section 5K2.0(e) provides that if the court departs, it shall state, pursuant to 18 U.S.C. § 3553(c) as amended by the PROTECT Act, its specific reasons for departure. Second, a new application note provides that in a case in which the court departs based on reasons contained in a plea agreement, the court must state the underlying substantive reasons for departure with specificity in the written judgment and commitment order.

### **3. Revisions to Chapter Five, Part H (Specific Offense Characteristics)**

The Commission also limited several departure provisions in Chapter Five, Part H (Specific Offender Characteristics).

#### **a. §5H1.4 (Gambling Addiction)**

First, the Commission added a prohibition to §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction) against departures based on addiction to gambling. The Commission determined that a departure based on addiction to gambling is never warranted.

#### **b. §5H1.6 (Family Ties and Responsibilities)**

The Commission limited the availability of departures based on family ties and responsibilities by requiring the court to conduct certain analyses under §5H1.6 (Family Ties and Responsibilities). In determining whether a departure is warranted under this policy statement, a new application note instructs the court to consider the seriousness of the offense; the involvement in the offense, if any, of members of the defendant's family; and the danger, if any, to members of the defendant's immediate family as a result of the offense.

In addition to considering those factors, the Commission further restricted family ties departures based on loss of caretaking or financial support. In order for a departure based on loss of caretaking or financial support to be warranted, the court must find the presence of all four of the following circumstances: (1) the defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential

caretaking or essential financial support to the defendant's family; (2) such loss exceeds the harm ordinarily incident to incarceration; (3) there are no effective remedial or ameliorative programs reasonably available, making the defendant's caretaking or financial support irreplaceable to the defendant's family, and (4) the departure effectively will address the loss of caretaking or financial support. The Commission determined that these heightened criteria are appropriate and necessary in order to distinguish hardship or suffering that is ordinarily incident to incarceration from that which is exceptional.

The Commission also deleted community ties from section 5H1.6.

#### **4. Revisions to Chapter Five, Part K (Departures)**

The Commission also limited several departure provisions in Chapter Five, Part K (Departures).

##### **a. §5K2.10 (Victim's Conduct)**

First, the Commission added a factor to §5K2.10 (Victim's Conduct) that the court should consider when determining whether a departure is warranted based on victim's conduct. In addition to five previously existing factors, the court now should consider the proportionality and reasonableness of the defendant's response to the victim's provocation.

##### **b. §5K2.12 (Coercion and Duress)**

The Commission added a factor to §5K2.12 (Coercion and Duress), providing that the extent of a departure based on coercion and duress ordinarily should depend on the proportionality of the defendant's actions to the seriousness of the coercion, blackmail, or duress involved, in addition to several other factors previously listed in the policy statement.

##### **c. §5K2.13 (Diminished Capacity)**

The Commission limited the availability of departures pursuant to §5K2.13 (Diminished Capacity) by adding a causation element. To receive a departure for diminished capacity, the significantly reduced mental capacity now must have contributed substantially to the commission of the offense. The Commission similarly limited the extent of departure by stating that the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

##### **d. §5K2.20 (Aberrant Behavior)**

The Commission significantly restructured §5K2.20 (Aberrant Behavior) to make further restrictions on the availability of departures based on aberrant behavior. As discussed above, the Commission promulgated section 5K2.20 effective November 1, 2000, in order to resolve a longstanding circuit conflict and more appropriately define when a departure based on aberrant behavior may be warranted. A departure based on aberrant behavior may be warranted only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represented a marked deviation by the defendant from an otherwise law-abiding life.

The amendment provided greater emphasis to these strict requirements by moving them from an application note to the body of the policy statement. The Commission also provided greater guidance in applying these requirements with a new application note that makes clear that repetitious or significant planned behavior does not meet the requirements for receiving a departure under section 5K2.20. A defendant involved in a fraud scheme, for example, generally would be prohibited from receiving a departure pursuant to section 5K2.20 because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, as well as significant planning.

The Commission further restricted the availability of departures based on aberrant behavior by adding several strict prohibitions to the list that has existed in section 5K2.20 since its initial promulgation. As described above, prior to this amendment, section 5K2.20 prohibited the court from departing based on aberrant behavior if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point; or (5) the defendant has a prior federal or state felony conviction.

The amendment gave greater prominence to those previously existing prohibitions and expanded them in significant ways. The amendment eliminated defendants who have any significant prior criminal behavior from consideration for a departure pursuant to section 5K2.20, regardless of whether such behavior is countable under Chapter Four, and even if such behavior is not a state or federal felony. The amendment also expanded the class of drug trafficking defendants prohibited from consideration for a departure pursuant to section 5K2.20 by expanding the definition of “serious drug trafficking offense.” Specifically, the amendment expanded the definition of “serious drug trafficking offense” in the accompanying application note to include any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that provides a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant meets the criteria of §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases). Prior to this amendment, only drug trafficking defendants who were subject to such mandatory minimum penalties and who did not meet the criteria set forth in section 5C1.2 were precluded categorically from consideration for a departure under section 5K2.20.

## **5. Revisions to Chapter Four (Criminal History)**

The Commission substantially restructured §4A1.3 (Departures Based on Inadequacy of Criminal History Category) to set forth more clearly the standards governing departures based on criminal history, to prohibit and limit the extent of departures based on criminal history for certain offenders with significant criminal history, and to require written specification of the basis for a departure based on criminal history.

Section 4A1.3(a) provides that an upward departure may be warranted if reliable information indicates that the defendant's criminal history category substantially underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes. Section 4A1.3(a) more clearly states previously existing guidance regarding determination of the extent of an upward departure based on criminal history. Similarly, section 4A1.3(b) provides that a downward departure may be warranted if reliable information indicates that the defendant's criminal history category substantially overrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

The Commission added several prohibitions and limitations on the availability of downward departures based on criminal history. Downward departures based on criminal history are now prohibited if the defendant is an armed career criminal within the meaning of §4B1.3 (Armed Career Criminal) or a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors). The Commission determined that such offenders should never receive a criminal history departure.

Section 4A1.3(b) reiterates the longstanding prohibition against a departure below the lower limit of the applicable guideline range for criminal history Category I.

Section 4A1.3(b) also added certain limitations on the extent of departure available under this provision. Specifically, a downward departure pursuant to this section for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

In addition, the amendment provides that a defendant whose criminal history category is Category I after receipt of a downward departure under section 4A1.3(b) does not meet the criterion of subsection (a)(1) of section 5C1.2 if, before receipt of the departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category). Thus, a departure to Category I cannot qualify an otherwise ineligible defendant for relief from an applicable mandatory minimum sentence under section 5C1.2.

The Commission added a new subsection, section 4A1.3(c), that requires the court, in departing based on criminal history, to state in writing the specific reasons why the applicable criminal history category underrepresents or overrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes. This specificity

requirement is consistent with the PROTECT Act and is intended both to facilitate the necessary departure analysis and to improve the Commission's ability to refine the criminal history guidelines.

## **6. Revisions to Chapter Six (Sentencing Procedures and Plea Agreements)**

The Commission revised §6B1.2 (Standards for Acceptance of Plea Agreements) to require greater specificity in the sentencing documentation in a case involving a departure either recommended or agreed to in a Rule 11(c)(1)(B) or Rule 11(c)(1)(C) plea agreement. Specifically, if the court accepts such a plea agreement, and the recommended or agreed to sentence departs from the applicable guideline range for justifiable reasons, the court now is required to provide specific written reasons in the Statement of Reasons or judgment and commitment order. This specificity requirement also is consistent with the PROTECT Act and is intended to facilitate the necessary statutory and guideline departure analysis, as well as to improve the Commission's ability to understand the underlying reasons for departures in cases involving plea agreements.

## **7. Revisions to Chapter One (Introduction and General Application Principles)**

The Commission created a new guideline, §1A1.1 (Authority), that clearly sets forth the Commission's authority to promulgate guidelines, policy statements, and commentary. The amendment moved *in toto* Chapter One, Part A, as in effect on November 1, 1987, to the commentary as a historical note. Section 401(m)(2) of the PROTECT Act directed the Commission to make conforming amendments to Part A, paragraph 4(b) of the introduction. Chapter One, Part A was an introduction to the *Guidelines Manual* that explained a number of policy decisions made by the Commission when promulgating the initial set of guidelines. This introduction was amended occasionally between 1987 and 2003. The Commission determined that the introduction should be returned to its original form and placed in a historical note in order to preserve its historical context without outdated commentary. Relevant portions regarding departures were incorporated into the background commentary to section 5K2.0.

## **8. Creation of §5K3.1 (Early Disposition Programs)**

The Commission implemented the directive at section 401(m)(2)(B) of the PROTECT Act regarding early disposition programs by adding a new policy statement at §5K3.1 (Early Disposition Programs). The provision restates the language contained in the directive and provides that, upon motion of the government, the court may depart downward not more than four offense levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides. The Commission determined that implementing the directive in this unfettered manner is appropriate at this time, notwithstanding several concerns that are discussed in Chapter 4, specifically the potential for unwarranted sentencing disparity based on geography.

As more fully discussed in Chapter 4, the Commission cannot determine the full impact

of fast track programs on the departure rate because fast track departures are documented in various ways by the judicial districts that have such programs. Based on information received from the Department of Justice, hearing testimony, public comment, and sentencing data, the Commission believes the impact of these programs on the departure rate is significant.

The Commission estimates that the government initiated approximately 40 percent of all nonsubstantial assistance downward departures in fiscal year 2001. The Commission is unable to isolate which government initiated departures were pursuant to fast track programs, however, because sentencing courts do not report this information in a uniform manner. When government initiated departures as a whole are excluded, the downward departure rate is 10.9 percent, significantly lower than the overall reported downward departure rate of 18.1 percent.<sup>171</sup>

An alternative method to estimate the impact of fast track programs is to exclude from the departure analysis the southwest border districts, many of which have implemented fast track programs to cope with increased caseloads of immigration and immigration related offenses. In fiscal year 2001, the southwest border districts had a combined departure rate of 38.2 percent. In contrast, the departure rate for the rest of the nation was 10.4 percent, significantly lower than the overall departure rate of 18.1 percent. Therefore, circumstances unique to the southwest border districts appear to be skewing the overall national departure rate to some degree.

### **C. COMMISSION ACTIONS TO REDUCE INCIDENCE OF DEPARTURES BEYOND 180 DAY TIME FRAME OF THE PROTECT ACT**

The Commission worked diligently to implement the directive within the time frame prescribed by the PROTECT Act, but its efforts in the area of departures are ongoing in nature.

The Commission is continuing its work on several specific areas that affect the incidence of departures. In particular, possible refinements to the criminal history calculations may be made to take into account data that is now becoming available from the Commission's multi-year comprehensive recidivism study. Refinements to the criminal history calculations could further reduce criminal history departures and eliminate aberrant behavior departures. The Commission has furthered this process by voting to publish an issue for comment in the *Federal Register* on this point.

The Commission also has identified addressing immigration offenses further as a priority for the current amendment cycle.<sup>172</sup> Immigration offenses account for a substantial proportion (33.3%) of all downward departure cases, and data regarding the impact of the Commission's

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<sup>171</sup> See *supra* ch. 4, fig. 14, at p. 55.

<sup>172</sup> Sentencing Guidelines for the United States Courts, 68 Fed. Reg. 52264–65 (Sep. 2, 2003).

illegal reentry amendment on the departure rate for such offenses will be available soon. Additional refinements to the guidelines for immigration offenses may reduce further the incidence of departures.

Related to immigration, the Commission intends to monitor closely the implementation and operation of fast track programs and the new policy statement providing departures for such programs. As discussed in Chapter 4, the Commission is concerned that fast track programs and the new policy statement may cause increased sentencing disparity. In addition, sentencing courts in judicial districts without fast track programs may be pressured to provide similar sentencing outcomes for similarly-situated defendants by employing other methods such as downward departures, which would undermine the PROTECT Act's goal of reducing the incidence of departures.

In addition, the Commission intends to study whether collateral consequences should be prohibited as grounds for departure. Such collateral consequences could include such things as inmate classification and facility designation decisions, policies crediting for previous time served and satisfactory behavior, correctional employment and other program opportunities or policies, furlough and work release policies, post-release incarceration policies, and similar factors relating to the place and manner in which a sentence is to be served and the defendant's eligibility for release thereafter, should be prohibited grounds for departure.

More generally, the Commission continues to review departure provisions throughout the *Guidelines Manual* and to consider whether circumstances warranting departure should be incorporated as guideline adjustments.

In sum, the Commission has taken decisive and significant action to reduce the incidence of departures, but this is an ongoing process that will continue beyond the 180 day time frame established in the PROTECT Act. The Commission has identified several specific areas on which it will continue to work that may further impact the incidence of departures and advance the goals of the Sentencing Reform Act.

# Appendix A

## COMMISSION EMERGENCY AMENDMENT EFFECTIVE OCTOBER 27, 2003

PART I: §5K2.0

1. Amendment: Section 5K2.0 is amended to read as follows:

"§5K2.0. Grounds for Departure (Policy Statement)

(a) UPWARD DEPARTURES IN GENERAL AND DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.—

(1) IN GENERAL.—The sentencing court may depart from the applicable guideline range if—

(A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(1), that there exists an aggravating or mitigating circumstance; or

(B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i), that there exists an aggravating circumstance,

of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

(2) DEPARTURES BASED ON CIRCUMSTANCES OF A KIND NOT ADEQUATELY TAKEN INTO CONSIDERATION.—

- (A) IDENTIFIED CIRCUMSTANCES.—This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (e.g., as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. § 3553(b) and the provisions of this subpart may be warranted.
  - (B) UNIDENTIFIED CIRCUMSTANCES.—A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.
- (3) DEPARTURES BASED ON CIRCUMSTANCES PRESENT TO A DEGREE NOT ADEQUATELY TAKEN INTO CONSIDERATION.—A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.
  - (4) DEPARTURES BASED ON NOT ORDINARILY RELEVANT OFFENDER CHARACTERISTICS AND OTHER CIRCUMSTANCES.—An offender characteristic or other circumstance identified in Chapter Five, Part H (Offender Characteristics) or elsewhere in the guidelines as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.
- (b) DOWNWARD DEPARTURES IN CHILD CRIMES AND SEXUAL OFFENSES.—Under 18 U.S.C. § 3553(b)(2)(A)(ii), the sentencing court may impose a sentence below the range

established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—

- (1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;
- (2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and
- (3) should result in a sentence different from that described.

The grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.

- (c) **LIMITATION ON DEPARTURES BASED ON MULTIPLE CIRCUMSTANCES.**—The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—
- (1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and
  - (2) each such offender characteristic or other circumstance is—
    - (A) present to a substantial degree; and
    - (B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a

determination of whether a departure is warranted.

- (d) **PROHIBITED DEPARTURES.**—Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:
- (1) Any circumstance specifically prohibited as a ground for departure in §§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third and last sentences of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts).
  - (2) The defendant’s acceptance of responsibility for the offense, which may be taken into account only under §3E1.1 (Acceptance of Responsibility).
  - (3) The defendant’s aggravating or mitigating role in the offense, which may be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively.
  - (4) The defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (*i.e.*, a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreement).
  - (5) The defendant’s fulfillment of restitution obligations only to the extent required by law including the guidelines (*i.e.*, a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).
  - (6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.

- (e) **REQUIREMENT OF SPECIFIC WRITTEN REASONS FOR DEPARTURE.**—If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the written judgment and commitment order.

### Commentary

#### Application Notes:

1. Definitions.—For purposes of this policy statement:

‘Circumstance’ includes, as appropriate, an offender characteristic or any other offense factor.

‘Depart’, ‘departure’, ‘downward departure’, and ‘upward departure’ have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. Scope of this Policy Statement.—

- (A) Departures Covered by this Policy Statement.—This policy statement covers departures from the applicable guideline range based on offense characteristics or offender characteristics of a kind, or to a degree, not adequately taken into consideration in determining that range. See 18 U.S.C. § 3553(b).

Subsection (a) of this policy statement applies to upward departures in all cases covered by the guidelines and to downward departures in all such cases except for downward departures in child crimes and sexual offenses.

Subsection (b) of this policy statement applies only to downward departures in child crimes and sexual offenses.

- (B) Departures Covered by Other Guidelines.—This policy statement does not cover the following departures, which are addressed elsewhere in the guidelines: (i) departures based on the defendant’s criminal history (see Chapter Four (Criminal History and Criminal Livelihood), particularly §4A1.3 (Departures Based on Inadequacy of Criminal History Category)); (ii) departures based on the defendant’s substantial assistance to the authorities (see §5K1.1 (Substantial Assistance to Authorities)); and (iii) departures based on early disposition programs (see §5K3.1 (Early Disposition Programs)).

3. Kinds and Expected Frequency of Departures under Subsection (a).—As set forth in subsection (a), there generally are two kinds of departures from the guidelines based on offense characteristics and/or offender characteristics: (A) departures based on circumstances of a kind not adequately taken into consideration in the guidelines; and (B) departures based on circumstances that are present to a degree not adequately taken into consideration in the guidelines.
- (A) Departures Based on Circumstances of a Kind Not Adequately Taken into Account in Guidelines.—Subsection (a)(2) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), of a kind not adequately taken into consideration in the guidelines.
- (i) Identified Circumstances.—This subpart (Chapter Five, Part K, Subpart 2) identifies several circumstances that the Commission may have not adequately taken into consideration in setting the offense level for certain cases. Offense guidelines in Chapter Two (Offense Conduct) and adjustments in Chapter Three (Adjustments) sometimes identify circumstances the Commission may have not adequately taken into consideration in setting the offense level for offenses covered by those guidelines. If the offense guideline in Chapter Two or an adjustment in Chapter Three does not adequately take that circumstance into consideration in setting the offense level for the offense, and only to the extent not adequately taken into consideration, a departure based on that circumstance may be warranted.
- (ii) Unidentified Circumstances.—A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.
- (B) Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration in Guidelines.—
- (i) In General.—Subsection (a)(3) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), to a degree not adequately taken into

consideration in the guidelines. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to determine the most appropriate weight to be accorded the mitigating and aggravating circumstances specified in the guidelines, it is expected that departures based on the weight accorded to any such circumstance will occur rarely and only in exceptional cases.

