by the Commission in determining past sentencing practices was a 1,279 page report indexing and categorizing some 40,000 sentences imposed by federal courts from January 1, 1984 to February 28, 1985. Federal Judicial Center, Punishments Imposed on Federal Offenders (1986). Conspicuously absent from this otherwise comprehensive study covering numerous categories of federal offenses is any data describing the sentences and fines imposed for violations of the Clean Water Act, the Clean Air Act, and the host of most other environmental laws on the books. Perhaps this was due to the paucity of such prosecutions, with administrative and civil remedies found to be more than adequate to punish, deter, and remedy the violations. After all, with respect to malum in se crimes like bank robbery, society cannot bring the robber before an administrative law judge to assess a fine, or file a civil suit for injunction and civil penalties. Criminal prosecution for such crimes is the only method that society has to deal with malum in se crimes. On the other hand, for malum prohibitum offenses, that is, conduct that is prohibited by statute or regulation, society has successfully used a number of remedies available to it short of criminal prosecution. Consequently, because almost any violation that is brought civilly could also be brought criminally, the more appropriate universe of determining what punishments society metes out for environmental offenses should take into account *all* the remedies used, i.e., administrative, civil, and criminal, to get an accurate picture of what the proper punishment should be.

If the Commission had properly done its homework, and even if it simply limited

itself to looking at criminal prosecutions of environmental offenses, it would have quickly discovered that pre-guideline sentences for environmental offenses were fairly uniform (already one of the goals of the Sentencing Reform Act, i.e., the elimination of disparate sentences). The sentences meted out by federal judges using their sound discretion, and taking into account the goals of punishment to impose no more punishment than is necessary, rarely involved incarceration; rather, suspended sentences, probation, fines, community service, and restitution were the norm. Where incarceration was imposed, the length of the sentences were usually for several few weeks or months which more than adequately served the principles of punishment and deterrence. See generally U.S. EPA, Office of Enforcement, National Enforcement Investigations Center, Denver Summary of Criminal Prosecutions Resulting From Environmental Investigations (May 31, 1991) (summarizing the disposition of all environmental criminal cases from fiscal years 1983 to 1991) (hereinafter "Summary").[10]

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[10] A few representative cases makes this clear. For example, in *United States v. ABC Compounding Company, Inc.*, William S. Armistead and Vincent Armistead, No. 85-484 (N.D. Ga.), a company engaged in the business of mixing and selling chemicals was charged with RCRA conspiracy, disposal, and reporting violations. The company was fined $40,000 and the father who was vice-president and part owner, and the son, who was plant supervisor, each received suspended term of imprisonment, placed on probation for one year, assessed a $20,000 fine, and ordered to perform community service. Summary at 39. In *United States v. Richard*

Significantly, the Commission has never identified in any of its literature what other source documents and data it relied upon in developing the environmental guidelines, or more importantly, if it did use other information, whether it first determined the average pre-guideline sentence. The government no doubt will attempt

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Brown, No. 86-005 (D. Col.), the defendant ordered five drums of toxic waste to be buried, and he was indicted for disposing of hazardous waste without a permit and for making a false statement to the EPA. The court fined the company $3,500 and placed Mr. Brown in a pretrial diversion program. Summary at 38. In *United States v. Arthur J. Greer*, No. 85-00105 (M.D. Fla.), the proprietor and operator of four hazardous waste handling companies endangered the lives of employees by ordering them to test for the presence of chemicals such as cyanide, methyl ethyl ketone, xylene, and other chemicals by "sniffing samples or lighting them in soft drink cans, rather than by performing required chemical analysis." In addition, he dumped 1,000 gallons of waste and mislabeled the drums as harmless dirt. Greer was indicted on 33 counts, including six counts of "knowing endangerment" under RCRA. He was acquitted of the knowing endangerment counts, but sentenced for RCRA and CERCLA violations to one year and one month imprisonment (and eligible for parole after serving one-third of that time, or approximately four months). Summary at 35. In *United States v. Taylor Laboratories, Inc. and John H. Taylor, Jr.*, No. CR89-006-R (N.D. Ga.), the company and Mr. Taylor were charged with storing reagent chemicals in violation of RCRA, some of which were found near a lake. Mr. Taylor was sentenced to five years and five days imprisonment, all of which was suspended and placed on three-years probation. Summary at 84.

to counter amicus' arguments on this score by claiming that the Commission did have the authority to increase sentences from past practice if those sentences "d[id] not accurately reflect the seriousness of the offense." 28 U.S.C. § 994(m). But any such departures "will require that, as a starting point. . . the Commission ascertain the average sentences." Afterwards, departures upward may still be made, but only if the resulting sentencing range "is consistent with the purposes of sentencing" in 18 U.S.C. § 3553(a)(2). 28 U.S.C. § 994(m).[11] It is Commission Policy that "when departures [from past sentencing practice] are substantial, the reasons for departure will be specified." Paragraph 6, Principles Governing the Redrafting of the Preliminary Guidelines, adopted December 16, 1986, *reprinted in* Stephen Breyer (former member of the Sentencing Commission), The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 50 (1988); *see also* id. at 17 (Guidelines primarily to be based on "typical, or average, actual past practice").

Where are the Commission's reasons to justify the substantial upward departures from pre-guideline sentencing practices? There simply are none. The fact of the matter is that (a) the current sentences mandated for environmental offenses

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[11] Congress also directed that the Commission "insure that the guidelines 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).

clearly do not represent the "typical" or "average" pre-guideline sentence, and (b) the Commission has never provided any reasons for the sharp departure which would assist a reviewing court in determining whether those departures are "consistent with the purposes of sentencing" or whether they are, as amicus submit, arbitrary, unreasonable, and inconsistent with the sentencing factors mandated by Congress in 18 U.S.C. § 3553(a) (sentences shall be "sufficient, but not greater than necessary" to satisfy punishment, deterrence, avoid sentencing disparities, etc.). The Commissioners figuratively threw darts on the wall to come up with the offense levels for environmental guidelines. If the courts do not scrutinize the promulgation and reasonableness of the guidelines, they become, and have become, blank checks to be arbitrarily filled out or modified by the Commission.[12]

Because of these drafting flaws, it should come as no surprise that the environmental guidelines are inherently unreasonable and result in wildly disparate and excessive sentences in this and other environmental cases. For an excellent critique of the environmental sentencing guidelines and the Commission's misguided "one-size-fits-

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[12] An agency's failure to follow Congressional directives for the promulgation of rules is itself sufficient grounds for invalidating a rule or guideline as a violation of law. *Environmental Defense Fund, Inc. v. EPA*, 898 F.2d 183, 189 (D.C. Cir. 1990) (court "cannot sustain [agency] action merely on the basis of interpretive theories that the agency might have adopted and findings that (perhaps) it might have made.") (emphasis added).

all" approach for applying the guidelines to different environmental statutes which provide for punishments ranging from 6 months to 15 years, see B. Sharp & L. Shen, The (Mis)Application of Sentencing Guidelines To Environmental Crimes, BNA Toxics L. Rpt'r 189 (July 11, 1990).

Not only do the flawed environmental guidelines produce sentences such as the instant one that are grossly disparate from pre-guideline cases, they also produce disparate post-guideline sentences, contrary to the purpose of the guidelines to reduce sentencing disparity. Consider, for example, *U.S. v. Wells Metal Finishing, Inc.*, 922 F.2d 54 (1st Cir. 1991) where the defendant was convicted after trial of 19 counts of "knowingly discharging excessive amounts of zinc and cyanide into the City of Lowell's sewer system" over a two-year period between February 1987 and 1989 resulting in the sewer system "containing levels of zinc and cyanide vastly in excess of federal pretreatment limits" and having costly impacts on the sewer system operation. The 15-month prison sentence imposed in *Wells Metal* for 19 counts of continuously discharging zinc and cyanide over two years stands in sharp contrast to the 46-108 month sentences imposed in this case. The 46-month sentence imposed on Randall Hansen in this case is a more than a 300 percent *longer* sentence than that imposed in *Wells Metal* for conduct that was less serious; Taylor's sentence of 78 months is over 500 percent greater than that in Wells; and Christian Hansen's sentence of 108 months is over 700 percent greater than in Wells. and certainly no worse than that in *Wells*.[13]

That is not to say that all sentences require mathematical exactitude; however,

sentencing disparities ranging from 300 to over 700 percent for roughly comparable acts for post-guideline offenses (and disparities easily over 1,000 percent between pre- and post-guideline sentences) is troubling to say the least, especially where the rationale for having the Guidelines in the first place was to *reduce* sentencing disparities, not to create them. Accordingly, this Court should seriously examine the fundamental flaws in the environmental guidelines and strike them down on their face or as applied in this case.

CONCLUSION

For all the foregoing reasons and those presented in the briefs of appellants, the judgment and convictions should be reversed. In the alternative, the sentences should be vacated, and the case remanded for re-sentencing.