- (ii) Examples.—As set forth in subsection (a)(3), if the applicable offense guideline and adjustments take into consideration a circumstance identified in this subpart, departure is warranted only if the circumstance is present to a degree substantially in excess of that which ordinarily is involved in the offense. Accordingly, a departure pursuant to §5K2.7 for the disruption of a governmental function would have to be substantial to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the guideline covering the mailing of injurious articles is applicable, however, and the offense caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure may be warranted if several persons were injured.

- (C) Departures Based on Circumstances Identified as Not Ordinarily Relevant.—Because certain circumstances are specified in the guidelines as not ordinarily relevant to sentencing (see, e.g., Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

In addition, as required by subsection (e), each circumstance forming the basis for a departure described in this subdivision shall be stated with specificity in the written judgment and commitment order.

#### 4. Downward Departures in Child Crimes and Sexual Offenses.—

- (A) Definition.—For purposes of this policy statement, the term ‘child crimes and

sexual offenses’ means offenses under any of the following: 18 U.S.C. § 1201 (involving a minor victim), 18 U.S.C. § 1591, or chapter 71, 109A, 110, or 117 of title 18, United States Code.

(B) Standard for Departure.—

- (i) Requirement of Affirmative and Specific Identification of Departure Ground.—The standard for a downward departure in child crimes and sexual offenses differs from the standard for other departures under this policy statement in that it includes a requirement, set forth in 18 U.S.C. § 3553(b)(2)(A)(ii)(I) and subsection (b)(1) of this guideline, that any mitigating circumstance that forms the basis for such a downward departure be affirmatively and specifically identified as a ground for downward departure in this part (*i.e.*, Chapter Five, Part K).
- (ii) Application of Subsection (b)(2).—The commentary in Application Note 3 of this policy statement, except for the commentary in Application Note 3(A)(ii) relating to unidentified circumstances, shall apply to the court’s determination of whether a case meets the requirement, set forth in subsection 18 U.S.C. § 3553(b)(2)(A)(ii)(II) and subsection (b)(2) of this policy statement, that the mitigating circumstance forming the basis for a downward departure in child crimes and sexual offenses be of kind, or to a degree, not adequately taken into consideration by the Commission.

5. Departures Based on Plea Agreements.—Subsection (d)(4) prohibits a downward departure based only on the defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense. Even though a departure may not be based merely on the fact that the defendant agreed to plead guilty or enter a plea agreement, a departure may be based on justifiable, non-prohibited reasons for departure as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreements). In cases in which the court departs based on such reasons as set forth in the plea agreement, the court must state the reasons for departure with specificity in the written judgment and commitment order, as required by subsection (e).

Background: This policy statement sets forth the standards for departing from the applicable guideline range based on offense and offender characteristics of a kind, or to a degree, not adequately considered by the Commission. Circumstances the Commission has determined are not ordinarily relevant to determining whether a departure is warranted or are prohibited as bases for departure are addressed in Chapter Five, Part H (Offender Characteristics) and in this policy statement. Other departures, such as those based on the defendant’s criminal history, the defendant’s substantial assistance to authorities, and early disposition programs, are addressed elsewhere in the guidelines.

As acknowledged by Congress in the Sentencing Reform Act and by the Commission when the first set of guidelines was promulgated, ‘it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.’ (See Historical Note to §1A1.1 (Authority)). Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain ‘sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.’ 28 U.S.C. § 991(b)(1)(B). By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, along with appellate cases reviewing these departures, the Commission can further refine the guidelines to specify more precisely when departures should and should not be permitted.

As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the ‘PROTECT Act’, Public Law 108–21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.

In order for appellate courts to fulfill their statutory duties under 18 U.S.C. § 3742 and for the Commission to fulfill its ongoing responsibility to refine the guidelines in light of information it receives on departures, it is essential that sentencing courts state with specificity the reasons for departure, as required by the PROTECT Act.

This policy statement, including its commentary, was substantially revised, effective October 27, 2003, in response to directives contained in the PROTECT Act, particularly the directive in section 401(m) of that Act to—

- ‘(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and
- (2) promulgate, pursuant to section 994 of title 28, United States Code—
  - (A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced;
  - (B) a policy statement authorizing a departure pursuant to an early disposition program; and
  - (C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by the Act, including a revision of ...section 5K2.0’.

The substantial revision of this policy statement in response to the PROTECT Act was intended to refine the standards applicable to departures while giving due regard for concepts, such as the ‘heartland’, that have evolved in departure jurisprudence over time.

Section 401(b)(1) of the PROTECT Act directly amended this policy statement to add subsection (b), effective April 30, 2003."

PART II: DEPARTURES UNDER CHAPTER FIVE, PART H

The Introductory Commentary of Chapter 5, Part H, is amended to read as follows:

" Introductory Commentary

The following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range and, in certain cases, to the determination of a sentence within the applicable guideline range. Under 28 U.S.C. § 994(d), the Commission is directed to consider whether certain specific offender characteristics 'have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence' and to take them into account only to the extent they are determined to be relevant by the Commission.

The Commission has determined that certain circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. See §5K2.0 (Grounds for Departure).

In addition, 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, and family ties and responsibilities in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment."

Section 5H1.4 is amended to read as follows:

"§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted. However, an extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly

than, imprisonment.

Drug or alcohol dependence or abuse is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see §5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.

Similarly, where a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (see §5B1.3(d)(4)).

Addiction to gambling is not a reason for a downward departure."

Section 5H1.6 is amended to read as follows:

"§5H1.6. Family Ties and Responsibilities (Policy Statement)

Family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

Commentary

Application Note:

1. Circumstances to Consider.—

(A) In General.—In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:

- (i) The seriousness of the offense.
- (ii) The involvement in the offense, if any, of members of the defendant's family.
- (iii) The danger, if any, to members of the defendant's family as a result of the

offense.

- (B) Departures Based on Loss of Caretaking or Financial Support.—A departure under this policy statement based on the loss of caretaking or financial support of the defendant's family requires, in addition to the court's consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:
- (i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.
  - (ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.
  - (iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.
  - (iv) The departure effectively will address the loss of caretaking or financial support."

Section 5H1.7 is amended to read as follows:

"§5H1.7. Role in the Offense (Policy Statement)

A defendant's role in the offense is relevant in determining the applicable guideline range (see Chapter Three, Part B (Role in the Offense)) but is not a basis for departing from that range (see subsection (d) of §5K2.0 (Grounds for Departures))."

Section 5H1.8 is amended to read as follows:

"§5H1.8. Criminal History (Policy Statement)

A defendant's criminal history is relevant in determining the applicable criminal history category. See Chapter Four (Criminal History and Criminal Livelihood). For grounds of departure based on the defendant's criminal history, see §4A1.3

(Departures Based on Inadequacy of Criminal History Category).".

PART III. OTHER DEPARTURES UNDER CHAPTER FIVE, PART K

Section 5K2.10 is amended to read as follows:

"§5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding whether a sentence reduction is warranted, and the extent of such reduction, the court should consider the following:

- (1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.
- (2) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.
- (3) The danger reasonably perceived by the defendant, including the victim's reputation for violence.
- (4) The danger actually presented to the defendant by the victim.
- (5) Any other relevant conduct by the victim that substantially contributed to the danger presented.
- (6) The proportionality and reasonableness of the defendant's response to the victim's provocation.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation."

Section 5K2.12 is amended to read as follows:

"§5K2.12. Coercion and Duress (Policy Statement)

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions, on the proportionality of the defendant's actions to the seriousness of coercion, blackmail, or duress involved, and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. Notwithstanding this policy statement, personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure."

Section 5K2.13 is amended to read as follows:

"§5K2.13. Diminished Capacity (Policy Statement)

A sentence below the applicable guideline range may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

Commentary

Application Note:

1. For purposes of this policy statement—

‘Significantly reduced mental capacity’ means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that

the defendant knows is wrongful.

Background: Section 401(b)(5) of Public Law 108–21 directly amended this policy statement to add subdivision (4), effective April 30, 2003."

Section 5K2.20 is amended to read as follows:

"§5K2.20. Aberrant Behavior (Policy Statement)

- (a) **IN GENERAL.**—Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, a downward departure may be warranted in an exceptional case if (1) the defendant's criminal conduct meets the requirements of subsection (b); and (2) the departure is not prohibited under subsection (c).
- (b) **REQUIREMENTS.**—The court may depart downward under this policy statement only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.
- (c) **PROHIBITIONS BASED ON THE PRESENCE OF CERTAIN CIRCUMSTANCES.**—The court may not depart downward pursuant to this policy statement if any of the following circumstances are present:
  - (1) The offense involved serious bodily injury or death.
  - (2) The defendant discharged a firearm or otherwise used a firearm or a dangerous weapon.
  - (3) The instant offense of conviction is a serious drug trafficking offense.
  - (4) The defendant has either of the following: (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood) before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); or (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four.

## Commentary

### Application Notes:

1. Definitions.—For purposes of this policy statement:  
  
‘Dangerous weapon,’ ‘firearm,’ ‘otherwise used,’ and ‘serious bodily injury’ have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).  
  
‘Serious drug trafficking offense’ means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that provides for a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant meets the criteria of §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases).
2. Repetitious or Significant, Planned Behavior.—Repetitious or significant, planned behavior does not meet the requirements of subsection (b). For example, a fraud scheme generally would not meet such requirements because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, and significant planning.
3. Other Circumstances to Consider.—In determining whether the court should depart under this policy statement, the court may consider the defendant’s (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense.

Background: Section 401(b)(3) of Public Law 108–21 directly amended subsection (a) of this policy statement, effective April 30, 2003."

#### PART IV: CRIMINAL HISTORY

Section 4A1.3 is amended to read as follows:

- "§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)
- (a) UPWARD DEPARTURES.—
    - (1) STANDARD FOR UPWARD DEPARTURE.—If reliable information indicates that the defendant’s criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

- (2) **TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.**—The information described in subsection (a) may include information concerning the following:
- (A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses).
  - (B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.
  - (C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.
  - (D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.
  - (E) Prior similar adult criminal conduct not resulting in a criminal conviction.
- (3) **PROHIBITION.**—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.
- (4) **DETERMINATION OF EXTENT OF UPWARD DEPARTURE.**—
- (A) **IN GENERAL.**—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.
  - (B) **UPWARD DEPARTURES FROM CATEGORY VI.**—In a case in which the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range

appropriate to the case.

(b) **DOWNWARD DEPARTURES.—**

(1) **STANDARD FOR DOWNWARD DEPARTURE.—**If reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) **PROHIBITIONS.—**

(A) **CRIMINAL HISTORY CATEGORY I.—**A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

(B) **ARMED CAREER CRIMINAL AND REPEAT AND DANGEROUS SEX OFFENDER.—**A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) **LIMITATIONS.—**

(A) **LIMITATION ON EXTENT OF DOWNWARD DEPARTURE FOR CAREER OFFENDER.—**The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) **LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE TO CATEGORY I.—**A defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).

- (c) **WRITTEN SPECIFICATION OF BASIS FOR DEPARTURE.**—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:
- (1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.
  - (2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.

Commentary

Application Notes:

1. Definitions.—For purposes of this policy statement, the terms ‘depart’, ‘departure’, ‘downward departure’, and ‘upward departure’ have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).
2. Upward Departures.—
  - (A) Examples.—An upward departure from the defendant’s criminal history category may be warranted based on any of the following circumstances:
    - (i) A previous foreign sentence for a serious offense.
    - (ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.
    - (iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.
    - (iv) Commission of the instant offense while on bail or pretrial release for another serious offense.
  - (B) Upward Departures from Criminal History Category VI.—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant’s criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an

upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

3. Downward Departures.—A downward departure from the defendant's criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(B), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures."

The Commentary to §4A1.1 captioned "Background" is amended by striking "permits information about the significance or similarity of past conduct underlying prior convictions to be used as a basis for imposing a sentence outside the applicable guideline range." and inserting "authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances."

Section 5C1.2 is amended in subsection (a)(1) by inserting "before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category)" after "guidelines".

The Commentary to §5C1.2 captioned "Application Notes" is amended in Note 1 by inserting "before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category)" after "Category)".

PART V: EARLY DISPOSITION PROGRAMS

Chapter 5, Part K, is amended by adding at the end the following:

"3. EARLY DISPOSITION PROGRAMS

§5K3.1. Early Disposition Programs (Policy Statement)

Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.

Commentary

Background: This policy statement implements the directive to the Commission in section 401(m)(2)(B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the 'PROTECT Act', Public Law 108–21).".

PART VI: PLEA AGREEMENTS

Section 6B1.2 is amended in subsection (a) by striking "[Rule 11(e)(1)(A)]" and inserting "(Rule 11(c)(1)(A))".

Section 6B1.2 is amended in subsection (b) by striking "[Rule 11(e)(1)(B)]" and inserting "(Rule 11(c)(1)(B))"; and by striking subdivision (2) and inserting the following:

"(2) (A) the recommended sentence departs from the applicable guideline range for justifiable reasons; and (B) those reasons are specifically set forth in writing in the statement of reasons or judgment and commitment order."

Section 6B1.2 is amended in subsection (c) by striking "[Rule 11(e)(1)(C)]" and inserting "(Rule 11(c)(1)(C))"; and by striking subdivision (2) and inserting the following:

"(2) (A) the agreed sentence departs from the applicable guideline range for justifiable reasons; and (B) those reasons are specifically set forth in writing in the statement of reasons or judgment and commitment order."

The Commentary to §6B1.2 is amended in the second paragraph by striking ". See generally Chapter 1, Part A, Subpart 4(b)(Departures)." and inserting "and those reasons are specifically set forth in writing in the statement of reasons or the judgment and commitment order. As set forth in subsection (d) of §5K2.0 (Grounds for Departure), however, the court may not depart below the applicable guideline range merely because of the defendant's decision to plead guilty to the offense or to enter a plea agreement with respect to the offense."



Historical Note: Chapter One, Part A, as in effect on November 1, 1987, read as follows:

‘  
CHAPTER ONE - INTRODUCTION  
AND GENERAL APPLICATION PRINCIPLES

PART A - INTRODUCTION

1. Authority

The United States Sentencing Commission (‘Commission’) is an independent agency in the judicial branch composed of seven voting and two non-voting, ex officio members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.

2. The Statutory Mission

The Comprehensive Crime Control Act of 1984 foresees guidelines that will further the basic purposes of criminal punishment, i.e., deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender. It delegates to the Commission broad authority to review and rationalize the federal sentencing process.

The statute contains many detailed instructions as to how this determination should be made, but the most important of them instructs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of ‘bank robbery/committed with a gun/\$2500 taken.’ An offender characteristic category might be ‘offender with one prior conviction who was not sentenced to imprisonment.’ The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons, to be determined by coordinating the offense behavior categories with the offender characteristic categories. The statute contemplates the guidelines will establish a range of sentences for every coordination of categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum imprisonment cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

The sentencing judge must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the judge to depart from the guidelines and sentence outside the range. In that case, the judge must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to see if the guideline was correctly applied. If the judge departs

from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act requires the offender to serve virtually all of any prison sentence imposed, for it abolishes parole and substantially restructures good behavior adjustments.

The law requires the Commission to send its initial guidelines to Congress by April 13, 1987, and under the present statute they take effect automatically on November 1, 1987. Pub. L. No. 98-473, § 235, reprinted at 18 U.S.C. § 3551. The Commission may submit guideline amendments each year to Congress between the beginning of a regular session and May 1. The amendments will take effect automatically 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The Commission, with the aid of its legal and research staff, considerable public testimony, and written commentary, has developed an initial set of guidelines which it now transmits to Congress. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines by submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts throughout the nation.

### 3. The Basic Approach (Policy Statement)

To understand these guidelines and the rationale that underlies them, one must begin with the three objectives that Congress, in enacting the new sentencing law, sought to achieve. Its basic objective was to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system. To achieve this objective, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by 'good time' credits. In addition, the parole commission is permitted to determine how much of the remainder of any prison sentence an offender actually will serve. This usually results in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence handed down by the court.

Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

Honesty is easy to achieve: The abolition of parole makes the sentence imposed by the court the sentence the offender will serve. There is a tension, however, between the mandate of uniformity (treat similar cases alike) and the mandate of proportionality (treat different cases differently) which, like the historical tension between law and equity, makes it difficult to achieve both goals simultaneously. Perfect uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the

guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that lumps together armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, is far too broad.

At the same time, a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect. A bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected (and therefore may already be counted, to a different degree, in the punishment for the underlying offense); and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies, depending on how much other harm has occurred. (Thus, one cannot easily assign points for each kind of harm and simply add them up, irrespective of context and total amounts.)

The larger the number of subcategories, the greater the complexity that is created and the less workable the system. Moreover, the subcategories themselves, sometimes too broad and sometimes too narrow, will apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system of subcategories, would have to make a host of decisions about whether the underlying facts are sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different judges will apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to eliminate.

In view of the arguments, it is tempting to retreat to the simple, broad-category approach and to grant judges the discretion to select the proper point along a broad sentencing range. Obviously, however, granting such broad discretion risks correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. That is to say, such an approach risks a return to the wide disparity that Congress established the Commission to limit.

In the end, there is no completely satisfying solution to this practical stalemate. The Commission has had to simply balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any ultimate system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the moral principle of ‘just deserts.’ Under this principle, punishment should be scaled to the offender’s culpability and the resulting harms. Thus, if a defendant is less culpable, the defendant deserves less punishment. Others argue that punishment should be imposed primarily on the basis of practical ‘crime control’ considerations. Defendants sentenced under this scheme should receive the punishment that most effectively lessens the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of these points of view have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation. As a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result.

For now, the Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses data estimating the existing sentencing system as a starting point. It has analyzed data drawn from 10,000 presentence investigations, crimes as distinguished in substantive criminal statutes, the United States Parole Commission’s guidelines and resulting statistics, and data from other relevant sources, in order to determine which distinctions are important in present practice. After examination, the Commission has accepted, modified, or rationalized the more important of these distinctions.

This empirical approach has helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, is short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit many distinctions that some may believe important, yet they include most of the major distinctions that statutes and presentence data suggest make a significant difference in sentencing decisions. Important distinctions that are ignored in existing practice probably occur rarely. A sentencing judge may take this unusual case into account by departing from the guidelines.

The Commission’s empirical approach has also helped resolve its philosophical dilemma.

Those who adhere to a just deserts philosophy may concede that the lack of moral consensus might make it difficult to say exactly what punishment is deserved for a particular crime, specified in minute detail. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient, readily available data might make it difficult to say exactly what punishment will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a moral or crime-control perspective.

The Commission has not simply copied estimates of existing practice as revealed by the data (even though establishing offense values on this basis would help eliminate disparity, for the data represent averages). Rather, it has departed from the data at different points for various important reasons. Congressional statutes, for example, may suggest or require departure, as in the case of the new drug law that imposes increased and mandatory minimum sentences. In addition, the data may reveal inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from present practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these initial guidelines are but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission has developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, and therefore effective, sentencing system.

#### 4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-writing process has required the Commission to resolve a host of important policy questions, typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction will briefly discuss several of those issues. Commentary in the guidelines explains others.

##### (a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and raced away damaging property during escape. A pure real offense system would sentence on the

basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a real offense system. After all, the present sentencing system is, in a sense, a real offense system. The sentencing court (and the parole commission) take account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process, given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable, and, in the Commission's view, risked return to wide disparity in practice.

The Commission therefore abandoned the effort to devise a 'pure' real offense system and instead experimented with a 'modified real offense system,' which it published for public comment in a September 1986 preliminary draft.

This version also foundered in several major respects on the rock of practicality. It was highly complex and its mechanical rules for adding harms (e.g., bodily injury added the same punishment irrespective of context) threatened to work considerable unfairness. Ultimately, the Commission decided that it could not find a practical or fair and efficient way to implement either a pure or modified real offense system of the sort it originally wanted, and it abandoned that approach.

The Commission, in its January 1987 Revised Draft and the present guidelines, has moved closer to a 'charge offense' system. The system is not, however, pure; it has a number of real elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law have forced the Commission to write guidelines that are descriptive of generic conduct rather than tracking purely statutory language. For another, the guidelines, both through specific offense characteristics and adjustments, take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken.

Finally, it is important not to overstate the difference in practice between a real and a charge offense system. The federal criminal system, in practice, deals mostly with drug offenses, bank robberies and white collar crimes (such as fraud, embezzlement, and bribery).

For the most part, the conduct that an indictment charges approximates the real and relevant conduct in which the offender actually engaged.

The Commission recognizes its system will not completely cure the problems of a real offense system. It may still be necessary, for example, for a court to determine some particular real facts that will make a difference to the sentence. Yet, the Commission believes that the instances of controversial facts will be far fewer; indeed, there will be few enough so that the court system will be able to devise fair procedures for their determination. See United States v. Fatico, 579 F.2d 707 (2d Cir. 1978) (permitting introduction of hearsay evidence at sentencing hearing under certain conditions), on remand, 458 F. Supp. 388 (E.D.N.Y. 1978), aff'd, 603 F.2d 1053 (2d Cir. 1979) (holding that the government need not prove facts at sentencing hearing beyond a reasonable doubt), cert. denied, 444 U.S. 1073 (1980).

The Commission also recognizes that a charge offense system has drawbacks of its own. One of the most important is its potential to turn over to the prosecutor the power to determine the sentence by increasing or decreasing the number (or content) of the counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin, or theft of \$10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of \$30,000. Further, a sentencing court may control any inappropriate manipulation of the indictment through use of its power to depart from the specific guideline sentence. Finally, the Commission will closely monitor problems arising out of count manipulation and will make appropriate adjustments should they become necessary.

(b) Departures.

The new sentencing statute permits a court to depart from a guideline-specified sentence only when it finds 'an aggravating or mitigating circumstance ...that was not adequately taken into consideration by the Sentencing Commission . . .'. 18 U.S.C. § 3553(b). Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of §5H1.4, and the last sentence of §5K2.12, list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two basic reasons. First is the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that in the initial set of guidelines it need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at the present time. Thus, for example, where the presence of actual physical injury currently makes an important difference in final sentences, as in the case of robbery, assault, or arson, the guidelines specifically instruct the judge to use this factor to augment the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data do not permit the Commission, at this time, to conclude that the factor is empirically important in relation to the particular offense. Of course, a factor (say physical injury) may nonetheless sometimes occur in connection with a crime (such as fraud) where it does not often occur. If, however, as the data indicate, such occurrences are rare, they are precisely the type of events that the court's departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed. Of course, the Commission recognizes that even its collection and analysis of 10,000 presentence reports are an imperfect source of data sentencing estimates. Rather than rely heavily at this time upon impressionistic accounts, however, the Commission believes it wiser to wait and collect additional data from our continuing monitoring process that may demonstrate how the guidelines work in practice before further modification.

It is important to note that the guidelines refer to three different kinds of departure. The first kind, which will most frequently be used, is in effect an interpolation between two adjacent, numerically oriented guideline rules. A specific offense characteristic, for example, might require an increase of four levels for serious bodily injury but two levels for bodily injury. Rather than requiring a court to force middle instances into either the 'serious' or the 'simple' category, the guideline commentary suggests that the court may interpolate and select a midpoint increase of three levels. The Commission has decided to call such an interpolation a 'departure' in light of the legal views that a guideline providing for a range of increases in offense levels may violate the statute's 25 percent rule (though others have presented contrary legal arguments). Since interpolations are technically departures, the courts will have to provide reasons for their selection, and it will be subject to review for 'reasonableness' on appeal. The Commission believes, however, that a simple reference by the court to the 'mid-category' nature of the facts will typically provide sufficient reason. It does not foresee serious practical problems arising out of the application of the appeal provisions to this form of departure.

The second kind involves instances in which the guidelines provide specific guidance for

departure, by analogy or by other numerical or non-numerical suggestions. For example, the commentary to §2G1.1 (Transportation for Prostitution), recommends a downward adjustment of eight levels where commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions, and that the courts of appeals may prove more likely to find departures ‘unreasonable’ where they fall outside suggested levels.

A third kind of departure will remain unguided. It may rest upon grounds referred to in Chapter 5, Part H, or on grounds not mentioned in the guidelines. While Chapter 5, Part H lists factors that the Commission believes may constitute grounds for departure, those suggested grounds are not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly unusual.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas, and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts have urged the Commission not to attempt any major reforms of the agreement process, on the grounds that any set of guidelines that threatens to radically change present practice also threatens to make the federal system unmanageable. Others, starting with the same facts, have argued that guidelines which fail to control and limit plea agreements would leave untouched a ‘loophole’ large enough to undo the good that sentencing guidelines may bring. Still other commentators make both sets of arguments.

The Commission has decided that these initial guidelines will not, in general, make significant changes in current plea agreement practices. The court will accept or reject any such agreements primarily in accordance with the rules set forth in Fed.R.Crim.P. 11(e). The Commission will collect data on the courts’ plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate.

The Commission nonetheless expects the initial set of guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. Insofar as a prosecutor and defense attorney seek to agree about a likely sentence or range of sentences, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which judges will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation. Since they will have before them the norm, the relevant factors (as disclosed in the plea agreement), and the reason for the agreement, they will find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to ‘reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .’ 28 U.S.C. § 994(j). Under present sentencing practice, courts sentence to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are ‘serious.’ If the guidelines were to permit courts to impose probation instead of prison in many or all such cases, the present sentences would continue to be ineffective.

The Commission’s solution to this problem has been to write guidelines that classify as ‘serious’ (and therefore subject to mandatory prison sentences) many offenses for which probation is now frequently given. At the same time, the guidelines will permit the sentencing court to impose short prison terms in many such cases. The Commission’s view is that the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement or intermittent confinement). For offense levels eleven and twelve, the court must impose at least one half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

(e) Multi-Count Convictions.

The Commission, like other sentencing commissions, has found it particularly difficult to develop rules for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The reason it is difficult is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to life sentences of imprisonment--sentences that neither ‘just deserts’ nor ‘crime control’ theories of punishment would find justified.

Several individual guidelines provide special instructions for increasing punishment

when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment when multiple offenses that are the subjects of separate counts take place.

These rules are set out in Chapter Three, Part D. They essentially provide: (1) When the conduct involves fungible items, e.g., separate drug transactions or thefts of money, the amounts are added and the guidelines apply to the total amount. (2) When nonfungible harms are involved, the offense level for the most serious count is increased (according to a somewhat diminishing scale) to reflect the existence of other counts of conviction.

The rules have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures where necessary to produce a mitigated sentence.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These criminal statutes pose two problems. First, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it cannot comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission has sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses are particularly important in light of the need for enforcement of the general regulatory scheme. The Commission has sought to treat these offenses in these initial guidelines. It will address the less common regulatory offenses in the future.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses, dividing them into four categories.

First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper treatment of any toxic substance.

Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense is as follows:

- (1) The guideline provides a low base offense level (6) aimed at the first type of recordkeeping or reporting offense. It gives the court the legal authority to impose a punishment ranging from probation up to six months of imprisonment.
- (2) Specific offense characteristics designed to reflect substantive offenses that do occur (in respect to some regulatory offenses), or that are likely to occur, increase the offense level.
- (3) A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will be treated like the substantive offense.

The Commission views this structure as an initial effort. It may revise its approach in light of further experience and analysis of regulatory crimes.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission began by estimating the average sentences now being served within each category. It also examined the sentence specified in congressional statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's forthcoming detailed report will contain a comparison between estimates of existing sentencing practices and sentences under the guidelines.

While the Commission has not considered itself bound by existing sentencing practice, it has not tried to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences in many instances will approximate existing practice, but adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons now receive probation, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who now receive probation from those who receive more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a current sentencing practice of very wide variability in which some defendants receive probation while others receive several years in prison for the same offense. Moreover, inasmuch as those who currently plead guilty often receive lesser sentences, the guidelines also permit the court to impose lesser sentences on those defendants who accept responsibility and those who cooperate with the government.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the new drug law and the career offender provisions of the sentencing law, require the Commission to promulgate rules that will lead to substantial prison population increases. These increases will occur irrespective of any guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum, or career offender, sentences), will lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons, estimate at approximately 10 percent, over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table. For technical and practical reasons it has 43 levels. Each row in the table contains levels that overlap with the levels in the preceding and succeeding rows. By overlapping the levels, the table should discourage unnecessary litigation. Both prosecutor and defendant will realize that the difference between one level and another will not necessarily make a difference in the sentence that the judge imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether \$10,000 or \$11,000 was obtained as a result of a fraud. At the same time, the rows work to increase a sentence proportionately. A change of 6 levels roughly doubles the sentence irrespective of the level at which one starts. The Commission, aware of the legal requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months, also wishes to permit courts the greatest possible range for exercising discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the judge within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many, rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation as to which category an offender fell within would become more likely. Where a table has many smaller monetary distinctions, it minimizes the likelihood of litigation, for the importance of the precise amount of money involved is considerably less.

5. A Concluding Note

The Commission emphasizes that its approach in this initial set of guidelines is one of caution. It has examined the many hundreds of criminal statutes in the United States Code. It has begun with those that are the basis for a significant number of prosecutions. It has sought to place them in a rational order. It has developed additional distinctions relevant to the application of these provisions, and it has applied sentencing ranges to each resulting category. In doing so, it has relied upon estimates of existing sentencing practices as revealed by its own statistical analyses, based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from existing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with these guidelines will lead to additional information and provide a firm empirical basis for revision.

Finally, the guidelines will apply to approximately 90 percent of all cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in this initial set of guidelines. They will, however, be addressed in the near future. Their exclusion from this initial submission does not reflect any judgment about their seriousness. The Commission has also deferred promulgation of guidelines pertaining to fines, probation and other sanctions for organizational defendants, with the exception of antitrust violations. The Commission also expects to address this area in the near future.’.

## Amendments

### 1989 Amendments

Amendment 67 amended Subpart 4(b) in the first sentence of the first paragraph by striking ‘...that was’ and inserting ‘of a kind, or to a degree,’; in the second sentence of the last paragraph by striking ‘Part H’ and inserting ‘Part K (Departures)’; and in the third sentence of the last paragraph by striking ‘Part H’ and inserting ‘Part K’.

Amendment 68 amended Subpart 4(b) in the first sentence of the fourth paragraph by striking ‘three’ and inserting ‘two’; in the fourth paragraph by striking the second through eighth sentences as follows:

‘The first kind, which will most frequently be used, is in effect an interpolation between two adjacent, numerically oriented guideline rules. A specific offense characteristic, for example, might require an increase of four levels for serious bodily injury but two levels for bodily injury. Rather than requiring a court to force middle instances into either the ‘serious’ or the ‘simple’ category, the guideline commentary suggests that the court may interpolate and select a midpoint increase of three levels. The Commission has decided to call such an interpolation a ‘departure’ in light of the legal views that a guideline providing for a range of increases in offense levels may violate the statute’s 25 percent rule (though other have presented contrary legal arguments). Since interpolations are technically departures, the courts will have to provide reasons for their selection, and it will be subject to review for ‘reasonableness’ on appeal. The Commission believes, however, that a simple reference by the court to the ‘mid-category’ nature of the facts will typically provide sufficient reason. It does not foresee serious practical problems arising out of the application of the appeal provisions to this form of departure.’;

in the first sentence of the fifth paragraph by striking ‘second’ and inserting ‘first’; and in the first sentence of the sixth paragraph by striking ‘third’ and inserting ‘second’.

## 1990 Amendment

Amendment 307 amended Subparts 2 through 5 to read as follows:

### ‘2. The Statutory Mission

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of ‘bank robbery/committed with a gun/\$2500 taken.’ An offender characteristic category might be ‘offender with one prior conviction not resulting in imprisonment.’ The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission’s initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The

Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

### 3. The Basic Approach (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.

In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the

criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

#### 4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

##### (a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing

court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of \$10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of \$30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.

(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds ‘an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.’ 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), and the last sentence of §5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts’ legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission’s data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud). Such rare occurrences are precisely the type of events that the courts’ departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by

analogy or by other numerical or non-numerical suggestions. For example, the Commentary to §2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures ‘unreasonable’ where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guidelines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable. Others argued that guidelines that failed to control and limit plea agreements would leave untouched a ‘loophole’ large enough to undo the good that sentencing guidelines would bring.

The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts’ plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea agreement practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate. Importantly, if the policy statements relating to plea agreements are followed, circumvention of the Sentencing Reform Act and the guidelines should not occur.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. In the event a prosecutor and defense attorney explore the possibility of a negotiated plea, they will no longer work in the dark. This fact alone should help to reduce irrationality in

respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to ‘reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . .’ 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are ‘serious.’

The Commission’s solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

(e) Multi-Count Convictions.

The Commission, like several state sentencing commissions, has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often

fortuitous, would lead to sentences of life imprisonment -- sentences that neither just deserts nor crime control theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) when the conduct involves fungible items (e.g., separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses were particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form

intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level (e.g., 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will have the same offense level as the substantive offense.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct. For defendants who provide substantial assistance to the government in the investigation or prosecution of others, a downward departure may be warranted.

The Commission has also examined its sentencing ranges in light of their likely

impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)), required the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimated at approximately 10 percent over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether \$10,000 or \$11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. § 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many small monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably less importance.

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing

ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment regarding their seriousness and they will be addressed as the Commission refines the guidelines over time.’.

#### 1992 Amendment

Amendment 466 amended Subpart 4(b) in the first paragraph by inserting ‘§5H1.12 (Lack of Guidance as a Youth and Similar Circumstances)’ after ‘§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status)’.

#### 1995 Amendment

Amendment 534 amended Subpart 4(d) in the second sentence of the third paragraph by striking ‘six’ and inserting ‘eight’; and in the third sentence of the third paragraph by striking "seven through" and inserting "nine and".

#### 1996 Amendment

Amendment 538 amended Subpart 4(b) in the fourth paragraph by striking the third sentence as follows:

‘For example, the Commentary to §2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved.’.

#### 2000 Amendments

Amendment 602 amended Subpart 4(b) in the fifth sentence of the first paragraph by striking ‘and’ before ‘the last’; and by inserting ‘, and §5K2.19 (Post-Sentencing Rehabilitative Efforts)’ after "(Coercion and Duress)’.

Amendment 603 amended Subpart 4(d) by adding an asterisk at the end of the last paragraph

after the period; and by adding at the end the following footnote:

‘\*Note: Although the Commission had not addressed ‘single acts of aberrant behavior’ at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See Supplement to Appendix C, Amendment 603.)’.”.

## PART VIII: MISCELLANEOUS AMENDMENTS

The Commentary to §1B1.1 captioned "Application Notes" is amended by striking Note 1 in its entirety and inserting the following:

- "1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):
- (A) ‘Abducted’ means that a victim was forced to accompany an offender to a different location. For example, a bank robber’s forcing a bank teller from the bank into a getaway car would constitute an abduction.
  - (B) ‘Bodily injury’ means any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.
  - (C) ‘Brandished’ with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.
  - (D) ‘Dangerous weapon’ means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).
  - (E) ‘Departure’ means (i) for purposes other than those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. ‘Depart’ means grant a departure.

‘Downward departure’ means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. ‘Depart downward’ means grant a downward departure.

‘Upward departure’ means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. ‘Depart upward’ means grant an upward departure.