Respectfully submitted,

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October 8, 1999

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[13] *Cf. United States v. Bogas*, 920 F.2d 363 (6th Cir. 1990) convicted for discharging hazardous and ignitable materials and lying about it to officials, was resentenced to a level 12 on remand, and received home detention. The defendants' sentences ranging from 46 to 108 months of hard prison time is infinitely greater than Mr. Bogas' home detention.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

UNITED STATES OF AMERICA, Plaintiff, v. RANDALL W. HANSEN, Defendant.	Docket No. CR298-23 **Argument Requested**

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF RANDALL W. HANSEN UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT HIS SENTENCE

Defendant Randall W. Hansen, through his undersigned counsel, respectfully submits this memorandum of law in support of his motion, under 28 U.S.C. § 2255, to vacate, set aside, or correct his sentence. Mr. Hansen, the former Vice President and, after April 1993, acting Chief Executive Officer ("CEO") of LCP Chemicals ("LCP"), is currently serving out the 46-month sentence imposed by this Court following his conviction, on January 15, 1999, for conspiracy and violations of the Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA"). The prosecution arose from LCP's operation, primarily in 1993 and early 1994, of a chlor-alkali plant in Brunswick, Georgia, although Randall Hansen at all relevant times resided and had his office in New Jersey. In the words of the Eleventh Circuit, Mr. Hansen's "primary focus was financial, and, with the support of the bankruptcy creditor's committee and court, he

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sought to sell the company to a responsible party who could operate the business and have the financial resources to deal with the various environmental conditions." *United States v. Hansen*, 262 F.3d 1217, 1229 (11th Cir. 2001), *cert. denied,* 535 U.S. 1111 (2002).

Given the absolute lack of any evidence whatsoever of Randall Hansen's involvement in any actions that caused violations of the environmental laws, Mr. Hansen was prosecuted and convicted under a theory of vicarious "responsible corporate officer" ("RCO") liability, as embodied in one of the Court's jury instructions. Indeed, the Government's theory to justify the conviction on appeal was that Mr. Hansen was responsible as acting CEO for failure to close the plant down when periodic violations of the environmental laws were inevitable. The RCO instruction permitted the jury to find Mr. Hansen guilty if (1) the CWA or RCRA violation "occurred under his area of authority and supervisory responsibility"; (2) he "had the power or capacity to prevent the violation"; and (3) he "acted knowingly in failing to prevent, detect or correct the violation." *Id.* at 1252.

At trial, the Court overruled Mr. Hansen's objection to this instruction, and the Eleventh Circuit affirmed the application of RCO liability. *Hansen*, 262 F.3d at 1235. Since that time, however, the Supreme Court has materially changed the law with respect to the imposition of vicarious liability on corporate officers such as that imposed on Randall Hansen. In *Meyer v. Holley*, 123 S. Ct. 824, (2003), the Supreme Court recently rejected the imposition of vicarious liability on corporate officers for an employee's unlawful acts simply because they controlled, or had the right to control, the employee's actions. As discussed below, Mr. Hansen's conviction was clearly contrary to the principles set forth in *Meyer*. This change in law applies retroactively

to Mr. Hansen's sentence and requires that his sentence be vacated, set aside, or corrected under 28 U.S.C. § 2255.

BACKGROUND STATEMENT

The Court is familiar with this case from Mr. Hansen's trial and sentencing hearings, as well as the Eleventh Circuit's *per curiam* opinion. Our recitation of the background facts is abridged accordingly.

In 1998, a federal grand jury in the Southern District of Georgia, Brunswick Division, returned a 42-count indictment against Mr. Hansen and his codefendants. The indictment charged Mr. Hansen with violations of the federal conspiracy statute, 18 U.S.C. § 371 (count 1); the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A) ("CWA") (counts 2-21); and RCRA, 42 U.S.C. §§ 6928(d)(2)(A) and (e) (counts 22-34). The last RCRA count (34) charged Mr. Hansen with knowing endangerment.

While the CWA has a provision allowing for RCO liability under the appropriate circumstances, *see* 33 U.S.C. § 1319(c)(6), RCRA does not. Moreover, the legislative history to RCRA's knowing endangerment provisions reflects the clear intention that corporate managers and officers *not* be subject to vicarious liability for the unlawful conduct of employees. *See* H.R. Conf. Rep. No. 96-1444, at 39-40 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 5039 ("[R]esponsibility for the felony of criminal endangerment should properly be confined only to those persons who themselves have actual knowledge of the danger resulting from their conduct. A supervisor, for example, who personally lacks the necessary knowledge, should not be criminally prosecuted for knowledge that only his subordinates possessed.") By contrast, the

RCO instruction in this case permitted a conviction if Mr. Hansen "failed to detect" the unlawful actions. The "failure to detect" standard was well below the standard Congress expressly established, and undermined Congress's intent to reserve RCRA's knowing endangerment statute for "the occasional case where the defendant's knowing conduct shows that his respect for human life is utterly lacking and it is merely fortuitous that his conduct may not have caused a disaster." H.R. Conf. Rep. No. 96-1444, at 38 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5038.

As this Court concluded at Mr. Hansen's sentencing, the evidence established that Mr. Hansen "was never directly involved in the discharging or dumping of hazardous waste, nor did he order such conduct to take place," and, further, was not located in Georgia but New Jersey. The government argued that as CEO he should have allocated additional funds for repairs and maintenance at the Brunswick plant, but offered no proof that those funds existed. Indeed, in 1991, before Mr. Hansen joined LCP, Hanlin, the parent corporation, filed a voluntary bankruptcy petition, becoming a Chapter 11 debtor-in-possession, with pre-petition obligations exceeding $100 million. *Hansen*, 262 F.3d at 1227. The company remained in bankruptcy throughout the relevant period, during which time the bankruptcy code severely restricted management's ability to allocate the bankruptcy estate's assets, or to assume new debts, for maintenance, repairs, and environmental compliance. *Id.*

Mr. Hansen nonetheless found additional funds for repairs. Maintenance spending increased under Mr. Hansen's management, contrary to the government's allegations. First, he "attempted to find additional funds by selling excess equipment and reducing the payroll but the

funds remained limited." *Id.* Second, under an asset purchase agreement negotiated primarily by Mr. Hansen in the late summer of 1993, the plant's former owner, Allied Signal, and another investor, Holtrachem, made a multimillion dollar advance against the purchase price for improvements primarily at the Brunswick plant. *Id.* 1230-31. Finally, contrary to the government's argument that Mr. Hansen "denied" requests for funds to make repairs at the Brunswick plant, evidence introduced at the sentencing hearing showed that he directed that such requests be fulfilled. For example, in response to a memorandum received from Al Taylor regarding "small parts needed for cell repair," Mr. Hansen instructed: "Mike, High priority to get funded. Help Al T[aylor] out as soon as practical. Thanks, R[andall]." (Document attached at Tab A(1).)

At trial and on appeal, the government argued that, because of the lack of funds available for repairs, Mr. Hansen should have caused LCP to cease operating the Brunswick plant before February 1994, when it was shut down. As acting CEO, however, Mr. Hansen did not have authority unilaterally to close the plant. The government's own witnesses testified that only the Board of Directors could close the Brunswick plant, and even that was subject to the approval of the creditors' committee and bankruptcy court. *Id.* at 1238. As the Eleventh Circuit stated, the "ultimate decision-making for all major projects, capital and extraordinary expenditures," including whether to shut down or cease operations at any particular plant, "were subject to the approval of the Board and the bankruptcy creditor's committee and court." *Id.* at 1227-28. Furthermore, a government witness, Hugh Croom, testified that Mr. Hansen at least once sought to close the plant in 1993 but was denied authority to do so by the Board. R19-23.

Faced with the undisputed fact that Mr. Hansen could not have closed the plant by himself, the government has argued that he nonetheless caused the CWA and RCRA violations, or conspired to commit them, by concealing information from the Board about the number of excursions at the Brunswick plant, thereby duping the Board into continuing operations at Brunswick. The government's only evidence at trial to support this theory was the immunized testimony of James Mathis, who was a Board member, Chairman of LCP's Environmental Committee, and Chairman pro tem of the Board during most of 1993. Mr. Mathis testified that the information Mr. Hansen provided to the Board "indicated that, really, compliance was not a problem" and that "there were really no excursions of any significance going on." *Id.* at 1238 & n.27. The Eleventh Circuit stated this "evidence indicates that [Mr. Hansen] apparently misled [the Board] into believing that environmental compliance was not a problem." *Id.* Indeed, this seemed to be essentially the closest the appellate court could come to identifying *anything* that in its view could have supported the notion that Randall Hansen was responsible for the environmental excursions in light of the uncontested evidence that closing the plant was a Board and Bankruptcy Court decision.

In fact, however, documents prove that the Board decided to continue operating the Brunswick plant *after* receiving information from *Mr. Mathis* about the number of excursions during the period January 1 to November 11, 1993. Specifically, on November 30, 1993, Mr. Mathis circulated a memorandum to the Board concerning the "Brunswick situation" in which he stated that the "thing that is causing much anguish by GAD-NR is the sporadically high rate of mercury releases since mid-August." (Document attached at Tab A(2).) Mr. Mathis appended a

chart to his memorandum "depicting the releases" from January 1 through November 11, 1993, which reflected a "dramatic worsening of results" beginning in mid-August. The November 30, 1993 memorandum from Mr. Mathis further advised his fellow members of the Board that "[f]ortunately the releases have been low the past several days."[1]

After receiving Mr. Mathis's memorandum with data on the year to date mercury excursions at Brunswick, the next day, December 1, 1993, the Board convened during a conference call, and voted not to shut down the plant. In a memorandum to the files dated December 7, 1993 on the subject of the "December 1, 1993 Conference Call with RHansen, RHill, JMcKinney and Board of Directors," A. Patrick Nucciarone, Esq., wrote that, "*[a]fter expressing concern about past permit exceedences*, the Board concluded that it should not shut down the plant until further information developed because of the fact that a plant shut down may exacerbate other environmental problems and may prevent the acquisition by Allied and HoltraChem which are currently funding the plant upgrade and site remediation." (Document attached at Tab A(3).) These documents refute the argument – central to the government's case against Mr. Hansen and the Eleventh Circuit's affirmation– that he caused the violations at Brunswick by concealing information about compliance from the Board, which, in fact, voted to keep the plant operational after receiving such data from Mr. Mathis. Even Judge Amanda Williams visited the site in late 1993, at which time the Georgia DEP withdrew its motion to close the plant, commending LCP on its "extraordinary" efforts to improve compliance.