- (F) ‘Destructive device’ means any article described in 26 U.S.C. § 5845(f) (including an explosive, incendiary, or poison gas - (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses).
- (G) ‘Firearm’ means (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. A weapon, commonly known as a ‘BB’ or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.
- (H) ‘Offense’ means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term ‘instant’ is used in connection with ‘offense,’ ‘federal offense,’ or ‘offense of conviction,’ as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).
- (I) ‘Otherwise used’ with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.
- (J) ‘Permanent or life-threatening bodily injury’ means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. In the case of a kidnapping, for example, maltreatment to a life-threatening degree (e.g., by denial of food or medical care) would constitute life-threatening bodily injury.
- (K) ‘Physically restrained’ means the forcible restraint of the victim such as by being tied, bound, or locked up.

- (L) 'Serious bodily injury' means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, 'serious bodily injury' is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law."

Section 2A4.1(a) is amended to read as follows:

"(a) Base Offense Level: 32".

Section 2A4.1(b)(4) is amended by striking subdivision (C) in its entirety.

Section 2A4.1(b)(5) is amended to read as follows:

"(5) If the victim was sexually exploited, increase by 6 levels."

The Commentary to §2A4.1 captioned "Application Notes" is amended by striking Note 3 in its entirety; and by redesignating Notes 4 and 5 and Notes 3 and 4, respectively.

# Appendix B

## LEGISLATIVE HISTORY

The legislative history of sentencing reform generally, and the Sentencing Reform Act specifically, has been reviewed and written about exhaustively.<sup>1</sup> This chapter reviews the legislative history of sentencing reform, however, with a particular emphasis on departures.

### A. THE EARLY YEARS OF SENTENCING REFORM

The Sentencing Reform Act of 1984 represents one of the most significant pieces of sentencing legislation ever enacted by the United States Congress. For more than a century, Congress had delegated virtually unfettered discretion to federal judges to determine what a sentence should be within a typically wide range prescribed by statute.<sup>2</sup> “The federal judge decided the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence.”<sup>3</sup> The lack of uniformity in sentencing was exacerbated by the creation of a parole system that applied to only a portion of those sentenced and that focused the release of prisoners according to their potential for or actual rehabilitation.<sup>4</sup>

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<sup>1</sup> See, e.g., United States Sentencing Commission [USSC], THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING, Vol. I (December 1991) [hereinafter USSC 1991 Report]; Kate Stith and Steve Y. Yoh, *The Politics of Sentencing Reform: The Legislative History of the Sentencing Guidelines*, 28 WAKE FOREST L. REV. 225 (1993); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291 (1993); see also, the extensive legislative history of the Sentencing Reform Act outlined in S. REP. NO. 98-225, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1983).

<sup>2</sup> USSC 1991 Report, *supra* note 1, at 9. The “unfettered discretion” of judges in determining sentencing outcomes would become one of the single biggest reasons Congress would cite for sentencing reform during the years leading up to passage of the Sentencing Reform Act. See, e.g., the dissenting views of Representatives Gekas and Sensenbrenner in H.R. REP. NO. 98-1017, 98<sup>th</sup> Cong., 2d Sess. 252 (1984) (“Sentencing disparity of truly alarming proportions exists today largely because individual trial judges are permitted unfettered discretion in sentencing.”).

<sup>3</sup> USSC 1991 Report, *supra* note 1, at 9.

<sup>4</sup> *Id.* (citing *United States v. Grayson*, 438 U.S. 41, 46 (1978)).

During the 1950s and 1960s, concern grew that the indeterminate, rehabilitation-based sentencing system was not working and losing the public faith.<sup>5</sup> In March 1966, President Lyndon Johnson, recognizing the faults in the federal criminal code and sentencing system, called for Congress to work with him in creating a “National Strategy on Crime.”<sup>6</sup> President Johnson’s message to Congress resulted in formation of the “Brown Commission,”<sup>7</sup> charged with creating a wholly revised Federal criminal code, including reform of a criminal sentencing system that lacked any general sentencing scheme.<sup>8</sup>

In January 1971, the Brown Commission released its Final Report.<sup>9</sup> Although sentencing reform was not the main focus of the Brown Commission’s work, it did propose some sentencing reform measures that would carry through to the passage of the Sentencing Reform Act, including: a list of authorized sentences for federal crimes, limits on cumulation of punishments for multiple offenses, and appellate review of sentences.<sup>10</sup>

By the 1970s, “there was a broad and rising level of concern in Congress regarding problems with the Federal criminal code, particularly with the serious problems of sentencing disparity.”<sup>11</sup> It had become clear that at that time “Federal sentencing practices provide[d] neither rationality nor fairness.”<sup>12</sup> The bipartisan efforts to reform the criminal code begun in the

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<sup>5</sup> *Id.* at 10. For an extensive discussion of the various approaches to penal justice, including the rehabilitative model, see Paul Hofer & Mark Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L.R. 19 (2003); FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981).

<sup>6</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 32.

<sup>7</sup> The Brown Commission was named after its chairman Edmund G. Brown, then Governor of California. The Brown Commission comprised twelve members: three Federal judges, three Senators, three House members, and three individuals appointed directly by the President. See *id.* at 32, n.6 & 7; Pub. L. No. 89-801, 80 Stat. 1516 (1984).

<sup>8</sup> William J. Wilkins, Jr., Phyllis J. Newton & John Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 365 (1991).

<sup>9</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 32.

<sup>10</sup> USSC 1991 Report, *supra* note 1, at 10 (citing Nat’l Comm’n on Reform of Federal Criminal Laws, Final Report, 271–318 (1971)). The concerns regarding sentencing raised by the Brown Commission would be echoed repeatedly throughout the history of sentencing reform. See, e.g., S. REP. NO. 97-307, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess. 6 (1981) (“The sentencing structure of present Federal criminal law [] cannot escape criticism. Indeed, it is riddled with irrationality and inconsistency . . . . Grading of offenses is []erratic. Similar conduct is often treated with gross disparity.”).

<sup>11</sup> Wilkins, Newton, & Steer, *supra* note 8, at 362.

<sup>12</sup> S. REP. NO. 95-605, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 882 (1977).

mid-1960s continued under the leadership of Senator John L. McClellan during the 92<sup>nd</sup> Congress,<sup>13</sup> and in 1973 the first legislation aimed at comprehensive reform of the federal criminal code was introduced.<sup>14</sup> None of the bills introduced during the 93<sup>rd</sup> Congress, however, contained provisions for either a sentencing commission or sentencing guidelines system.<sup>15</sup>

In 1975, Senator Edward Kennedy introduced the first piece of substantive sentencing reform legislation, S. 2966. That legislation was based on extensive research by the American Law Institute and the criticisms of the federal sentencing system set forth by federal Judge Marvin E. Frankel.<sup>16</sup> Senator Kennedy's reform legislation called for the creation of a sentencing commission that would put into place a guideline system to govern Federal sentencing,<sup>17</sup> "to reduce unwarranted disparity among sentences imposed by different judges and to provide more rationality and certainty in sentencing."<sup>18</sup>

Senator Kennedy's proposed sentencing reform legislation provided the foundation for debating a new federal sentencing system over the next several years.<sup>19</sup> Despite Senator

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<sup>13</sup> USSC 1991 Report, *supra* note 1, at 10–11. Senator McClellan chaired the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee and took the lead in examining the Brown Commission's recommendations, including those regarding sentencing reform. Senator McClellan's subcommittee held hearings throughout the 92<sup>nd</sup> Congress in preparation for the introduction of legislation in the following Congress. *Id.*

<sup>14</sup> S. REP. NO. 97-307, *supra* note 10, at 2; H.R. REP. NO. 98-1017, *supra* note 2, at 33. Early efforts to revise the criminal code were spearheaded in the Senate by then-Senators McClellan, Ervin, and Hruska.

<sup>15</sup> USSC 1991 Report, *supra* note 1, at 11. None of the bills proposed in the 93<sup>rd</sup> Congress moved out of committee. H.R. REP. NO. 98-1017, *supra* note 2, at 33.

<sup>16</sup> Stith & Yoh, *supra* note 1, at 225. In 1972, Judge Frankel authored a piece entitled *Criminal Sentences: Law without Order* that, along with his series of lectures at the University of Cincinnati Law School, sharply criticized the disparity in sentencing created not only by the federal parole system, but the discretion exercised by judges. Stith & Yoh, at 229; USSC 1991 Report, *supra* note 1, at 11.

<sup>17</sup> Stith & Yoh, *supra* note 1, at 225.

<sup>18</sup> S. REP. NO. 95-605, *supra* note 12, at 883.

<sup>19</sup> Feinberg, *supra* note 1, at 294–95. At the same time debate was underway over Senator Kennedy's proposed guidelines system, the U.S. Parole Commission was undertaking its own guidelines study as a pilot project. The program was expanded to all parole decisions in 1974, and Congress ultimately codified the Parole Commission's guidelines system in 1976. *See* USSC 1991 Report, *supra* note 1, at 12 (citing 38 Fed. Reg. 31,942 (1973); 39 Fed. Reg. 20,028 (1974), and Pub. L. No. 94-233, 90 Stat. 219 (May 14, 1976)). The implementation of this guideline system led to suggestions that a similar system be put into place for sentencing and a number of states, including Minnesota, began their own sentencing guidelines system of reform. USSC 1991 Report, *supra* note 1, at 12.

Kennedy's and others' efforts, reform legislation ultimately died in the 94<sup>th</sup> Congress. The concept of a judicial commission "to promulgate guidelines for federal courts as 'the beginning of a concerted legislative effort to deal with sentencing disparity'" continued to garner widespread support.<sup>20</sup>

Efforts to revise the criminal code and sentencing system continued during the 95<sup>th</sup> Congress. In 1977, Senator McClellan and Senator Kennedy worked with then Attorney General Griffin Bell to draft compromise sentencing reform legislation.<sup>21</sup> The Senate's legislation, S. 1437, not only included Senator Kennedy's earlier sentencing commission initiative, but also a comprehensive plan to replace indeterminate sentencing in the federal criminal system.<sup>22</sup>

The Senate's Subcommittee on Criminal Justice conducted public hearings on the McClellan-Kennedy compromise (S. 1437) as well as on a House version of the bill introduced by then-Representative Robert Kastenmaier.<sup>23</sup> The House Judiciary Committee held numerous hearings and received extensive testimony on S. 1437 and other recodification efforts.<sup>24</sup> By the end of the 95<sup>th</sup> Congress, however, the House Judiciary Committee had concluded that an omnibus approach to criminal code reform as proposed in S. 1437 was not feasible.<sup>25</sup> Instead, it preferred the incremental approach demonstrated by H.R. 13959.<sup>26</sup> This difference in approach caused sentencing reform to stall in the 95<sup>th</sup> Congress. The Senate's version of criminal code

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<sup>20</sup> Wilkins, Newton, & Steer, *supra* note 8, at 362 (citing 121 CONG. REC. 37,562 (1975)). Senator Kennedy's sentencing reform proposal was further bolstered by the recommendations that resulted from a workshop on sentencing reform held at Yale University in the 1970s. S. REP. NO. 95-605, *supra* note 12, at 1159. Those recommendations from a prominent group of law professors and scholars included the creation of a sentencing commission and sentencing guidelines system, a mandatory statement of the purposes of sentencing, abolishment of parole, and appellate review of sentences. USSC 1991 Report, *supra* note 1, at 12; S. REP. NO. 95-605, *supra* note 12, at 1159.

<sup>21</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 33.

<sup>22</sup> Feinberg, *supra* note 1, at 298.

<sup>23</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 33.

<sup>24</sup> H.R. REP. NO. 95-29, 96<sup>th</sup> Cong., 2d Sess. 2-3 (1979).

<sup>25</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 33; H.R. REP. NO. 95-29, *supra* note 24, at 2. The House Judiciary Committee was particularly concerned with the "untested" guidelines system that it feared would "virtually deprive" the sentencing judges of the ability to tailor criminal sentences to the individual being sentenced. H.R. REP. NO. 95-29, *supra* note 24, at 3.

<sup>26</sup> H.R. REP. NO. 95-29, *supra* note 24, at 4-5; H.R. REP. NO. 98-1017, *supra* note 2, at 33. This "incremental approach" would have broken criminal code and sentencing reform initiatives into separate pieces of legislation to cure the most glaring defects with the federal criminal system rather than undertake an omnibus reform effort that House members felt had not been addressed adequately by the Senate. H.R. REP. NO. 98-1017, *supra* note 2, at 33

reform legislation passed the Senate by a 72-15 vote on January 30, 1978,<sup>27</sup> but failed to move in the House of Representatives.

## **B. THE BEGINNING OF THE ROLE OF DEPARTURES IN SENTENCING REFORM**

By the early 1980s, sentencing reform was reaching its final draft form. Both chambers of Congress had acknowledged that a guidelines system was the optimal choice reducing sentencing disparity and uncertainty. The extent to which judges would be required to comply with the guidelines, however, continued to be defined in the final years of debate. What emerged from the failed sentencing reform efforts of the 95<sup>th</sup> Congress was a new provision that would permit a judge to depart from the proposed guidelines system when a particular case so warranted because it did not fit within the applicable guideline range.<sup>28</sup> This provision, added to S. 1437 during the Senate's debate of the bill during the 95<sup>th</sup> Congress,<sup>29</sup> specifically granted the sentencing judge discretion to depart from the relevant guideline sentence, as long as the sentence imposed was not "clearly unreasonable" from the sentencing guidelines.<sup>30</sup>

While requiring general conformity to the guideline ranges, the provision was intended to provide "the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines."<sup>31</sup> In adopting this provision, the Senate Committee expressly rejected an amendment offered by Senator Mathias that would have expanded significantly the circumstances under which judges could depart from the sentencing guidelines in

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<sup>27</sup> *Id.*

<sup>28</sup> S. REP. NO. 95-605, 95<sup>th</sup> Cong., *supra* note 12, at 892 (proposed 18 U.S.C. 3553(b)).

<sup>29</sup> S. REP. NO. 98-225, *supra* note 1, at 3261 (citing 124 CONG. REC. S289 (daily ed. Jan. 23, 1978)).

<sup>30</sup> Stith & Yoh, *supra* note 1, at 244. The House did not take the same approach to sentencing reform. In fact, it flatly rejected the Senate notion that sentencing judges should be restricted to selecting a sentence within a narrowly defined guideline. Whereas the Senate had proposed a mandatory guidelines system, a new departure provision, and appeals of right for sentences outside the guidelines, H.R. 6915 sought to retain parole terms, reduce maximum statutory sentence lengths by one-third, and to empower the Judicial Conference with authority to promulgate non-binding guidelines to assist judges in sentencing. Because the guidelines were not mandatory, there was no need for a departure provision. H.R. 6915 also did not address appellate review. See Marc L. Miller & Ronald F. Wright, *Your Cheatin Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 725, 739 (1999) (discussing legislative history of appellate review); see also H. REP. NO. 98-1017, *supra* note 2, at 32–33 (discussing history of House attempts at sentencing reform).

<sup>31</sup> See S. REP. NO. 98-225, *supra* note 1, at 3261 (discussing legislative history of each section of the Sentencing Reform Act).

a particular case,<sup>32</sup> as well as an amendment by Senator Gary Hart that would not have permitted judicial departures at all.<sup>33</sup>

While the Senate bill allowed departures under prescribed circumstances, it also required the sentencing judge to set forth a statement of reasons justifying any deviation from the guidelines,<sup>34</sup> and it required that all such sentences be subject to appellate review.<sup>35</sup> S. 1437 permitted appellate courts to overturn a sentence if the sentencing judge misapplied the guidelines, or if the sentence was “outside the guidelines” *and* the resulting sentence was unreasonable.<sup>36</sup> Under the Senate bill, an appeal of right was not available for correctly determined sentences that fell within the requisite guideline sentence.<sup>37</sup> These provisions, particularly the availability of appellate review, were intended to act as checks against “clearly unreasonable” sentences.<sup>38</sup>

The legislative maneuvering surrounding this amendment illustrates that Senate reformers intended for typical cases to be sentenced within the guideline range.<sup>39</sup> “The need for consistency in sentences for similar offenders committing similar offenses should be sufficiently important to dissuade a judge from deviating from a clearly applicable guideline range simply because it

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<sup>32</sup> S. REP. NO. 98-225, *supra* note 1, at 3262. “The Mathias amendment would have permitted deviations from the guidelines whenever a judge determined that the characteristics of the offender” or the offense warranted deviation, “whether or not the Sentencing Commission had considered such offense and offender characteristics in the development of the sentencing guidelines.” *Id.*

<sup>33</sup> Stith & Yoh, *supra* note 1, at 240, 245.

<sup>34</sup> A statement of reasons actually was expected for all sentencing, not just in cases of departures, but Congress expected the nondeparture statements to “be brief.” S. REP. NO. 95-605, *supra* note 12, at 893. By contrast, with respect to departures, reformers expected *specific* reasons to be articulated setting forth all the reasons why the judge “felt the guidelines did not adequately take into account all the pertinent circumstances of the case at hand.” *Id.* at 892. Senator Kennedy explained the relationship between the written requirement and departures this way: “A judge would be required to impose a penalty within the established [guideline] range unless it could be demonstrated *in writing* that a justification existed for sentencing the offender to a different term.” Stith & Yoh, *supra* note 1, at 244 n.126 (citing Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 373 (1979)) (emphasis added).

<sup>35</sup> S. REP. NO. 95-605, *supra* note 12, at 883.

<sup>36</sup> Miller & Wright, *supra* note 30, at 737.

<sup>37</sup> *Id.*

<sup>38</sup> S. REP. NO. 95-605, *supra* note 12, at 883.

<sup>39</sup> *Id.* at 892–93.

would have promulgated a different range.”<sup>40</sup> The Senate Judiciary Committee did not leave judges without recourse in dealing with the guidelines, however: “A judge who disagrees with a guideline, may of course, make his views known to the Sentencing Commission, and may recommend such changes as he deems appropriate.”<sup>41</sup>

Following the Senate Judiciary Committee’s report of S. 1437, two additional changes related to departures were made to the legislation that together would seem to further restrict the use of departures. First, the Senate adopted an amendment by Senator Mathias to remove the “clearly” modifier so that appellate courts were directed to vacate sentences outside the guidelines that were “unreasonable” as opposed to “clearly unreasonable.”<sup>42</sup> Second, the Senate agreed to an amendment by Senator Hart that added a new directive to the sentencing judge. “In addition to ‘considering’ a variety of factors and specifying the reasons for a particular sentence, the sentencing judge was directed to ‘impose a sentence within the range specified by the Commission’s guidelines unless the court finds that an aggravating or mitigating circumstance exists *that was not adequately taken into consideration by the Sentencing Commission* in formulating the guidelines and that should result in a different sentence.”<sup>43</sup>

By the 96<sup>th</sup> Congress, the House had modified its piecemeal legislative approach, and again embraced the concept of broad reform legislation in certain areas of federal criminal law and sentencing.<sup>44</sup> During the 96<sup>th</sup> Congress, the Senate continued its omnibus approach. In 1979, S. 1732 was introduced and after fifty Committee meetings, ten days of hearings, and 69 additional meetings, the Senate passed it on January 7, 1980.<sup>45</sup> In the 96<sup>th</sup> Congress, both the Senate and the House Committees on the Judiciary reported criminal code bills; however, insufficient time remained in the press of the election year to complete the process.”<sup>46</sup>

### **C. THE 1981 EFFORTS: THE FINAL STAGES OF SENTENCING REFORM LEGISLATION**

Both the House and Senate continued to work on criminal code reform legislation during the 97<sup>th</sup> Congress. The House Judiciary Committee held twenty-two days of hearings on five different bills aimed at reforming the Federal criminal justice system, including one by

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 893.

<sup>42</sup> Stith & Yoh, *supra* note 1, at 245 (citing 124 CONG. REC. 18 (daily ed. Jan. 23,1978)).

<sup>43</sup> S. REP. NO. 98-225, *supra* note 1, at 3261; Stith & Yoh, *supra* note 1, at 245 (citing 124 CONG. REC. 382-83 (daily ed. Jan. 23, 1978)) (emphasis added).

<sup>44</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 33.

<sup>45</sup> *Id.* at 34.

<sup>46</sup> *Id.*; S. REP. NO. 97-307, *supra* note 10, at 2 .

Representative Conyers that dealt exclusively with sentencing reform.<sup>47</sup> The Senate again took up the reform effort and passed its own version of a criminal code reform bill, S. 1630,<sup>48</sup> one part of which would ultimately become the Sentencing Reform Act of 1984.<sup>49</sup> A completely revamped sentencing system was proposed in S. 1630; it expanded upon Senator Kennedy’s earlier efforts and set out the final legislative parameters of a proposed Federal sentencing guideline system.<sup>50</sup>

By the 97<sup>th</sup> Congress, there was an emerging consensus in Congress that the Federal sentencing system was failing.<sup>51</sup> Some of the harshest criticisms of the pre-guidelines sentencing system were directed at the discretion of federal judges.<sup>52</sup> The Committee report stated that “each judge is left to apply his own notions of the purposes of sentencing . . . and [a]s a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders convicted of similar crimes.”<sup>53</sup> The “glaring disparities” in federal sentencing “can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any meaningful statutory guidance or review procedures to which courts and parole boards might look.”<sup>54</sup>

The Senate Judiciary Committee, therefore, set forth to address five major sentencing-related problems:

- (1) lack of comprehensiveness and consistency in federal sentencing law;
- (2) unfairness and inconsistency in sentencing practices;
- (3) uncertainty in release date;
- (4) limited availability of sentencing options; and
- (5) apparent inconsistency of purpose.<sup>55</sup>

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<sup>47</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 34.

<sup>48</sup> *Id.*

<sup>49</sup> S. REP. NO. 97-307, *supra* note 10, at 955.

<sup>50</sup> *Id.* at 10 (“The sentencing provisions of the Code represent a complete revision and reformation of sentencing law to assure that sentences are fair both to defendants and to the public. The provisions are designed to achieve a rationality, uniformity and fairness that simply have not existed before.”).

<sup>51</sup> *See* S. REP. NO. 97-307, *supra* note 10, at 955 (discussing problems with rehabilitative sentencing model); S. REP. NO. 98-225, *supra* note 1, at 3223 (discussing inappropriateness of rehabilitative sentencing model).

<sup>52</sup> S. REP. NO. 97-307, *supra* note 10, at 5.

<sup>53</sup> *Id.* at 955.

<sup>54</sup> *Id.* at 956.

<sup>55</sup> *See id.* at 957–67 (outlining and discussing problems with current Federal sentencing system).

S. 1630 followed the outline of its predecessor legislation and proposed establishing a sentencing commission within the judicial branch. The commission would be charged with developing “sentencing guidelines to govern the imposition of sentences for all Federal offenses”<sup>56</sup> taking into consideration “factors relating to the purposes of sentencing, the characteristics of offenders, and the aggravating and mitigating circumstances under which specific offenses may be committed.”<sup>57</sup>

The Senate also addressed the level of compliance with the guidelines it expected to occur in the new system. The Senate Judiciary Committee explained:

The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that *the sentencing judge has an obligation to consider all the factors in a case and to impose sentences outside the guidelines in an appropriate case*. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender as compared to similarly situated offenders, not to eliminate the imposition of thoughtful individualized sentences.”<sup>58</sup>

Although the judge was expected to sentence a defendant within the range specified in the guideline, “if he considers the guideline range inappropriate because of factors not taken into consideration by the Sentencing Commission, he is free to sentence the defendant above or below the guideline range as long as he explains his reasons for so doing.”<sup>59</sup> For instance, a judge “may either decide that the guideline recommendation reflects the offense and offender characteristics, that should affect the sentence and impose sentence according to the guidelines recommendation,

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<sup>56</sup> *See id.* at 967 (“One of the main benefits of the sentencing guidelines system . . . is that it can achieve the purpose of eliminating disparity in sentences that is not justified by differences among offenses and offenders.”).

<sup>57</sup> *Id.* at 10; *see also* S. REP. NO. 95-605, *supra* note 12, at 1161. S. 1630 was crafted to ensure that the “chaotic variety of existing terms of imprisonment and penalties is replaced with a modern system under which offenses are classified into nine categories for sentencing purposes, and under which the range of penalties more accurately reflects the range of conduct covered by the offenses. The uncertainty and inequity of the current sentencing parole process is supplanted by a carefully interrelated sentencing package incorporating guidelines, determinate sentences, and appellate review. As a result, existing anomalies can be obviated and penal sanctions can appropriately reflect the seriousness of the offense according to contemporary standards.” *Id.* at 8.

<sup>58</sup> S. REP. NO. 97-307, *supra* note 10, at 969 (emphasis added); *see also* S. REP. NO. 98-225, *supra* note 1, at 3235 (reiterating language contained in S. REP. NO. 97-307).

<sup>59</sup> S. REP. NO. 97-307, *supra* note 10, at 11. *See also* S. REP. NO. 98-225, *supra* note 1, at 3236 (noting that “[r]ecent studies indicate that sentences too often reflect the personal attitudes and practices of individual sentencing judges.”).

or conclude that the guidelines fail to adequately reflect an aggravating or mitigating circumstance that should affect the sentence and impose sentence outside the guideline.”<sup>60</sup> A sentence outside the guidelines would be appealable, with the appellate court directed to determine whether the sentence is reasonable.<sup>61</sup>

The Committee report also stated that “the majority of cases will result in sentences within the guidelines range, while a sentence outside the guidelines will be imposed only in appropriate cases.”<sup>62</sup> This sentencing reform legislation maintained broad bipartisan support in the Senate, but the crime control legislation that ultimately passed did not include sentencing reform measures, and for reasons unrelated to sentencing policy, ultimately was vetoed by President Reagan.<sup>63</sup> Yet, the concept of a judicial commission that would work to curb unwarranted disparities in sentencing by providing guidance for judges to ensure consistency and certainty in sentencing was the hallmark of sentencing reform efforts in the 97<sup>th</sup> Congress.<sup>64</sup>

#### **D. SENTENCING REFORM LEGISLATION BECOMES LAW**

Sentencing reform legislation finally became law in the 98<sup>th</sup> Congress.<sup>65</sup> In 1983, Senators Thurmond and Laxalt introduced the Reagan Administration’s version of comprehensive crime control legislation, which contained sentencing reform provisions as Title II.<sup>66</sup> After holding hearings on the legislation, the Senate Judiciary Committee divided the legislation into several parts, one of which was S. 1762, the Comprehensive Crime Control Act of 1983, which contained the sentencing reform provisions of the Thurmond-Laxalt bill.<sup>67</sup> Simultaneously, Senator Kennedy introduced a stand-alone version of the Title II sentencing reform provisions (S. 668), and both pieces of legislation were forwarded to the House in February 1984.<sup>68</sup>

Meanwhile, the House Judiciary Subcommittee on Criminal Justice held nine days of hearings on criminal code reform as presented in a number of measures and reported out, through

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<sup>60</sup> S. REP. NO. 97-307, *supra* note 10, at 969.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 34.

<sup>64</sup> Wilkins, Newton and Steer, *supra* note 8, at 364.

<sup>65</sup> USSC 1991 Report, *supra* note 1, at 13.

<sup>66</sup> S. REP. NO. 98-225, *supra* note 1.

<sup>67</sup> USSC 1991 Report, *supra* note 1, at 13.

<sup>68</sup> *Id.* (citations to the CONGRESSIONAL RECORD omitted).

the full committee, its own sentencing reform legislation, H.R. 6012 (the Sentencing Revision Act of 1984).<sup>69</sup> The House concurred with certain fundamentals of the reform measures proposed by the Senate, but H.R. 6012 differed in many ways from the Senate's version.<sup>70</sup> Specifically, H.R. 6012 would have provided more latitude for judges to depart from the guideline ranges, allowing departures whenever "because the particular characteristics of offense and offender, the guideline sentence does not fulfill the requirements set forth as the reasons for sentencing."<sup>71</sup> The House bill required a sentencing court to "impose a sentence that accords with the applicable sentencing guidelines," unless the court determined that some other sentence would be the "least severe appropriate measure" that can fulfill the purposes of sentencing as set forth in the statute.<sup>72</sup>

Unlike the Senate version, the House bill contained no presumption that judges would depart only in unusual circumstances not contemplated by the new sentencing commission.<sup>73</sup> The House believed that sentencing simply involved too many factors that could not possibly be encompassed within a particular guideline.<sup>74</sup> The House preferred judges to consider whether the sentence being meted out was "appropriate" in the case at hand, rather than whether the sentencing commission had given "adequate consideration" to the present factors for an entire class of cases.<sup>75</sup> The House also questioned whether limits on judicial discretion would erase unwarranted sentencing disparity because such disparity resulted "from discretion exercised by several participants in the criminal justice system."<sup>76</sup> Although this version of sentencing reform legislation was reported by the House Judiciary Committee, the full House did not consider this version of sentencing reform legislation.<sup>77</sup>

The Senate's bill eventually was included by the House in a continuing appropriations

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<sup>69</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 34.

<sup>70</sup> *Id.* at 35–36.

<sup>71</sup> *Id.* at 42.

<sup>72</sup> Miller & Wright, *supra* note 30, at 743; *see also* H.R. 6012, § 3522(b), 98<sup>th</sup> Cong., 2d Sess. (1984).

<sup>73</sup> Miller & Wright, *supra* note 30, at 743.

<sup>74</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 41.

<sup>75</sup> Miller & Wright, *supra* note 30, at 743.

<sup>76</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 36 note 41.

<sup>77</sup> USSC 1991 Report, *supra* note 1, at 13. H.R. 6012 was placed on the House calendar for debate on September 14, 1984 but no vote occurred. Miller & Wright, *supra* note 30, at 744.

bill, further amended by the Senate,<sup>78</sup> and signed into law by the President on October 12, 1984.<sup>79</sup>

With regard to departures, new section 3553(b) of title 18, United States Code, as contained in the Act, provided flexibility for judges to depart upward or downward when individual cases contained aggravating or mitigating circumstances not adequately considered by the Sentencing Commission when formulating the applicable guidelines.<sup>80</sup> Section 3553(b), as enacted, read:

The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) [the applicable sentencing guideline range] unless the court finds an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.<sup>81</sup>

## **1. Codification of Appellate Review**

In addition to codifying the departure provisions, the Sentencing Reform Act codified provisions governing the appellate review of sentences at 18 U.S.C. § 3742, an important feature of the guidelines system that had been absent in the pre-guidelines sentencing structure. The House, in a shift from its previous position, in particular viewed appellate review as essential to alleviating sentencing disparity.<sup>82</sup> The Sentencing Reform Act established limited appellate review of sentences in the federal criminal justice system “designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court.”<sup>83</sup> But congressional reformers recognized that “[b]ecause sentencing judges retain the flexibility of sentencing outside the guidelines, it is inevitable that

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<sup>78</sup> The Senate amendments were, according to Senate reformers, “clarifying in nature” and resulted from final discussions regarding the scope of permissible departures and several other issues. As examined in the next section, Congress revisited the issue of departures in 1987, with the House and Senate restating their positions on departures.

<sup>79</sup> USSC 1991 Report, *supra* note 1, at 13.

<sup>80</sup> *See* 18 U.S.C. 3553(b) (1984).

<sup>81</sup> Pub. L. No. 98-473, 98 Stat. 1837, 1990 (1984).

<sup>82</sup> Miller & Wright, *supra* note 30, at 744.

<sup>83</sup> S. REP. NO. 98-225, *supra* note 1, at 3332–33. The appellate review procedures contained in the Sentencing Reform Act were attributed in large measure to the efforts of then-Senator Roman Hruska. *See id.* at 3332.

some of the sentences outside the guidelines will appear to be too severe or too lenient.”<sup>84</sup>

The Sentencing Reform Act set forth procedures for appeal in four cases: (1) appeal of a sentence imposed in violation of law; (2) appeal of a sentence that reflects an incorrect application of the sentencing guidelines; (3) appeal of a sentence in a case in which there is no guideline applicable to the offense committed; and most relevant to the issues of departures, (4) automatic appellate review for a defendant if a judge upwardly departs, and for the government if the judge downwardly departs.<sup>85</sup>

Senate reformers believed that the appellate review provisions created a “comprehensive system of review of sentences that permits the appellate process to focus attention on those sentences whose review is crucial to the functioning of the sentencing guidelines system, while also providing adequate means for correction of erroneous and clearly unreasonable sentences.”<sup>86</sup> Hence, the reformist vision of the new sentencing system was one in which the new Sentencing Commission and appellate review would work in tandem to reduce unwarranted sentencing disparity and uncertainty.

#### **E. THE GUIDELINES PERIOD AND THE ROLE OF DEPARTURES**

As repeatedly expressed throughout the legislative history of the various bills leading up to the enactment of the Sentencing Reform Act, Congress considered departures from the guideline system to be an integral part of the sentencing guidelines system. Congress expected that “under [the] guideline sentencing system, the judge should be able to sentence outside the guideline range in *unusual* circumstances, but should . . . give reasons for such a sentence.”<sup>87</sup>

To assist judges in navigating the new guidelines system and obtaining a better understanding of when departures from those guidelines may be appropriate, Congress envisioned that the Sentencing Commission would promulgate a set of “policy statements.”<sup>88</sup>

[T]he Commission is required to issue general policy statements concerning application of the guidelines and other aspects of sentencing that would

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<sup>84</sup> S. REP. NO. 98-225, *supra* note 1, at 3334.

<sup>85</sup> See 18 U.S.C. § 3742 (Review of a sentence) (1987). Amendments to 18 U.S.C. § 3742 made by the PROTECT Act are discussed *infra*. See also, S. REP. NO. 98-225, *supra* note 1, at 3334–36 (discussing criticisms raised against the appellate review provisions).

<sup>86</sup> S. REP. NO. 98-225, *supra* note 1, at 3338.

<sup>87</sup> STAFF OF SUBCOMMITTEE ON CRIMINAL JUSTICE, HOUSE COMM. ON THE JUDICIARY, 97<sup>TH</sup> CONG., FEDERAL CRIMINAL LAW REVISION: HEARINGS ON H.R. 1647, H.R. 4492, H.R. 4711, H.R. 5679, AND H.R. 5703, 8 (Comm. Print 1983) (emphasis added).

<sup>88</sup> See 28 U.S.C. § 994(a)(2–3) (2003) (setting forth the parameters of policy statements to be promulgated by the Sentencing Commission).

further the ability of the federal criminal justice system to achieve the established purposes of sentencing. These policy statements could address, for example, such questions as the appropriateness of sentences outside the guidelines where there exists a particular aggravating or mitigating factor which did not occur sufficiently frequently to be incorporated into the guidelines themselves. . . . One important function of the policy statements might be to alert the federal district judges to existing disparities which have not been adequately cured by the guidelines, while offering recommendations as to how these situations should be treated in the future.<sup>89</sup>

The first set of guidelines and accompanying policy statements were submitted for congressional review in April 1987.<sup>90</sup>

### **1. Further Modifications in the Sentencing Reform Effort: The Sentencing Act of 1987**

Congressional efforts to reform the Federal sentencing system did not end with passage of the Sentencing Reform Act.<sup>91</sup> Congress recognized that the comprehensive systematic overhauls put into place by the Act “would inevitably require refinement.”<sup>92</sup> As the changes mandated in the Sentencing Reform Act were undertaken, Congress received substantial feedback from the newly created Sentencing Commission, the Department of Justice, practitioners, judges, and academics regarding the practical aspects of implementing the federal sentencing guideline system.<sup>93</sup> Of particular concern to many involved in the process was clarifying the scope of the sentencing judge’s authority to depart from the prescribed sentence under the guidelines as set forth in 18 U.S.C. § 3553, the expected role of appellate review of such departures, and as an extension of that query, upon which Sentencing Commission materials it could rely when doing

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<sup>89</sup> S. REP. NO. 95-605, *supra* note 12, at 1165; *see also*, *Sentencing Commission Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 38 (Oct. 22, 1987) (testimony of Judge Stephen Breyer, Commissioner, USSC) describing the “heartland” concept applied to the guidelines and the role of policy statements and commentary in supporting the guidelines).