As the Court is aware from the many letters received prior to Mr. Hansen's sentencing

[1] Documents confirming these facts are attached at Tab A hereto.

hearing, one of Mr. Hansen's numerous character witnesses (who did not testify at trial as such but submitted letters on behalf of Mr. Hansen prior to his sentencing), was Hugh Croom. Mr. Croom, the former Brunswick manager, did testify at trial for the government, as its first witness, but later wrote to the Court asking for leniency for Mr. Hansen. At trial he also testified that Mr. Hansen was "just as concerned as we were about the problems" and "did the best he could to help us." R19-50. After making reductions to the offense levels but reluctantly denying Mr. Hansen's request for a downward departure ("if I knew of an appropriate way to really depart, I would do so.",[2] the court sentenced him to serve 46 months of incarceration and to pay a $20,000 fine. Mr. Hansen has paid the fine and served almost a year of incarceration. His sentence was dramatically extended under the Guidelines by the knowing endangerment conviction, for which the evidence at trial was particularly weak, if not directly contradictory:

> To minimize the workers' risk of skin irritations and burns, LCP held routine safety meetings, encouraged and received safety inspections, and provided the employees with training, protective equipment to preclude skin contact, and first aid stations and showers to relieve inadvertent contact. All employees, including those assigned to the cellrooms, were authorized to work elsewhere in the plant if they were concerned about their safety.

Hansen, 262 F.3d at 1227. The Eleventh Circuit upheld the conviction on the basis of water having accumulated on the cell room floors (while Mr. Hansen was in New Jersey), and the testimony of the government's expert that the caustic water on the floors could in theory have been fatal if one were to fall in and be unable to get out, and not be taken out by another person (which of course never happened). *Id.* at 1240. Indeed, the one person to testify that he did on

[2] June 2, 1999 Sentencing Tr. at 78 (excerpts attached as Tab B).

one occasion fall into the sump and come into contact with the caustic water admitted that he simply showered off and returned to work, never reported the incident to the plant nurse, and could not remember the decade in which the incident took place. *Id.* at 1227 n.6.

The judgment became final on June 3, 2002, when the Supreme Court denied Mr. Hansen's petition for a writ of certiorari.

ARGUMENT

I. the supreme court has changed the standard for vicarious corporate officer liability

When an intervening change in law is such that the defendant was punished "for an act that the law does not make criminal," the new rule is entitled to retroactive application. *Davis v. United States*, 417 U.S. 333, 346 (1974). Thus, a conviction that has become final may nonetheless be collaterally attacked on the basis of such a subsequent change in substantive law under 28 U.S.C. § 2255. *E.g.*, *United States v. McKie*, 73 F.3d 1149, 1152-53 (D.C. Cir. 1996).

In *Meyer*,[3] the Supreme Court reversed a decision by the Ninth Circuit imposing vicarious liability on a corporate shareholder and officer for an employee's unlawful acts. 123 S. Ct. at 828. The case, which arose under the Fair Housing Act ("FHA"), involved claims against David Meyer, an officer and sole shareholder of Triad, Inc., a real estate corporation. *Id.* A Triad salesman, Grove Crank, was alleged to have prevented the Holleys from obtaining a house for discriminatory reasons. The Holleys sued Meyer, claiming that he was vicariously *civilly* liable for Crank's unlawful actions. The Ninth Circuit recognized that "under general principles of tort

[3] The Supreme Court decided *Meyer* on January 22, 2003.

law corporate shareholders and officers usually are not held vicariously liable for an employee's action," but nonetheless interpreted the FHA to impose such liability. *Id.* The Ninth Circuit stated (in language similar to that used to affirm the RCO instruction in this case) that, in his capacity as Triad's sole shareholder and officer, Meyer had (1) "the authority to control the acts" of a Triad salesperson, and (2) "did direct or control, or had the right to direct or control, the conduct" of a Triad salesperson. *Id.* The Ninth Circuit further held that, even if Meyer neither participated in nor authorized the discrimination in question, "that control" or "authority to control" is "enough ... to hold Meyer personally liable." *Id.*[4]

The Supreme Court, in reversing the Ninth Circuit's decision, stated that "traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Id.* at 829. Moreover, absent "special circumstances it is the corporation, not its owner or officer, who is the principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents." *Id.* The Supreme Court further rejected the Ninth Circuit's extension of vicarious liability to corporate officers, stating that it "has applied unusually strict rules only where Congress has specified that such was its intent." *Id.* In the case of the FHA, "Congress said nothing in the statute or in the legislative history about extending vicarious liability" to corporate officers. "And Congress' silence, while permitting an inference that Congress intended to apply

[4] Similarly, the RCO instruction in this case, directed the jury to find Randall Hansen guilty of knowing endangerment if (1) the violation "occurred under his area of authority and supervisory responsibility"; (2) he "had the power or capacity to prevent the violation"; and (3) he "acted knowingly in failing to prevent, detect or correct the violation." *Hansen*, 262 F.3d at 1252.

ordinary background tort principals, cannot show that it intended to apply an unusual modification of those rules." *Id.* (emphasis added).

The Supreme Court's decision in *Meyer* makes clear that an extension of vicarious liability can occur only where Congress "has specified that such was its intent." This case is even more clear than *Meyer.* Not only did Congress *not* express an intent to impose vicarious liability, it expressed its intent to the contrary. The legislative history for RCRA's knowing endangerment provisions made clear that Congress intended *not* to impose RCRA's strict felony sanctions vicariously and, indeed, that its intent was only to impose liability under the most egregious of circumstances.[5] Congress expressly stated that it did *not* intend § 6928(e) (the RCRA knowing endangerment provision) to criminalize managerial negligence, that is, omissions based on knowledge that a defendant "should have had, could have had, or would have had under various circumstances." S. Rep. No. 96-172 at 39, *reprinted in* 1980 U.S.C.C.A.N. 5019, 5038. And Congress further stated that it *did not* intend the imposition of criminal liability under § 6928(e) to attach to corporate officers who were "making difficult business judgments" or "for errors in judgment made without the necessary scienter, however dire may be the danger in fact created." *Id.* at 37-39, *reprinted in* 1980 U.S.C.C.A.N. at 5036-5038. One is hard pressed

[5] Congress understood the difference between permitting a responsible corporate officer to be held liable and how to express its desire that such be permitted. In the Clean Water Act, there are provisions that expressly permit "responsible corporate officers" to be convicted. *See, e.g.,* 33 U.S.C. § 1319(c)(6). By contrast, no RCRA provision contains such language, and, as discussed herein, the legislative history behind RCRA's knowing endangerment provisions demonstrate that it intended such vicarious liability not to attach. Although Mr. Hansen was convicted for Clean Water Act violations also, had he only been convicted on those counts, under the Sentencing Guidelines, he would no doubt have already served out his sentence as of the filing of this petition.

to describe Mr. Hansen's business quandary in 1993 otherwise; while the Board and Creditors decided to keep the plant open, he was hamstrung by bankruptcy proceedings in his ability to fund repairs. Instead, Congress intended the provision for "the occasional case where the defendant's knowing conduct shows that his respect for human life is utterly lacking and it is merely fortuitous that his conduct may not have caused a disaster." *Id.* at 40, *reprinted in* 1980 U.S.C.C.A.N. at 5037-5038. These standards are not only facially in contrast to the evidence at trial but certainly cannot form the basis for the Court to conclude, as it would have to under *Meyer v. Holley,* that Congress clearly expressed its intent that vicarious criminal liability be imposed under this statute on corporate officers rather than on the corporation itself.[6]

This Court itself at sentencing characterized the basis for Randall Hansen's conviction in terms describing negligence rather than the willful conduct that Congress explained was necessary to support a knowing endangerment conviction. For example, the Court stated that "The willful violation of the EPD permits were done without the prior consent or knowledge of [Randall Hansen]." It explained that Randall Hansen "failed to act in an appropriate and reasonable manner when various violations were reported to him... [but] he was notified of these violations after the fact. And his failure to act in a reasonable manner caused further harm to the environment." July 1, 1999 Sentencing Tr. at 6.

These circumstances could not be farther from those described by Congress in creating

[6] The dearth of cases brought against individuals under this statute reflects the extreme nature of the conduct it was intended to punish. The government was never able to cite to a single case where an individual's conviction under § 6928(e) was upheld under even remotely analogous facts.

the statute under which Randall Hansen was convicted, as described above, and for which conviction he is serving out a lengthy sentence that is inconsistent with the Supreme Court's most recent pronouncement regarding vicarious corporate officer liability in *Meyer v. Holley*. The Court's reasoning in *Meyer* applies with even greater force in the criminal context than the civil context, where the repercussions of extending liability have infinitely greater implications on personal liberties.

II. THE COURT DID HAVE THE DISCRETION TO GRANT A DOWNWARD DEPARTURE BECAUSE THE CONDUCT AT ISSUE WAS "ABERRANT BEHAVIOR"

At the initial Sentencing Hearing in this matter, the Court indicated that it was particularly troubled by Randall Hansen's case. After hearing testimony regarding Mr. Hansen's exemplary character, family life and past conduct, the Court stated that the letters from friends and evidence before him "describe a life such as your wife did here, something that somehow is foreign to what finally happened here." The Court went on to add that, under those circumstances, "I do not mind saying, if I knew of an appropriate way to really depart, I would do so." June 2, 1999 Sentencing Tr. at 77-78. The Court's observations were, of course, correct. Randall Hansen had an impeccable record of achievement and community service, was a devoted family man with two young children in whose lives he remained intensely involved. Since his conviction, while his appeals were pending, Mr. Hansen devoted much of his time to helping his wife care for her ailing father (who has since passed away during Mr. Hansen's incarceration).