<sup>90</sup> USSC 1991 Report, *supra* note 1, at 8.

<sup>91</sup> Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 192 (Summer 1993).

<sup>92</sup> *Sentencing Commission Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 38 (Oct. 22, 1987) (testimony of Judge Stephen Breyer, Commissioner, USSC), (statement of Sen. Kennedy); *accord id.* (statement of Sen. Thurmond). *See also id.* at 23 (testimony of Judge William J. Wilkins, Jr., Chairman, USSC).

<sup>93</sup> *See* 130 CONG. REC. S16646–47 (daily ed. Nov. 20, 1987) (joint statement of Sens. Biden, Thurmond, Kennedy, and Hatch on S. 1822).

so.<sup>94</sup> Debate over clarifying the standard for departure in section 3553 reignited the differing positions of the House and Senate Judiciary Committees with regard to sentencing reform. The House Committee argued for more discretion for judges, as present under former law, and the Senate advocated for strict adherence to the new guidelines approach and departures only in limited circumstances.

Throughout the summer and fall of 1987, Congress conducted hearings on these issues and about the guidelines submitted by the Commission in April. To address a number of gaps in the 1984 law and clarify various provisions, Congress ultimately passed the Sentencing Act of 1987.<sup>95</sup> Although making a modest change in the statutory departure standard, Congress confirmed the expectation that judges would depart from the sentencing guidelines in rare instances, proclaimed that the only statutory provision governing departures was section 3553(b), reaffirmed the role of appellate review with regard to departures, and clarified the categories of Sentencing Commission documents and actions courts could consult in making departure determinations.

**a. Legislative Debate Leading Up to the Sentencing Act of 1987**

The legislative debate that culminated in the Sentencing Act of 1987 was extensive, as both chambers of Congress digested the first set of guidelines promulgated by the Sentencing Commission.<sup>96</sup> Over the summer of 1987, the House held hearings on the sentencing guidelines that addressed a number of topics, including the extent to which courts were permitted to depart below the guidelines.<sup>97</sup> A House package of amendments to the Sentencing Reform Act was embodied in H.R. 3483, which the House passed on October 27, 1987 (four days before the first set of sentencing guidelines were to take effect) and referred to the Senate the same day.<sup>98</sup>

After monitoring the activities of the House, the Senate undertook its own review of the guidelines system and needed statutory clarifications.<sup>99</sup> The Senate Judiciary Committee held an oversight hearing in October 22, 1987 to hear from the first set of Sentencing Commissioners regarding their experience with drafting the initial set of guidelines, expectations for their application, and problems that were being encountered by the Commission during its work.

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<sup>94</sup> 133 CONG. REC. H10016 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers).

<sup>95</sup> Pub. L. No. 100-182, 101 Stat. 1271 (1987).

<sup>96</sup> The first set of guidelines was submitted to Congress April 13, 1987. USSC 1991 Report, *supra* note 1, at 8.

<sup>97</sup> *See* 133 CONG. REC. H10016 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers); *see* Oct. 22, 1987 Senate Hearings, *supra* note 92, at 9 (statement of Sen. Kennedy).

<sup>98</sup> 133 CONG. REC. H10016 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers).

<sup>99</sup> Oct. 22, 1987 Senate Hearings, *supra* note 92, at 9 (statement of Sen. Kennedy).

On October 27, 1987, Senator Biden, along with Senators Thurmond, Hatch, and Kennedy, introduced the Senate’s version of sentencing reform refinements, S. 1822.<sup>100</sup> The Senate passed the bill on October 28, 1987 by unanimous consent.<sup>101</sup> In order to ensure that S. 1822 would be considered in the House in an expeditious manner to meet the deadline of the new sentencing guidelines taking effect, the Senate agreed to a House request to add language to S. 1822 that would clarify the standard for departure from the guidelines embodied in 18 U.S.C. § 3553(b).<sup>102</sup> The Senate amendment added the words, “of a kind, or to a degree” as modifiers to the aggravating or mitigating circumstances upon which a judge could base a departure from the prescribed guidelines.<sup>103</sup> This language clarified that a judge could depart based on a circumstance, even if the Sentencing Commission had considered it adequately for *some* types of cases, so long as the factor was present to an unusual degree in the instant case.<sup>104</sup>

The House passed the agreed upon bill on November 16, 1987, and included a detailed section-by-section analysis in the Congressional Record. The Senate principals, however, disagreed with a key part of that analysis regarding the House interpretation of the statutory departure provisions in 18 U.S.C. § 3553. According to the House interpretation, 18 U.S.C. § 3553 authorized departures in two places. First, it explicitly provided for departures in section 3553(b) and second, it implicitly provided for departures under section 3553(a). Representative Conyers explained:

Section 3553(a) as enacted by the Sentencing Reform Act of 1984 requires that the court (1) consider several factors, including the purposes of sentencing, and (2) “*impose a sentence sufficient, but not greater than necessary, to comply with*” the purposes of sentencing. Thus, if the court finds that the sentence called for by the

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<sup>100</sup> 133 CONG. REC. H10016 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers).

<sup>101</sup> *Id.*

<sup>102</sup> 133 CONG. REC. S16646–47 (daily ed. Nov. 20, 1987) (joint statement of Senators Biden, Thurmond, Kennedy, and Hatch on S. 1822); *see also* 133 CONG. REC. H10016 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers) (discussing negotiations agreed to among Senate, House, Sentencing Commission and Department of Justice regarding how to proceed with sentencing legislation).

<sup>103</sup> 133 CONG. REC. H10014 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers).

<sup>104</sup> Miller & Wright, *supra* note 30, at 747–48 (emphasis added). Moreover, it was anticipated that the role of departures would be refined routinely, thus enhancing the ability of judges to craft individualized sentences where appropriate rather than stripping them of that flexibility. *See* Judge Breyer’s written answers to Sen. Biden’s questions, *reprinted in Sentencing Commission Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 38 (1987) at 79; *accord* Oct. 22, 1987 Senate Hearings, *supra* note 92, at 2 (statement of Sen. Kennedy explaining that sentencing decisions of judges, including departures, provide record for Commission’s review).

applicable sentencing guidelines is greater than necessary to comply with the purposes of sentencing, section 3553(a) *would seem to require the court to impose a more lenient sentence.*<sup>105</sup>

In sum, Representative Conyers concluded that the Sentencing Reform Act provided for departures whenever a judge determined that the guideline range was too severe.<sup>106</sup>

The Senate strongly disagreed. According to Senate reformers, the House analysis was the very approach to the sentencing guidelines and departures that senators specifically rejected when they passed the Sentencing Reform Act. In fact, during the 1984 Senate floor debate surrounding the Senate amendment, Senator Hatch contended that the addition of the phrase “impose a sentence sufficient, but not greater than necessary, to comply with” the purposes of sentencing was simply a “clarifying measure” and not an attempt to broaden the scope of sentencing authority already contained in the Sentencing Reform Act.<sup>107</sup>

In 1987, the Senate discounted not only the broader approach to departures from the guidelines advocated by the House, but also the suggestion that any section other than 3553(b) provided courts the authority to depart.<sup>108</sup> Senate reformers claimed that the House analysis disregarded the intent of the Sentencing Reform Act that departures were to occur in *limited* cases, and only under section 3553(b).<sup>109</sup> Senator Hatch summarized the Senate’s position as follows:

The standard for departure is vital to the proper functioning of the guidelines system. It tells judges when, under the law, they are permitted to impose a sentence outside the guidelines promulgated by the Sentencing Commission. If the standard is relaxed, there is a danger that trial judges will be able to depart from the guidelines too freely, and such unwarranted departures would undermine the core function of the guidelines and the underlying statute, which is to reduce disparity in sentencing and restore fairness and predictability to the sentencing

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<sup>105</sup> 133 Cong. Rec. H10014 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers) (emphasis added).

<sup>106</sup> *Id.* The language at issue in section 3553(a) derived from an amendment (S. Amdt. 7043) sought by Senator Mathias and offered on the Senate floor during final debate of the Sentencing Reform Act of 1984 by Senator Thurmond in his role as Manager of the bill. 130 CONG. REC. S29870 (daily ed. Oct. 4, 1984).

<sup>107</sup> 130 CONG. REC. S29685 (daily ed. Oct. 4, 1984) (statement of Sen. Hatch); *see also* 133 CONG. REC. S16644 (daily ed. Nov. 20, 1987) (statement of Sen. Hatch reiterating that language added to 3553(a) was clarifying in nature and not intended to “provide an additional basis for departure.”).

<sup>108</sup> 133 CONG. REC. S16644 (daily ed. Nov. 20, 1987) (statement of Sen. Hatch); *see also* 133 CONG. REC. S16646–7 (daily ed. Nov. 20, 1987).

<sup>109</sup> 133 CONG. REC. S16644 (daily ed. Nov. 20, 1987) (statement of Sen. Hatch).

process. Adherence to the guidelines is therefore properly required under the law except in those rare and particularly unusual instances in which the court concludes that there is present in the case an aggravating or mitigating circumstance of a kind or to a degree not included in the guidelines, and that the presence of this circumstance should result in a sentence different from that described.<sup>110</sup>

Despite the disagreement between the two chambers regarding the statutory authority for departures, what is clear is that Congress consistently refrained from offering a “magic number” for the rate of departures, upward or downward, that it expected to occur within the guidelines system.<sup>111</sup> In his 1987 testimony before the Senate Judiciary Committee, then federal Judge Stephen Breyer, one of the original Commissioners, explained that the Minnesota sentencing guidelines system, which had served as a model upon which the Federal sentencing guidelines system was drafted, experienced “quite a few departures, maybe 17-18 percent” during the first couple years after the system was implemented.<sup>112</sup> “Over time, the number of departures diminished radically, until you ha[d] maybe 7 to 11 percent departures at the moment.”<sup>113</sup> However, he was careful to note that “[n]o one at this point can predict accurately how often sentencing courts will depart from the Guidelines or how often the courts of appeal will permit them to do so.”<sup>114</sup> Instead of using any of these varying rates of departures as a benchmark when drafting sentencing reform legislation Congress stuck to more general descriptive terms such as “unusual” or “very limited” in referring to the frequency with which departures would occur and repeatedly stated that it expected the “majority” of cases to fall within applicable sentencing guideline ranges.

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<sup>110</sup> *Id.* Interestingly, in a later 1993 law review article, Senator Hatch raised the debate over the compulsory nature of the guidelines and seemed to suggest that the more flexible approach taken by the House during the 1987 debates should not be ruled out of hand. In the article, Senator Hatch suggested that “many of the guidelines problems, including their perceived rigidity and . . . facilitation of hidden bargaining and increased prosecutorial leverage, can be traced to their compulsory nature.” Senator Hatch further suggested that “Congress may need to examine whether the most effective way of addressing these problems is to return a greater degree of flexibility to the judiciary.” Hatch, *supra* note 91, at 197.

<sup>111</sup> Departures from the parole guidelines system that Congress enacted in 1976 as an interim response to sentencing reform, were estimated at the time to occur in about 20 percent of cases, including both upward (12%) and downward (8%) departures. *See* S. REP. NO. 98-225, *supra* note 1, at 3235 n.83; *see also* Wilkins, Newton and Steer, *supra* note 8, at 362 (citing S. REP. NO. 94-369, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 18 (1975)).

<sup>112</sup> Oct. 22, 1987 Senate Hearings, *supra* note 92, at 38 (testimony of Judge Breyer).

<sup>113</sup> *Id.* at 38. Judge Breyer also noted that the departure rate in Washington state, another sentencing guidelines system, had “experienced a somewhat lower departure rate” than that of Minnesota. *Id.* at 49 (written statement of Judge Stephen Breyer).

<sup>114</sup> *Id.*

## **b. Appellate Review**

With regard to the appellate review process, in 1987 Congress received testimony on its role in the new guidelines system, and reaffirmed the belief that appellate review was to act in tandem with the guidelines promulgated by the Sentencing Commission to ensure the proper functioning of the federal sentencing system.

In his 1987 testimony before the Senate Judiciary Committee, Judge Breyer explained the role of appellate review of departures, noting that the system was designed so that appellate courts would review departure decisions for reasonableness and if, “over time, the courts of appeals and the judges are departing too often, or for bad reasons, the [Sentencing] Commission can promulgate further guidelines – and it will – that will limit those departures to make them more rational.”<sup>115</sup> The role of departures, therefore, was to “provide judges with the sufficient leeway to individualize sentences as appropriate,”<sup>116</sup> while the role of appellate review of such departures would aid in the development of a form of common law based on the new guidelines system.<sup>117</sup>

The result of the 1987 discussions on appellate review was that district courts were to remain the “hands-on” formulators of sentences and, as such, their decisions would receive deferential treatment by the appellate courts. In turn, the appellate courts, with the assistance of the Sentencing Commission, were to monitor carefully those sentences that deviated from the guidelines and ensure that sentencing in the lower courts was meeting the goals of sentencing.<sup>118</sup>

## **c. Sentencing Commission’s Suggested Legislative Proposals**

In addition to submitting its first set of guidelines to Congress, the Sentencing Commission submitted legislative proposals it considered necessary to ensure the effectiveness of the guideline system. One of these amendments was to the departure provision of section 3553(b). The Commission sought to amend the phrase “not adequately considered by the Commission” with “language which focuses the inquiry not on the sufficiency to which the Commission may have debated a given factor . . . but, more properly, . . . on whether such factor was or was not taken into account or included within the calculus of factors built into a particular Sentencing Guideline.”<sup>119</sup> The Sentencing Commission deemed this change essential because the existing language required a judicial determination “which is literally impossible to determine

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<sup>115</sup> *Id.* at 2 (testimony of Judge Breyer).

<sup>116</sup> *Id.* at 89 (providing Judge Breyer’s written answers to Sen. Biden’s questions).

<sup>117</sup> *Id.* at 2, 79.

<sup>118</sup> *Id.* at 199.

<sup>119</sup> *Id.* at 86.

without objective criteria.”<sup>120</sup>

The Sentencing Commission’s proposal also contained guidance to district courts, when making a determination under 18 U.S.C. 3553(b), “to limit their consideration to the ‘four corners’ of the Commission’s published Guidelines, policy statements, and commentary.”<sup>121</sup> The proposed changes to the departure provision had the acquiescence of the Department of Justice and furthered the expectation that courts would depart only for compelling reasons, in limited circumstances, as a result of a case falling outside the “heartland” of cases considered by the Sentencing Commission.<sup>122</sup> The “four corners” recommendation was accepted by Congress and included in amendments to section 3553(b) made by S. 1822, but the “not adequately taken into consideration” language was left untouched.<sup>123</sup>

The President signed S. 1822 into law on December 7, 1987. The President commented favorably on the change to the departure language admonishing, however, that it was not intended to “expand the extremely limited basis for sentencing outside the applicable sentencing guidelines.”<sup>124</sup> “A narrow reading of the departure standard is *vital* to the proper implementation of the Sentencing Reform Act.”<sup>125</sup> While the 1987 discussions about the statutory standards amounted, in many respects, to merely post-enactment re-interpretation of the Sentencing Reform Act’s legislative history and is thus limited in its authoritative value, it made clear that the Senate’s view of limited availability and use of departures from the guidelines was the prevailing intent in Congress. The Sentencing Act of 1987 and its legislative history confirmed that the only authority for courts to depart was embodied in 18 U.S.C. 3553(b), the power to do so was limited, and it was expected that appellate courts and the Sentencing Commission would act together to

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *See id.* at 85, 143. In addition to reflecting the “heartland concept,” the proposed amendment sought to curtail attempts to subpoena members or records of the Sentencing Commission in order to determine whether it had “adequately taken into consideration” a particular aggravating or mitigating factor. “Rather, the amendment makes clear, as we believe was Congress’s original intent, that only the official published writings of the Commission are to be” considered. *See id.* at 143.

<sup>123</sup> *See* 18 U.S.C. 3553(b) (West Supp. 2003) (“In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission”). This “four corners” language was modified by the PROTECT Act to include the phrase “together with any amendments thereto by act of Congress” for certain sex crime offenses, the sentencing guidelines for which were directly amended by Congress in the PROTECT Act. *See* Pub. L. No. 108-21, § 401(a), 117 Stat. 650 (2003).

<sup>124</sup> Statement of the President Ronald S. Reagan Upon Signing S. 1822, 23 WKLY COMP. PRES. DOC. 1452 (Dec. 14, 1987), *reprinted in* U.S.C.C.A.N. 2135, 2135-36 (1987).

<sup>125</sup> *Id.*

monitor and regulate such departures.

#### **F. GUIDELINE EFFECTIVENESS AND THE RATE OF DEPARTURES**

In 1995, following the first time<sup>126</sup> Congress had rejected a Commission guideline amendment, the Subcommittee on Crime of the House Judiciary Committee held an oversight hearing on the Sentencing Commission and the functioning of the sentencing guidelines. Of particular interest was the role of judicial discretion as evidenced by the rate of guideline departures. Judge Conaboy, then chair of the Sentencing Commission, testified that with regard to departures, the “vast majority of cases between 1989 and 1994” were being sentenced within the guideline range. “In total, only about 20 or 25 percent of the cases involve departures, most of which are departures based on motions submitted by the Government pursuant to what they assure the courts have been substantial assistance offered by defendants.”<sup>127</sup> In fact, taking away the

cases that involved substantial assistance departures, Judge Conaboy indicated “more than 9 out of 10 defendants are sentenced within the guideline range determined by the court.”<sup>128</sup>

Judge Conaboy did raise the issue of possible geographic disparity that the Sentencing Commission intended to review in the coming years because of its potential impact on achieving the goals of sentencing reform. During questioning by Representative Conyers regarding prosecutorial discretion under the guidelines system, Judge Conaboy explained that the tools

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<sup>126</sup> *U.S. Sentencing Commission: Hearing Before the Subcommittee on Crime of the House Committee on the Judiciary*, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2 (Dec. 14, 1995) (statement of Rep. McCollum). Under 28 U.S.C. § 994(p), amendments, policy statements, and official commentary promulgated by the Sentencing Commission usually take effect 180 days after being submitted to Congress, and no later than the first day of November of the year the amendments have been submitted, unless the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

Although the rejection of the Commission’s 1995 amendment of the crack and powder cocaine penalties marked the first time Congress directly had disapproved a Commission amendment, Congress did take action against another set of Commission amendments in 1991. On May 1, 1991, the Sentencing Commission submitted amendments to some of the sex offense guidelines (2G2.2, 2G2.4 and 2G3.1). Congress did not disapprove the amendments directly, it included language in Pub. L. No. 102-141 (the Treasury, Postal Service and General Government Appropriations Act of 1991) that specifically directed the Sentencing Commission to revise the guidelines in such a way as to reverse the amendments the Sentencing Commission had submitted in the spring of 1991. *See* Pub. L. No. 102-141, § 632 (1991) (setting forth directive to Sentencing Commission).

<sup>127</sup> Dec. 14, 1995 Senate Hearings, *supra* note 126, at 6 (statement of Judge Richard P. Conaboy, Chairman, USSC).

<sup>128</sup> Dec. 14, 1995 Senate Hearings, *supra* note 126, at 16.

available to prosecutors under the system, namely the various motions for departures, were being used “in very diverse ways around the country and very differently in different places,” which the Sentencing Commission hoped to review because such practices could eventually lead to increased disparity in sentencing.<sup>129</sup>

By 2000, some in Congress appeared concerned with the rising rate of downward departures.<sup>130</sup> In October 2000, the Senate Judiciary’s Subcommittee on Criminal Justice Oversight held an oversight hearing of the Sentencing Commission. Witnesses that testified before the Subcommittee included the newly installed Chair and a Vice Chair of the Sentencing Commission,<sup>131</sup> the Department of Justice’s *ex officio* member of the Sentencing Commission, the U.S. Attorney for the Western District of New York, a representative of the National Association of Criminal Defense Lawyers, and a former federal prosecutor.

Senator Strom Thurmond, one of the architects of the Sentencing Reform Act who was then serving as the Subcommittee chair, opened the hearing by expressing concern that “the purpose of the Guidelines is being threatened by the increasing trend of sentencing criminals below the range established in the Guidelines.”<sup>132</sup> “Just in the past 8 years, the number of downward departures has increased steadily from 20 percent to about 35 percent of cases, which is more than 1 out of 3. If the trend continues much longer, we will see more criminals being

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<sup>129</sup> *Id.* at 50 (statement of Judge Richard P. Conaboy, Chairman, USSC). This differing use of prosecutorial discretion was of particular interest to Representative Coble who was concerned that prosecutors “were using their discretion . . . maybe to get out from mandatory, statutory guideline sentences through practices that at least appear to be undermining the goals of the Sentencing Reform Act.” *Id.* (statement of Rep. Coble). Robert Edmunds, a former prosecutor, responded to Rep. Coble that in his experience Department of Justice attorneys generally were not misusing available sentencing tools because if they did, it would appear in Sentencing Commission data and the Commission would alert the Department of Justice and remedy the situation. Dec. 14, 1995 Senate Hearings, *supra* note 126, at 113–14 (statement of Robert Edmunds).

<sup>130</sup> As discussed in Chapters 1 and 5 of this report, the Supreme Court’s 1996 decision in *Koon v. United States* resulted in a deferential review of district court departures by the appellate courts. The perceived impact of the *Koon* decision on the national downward departure rate was part of the overall congressional concern being expressed by the fall of 2000.

<sup>131</sup> Judge Diana E. Murphy and John R. Steer became Chair and Vice Chair respectively, of the Sentencing Commission on November 15, 1999. Moreover, the Chair and Vice Chair were filling year and a half vacancies at the Sentencing Commission and working on a significant back log of legislative directives at the time of the hearing.

<sup>132</sup> *Oversight of the U.S. Sentencing Commission: Are the Guidelines Being Followed?: Hearing Before the Subcommittee on Criminal Justice Oversight of the Senate Judiciary Committee*, 106<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1 (2000) (statement of Sen. Thurmond).

sentenced below the Guidelines than within them.”<sup>133</sup> Senator Thurmond explained that, downward departures “should be rare because they are permitted only for factors not adequately considered by the Commission.”<sup>134</sup> Senator Jeff Sessions also expressed a similar concern that the trend in downward departures may be indicative of a turning away from the fundamentals of the Sentencing Reform Act.<sup>135</sup>

By contrast, Senator Patrick Leahy, Ranking Member of the Judiciary Committee, stated that the downward departure rate was not a cause for concern.<sup>136</sup> In fact, Senator Leahy posited that the departure rate demonstrated that the guidelines system was operating as intended by the drafters of the Sentencing Reform Act.<sup>137</sup> “Downward departures, like upward departures, are an integral and necessary part of our sentencing scheme. The provision for downward departures which we discuss today was incorporated into the guidelines so that federal judges can make appropriate adjustments where there are circumstances of a kind or degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”<sup>138</sup> “The provision for downward departures recognizes that Congress and the Sentencing Commission . . . cannot possibly anticipate and enact a guideline that accounts for every conceivable set of facts. Even in as comprehensive a framework as the sentencing guidelines, our judges need room for flexibility.”<sup>139</sup>

Senator Leahy also addressed the suggestion, raised by some critics of the downward departure trend, that Congress enact legislation to effectively overrule the Supreme Court decision in *Koon v. United States* and require appellate courts to review departures *de novo*. Senator Leahy stated that this would be a mistake and “[t]o do so, in my view, would unwisely and unnecessarily transfer the ultimate responsibility for sentencing away from the federal judge, who is in the best position to evaluate whether an upward or downward departure is

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<sup>133</sup> *Id.* at 1 (statement of Sen. Thurmond).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 3–4, 77.

<sup>136</sup> *Id.* at 74 (statement of Sen. Leahy).

<sup>137</sup> *Id.* at 76.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* Moreover, the Senator attributed the increase in the departure rate primarily to exigent circumstances unique to the judicial districts situated along the southwest border of the United States. *Id.* at 74–75 (statement of Sen. Leahy). Senator Thurmond also acknowledged the large role immigration and border related offenses played in the downward departure statistics but insisted that the growing trend of downward departures was “much broader.” *Id.* at 1 (statement of Sen. Thurmond).

appropriate.”<sup>140</sup>

Commissioner testimony on the issue supported the proposition that “most cases will result in sentences within the guideline range” but that departures are an integral part of the guideline system.<sup>141</sup> Judge Murphy explained that data available to the Sentencing Commission during the fall of 2000 demonstrated that after removing substantial assistance and other government sponsored departures, 82% of cases fell within prescribed sentencing guidelines ranges.<sup>142</sup> Thus, the nonsubstantial assistance downward departure rate was eighteen percent.<sup>143</sup>

Excessive or geographically uneven rates of departure, however, could be at odds with the goals of the Sentencing Reform Act.<sup>144</sup> Following the hearing, the Commission specifically examined an issue of geographically uneven departure rates during the 2001 amendment cycle. Concerns had been raised to the Commission by a number of judges, probation officers, and defense attorneys, particularly those situated in the southwest border districts, that application of §2L1.2 (Unlawful Entering or Remaining in the United States) was resulting in disproportionate penalties because of the 16 level enhancement provided in the guideline for a prior conviction for an aggravated felony. The disproportionate penalties resulted because of the breadth of the definition of “aggravated felony” provided in 8 U.S.C. § 1101(a)(43) and incorporated into the guideline by reference. Under this definition, a defendant who previously was convicted of murder, for example, was receiving the same 16 level enhancement as a defendant previously convicted for simple assault. The Commission observed that the criminal justice system was addressing this inequity on an *ad hoc* basis by increased use of departures from the guideline.

To address this rise in departure use, the Commission amended section 2L1.2 by deleting an invited departure provision in the guideline<sup>145</sup> and providing for a more graduated sentencing enhancement of between 8 and 16 levels, depending on the seriousness of the prior aggravated

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<sup>140</sup> *Id.* at 75 (statement of Sen. Leahy).

<sup>141</sup> *Id.* at 19 (statement of John R. Steer, Vice Chair, USSC) (citing S. REP. NO. 225, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1983)).

<sup>142</sup> *Id.* at 39 (statement of Judge Diana E. Murphy, Chairman, USSC).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 19 (statement of John R. Steer, Vice Chair, USSC). Commissioner Steer’s testimony regarding the issue of geographical disparity followed up on similar testimony given in 1995 by Chairman Conaboy, *see* discussion *supra* at pp. B-21 to B22.

<sup>145</sup> USSG §2L1.2, former comment. (n.5).

felony and the dangerousness of the defendant.<sup>146</sup> The amendment of section 2L1.2 arguably is an example of the system working as Congress intended: application of a guideline was resulting in an increased use of departures that, in turn, signaled to the Commission that a potential problem existed and prompted a response by the Commission.

## G. CHILD PORNOGRAPHY AND THE PROTECT ACT

On April 16, 2002, the Supreme Court released its decision in *Ashcroft v. Free Speech Coalition*,<sup>147</sup> which struck down certain provisions of the 1996 Child Pornography Prevention Act that defined “child pornography.” As a result of that decision, bills were introduced in both the House and Senate during the 107<sup>th</sup> Congress, focusing on the issues of child pornography, child abduction and child sexual offenses. As these various bills progressed through Congress, additional sentencing provisions were added to tighten the penalties for these types of offenses.

In April 2002, Representative Lamar Smith introduced the Department of Justice’s legislation, H.R. 4623, the “Child Obscenity and Pornography Prevention Act of 2002” to address the concerns raised by the Supreme Court in *Ashcroft v. Free Speech Coalition*, including a new, more narrow definition of child pornography.<sup>148</sup> This bill included increased penalties for certain repeat sex offenders but did not include directives to the Sentencing Commission, or other sentencing revisions. The House Subcommittee on Crime, Terrorism, and Homeland Security held two days of hearings on H.R. 4623,<sup>149</sup> and the House passed the bill on June 25, 2002 by a vote of 413-8, with one Member voting “present.”<sup>150</sup>

In September 2002, Representative James Sensenbrenner introduced H.R. 5422, the “Child Abduction Prevention Act”. The Act sought to improve the national response to child abductions<sup>151</sup> and also included a number of increased mandatory minimum and other penalties

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<sup>146</sup> See USSG App. C, amend. 632 (effective Nov. 1, 2001).

<sup>147</sup> \_\_\_ U.S. \_\_\_, 122 S. Ct. 1389 (2002).

<sup>148</sup> *Enhancing Child Protection Laws After the April 16, 2002 Supreme Court Decision in Ashcroft v. Free Speech Coalition: Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee*, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 2 (2002).

<sup>149</sup> H.R. REP. NO. 107-526, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 14 (2002). In addition to addressing the issues of child pornography raised in H.R. 4623, the hearings also addressed H.R. 4477, the “Sex Tourism Prohibition Improvement Act of 2002”. H.R. 4477 prohibited, among other activity, interstate travel for the purpose of engaging in illicit sexual conduct. The House passed H.R. 4477 on June 26, 2002 and incorporated its provisions in the PROTECT Act of 2003.

<sup>150</sup> 148 CONG. REC. H2876–78 (2002).

<sup>151</sup> The enhanced AMBER Alert provisions of H.R. 5422 mirrored those contained in a Senate bill, S. 2896, the “National AMBER Alert Act of 2002,” that passed the Senate by unanimous consent on

for offenses involving child pornography, sexual abuse, and commercial sexual exploitation.<sup>152</sup> The Act also contained directives to the Sentencing Commission to increase offense levels for kidnapping offenses.<sup>153</sup>

On October 1, 2002, the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee held a hearing on the bill and received testimony from the Department of Justice. During that testimony, the Department of Justice lauded the increased mandatory minimums contained in the bill but stated they did not go “far enough” to address what the Department of Justice deemed the overly frequent imposition of sentences more lenient than those prescribed by the sentencing guidelines in cases under chapter 117.<sup>154</sup> The Department of Justice testified that “departures should be rare occurrences,” but the “leniency [in sentencing of sex offense cases] is much more marked than even the base leniency that characterizes the system.”<sup>155</sup> For example, in “20 percent of all cases sentenced nationwide for sexual abuse, judges are departing from the sentencing guidelines.”<sup>156</sup>

The Department of Justice further suggested that the Subcommittee consider, as a possible amendment to 18 U.S.C. § 3553(b), “a general prohibition of sentencing below the range specified by the sentencing guidelines in child abduction and sex offense cases, except on ground of substantial assistance to authorities.”<sup>157</sup> The Department of Justice believed a “reform of this type would help to ensure the efficacy of the sentencing guidelines system in promoting adequate penalties and protecting the public from child abductors and sexual predators is not undermined in practice.”<sup>158</sup> The Department of Justice’s sentencing recommendations for H.R. 5422 had not been included in the draft legislation that became H.R. 4623, passed by the House earlier in 2002.

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September 10, 2002. 148 CONG. REC. S8436–41 (daily ed. Sept. 10, 2002)). Representative Scott offered an amendment in the nature of a substitute to H.R. 5422 that would have stripped it of all language other than the Amber Alert provisions but that amendment failed during debate in the full Committee. *See* H.R. REP. NO. 107-723, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 42, 45–47 (2002).

<sup>152</sup> H.R. 5422, 107<sup>th</sup> Cong., § 103 (2002).

<sup>153</sup> H.R. 5422, 107<sup>th</sup> Cong. § 104 (2002); *see also* H.R. REP. NO. 107-723, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. at (38) (2002) (statement of Rep. Smith).

<sup>154</sup> *Child Abduction Prevention Act: Hearing on H.R. 5422 Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee of the Judiciary*, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 13 (Oct. 1, 2002) (written statement of Daniel Collins).

<sup>155</sup> *Id.* at 68–69 (testimony of Daniel Collins).

<sup>156</sup> *Id.* at 69.

<sup>157</sup> *Id.* at 14 (testimony of Daniel Collins).

<sup>158</sup> *Id.* at 14 (written statement of Daniel Collins).

The House Judiciary Committee Report on H.R. 5422 included the Department of Justice's language regarding the "real problems of excessive leniency in sentencing under existing law" in cases involving offenses under chapter 117 of Title 18, United States Code.<sup>159</sup> The Committee also noted a trend in downward departures in child pornography possession offenses under chapter 110 of Title 18, United States Code, and indicated that the new mandatory minimums and other increased penalties contained in H.R. 5422 were designed to curtail this departure trend.<sup>160</sup> The House Committee did not include, however, the Department of Justice's recommendations to amend 18 U.S.C. § 3553(b) and prohibit departures in these types of cases. H.R. 5422 passed the House on October 8, 2002.<sup>161</sup> The Senate received the bill but took no action on it.

Like the House, the Senate pursued the issues of child abduction and pornography during the 107<sup>th</sup> Congress in response to the *Ashcroft v. Free Speech Coalition* decision. On May 14, 2002, Senators Carnahan and Hutchison introduced S. 2511 (the companion bill to H.R. 4623) that included the Department of Justice's initial response to the *Ashcroft* decision.<sup>162</sup> On May 15, 2002, Senator Hatch, for himself and Senators Leahy, Sessions, DeWine, Hutchinson, Edwards and Brownback, introduced S. 2520, the "Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2002".<sup>163</sup>

On October 2, 2002, the Senate Judiciary Committee held a hearing on the issue of child pornography and sexual exploitation, as addressed by H.R. 4623, S. 2511 and S. 2520.<sup>164</sup> Daniel Collins, Associate Deputy Attorney General of the Department of Justice, testified at that hearing but did not suggest changes to 18 U.S.C. § 3553(b), as he had in his testimony before the House Judiciary Committee the previous day in relation to H.R. 5422. He did indicate that the Department of Justice fully supported a directive to the Sentencing Commission in S. 2520 that addressed a disparity between sentences for defendants convicted on child pornography charges and those defendants convicted of traveling across state lines to have sex with a minor, in which the former sometimes received longer sentences. He also supported increased penalties and enhancements generally contained in the bill.<sup>165</sup> S. 2520 passed the Senate (with amendment) on

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<sup>159</sup> H.R. REP. NO. 107-723, *supra* note 151, at 19.

<sup>160</sup> *Id.*

<sup>161</sup> H.R. 5422 passed the House by a vote of 390-24. 148 CONG. REC. H7048-50 (daily ed. Oct. 7, 2002).

<sup>162</sup> 148 CONG. REC. S4389 (daily ed. May 14, 2002).

<sup>163</sup> 148 CONG. REC. S4391-93 (daily ed. May 15, 2002).

<sup>164</sup> *Stopping Child Pornography: Protecting Our Children and the Constitution, Hearing Before the Senate Committee on the Judiciary, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (Oct. 2, 2002).*

<sup>165</sup> *Id.* at 19 (testimony of Daniel Collins).

November 14, 2002.<sup>166</sup> It was received in the House on November 15, but no further action was taken on any of these bills during the 107<sup>th</sup> Congress, and the bills died with the adjournment of the 107<sup>th</sup> Congress.

## 1. The PROTECT Act of 2003

In April 2003, Congress considered and passed a new version of the PROTECT Act.<sup>167</sup> The legislation that became the 2003 PROTECT Act,<sup>168</sup> was re-introduced by Senator Hatch in January 2003 to address sexual exploitation of children, particularly “virtual” child pornography, following up on congressional efforts to address *Ashcroft v. Free Speech Coalition* undertaken during the 107<sup>th</sup> Congress.<sup>169</sup> This version of S. 151 passed the Senate by a vote of 84-0 on February 24, 2003.<sup>170</sup> S. 151 was referred to the House Judiciary Committee on February 25, 2003 and discharged by the Committee on March 27, 2003.<sup>171</sup>

The legislative history of the sentencing provisions that ultimately were included in the 2003 PROTECT Act is somewhat sparse.<sup>172</sup> It appears that the sentencing reform provisions stemmed from continuing congressional concern that the increasing rate of downward departures from the sentencing guidelines, particularly after the Supreme Court’s decision in *Koon*, was hindering the goals of the Sentencing Reform Act.<sup>173</sup> In addition to the overall rise in departure

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<sup>166</sup> 148 CONG. REC. S11150–53 (daily ed. Nov. 14, 2002).