The Court apparently believed that it did not have the discretion to depart under the

Guidelines for conduct that was acknowledged to be "foreign" to Mr. Hansen's prior conduct and character. The Guidelines have since been revised to make clear that a departure based on "aberrant behavior" is appropriate. *See* Guideline §5K2.20, made effective November 1, 2000. This departure applies when "the defendant's criminal conduct constituted aberrant behavior." This provision applies unless the case involved: "serious bodily injury or death" (this case did not); discharge of a firearm or dangerous weapon by defendant (not applicable); serious drug or drug trafficking offense (not applicable); a defendant with more than one criminal history point (not applicable); or a defendant with a prior felony conviction (none here).

Application Note 2 for §5K2.20 states that "In determining whether the court should depart on the basis of aberrant behavior, 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 offense. These factors warranted application of a downward departure in Randall Hansen's case. He had an exemplary record of employment and prior good works. Indeed, the record established that, with his M.B.A. from Harvard University, he had left a more lucrative career path at his father's urging to come to the assistance of LCP while it was in financial straits. Indeed, his cost-cutting actions included cutting his own salary to help raise money to improve plant conditions. It was clear that, as the evidence established at trial and the Court recognized (July 1, 1999 Sentencing Tr. at 5), his motivation was to find a buyer with the resources to handle the environmental and other problems plaguing the plant. Moreover, after the plant was closed, Randall sought funds from the Bankruptcy Court to remediate the conditions and effect a safe shutdown, but those funds

were denied. *Hansen*, 262 F.3d at 1231. He nevertheless was able to secure some funds from the prior owners to do everything possible to mitigate any harm from the plant's operation, though decisions as to expenditures for capital improvements were Board decisions that had to be approved by the Bankruptcy Court. *Id.* at 1227, 1231.

The Court was mistaken that it did not have the authority and discretion to depart from the guidelines. Randall Hansen should be resentenced accordingly.

III. conclusion

For the foregoing reasons,[7] the Court should vacate the conviction of Randall Hansen under all counts alleging violations of RCRA. Alternatively, the Court should apply the Sentencing Guidelines to reduce his sentence because the conduct alleged was aberrant behavior.

Dated: June 2, 2003

Respectfully submitted,

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[7] In addition to the argument contained in this Memorandum, Mr. Hansen adopts in support of his Motion, and incorporates by reference as if fully set forth herein, the arguments made in the "Memorandum of Law in Support of Motion Filed Pursuant to 28 U.S.C. § 2255" by Mr. Hansen's codefendant, Christian A. Hansen to the extent that they are applicable to him.

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August 1, 2003

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Michael Courlander, Public Affairs Officer
United States Sentencing Commission
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Re: Request for Public Comment

Dear Commission:

The following sets forth our public comment for the amendment cycle ending May 1, 2004, and possibly continuing into the amendment cycle ending May 1, 2005:

Additional Priority Insert

"In the event such recommendations made by the Commission's Organizational Guidelines Advisory Group require substantial revisions to Chapter Eight of the Guidelines, the Commission shall consider the need for presenting a national symposium covering such Chapter Eight Guidelines revisions and the compliance management required by the Sarbanes-Oxley Act of 2002."

Thank you very much for the opportunity to provide the above public comment.

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law

Index to Public Comment
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INDEX TO PUBLIC COMMENT
LATE SUBMISSIONS
August 12, 2003

PUBLIC COMMENT SUMMARIES
(LATE SUBMISSIONS)

Federal Public and Community Defenders (FPCD)
Jon M. Sands
Chair, Federal Sentencing Guidelines Committee of the FPCD

SECTION I

A. Increasing Rate of Downward Departures

When making decisions to change the guidelines, the FPCD recommends that the Commission only increase sentences "where necessary, preserve judicial discretion whenever warranted, and act solely based on the facts, fully explaining the reasons for the Commission's actions in the official commentary to the guidelines." The FPCD recognizes that the rate of downward departures has been steadily increasing, but does not believe that this is due to an "epidemic of leniency among federal judges." The FPCD believes that the increase in the rate of departure is directly related to the "fact that federal prosecutors have adopted a practice of "exchanging" departures for "fast track" guilty pleas. In return for a tacit or explicit agreement from the prosecutor to not oppose a motion for departure, the defendant is required to waive his rights to discovery, appeal, confrontation, and trial by jury, among others." The FPCD goes on to say that most downward departures are controlled by the government in one form or another, and cites as an example the Southern District of New York where the standard plea agreement in white collar cases requires the defendant to waive the right to seek a downward departure.

1. Fast Track Practices

The FPCD argues that fast-track departures are not limited to immigration cases and are not standard from district to district or even within a single district. In the Tucson division in the district of Arizona, for example, fast track departures are stated to be based on a "plea agreement."

a. Departures Pursuant to Plea Agreement

The FPCD cites the Commission's statistics that departures "pursuant to plea agreements" account for nearly 20% of all departures nationally, and states that the majority of these departures will presumably be eliminated once the Commission promulgates an "Early Disposition" departure as required by the PROTECT Act. The FPCD goes on to argue that if the Commission were also to specifically forbid departures "pursuant to plea agreement" simultaneously requiring more specificity in the stated reason for departure, as required by 18 U.S.C. § 3553(c), this would push such departures into the now-government controlled "Early Disposition program" and also serve as a self-policing mechanism as courts realize that the

reason put forward is not an adequate departure ground. The FPCD believes that the Commission ought to make some provision in the guidelines for downward adjustments where a defendant enters into a quid-pro-quo agreement with the government giving up some right in exchange for leniency.

The FPCD contends that the Commission should consider promulgating a new adjustment in Chapter 3, by identifying a non-exhaustive list of factors that, when present in a plea agreement would merit an additional reduction, e.g., (1) a defendant expressly waives some constitutional right, such as the right to appeal or to review discovery; (2) a defendant assists the government by not putting it to its proof or waiving the right to pursue a motion to suppress, where the facts or the law raise a substantial issue; (3) a defendant relieves the government of the expense of making a material witness available by stipulating to the testimony; and (4) factors of a similar nature.

b. Departures Based on "Totality of Circumstances" or "General Mitigating Circumstances"

The FPCD notes that in the Phoenix division of the district of Arizona, the fast-track practice is slightly different, departures pursuant to fast-track agreements are granted for the stated reason that the guidelines have not accounted for the "totality of the circumstances." The FPCD believes the Commission's statistics that reflect that 19.9% of downward departures nationally were granted on the ground of "general mitigating circumstances" include a substantial number of these departures, which when moved to the "Early Disposition" column would substantially reduce the departure rate nationwide by another 3 to 4%. The FPCD believes that other districts may use formulations similar to those in the District of Arizona and as those practices change consistent with the mandate in the PROTECT Act, there will be a corresponding substantial reduction in the rate of departures nationwide.

B. Few Upward Departures

The FPCD also notes that the very low rate of upward departures does not reflect a judiciary intent on soft-on-crime sentences.

SECTION II

A. Reducing the Incidence of Downward Departures Should be Accomplished Without Limiting Judicial Discretion

The FPCD believes that the Commission should preserve judicial discretion whenever possible. It asserts Congress did not explicitly direct the Commission to abolish or restrict judicial discretion, but directed it to "reduce the incidence of downward departures" and left intact the statutory authority allowing district judges to depart when warranted. The FPCD thinks that changes that broadly limit the authority of district court judges to depart might be struck down as

inconsistent with the statutory mandates in §§ 3553(a) & (b). The FPCD also believes that drastic restrictions on the district court's discretion to depart would transfer even more power to federal prosecutors, whose charging decisions would control the outcome even more than at present. The FPCD further states that the Commission could displace one of the basic goals that Congress laid down for the Commission - "maintaining flexibility to permit individualized sentences" - without implicating the "nondelegation doctrine rooted in the separation of powers that underlies our tripartite system of Government." citing *United States v. Mistretta*, 488 U.S. 361, 371 (1989). The FPCD concludes that section 401(m) of the PROTECT Act does not replace that principle with one that authorizes a transfer of discretion to prosecutors or to the Commission.

B. The Commission Needs to Understand the Departure Trend

The FPCD recognizes as one of the central functions of the Commission to monitor and make sense of sentencing data, including the district court's statement of reasons for imposing a departure, so that it may carry out the Congressional mandate to "review and revise" the guidelines. The FPCD argues that "the Commission simply cannot make policy divorced from a grasp of the underlying facts and without reference to the "intelligible principles" laid out by Congress in the Sentencing Reform Act - and neither repealed nor replaced by the PROTECT Act - without risking a constitutional challenge."

The FPCD thinks that if the departure trends reflect guidelines that require change because there are recurring mitigating circumstances "not adequately taken into consideration" by the guideline, the Commission should amend the guideline and thus reduce the incidence of departure. If those trends reflect case-management methods used by the government in exchange for waiver of appellate rights or an expedited guilty plea, that ground will be addressed by the Early Disposition departure. The FPCD argues that alternatively the Commission might promulgate amendments or add commentary to existing guidelines to address other frequently relied-on mitigating circumstances as, for example with the role adjustment or the acceptance of responsibility guideline.

The FPCD goes on to say that the Commission should limit departure authority only if it determines that there is a systemic failure on the part of district judges to comply with statutory or guideline commands. Failure of individual judges to abide by the guidelines should be corrected through the appeal process, which the Department of Justice will monitor with more rigor under the new directive implemented by Attorney General Ashcroft.

The FPCD thinks that the enhanced specificity requirement in § 3553(c) will result in a form of self-policing by district courts, when including reasons in the written order of judgment, "which reasons must also be stated with specificity." 18 U.S.C. § 3553(c). The FPCD believes that this will lead district judges either to realize that a departure is not warranted or to articulate more clearly why the departure is warranted, which will allow the Commission to more readily review and revise the guidelines.

The FPCD also believes that the newly expanded de novo standard of review will serve the same self-policing purpose by appellate courts. 18 U.S.C. § 3742(e). The FPCD concludes that the Commission should not act except on the basis of a real understanding of the reasons for the departure trends and by reference to guidelines principles laid down in the Sentencing Reform Act.

1. Acceptable Rates of Departures

While the Sentencing Reform Act of 1984 contemplates a departure rate of 20%, Congress has left for the Commission to decide what rate of departure is appropriate. The FPCD suggests that an inference can be drawn from § 3553(b) that the number of departures that may be granted is limitless.

The FPCD says that the Commission should be cautious in determining how much of a reduction in the rate of departures would amount to "substantial" reduction. The FPCD suggest that the Commission should await making further changes until after it is able to assess what impact the current changes (i.e., the new Early Disposition program, specificity requirements, etc.) will have on the departure rates. The FPCD recommends that the Commission implement the directive to "substantially reduce" departures by means other than reducing judicial flexibility.

C. The Incidence of Downward Departures

Contrary to the Commission's statistics, the FPCD believes that the rate of departures granted by federal judges have remained relatively constant from 1995 to 2001. The FPCD contends that the increased departure rates evidenced in the Commission's statistics are directly related to a spike in immigration cases in border districts. In the following sections of its comments, the FPCD addresses reasons for the various departures based on its own experience.

1. Drastic Increase in Immigration Cases

a. "Fast-Track" or Early Disposition Departures

The spike in downward departures directly corresponds to the spike in immigration cases more so than to any change in the law of departure that resulted from the decision in *Koon v. United States*. The FPCD believes that the departures in the border states include marijuana "backpack" cases in addition to immigration cases.

b. Standard of Review & Specificity of Ground for Departure

The amendments to the standard of review and the specificity requirements will also reduce the number of downward departures. The FPCD asserts that the cases that have been decided since the effective date of the PROTECT Act support its assessment that the operation of changes included in the PROTECT Act will reduce the incidence of downward departures.

c. Amend §5K2.0 to Require that Reasons for Departures be Stated with More Specificity

The Commission should add language to §5K2.0 to implement the amendment to 18 U.S.C. § 3553(c).

d. Amend Immigration Guidelines

The Commission should refine the immigration guidelines to eliminate some of the sentencing disparities that are generated by adjustments that do not adequately differentiate between defendants whose relative culpability or potential for dangerousness or recidivism varies widely.

2. Criminal History Departures

The incidence of criminal history downward departures has decreased in recent years from 15.1% in 1995 to 11.9% in 2001. Criminal history departures are necessary for reasons identified by the Commission in the commentary to § 4A1.1. Criminal history departures are especially necessary in light of the state jurisdictions that have recently admitted to engaging in racial profiling. The FPCD argues that because departures in this area have been used sparingly by district courts, there is no need to reduce discretion. If anything, the FPCD believes that the Commission should add language encouraging consideration of disparate state practices.

The FPCD believes that the Commission should, however, address the provision for counting minor offenses under §4A1.2(c), which it argues would reduce a number of criminal history departures.

The FPCD suggests that the Commission should await the results of its two-year recidivism study before making changes to limit discretion to depart under the criminal history provision.

3. Family Ties

The rate of departures based on family ties has diminished throughout the years from 6.2% of all departures in 1996 to 3.8% in 2001. The FPCD does not believe that discretion to grant this departure should be narrowed. To the contrary, it suggests that this departure is not being used often enough in light of the *Family Unit Demonstration Project* passed by Congress in 1994.

The FPCD notes that because this factor has become a prohibited factor in child-related offenses, its incidence as a ground for departure will be reduced.

4. Diminished Capacity

Departures for this reason were granted in fewer than .4% of cases in 2001. The FPCD believes that the departure is applied too strictly to deny downward departures to persons who are

suffering from diminished capacity, which in many ways does contribute to the commission of the offense.
This departure is particularly appropriate because person who suffer from mental disabilities are less deserving of punishment and less likely to be deterred by a lengthier sentence.

The FPCD argues that this departure is not overused and district courts are not abusing or improperly granting departures on this ground.

5. Substantial Assistance Departures

The FPCD points out that the rate of substantial assistance departures has decreased, while the number of safety valve cases has increased. The FPCD believes that the Commission needs to require the government disclose its reasons for granting and denying departures before any rational inferences can be drawn.

6. Increased Rate and Number of Departures in Drug Cases

The increased rate of non-substantial assistance departures in drug cases is also directly related to factors controlled by the government. The FPCD believes the increased rate of departures are primarily in the Southwester border districts. Similarly, the FPCD believes that the increase in downward departures in marijuana cases is due in large part to the marijuana importation cases prosecuted in the Southwestern border districts.

The FPCD provided a table of departure statistics in drug cases taken from statistics in the Commission's annual report.

a. The Need for Refining Adjustments to Reflect Range of Culpability in Drug Cases

The FPCD argues that the drug guideline, which is driven by quantity, does not sufficiently differentiate among the great range of culpability of persons engaged in drug trafficking. The FPCD notes that the only provision for differentiating for the broad range of activity and culpability is the role in the offense adjustment, which it argues is not often used. The FPCD suggests that the Commission's recent drug cap may reduce the incidence of downward departures in these cases.

7. Unmentioned Factors

The FPCD states that these departures are at the heart of judicial flexibility and allow judges to consider each person as an individual. The FPCD claims that the nondelegation separation of powers doctrine would certainly be implicated were the Commission to restrict departures in this area without reference to the "intelligible principle" laid out by Congress. The FPCD does not believe that his is a ground that is overly used or abused by district courts.

8. Departures in White Collar Cases

The FPCD argues that the fact that the government may want higher sentences in such cases does not justify restricting judicial discretion in the absence of some showing of systemic abuse or need to guide discretion. The FPCD believes that the current rate of departure in this area is modest given that this guideline is quantity-driven and thus may often tend to overstate the culpability of offenders who are merely carrying out the scheme formulated by more culpable defendants.

D. Need to Explain Commission Action in Official Commentary

The FPCD suggests that the Commission should explicitly explain its actions in response to the congressional directive and in general. Additionally, the FPCD recommends that the Commission include more explicit explanations for its policy choices in the official commentary of the guidelines.

CONCLUSION

The FPCD recommends that, in responding to the PROTECT Act, the Commission act by scrupulously adhering to the central or "intelligible principles" of the Sentencing Reform Act.

Probation Officers Advisory Group (POAG)
Concord, NH

THE PROTECT ACT

The Probation Officers Advisory Group (POAG) met in July to discuss the directives of the PROTECT Act and other issues of concern to probation officers around the country. In that meeting, the POAG noted that downward departures are appropriate when valid reasons exist, and probation officers do not want to lose the ability to recommend departures to the courts.

Further, the POAG believes that while Commission staff presented information regarding the rates of downward departures, significant data found only in sentencing transcripts is missing, and it believes this information would allow Commission staff to conduct a more detailed analysis regarding that rate. It noted that while courts where perhaps stating more specific departure findings on the record, since the transcripts are not provided to the Commission, those specified reasons cannot be determined. The POAG thinks the new proposed Statement of Reasons might help Commission staff gather more accurate departure information, noting that the new form includes blocks to be checked for specific departures and adds a section entitled "Additional Supporting Explanation." The POAG believes the form will make Commission coding more accurate.

The POAG does not believe the category marked as "plea agreements" is a valid reason for departure. The POAG suspects that binding stipulations for drug weight or other factors might be cited in the plea agreement which, if accepted by the court, would cause the judgment in a criminal case to reflect a downward departure pursuant to the plea agreement. Further, the POAG notes that this downward departure involved either the explicit or implicit approval of the Department of Justice. Therefore, according to the POAG, while it appears this is a "judicial departure," perhaps it should be categorized as a downward departure which involves the government's participation, similar to §5K1.1.

Additionally, the POAG discussed the appropriateness of a standard downward departure in immigration cases, and considered a specific offense characteristic for defendants subject to deportation, but concerns were raised that not all deportation cases are for simple re-entry offenses. Thus, the POAG agreed a specific offense characteristic would be difficult to draft. However, the POAG recognizes that if this departure was added to Chapter 5 and addressed separately from "judicial departures," similar to §5K1.1, the rate of other "judicial departures" would be significantly reduced as the authority for this departure would rest with the government.

Issue for Comment 1

The POAG wishes to emphasize that downward departures under §5K2.0 are appropriate and should not be more restrictive, but it recognizes the PROTECT Act mandates a reduction in downward departures. The POAG believes additional wording could be added to strengthen the

application instructions of this guideline, or perhaps some clarifying examples of appropriate and inappropriate departures could be included.

Issue Comment 2

The POAG recommends clarifying the purpose of §5H as to whether it addresses departures or guideline sentences within the applicable range. The POAG requests guidance and examples as to what is outside the heartland as it relates to departures for a combination of factors involving §5H. The POAG notes the specificity of the guideline instructions for Aberrant Behavior and Diminished Capacity and suggest similar language in §5H would be beneficial in reducing the number of inappropriate departures.