<sup>167</sup> The full title of the bill is “Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003”.

<sup>168</sup> S. 151, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003).

<sup>169</sup> See S. REP. NO. 108-2, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1–2 (2003). This bill expanded upon S. 2520, which passed the Senate in 2002.

<sup>170</sup> 149 CONG. REC. S2587–90 (daily ed. Feb. 24, 2003).

<sup>171</sup> 149 CONG. REC. H2440–43 (daily ed. Mar. 27, 2003).

<sup>172</sup> The House Judiciary Committee, Subcommittee on Crime, Terrorism and Homeland Security, held one hearing in March 2003 that delved into the issues of sentencing reform raised by the Department of Justice during the 2002 hearings, namely those reform measures dealing with sex crimes and abduction offenses. This hearing did not cover, however, the broader sentencing reform provisions that eventually were included in the PROTECT Act. For a general discussion of the sentencing provisions included in the final PROTECT Act, see H.R. REP. NO. 108-66, 108<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 57–58 (2003) (discussing need for sentencing provisions contained in PROTECT Act).

<sup>173</sup> See, e.g., 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch); 149 CONG. REC. S5132 (daily ed. Apr. 10, 2003) (statement of Sen. Sessions) (finding apparent rise in downward departures “disturbing”). This concern seems to have been heightened by the Department of Justice’s October 2002 testimony about departures in child sex crime cases. Senator Hatch’s statements

numbers, some in Congress apparently were concerned with the disparity among different judicial districts that seemed to result from the varying use of downward departures.<sup>174</sup> And some members of Congress seemed particularly troubled by the departure rate in sex crimes and other offenses involving children.<sup>175</sup> Senator Hatch criticized the Sentencing Commission during floor statements for not taking action sooner to restrict the incidence of downward departures, particularly in these areas.<sup>176</sup>

Congress held one hearing on some of the proposed sentencing provisions of the PROTECT Act. In March 2003, Representative Lamar Smith introduced H.R. 1161, the Child Obscenity and Pornography Prevention Act of 2003. Section 12 of that bill required *de novo* review of sentences under 18 U.S.C. § 3742 and required the Attorney General, within 15 days of a district judge's grant of a downward departure, to file a report with both the House and Senate

Judiciary Committees setting forth the case and the judge, and indicating whether or not the Department of Justice intended to file an appeal.<sup>177</sup>

On March 11, 2003, the House Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on H.R.1161 (and H.R.1104, the Child Abduction Prevention

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about excessive judicial departures seemingly suggest a further shift in his view of the role judges could play in protecting the integrity of the guidelines system. In 1993, Senator Hatch addressed concerns that had been raised throughout the sentencing reform debate that the guidelines system transferred too much discretion from judges to prosecutors. Senator Hatch then stated that it was the responsibility of Congress to ensure that the guidelines protect against undue prosecutorial influence. To that end, he wrote: "Congress should consider all options, including, if necessary, giving judges *greater flexibility* in deciding the appropriate application of, *and departure from*, guidelines sentences." Hatch, *supra* note 113, at 192 (emphasis added).

<sup>174</sup> 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch). Senator Hatch noted that in the Fourth Circuit, for example, the documented nonsubstantial assistance downward departure rate was 5.2 percent, in the Tenth Circuit it was 23.3 percent. 149 CONG. REC. S5122 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch). The difference in these numbers, according to Senator Hatch, demonstrated an increasing undermining of the sentencing guidelines by some judges. *Id.*

<sup>175</sup> *See* 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch) (noting that "in the last five years," trial courts granted downward departures in 19.20 percent of sexual abuse cases, 21.36 percent of pornography and prostitution cases, and 12.8 percent in kidnapping and hostage-taking cases).

<sup>176</sup> *See* 149 CONG. REC. S5122 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch). Senator Hatch also criticized the Sentencing Commission for not monitoring the departure rate and for failing to make addressing previously raised concerns regarding the departure rate a priority. *Id.* at S5123.

<sup>177</sup> *See* H.R. 1161, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003).

Act).<sup>178</sup> Daniel Collins testified on behalf of the Department of Justice that the inclusion of section 12 in H.R. 1161 “would enact long-overdue reforms to address the growing frequency of ‘downward departures’ from the Sentencing Guidelines,” a particular problem in child pornography cases.<sup>179</sup> According to Mr. Collins’ testimony, the increasing rate of downward departures was “traceable to the Supreme Court’s decision in *Koon*” that the Sentencing Reform Act required appellate courts to apply a highly deferential standard of review to departure determinations by sentencing judges.<sup>180</sup> By including the *de novo* review in section 12, this portion of the *Koon* decision effectively would be overturned.<sup>181</sup> Mr. Collins and the Department of Justice also advocated adding language to H.R. 1161 “that would prohibit departures” on “any ground that the Sentencing Commission has not affirmatively specified as a permissible ground for a downward departure.”<sup>182</sup> “In doing so, the bill would effectively overrule *Koon* on this point as well.”<sup>183</sup>

H.R. 1161 lay dormant in the House Judiciary Committee, while H.R.1104, which contained the child abduction provisions<sup>184</sup> passed by the Senate in February as S. 151, was reported from the House Judiciary Committee. H.R. 1104 was scheduled for floor debate on March 27, 2003. On the eve of that debate, Representative Tom Feeney, introduced an amendment that contained significant sentencing reform provisions, reaching far beyond the provisions of H.R. 1161. According to Representative Feeney, his proposed amendment to the 2003 PROTECT Act was necessary because it appeared that the sentencing guidelines were not

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<sup>178</sup> *Child Abduction Prevention Act and the Child Obscenity and Pornography Prevention Act of 2003: Hearing on H.R. 1104 and H.R.. 1161 Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Mar. 11, 2003).* H.R. 1104 and 1161 expanded upon House efforts in the 107<sup>th</sup> Congress to address the issues of child pornography and abduction.

<sup>179</sup> *Id.* at 15 (testimony of Daniel Collins). This was the only hearing held on sentencing reform provisions during the 108<sup>th</sup> Congress.

<sup>180</sup> *Id.* at 17.

<sup>181</sup> *Id.* at 18.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> The issue of child abduction and the creation of a national “Amber Alert” system received a great deal of media attention during the beginning of the 108<sup>th</sup> Congress. A number of child abductions, including the abduction of Elizabeth Smart, had taken place during the summer of 2002, and Elizabeth Smart’s parents attended the October 2002 Senate hearing regarding the Senate’s version of child pornography and abduction prevention legislation. In addition, Elizabeth Smart’s safe return coincided with House consideration of H.R. 1161 and H.R. 1104. In part, as a result of this media attention on the issue of child abduction – attention that had not been present when similar “Amber Alert” bills had been debated in Congress – bills such as H.R. 1104 and S. 151 now were moving rapidly through Congress.

being followed sufficiently by the sentencing courts.<sup>185</sup>

Among some of its changes to the federal sentencing system, the “Feeney amendment” sought to “place strict limits on departures from federal sentencing guidelines by allowing sentences outside the guideline range only upon grounds specifically enumerated by [the Sentencing Commission] as proper for departure,”<sup>186</sup> as suggested by the Department of Justice during the March 11, 2003 hearing. The amendment permitted departures under 18 U.S.C. §3553(b) only for those mitigating circumstances that have: (a) been “affirmatively and specifically identified as permissible grounds for departure in the sentencing guidelines; (b) not been taken into adequate consideration by the Sentencing Commission under the guidelines; and that (c) should result in a sentence different from that described.”<sup>187</sup> The amendment required courts “to give specific and written reasons for any departure from federal sentencing guidelines,” and changed the standard of review for departures to a *de novo* appellate review “to allow appellate courts to more effectively review illegal and inappropriate downward departures from federal sentencing guidelines.”<sup>188</sup> The Feeney amendment also prevented sentencing courts, upon remand, from imposing “the same illegal departure on a different theory” and only permitted the court to grant the third offense level reduction for “acceptance of responsibility” upon motion from the government.<sup>189</sup> The amendment also for the first time directly amended the sentencing guidelines with regard to penalties for possession and trafficking of child pornography, kidnapping, and acceptance of responsibility.

The Feeney amendment passed the House on March 27, 2003, by a vote of 357 to 58, and the entire bill, H.R. 1104, passed by a vote of 410 to 14.<sup>190</sup> H.R. 1104 was then incorporated into S. 151 and the PROTECT Act was sent to a House and Senate conference committee to work out

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<sup>185</sup> See 149 CONG. REC. H2423 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney) (“Unfortunately, judges in our country all too often are arbitrarily deviating from the sentencing guidelines enacted by the U.S. Congress based on their personal biases and prejudices, resulting in wide disparity in sentencing.”). Senator Hatch later would echo this sentiment during the floor debate of the final conference report version of the PROTECT Act: 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch) (“While the U.S. Sentencing Commission promulgated sentencing guidelines to meet [the] laudable goal [of avoiding unwarranted sentencing disparities,] sentencing courts have strayed further and further from this system of fair and consistent sentencing over the past decade.”).

<sup>186</sup> H. R. REP. NO. 108-48, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3 (2003).

<sup>187</sup> H.R. 1104, § 401(a), 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003).

<sup>188</sup> H.R. REP. NO. 108-48, *supra* note 186, at 3.

<sup>189</sup> *Id.*

<sup>190</sup> 149 CONG. REC. S5115 (daily ed. Apr.10, 2003) (statement of Sen. Hatch).

differences between the bills.<sup>191</sup>

The PROTECT Act conferees met on April 8, 2003. The resulting conference bill contained substantial changes to the sweeping sentencing provisions embodied in the Feeney amendment. The conference bill sought to: (1) prohibit certain downward departures, but only for certain crimes against children and sex offenses;<sup>192</sup> (2) change the standard of review of sentencing matters for appellate courts to a *de novo* review, while factual determinations would continue to be subject to a “clearly erroneous standard”; (3) require courts to give specific and written reasons for any departure from the guidelines of the Sentencing Commission; and (4) require judges to report sentencing decisions to the Sentencing Commission.<sup>193</sup> “It is important to note that the compromise restricts downward departures in serious crimes against children and sex crimes and does not broadly apply to other crimes, but because the problem of downward departures is acute across the board, the compromise proposal would direct the Sentencing Commission to conduct a thorough study of these issues, develop concrete measures to prevent this abuse, and report these matters back to Congress.”<sup>194</sup>

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<sup>191</sup> 149 CONG. REC. H2443 (daily ed. Mar. 27, 2003).

<sup>192</sup> The compromise added a fourth factor for permitting departures in child abduction and child sex offenses, that “the court finds upon motion of the Government that the defendant has provided substantial assistance to the investigation or prosecution of another individual to the kind or degree not adequately taken into consideration” by the Sentencing Commission. *See* Pub. L. No. 108-21, § 401(a), 117 Stat. 650 (2003).

<sup>193</sup> 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch). Sentencing courts already submitted data to the Sentencing Commission; however, the PROTECT Act mandated the Chief Judge of each district to ensure that a certain list of materials along with a “written report” of the sentencing decision be forwarded to the Sentencing Commission by the Chief Judge of each district within 30 days of a sentencing decision. Pub. L. No. 108-21, § 401(h). The conference report language also added a new provision to the PROTECT Act, limiting the number of federal judges who may serve on the Sentencing Commission to “no more than three.” In support of this change, Senator Hatch stated it “will, hopefully restore the appearance of balance in the Sentencing Commission and eliminate any conflict between the commissioners’ desire to retain judicial discretion and uniformity in sentencing.” 149 CONG. REC. S5126 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch).

<sup>194</sup> 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch). The final language of the PROTECT Act actually went beyond merely requiring the Sentencing Commission to “report back to Congress” on downward departures. Section 401(m) of the PROTECT Act directs the Sentencing Commission, within 180 days of enactment, to “review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary, . . . and promulgate . . . appropriate amendments . . . to ensure that the incidence of downward departures are [sic] substantially reduced . . .” Pub. L. No. 108-21, § 401(m), 117 Stat. 650 (2003). Individual conferees offered alternative approaches that were not accepted. For instance, Senator Kennedy proposed legislation directing the Sentencing Commission to review the incidence of downward departures and report back to Congress its findings and recommendations within 180 days. 149 CONG. REC. S5117 (daily ed. Apr. 10, 2003) (statement of Sen. Kennedy). Senator Richard Durbin asked Senator Hatch for

The 2003 PROTECT Act, with its amended sentencing provisions, passed the House on April 10, 2003, by a vote of 400-25 and the Senate by 98-0.<sup>195</sup> The President signed the bill into law on April 30, 2003.<sup>196</sup> The Sentencing Commission immediately implemented the direct amendments to the guidelines required by the PROTECT Act. At the same time, in response to the directive contained in Section 401(m) of the Act, the Sentencing Commission expanded and expedited its review of the role of departures that had been undertaken as part of its fifteen year review of the guidelines system.<sup>197</sup>

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additional hearings on the sentencing guidelines generally, and the issue of downward departures specifically, that would go beyond the provisions of the PROTECT Act. 149 CONG. REC. S5125 (daily ed. Apr. 10, 2003) (statement of Sen. Durbin).

<sup>195</sup> Despite ultimately voting for the PROTECT Act, Senator Kennedy passionately voiced his opposition to the sentencing provisions it contained. He noted that taking away the downward departures “pursuant to plea agreement” and “substantial assistance,” both government driven departures, the downward departure rate based on judicial leniency was quite low. 149 CONG. REC. S5134 (daily ed. Apr. 10, 2003) (statement of Sen. Kennedy). In his view, there is no “epidemic of leniency in the Federal criminal justice system,” and the “departure rate is not excessive.” *Id.*

<sup>196</sup> *See* Statement of the President George W. Bush Upon Signing S. 151, 39 WKLY COMP. PRES. DOC. 502-04 (April 2003) (2003) (acknowledging various provisions of the 2003 PROTECT Act).

<sup>197</sup> Unsatisfied with the way in which the 2003 PROTECT Act proceeded through Congress, as well as with its content, Senator Kennedy and Representative Conyers, for themselves and others, introduced companion bills (S. 1086 and H.R. 2213, respectively) that would repeal all the provisions contained in the PROTECT Act not related specifically to the prevention of exploitation of children. These bills, titled the Judicial Use of Discretion to Guarantee Equity in Sentencing Act of 2003 or “JUDGES Act”, both introduced in May 2003, also direct the Sentencing Commission, within 180 days after enactment of the JUDGES Act, to submit a report to Congress on the incidence of downward departures from the sentencing guidelines. These bills have been referred to their respective judiciary committees and no further action has been scheduled for them.

# Appendix C

## DATA SOURCES AND METHODOLOGY

### A. COMMISSION MONITORING DATAFILES

The Commission monitoring datafiles contain information collected from court documents (*i.e.* Presentence Investigation Reports, Judgment and Commitment Orders, and Reports on the Sentencing Hearing [Statement of Reasons]) for criminal felony and class A misdemeanor cases sentenced under the federal sentencing guidelines. For each case sentenced under the guidelines, the Commission routinely collects more than 250 pieces of information including defendant demographics, statutes of conviction, sentencing guideline applications, and sentence outcomes.<sup>1</sup>

#### 1. USSC 1991-1998 Datafiles

Data reported from fiscal years 1991 through 1998 are from the Commission's monitoring datafiles and replicate statistics in the *Sourcebook of Federal Sentencing Statistics* for their respective years.

#### 2. USSC 1999-2001 Datafiles

Data from fiscal years 1999 through 2001 are from the Commission's revised datafiles. These datafiles were revised as part of the Commission's work with the General Accounting Office in preparation of its report *Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2001*. The revisions corrected coding discrepancies for a very small proportion of cases in each datafile. As a result of these revisions, the data for these three years varies slightly from statistics reported in the Commission's *Sourcebook of Federal Sentencing Statistics*.

The Commission further revised the fiscal year 2001 datafile as part of its work in preparing this report. The Commission assessed downward departure reasons cited on Statements of Reasons that, when initially coded, were not easily classified into existing categories. After assessment, a number of downward departure reasons were reclassified, into existing categories when possible. As a result, the distribution of downward departure reasons in this report differs slightly from that reported in Table 25 in the Commission's 2001 *Sourcebook of Federal Sentencing Statistics* for 2001.

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<sup>1</sup> For more information on the Commission's monitoring datafiles, see USSC 2001 *Sourcebook of Federal Sentencing Statistics* and USSC 2001 *Annual Report*.

## **B. 2001 DOWNWARD DEPARTURE SAMPLE**

The 2001 Downward Departure Sample consists of a random sample of 658 downward departure cases selected according to downward departure reason from the revised fiscal year 2001 datafile. A case was designated as having received a downward departure if the court indicated on the Statement of Reasons that a nonsubstantial assistance downward departure was granted. Furthermore, only cases with complete file documentation were eligible for the sample (*i.e.*, the file contained presentence reports, Statements of Reasons, and plea documents, if appropriate).

The sample consisted of cases with one of six commonly cited downward departure reasons. A ten percent sample of cases was selected for each of those six reasons. Downward departure cases were selected that cited general mitigating circumstances (223 cases), pursuant to plea agreement (178 cases), criminal history overrepresents seriousness (120 cases), aberrant behavior (72 cases), family ties and responsibilities (42 cases), and diminished capacity (27 cases) as reasons.<sup>2</sup> Reason specific data was collected for each case and is reported in Chapter 3 of this report.

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<sup>2</sup> Adding the total number of cases in the six samples results in 662 because four of the cases had more than one downward departure reason and were sampled for both the criminal history and general mitigating circumstances samples (2 cases), the plea agreement and aberrant behavior samples (1 case) and the aberrant behavior and family ties samples (1 case).