Issue for Comment 3

The POAG argues that while Commission data preliminarily indicates that the over-representation of the defendant's criminal history is a frequent basis for departure, there is currently insufficient data to determine what specific factors the courts are relying on in making these departures. In its view, simply adding up criminal history points does not necessarily provide the court with an idea of whether an individual is a violent recidivist who needs to be treated more severely than another defendant with the same number of points. The POAG believes the Commission should continue to pursue a detailed analysis of the reasons behind the downward departures before making any decisions in restricting these departures. In addition, the POAG strongly believes the Commission needs to review Chapter 4 in its entirety, noting that the concepts of "related cases," §4A1.2 issues, recency points, revocations, and the staleness factor should be addressed.

Issue for Comment 4

The POAG does not think the guidelines require any more restrictive guidance, however, it believes specific examples in those sections suggesting a downward departure could be helpful.

Issue for Comment 5

The POAG does not believe any of the aforementioned departure issues should be prohibited.

NOTICE OF PROPOSED PRIORITIES

1. Involuntary Manslaughter

The POAG believes this guideline warrants change as the conduct for this type of crime can vary substantially. In its view, the guideline does not provide for any specific offense characteristics, and it believes consideration should be given as to whether the defendant has a prior history of assaultive behavior, whether a weapon was used, or the number of victims injured in the offense.

2. Immigration

The POAG believes the ambiguous language in the guideline needs to be corrected because of the large number of immigration cases and because this is frequently a question on the Helpline.

Additionally, the POAG suggests that if a defendant agreed to waive deportation, there could be a two to four level reduction as a specific offense characteristic, which could impact the downward departure rate. If a defendant was eligible for the Early Departure Program, then this specific offense characteristic should not be applied.

3. Review of the Limitation on the Base Offense Level

The POAG believes that no application difficulties with the specific offense characteristic regarding the mitigating role cap in the drug guideline exists. However, the POAG has ongoing concerns, and believes more examples or guidance are needed in Chapter 3 regarding this issue. It further notes that this is a circuit conflict which it wishes the Commission would address.

TENTATIVE ISSUES

The POAG suggests that a two level reduction should be added in §2D1.11 if an offender meets the criteria for the safety valve because defendants who are similarly situated as those sentenced pursuant to §2D1.1 are not receiving this benefit.

Finally, the POAG believes an index to Appendix C should be created to ease research regarding all amendments.

The Honorable John W. Bissel, Chief Judge
United States District Court
District of New Jersey
Newark, New Jersey

THE PROTECT ACT

Judge Bissel notes that the commentary to §5K2.0 needs to be revised in light of the PROTECT Act and its impact on the holding of *Koon v. United States,* 581 U.S. 82 (1996).
Judge Bissel suggests the following changes to Chapters Two, Three and Four:

- the number of criminal history points needed to fall into a particular category and adjustments in drug quantities needed to trigger certain base offense levels;

- mitigating role adjustments ranging from 3 to 5 under §3B1.2, rather than 2 to 4;

- an examination of §4A1.1(d) and (e) - if the numerical impact of these subparts could be lowered, or if they could be applied only to higher criminal history categories, this might reduce the need for downward departures due to criminal history overstatements;

- expand provision in §4A1.3 dealing with the situation where "a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." A focus on the likelihood of recidivism (or lack thereof) in a given case or class of cases could be productive.

Regarding Chapter Five Part H, Judge Bissel believes that some added exceptions, if well-defined and clearly justified, would aid sentencing judges.
Judge Bissel concludes by suggesting that Chapter I, Part A, Subsection 4(b) be reexamined in light of the PROTECT Act and its impact upon the continuing viability of *Koon v. United States.* Judge Bissel notes that the revisiting of this Subsection could result in an elaboration and clarification of the heartland/non-heartland population of cases.

The Honorable James C. Fox, Senior Judge
United States District Court
Eastern District of North Carolina
Wilmington, North Carolina

THE PROTECT ACT

Judge Fox states that it would be helpful if §5K2.0 and the commentary thereto were amended to provide hypothetical situations that might warrant a departure thereunder. Judge Fox believes

that the Commission should provide additional and/or more restrictive guidelines on mitigating factors, particularly those described in other provisions of Chapter 5, Part K, that may warrant a departure. Judge Fox believes that the guideline provisions governing downward departures for criminal history should offer more detailed suggestions as to how the court should structure the departure. Judge Fox notes that the Commission should provide additional and/or more restrictive guidance in §4A1.3 regarding the circumstances under which the court may depart for the over-representation of the defendant's criminal history. Judge Fox notes that a defendant should receive a two-offense level downward adjustment if he has no prior scorable convictions. Judge Fox also notes that the penalties for crack cocaine are disproportionate.

The Honorable Max Rosenn, Senior Circuit Judge
United States Court of Appeals
Third Circuit
Wilkesbarre, Pennsylvania

THE PROTECT ACT

Judge Rosenn believes that §401(m) of the PROTECT Act runs the serious risk of undermining judicial autonomy and encouraging one-size-fits-all sentencing. Judge Rosenn believes that a case-by-case approach to sentencing would be more effective in protecting children and in upholding the rights of criminal defendants and society as a whole.

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Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comments re: Section 401(m), PROTECT Act

Dear Judge Murphy:

The Federal and Community Defenders are very mindful of the plight facing the Commission because we know that you are so diligent in carrying out your statutory obligations. We applaud your willingness to address and attempt to resolve some of the most complicated sentencing issues during your tenure. Now, as you set out on one of the most considerable tasks to face the Commission, perhaps since the first set of guidelines, we commend to you an eloquent quote from Abraham Lincoln that may help guide you in this process:

> I'll do the very best I know how – the very best I can; and I mean to keep doing so until the end. If the end brings me out all right, what is said against me won't amount to anything. If the end brings me out wrong, ten angels swearing I was right would make no difference.

Abraham Lincoln[1]

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[1] The Honorable Frank M. Johnson, Jr., federal district judge and later circuit judge, first appointed to the bench in 1955 by President Eisenhower, is said to have kept this "typed quotation from Abraham Lincoln under an unobtrusive paperweight on this courtroom desk" during his more than thirty-six years on the bench. Jack Bass, *Taming the Storm* 3 (1st ed. 1993).

Introduction – A Principled Approach

We recommend that the Commission approach the task of reviewing departure grounds and substantially reducing the incidence of downward departures by scrupulously adhering to the central, "intelligible principles" of the Sentencing Reform Act: "to establish sentencing policies and practices . . . that provide certainty and fairness in sentencing, avoiding unwarranted disparities ... while maintaining sufficient flexibility to permit individualized sentences." [2] Considering also the parsimony principle in 18 U.S.C. § 3553(a) and the departure authority in § 3553(b), this means that the Commission should (1) increase sentences only where necessary; (2) preserve judicial discretion to whenever warranted; and (3) act solely based on the facts, fully explaining the reasons for the Commission's actions in the official commentary to the guidelines. [3]

We recommend this approach because we believe it provides a principled way to implement the directive without compromising the central purpose of the guidelines. It is also grounded on statutory and constitutional requirements. The alternative – longer prison terms and limits on the power of federal judges to show mercy where appropriate – is not a solution to any problem that we are aware of.

Your adherence to these first principles is particularly important now, in light of the "disturbing state of affairs" of our criminal justice system, marking us as the "most penal of civilized nations ." [4] The criminal justice crisis is fueled by the constant ratcheting up of prison sentences

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[2] 28 U.S.C. § 991(b)(1)(B); *United States v. Mistretta*, 488 U.S. 361, 371 (1989).

[3] *See* 18 U.S.C. § 3553(a) and (b); 28 U.S.C. § 991. Section 3553(a) requires district court judges to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes of" sentencing, namely: just punishment, adequate deterrence, protection of the public, and providing the defendant with needed rehabilitation.

Section 3553(a) is understood as establishing the "parsimony principle" for sentencing under the guidelines. *See* Marc L. Miller and Ronald F. Wright, Your Cheatin' Heart(land): the Long Search for Administrative Sentencing Justice, 2 Buff. Crim. L. Rev 723, 747. The principle of parsimony means that the "least restrictive – least punitive – sanction necessary to achieve defined social purposes should be chosen. This principle is not novel. A presumption in favor of punishment less severe than imprisonment pervades all recent scholarship and most legislative reforms. This principle is utilitarian and humanitarian; its justification is somewhat obvious since any punitive suffering beyond societal need is, in this context, what defines cruelty." *Id.* at 810, n.57, citing, Norval Morris, The Future of Imprisonment 60-62 (1974).

[4] Richard A. Posner, Overcoming Law 157-158 (Harvard U. Press, 1995). When Judge Posner wrote in 1995, the prison population had just exceeded one million, with that number now

and the failure of Congress to correct, particularly with respect to drug offenses, the disparate impact of many of its policies and mandatory minimum sentencing schemes on minorities and the least culpable.

I. The Perceived Problem

A. Increasing Rate of Downward Departures

The rate of downward departures has steadily increased since the early days of the guidelines, spiking in 1996 and inching up steadily to a rate of 18.3% in 2001. This is not due to an epidemic of leniency among federal judges. The very judges who are assailed for being soft on criminals because of the supposed increase in the overall rate of downward departures are the judges who are ordering prison terms for the overwhelming majority of offenders even where the guidelines do not require it.[5] Moreover, a downward departure does not mean a sentence of probation or that a defendant is released outright. In 2001, more than ninety percent of offenders received some sort of prison sentence compared with the pre-guidelines practice where almost half of all defendants received probation. [6] Of those offenders in 2001 who were eligible for straight probation, nearly 40% received some form of prison sentence.

The increase in the rate of departure is directly related to the fact that federal prosecutors have adopted a practice of "exchanging" departures for "fast track" guilty pleas. In return for a tacit or explicit agreement from the prosecutor to not oppose a motion for departure, the defendant is required to waive his rights to discovery, appeal, confrontation, and trial by jury, among others. *See generally* Testimony of USSC Vice Chair John Steer, before the Senate Judiciary Oversight Committee, October 2000. The government has adopted this practice as a case-management tool in immigration cases, and also in drug cases in some districts, particularly along the Southwestern border.

In addition, most downward departures are controlled by the government in one form or another. In a growing number of districts, for example, the standard plea agreement requires the defendant to waive the right to seek a downward departure. In the Southern District of New York the standard plea agreement in white collar cases requires such a departure waiver. In such districts,

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having doubled in less than a decade.

[5] USSC, *Sourcebook of Federal Sentencing Statistics,* at 34; 53 (2001)

[6] USSC, *Sourcebook of Federal Sentencing Statistics,* at 27 (2001) (81.9% received straight prison terms; 3.8 received prison and conditions of confinement; 5.5% received probation and confinement; and only 8.8 % received straght probation); U.S. Bureau of the Census, *Statistical Abstract of the United States* 183 (110th ed. 1990).

a defendant must go to trial or plead guilty without an agreement if he wants to preserve his right to seek a departure. Although district courts have independent authority to grant departures, it is rare for a district court to grant a departure in the absence of an express request for one. Hence, in such districts, when the plea agreement does not forbid the request for a departure, it serves as signal to the court that the government does not oppose the departure.

1. So-Called "Fast Track" Practices

Fast-track departures are not limited to immigration cases and are not standard from district to district or even within court divisions in a single district. The government's rationale for offering fast-track departures differs depending on the district and type of case. In reentry cases, the crushing caseloads drive the fast-track policies. In addition, in some border and point-of-entry districts that see a lot of drug courier cases, the government agrees to a departure in drug cases. In some instances, the government will offer "fast-track" deals in cases that would ordinarily be handled in state court because the quantity of drugs does not meet the district's criteria for federal prosecution and the state has declined prosecution. Reportedly, this is a more frequent occurrence with state budgetary systems strapped for cash.

a. Departures "Pursuant to Plea Agreement"

In the district of Arizona, the practices differ depending on the division. In Tucson, fast-track agreements provide for a downward departure with the reason stated in open court that the departure is based on the "plea agreement." Commission statistics reflect that departures "pursuant to plea agreements" account for nearly 20% of all departures nationally (1947 departures out of 10,026 departures).[7] The majority of these departures will presumably be eliminated once the Commission promulgates an "Early Disposition" departures as required by the PROTECT Act. That change will reduce the overall departure rate by nearly 4% to somewhere over 14%. If the Commission were also to specifically forbid departures "pursuant to plea agreement" simultaneously requiring more specificity in the stated reason for departure, as required by 18 U.S.C. § 3553(c), this would push such departures into the now-government controlled "Early Disposition program" and also serve as a self-policing mechanism as courts realize that the reason put forward is not an adequate departure ground.

In any event, however, even if some of these departures are not in fact "fast-track" departures, the Commission ought to make some provision in the guidelines for downward adjustments where a defendant enters into a quid-pro-quo agreement with the government giving up some right in exchange for leniency. From the perspective of sentencing policy and consistent with the "truth-in-sentencing" principles embodied in the guidelines, it would be preferable if such arrangements were

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[7] USSC Sourcebook at Table 24-25 (2001).

brought to light and acknowledged by the court rather than negotiated in the dark.[8] The Commission should consider promulgating a new adjustment in Chapter 3, by identifying a non-exhaustive list of factors that, when present in a plea agreement would merit an additional reduction, *e.g.*,

> (1) a defendant expressly waives some constitutional right, such as the right to appeal or to review discovery;
>
> (2) a defendant assists the government by not putting it to its proof or waiving the right to pursue a motion to suppress, where the facts or the law raise a substantial issue;
>
> (3) a defendant relieves the government of the expense of making a material witness available by stipulating to the testimony; and
>
> (4) factors of a similar nature.

b. Departures Based on "Totality of Circumstances" or "General Mitigating Circumstances"

In the Phoenix division of the district of Arizona, the fast-track practice is slightly different. There, departures pursuant to fast-track agreements are granted for the stated reason that the guidelines have not accounted for the "totality of the circumstances." We believe that the Commission statistics that reflect that 19.9% of downward departures nationally were granted on the ground of "general mitigating circumstances" include a substantial number of these departures, which when moved to the "Early Disposition" column would substantially reduce the departure rate nationwide by another 3 to 4%.

Other districts may use formulations similar to those used in the District of Arizona and as those practices change consistent with the mandate in the Protect Act, there will be a corresponding substantial reduction in the rate of departures nationwide.

B. Few Upward Departures

At the other end, the very low rate of upward departures does not reflect a judiciary intent on soft-on-crime sentences. It simply reflects the realities of legislative and guideline changes, which with a handful of notable exceptions, raise penalties and add enhancements. Simply put, sentences are very high and upward adjustments are added frequently to the many that already exist making upward departures redundant and unwarranted. For example, when a court in a single,

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[8] Plea agreements, as the Supreme Court has explained, are a sanctioned method of resolving criminal cases. *See Santobello v. New York*, 404 U.S. 257 (1971).

recent case, held that a prison cook, who had been assaulted by an inmate did not qualify as an "official victim" for purposes of the enhancement in U.S.S.G. § 3A1.2, the Commission promptly amended the guideline in response to concerns expressed by the Bureau of Prisons.[9] The amendment expanded the category of persons who may be considered official victims to include a variety of "prison employees, as well as independent contractors and volunteers on prison premises with official authorization." [10] As a result, there is rarely a situation where an aggravating factor has not been more than adequately considered in establishing the guideline and thus rarely does the need for an upward departure arise.

II. The Task: Review Departure Grounds, Reduce Incidence of Downward Departures & Promulgate an Early Disposition Departure

Section 401(m) of the PROTECT Act directs the Commission to:

> (1) review the grounds of downward departure that are authorized by the sentencing guidelines, . . and
>
> (2) promulgate . . .
>
> > (A) appropriate amendments . . . to ensure that the incidence of downward departures are 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 . . . necessitated by this Act.

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[9] United States v. Walker, 202 F.3d 181 (3d Cir. 2000).

[10] USSG App.C, amend. 643 (2002).

A. Reducing the Incidence of Downward Departures Should be Accomplished Without Limiting Judicial Discretion

Sentencing "lies so close to the heart of the judicial function" and the judicial flexibility to impose individualized sentences is so integral to the goals and structure of the Sentencing Reform Act that the Commission should preserve judicial discretion whenever possible. Congress did not explicitly direct the Commission to abolish or restrict judicial discretion. [11] Instead, Congress has directed the Commission to "reduce the incidence of downward departures." Congress left intact the statutory authority allowing district judges to depart when warranted. The directive should be read as a command to the Commission concerning its ongoing obligation to "review and revise" the guidelines "in consideration of [the] data coming to its attention," in this case the rising trend of downward departures rather than a directive to restrict summarily judicial discretion.[12]

Were the Commission to promulgate amendments broadly limiting the authority of district courts to depart – say for example by abolishing all unmentioned factors – such changes may be struck down as inconsistent with the statutory mandates in §§ 3553(a) & (b).[13] Such a drastic approach would also alter the basic structure of the guidelines, from one that promotes flexibility, requiring district judges to consider inadequately considered factors on a case-by-case basis to something altogether different. In 1984, Congress rejected a "strict determinate sentencing" scheme in favor of the "mandatory-guideline system" that it adopted.[14] At the time, Congress settled on this system over competing proposals because it "would be successful in reducing sentence disparities while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case."[15]

Congress preserved judicial authority to depart as a critical component of the new scheme.[16] Drastic restrictions on the district court's discretion to depart would transfer even more power to

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[11] *Mistretta*, 488 U.S. at 673-74; 18 U.S.C. § 3553(b); 28 U.S.C. § 991(b)(1)(B); *see also Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035, 2053 (1996).

[12] 28 U.S.C. § 994(o).

[13] *See Stinson v. United States*, 113 S.Ct. 1913, 1915 (1993) ("commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline").

[14] *United States v. Mistretta*, 488 at 367.

[15] *Id.* (reviewing the Senate Report on the Sentencing Reform Act of 1984, S.Rep. No. 98-225 (1983), U.S. Code Cong. & Admin. News 1984 at 78-79, 62); *see also* 28 U.S.C. § 991(b)(1)(B).

[16] *United States v. Mistretta*, 488 U.S. at 367.

federal prosecutors, whose charging decisions would control the outcome even more than at present. The Commission does not have the authority to make changes that drastically change that structure without a more explicit mandate from Congress that laying down a different set of intelligible principles.

It is not altogether clear, moreover, that the Commission could displace one of the basic goals that Congress laid down for the Commission – "maintaining flexibility to permit individualized sentences" – without implicating the "nondelegation doctrine rooted in the separation of powers that underlies our tripartite system of Government."[17] In *Mistretta,* the Supreme Court made clear that the delegation of power to the Commission to establish sentencing policy is constitutional only because Congress laid down an "intelligible principle" to guide the Commission.[18] Section 401(m) of the PROTECT Act does not replace that principle with one that authorizes a transfer of discretion to prosecutors or to the Commission.

B. The Commission Needs to Understand the Departure Trend

The Commission is not Congress, which has almost unfettered discretion to make policy judgments. Before limiting judicial flexibility to grant departures, the Commission first needs to review and understand the sentencing data it has collected. It simply makes sense to understand a problem before drafting a solution. But more importantly, one of the central functions of the Commission is to monitor and make sense of sentencing data, including the district court's statement of reasons for imposing a departure, so that it may carry out the Congressional mandate to "review and revise" the guidelines.[19] That is precisely why Congress created a Sentencing Commission to serve as an expert body that could monitor sentencing data and practices. Indeed, the nondelegation doctrine is driven by "a practical understanding" of Congress' inability to conduct fact finding on increasingly complex issues.[20]

> It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework . . .

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[17] *United States v. Mistretta*, 488 U.S. at 371.

[18] *United States v. Mistretta*, 488 U.S. at 374-75.

[19] 28 U.S.C. § 994(o); *see* 18 U.S.C. § 3553(c).

[20] *Mistretta,* at 372; *see* 28 U.S.C. § 991(b)(1).

Mistretta at 378-79. It is in part because of the fact-finding function of the Commission that Congress may delegate the power to make sentencing policy to the Commission. The Commission simply cannot make policy divorced from a grasp of the underlying facts and without reference to the "intelligible principles" laid out by Congress in the Sentencing Reform Act – and neither repealed or replaced by the PROTECT Act – without risking a constitutional challenge.

If the departure trends reflect guidelines that require change because there are recurring mitigating circumstances "not adequately taken into consideration" by the guideline, the Commission should amend the guideline and thus reduce the incidence of departure. If those trends reflect case-management methods used by the government in exchange for waiver of appellate rights or an expedited guilty plea, that ground will be addressed by the Early Disposition departure. Alternatively, the Commission may promulgate amendments or add commentary to existing guidelines to address other frequently relied-on mitigating circumstances as, for example with the role adjustment or the acceptance of responsibility guideline.

The Commission should limit departure authority only if determines from its review of the trends and the available sentencing information that there is a systemic failure on the part of district judges to comply with statutory or guidelines commands. Even if there is a failure on the part of individual judges to abide by the guidelines, such problems should not be handled by broad policy changes. Those corrections, if they are necessary, should be accomplished through the appeal process, which the Department of Justice will monitor with more rigor under the new directive implemented by Attorney General Ashcroft in compliance with the PROTECT Act.

In addition, any such non-systemic problems are likely to be corrected by the newly broadened standard of review for departure decisions and the enhanced specificity requirement in § 3553(c). The enhanced specificity requirement in § 3553(c), for example, will result in a form of self-policing by district courts, when including reasons in the written order of judgment, "which reasons must also be stated with specificity." 18 U.S.C. § 3553(c) (as amended by the PROTECT Act). That exercise will lead district judges either to realize that a departure is not warranted or to articulate more clearly why the departure is warranted, which in turn will allow the Commission to review and revise the guidelines more readily. *See* 28 U.S.C. §994(o).

In addition, the newly expanded *de novo* standard of review will also serve the same self-policing purpose except this time by appellate courts. 18 U.S.C. § 3742(e). In any event, the Commission should not act except on the basis of a real understanding of the reasons for the departure trends and by reference to guidelines principles laid down in the Sentencing Reform Act.

2. Acceptable Rates of Departures

Congress has left for the Commission to decide what rate of downward departure is appropriate; no statute specifies an appropriate rate. One possibility is the inference to be drawn from § 3553(b) that the number of departures that may be granted is limitless. The only question under § 3553(b) is whether the departure is warranted or unwarranted in each case where the district court is required to impose a sentence under the guidelines.

The legislative history of the 1984 Sentencing Reform Act contemplates a departure rate of 20%. [21]

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[21] S. Rep. No. 225, 98th Cong., 1st Sess. 52 n.71 (1983). Commissioner Steer believes that Congress contemplated a downward departure rate around 12%:

> In a footnote, the [Senate] Report went on to "anticipate" that judges would depart from the sentencing guidelines "at about the same rate or possibly at a somewhat lower rate" than the U.S. Parole Commission customarily set parole release dates outside its guidelines, which then was about 20% (12% above and 8% below). S.Rep. No. 225, at 52, n.71. A direct comparison between the two systems is difficult, however, for several reasons, including the advent of substantial assistance as a formally recognized, statutory departure under the sentencing guideline system (whereas the parole guidelines actually incorporate into the range determination a more limited form of cooperation), and the generally greater severity of the sentencing guidelines.

Statement of John R. Steer, Vice-Chair, USSC, before the Subcommittee on Criminal Justice Oversight, U.S. Senate Judiciary Committee (Oct. 13, 2000).

Others believe that Congress anticipated a departure rate fully at 20%:

> Congress contemplated that the sentencing guidelines system will enhance, rather than detract from, the individualization of sentences. Each sentence will be the result of careful consideration of the particular characteristics of the offense and the offender, rather than being dependent on the identity of the sentencing judge and the nature of his sentencing philosophy. Congress thought that judges would depart from the guidelines when necessary to create individualized sentences, and estimated that this would occur in about twenty percent of the cases. Although courts depart from the sentencing range in approximately thirty percent of the cases, about twenty percent of all departures are for substantial assistance to the government. When Congress estimated a twenty percent departure rate, it had yet to pass the legislation that authorized departures for substantial assistance to the authorities. Accordingly,

The Commission should tread lightly in this area. Without any indication of what rate of departure the current Congress considers appropriate, the Commission is left without clear guidance from Congress as to how much of a reduction in the rate of departures would amount to a "substantial" reduction. The better practice would certainly be to await making further changes until after the Commission is able to assess what impact the current changes (i.e., the new Early Disposition program, specificity requirements, etc.) will have on the departure rates. The Commission should implement the directive to "substantially reduce" departures by means other than reducing judicial flexibility.

C. The Incidence of Downward Departures

Commission statistics reflect an upward trend in the rate of downward departures for non-substantial assistance departures ("other downward departures") beginning around 1995 and continuing to 2001, the date of the most recently published USSC Sourcebook of Federal Sentencing Statistics. The Department of Justice has complained to the Commission and to Congress that the increasing trend reflects an avoidance of guidelines sentences that creates unwarranted sentencing disparities. Testimony of William M. Mercer before the USSC at 7 (March 25, 2003).

Based on our experience, we believe that the rate of departures granted by federal judges have remained relatively constant during this period. The increased departure rates are directly related to a spike in immigration case loads in border districts, where the government offers reduced sentences based on departures as a case-management tool. Some of the departures reflect quid-pro-quo waiver of rights agreements, primarily in border and other districts where caseloads have also increased dramatically. Although only a review of the sentencing data submitted to the Commission can fairly resolve this question, we address the reasons for the various departures based on our experience.

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its estimate of the rate of departure did not include substantial assistance departures. In fiscal year 1996, approximately 70% of defendants were sentenced within the guideline range, 19% received a substantial assistance departure, 10% received a down-ward departure (other than substantial assistance), and 1% received an upward departure. The sentencing judges are departing, it could be argued, about 50% less frequently than Congress contemplated.

Sharon O. Henegan, *Teaching Judges How to Find the Appropriate Sentence*, 10 Fed. Sent. R.310 (1998).

1. **Drastic Increase in Immigration Cases**

a. **"Fast-Track" or Early Disposition Departures.** The spike in downward departures directly corresponds to the spike in immigration cases more so than to any change in the law of departure that resulted from the decision in *Koon v. United States*. A large number of downward departures generated by the case-management policies of federal prosecutors should be properly identified for what they are. This class of departures in border states as well as in other districts with a high volume of cases or unusual cases likely accounts for 5% to 7% or more of the non-substantial assistance departures. We believe that these departures are not limited to immigration cases but also include marijuana "backpack" cases.

These departures are controlled by government prosecutors to ease their caseload. They are not departures granted by judges in the exercise of their independent discretion. The Commission should not narrow judicial discretion, provide additional guidance to district judges based on the incidence of this type of departure, nor abolish any grounds for departure based on these departures. These departures should be designated as government-generated departures in the same category as substantial assistance departures and included in Chapter 5K1. The Commission's review of departures and the creation of the "early disposition" departure, pursuant to the directive in §401(m)(2)(B) of the PROTECT Act, should clarify this issue.

b. **Standard of Review & Specificity of Ground for Departure.** The recent amendments to the standard of review and the specificity requirements will also reduce the number of downward departures. The Commission may be able to project the number of cases that would not meet the new specificity standard set out in 18 U.S.C. § 3553(c) from its review of departure records. In any event, it is clear that those changes have had an impact on departure jurisprudence. Of the cases, where opinions have been issued relating to downward departures since April 30, the date the PROTECT Act became law, 10 affirmed upward departures; 2 affirmed the denial of downward departures; 4 reversed downward departures; 1 involved a remand of a downward departure to reconsider the extent of the departure; 1 remanded to consider a downward departure that the court believed it had no authority to consider and only 1 case, a district court case out of Utah granted a downward departure on the ground that the felon-in-possession prosecution presented a lesser harm. These cases all specifically referred to changes in the Protect Act, thus supporting our assessment that the operation of changes included in the Protect Act will reduce the incidence of downward departures.

c. **Amend §5K2.0 to Require That Reasons for Departures be Stated with More Specificity.** The Commission should add language to §5K2.0 to implement the amendment to 18 U.S.C. § 3553(c).

d. Amend Immigration Guidelines. The Commission should refine the immigration guidelines to eliminate some of the sentencing disparities that are generated by adjustments that do not adequately differentiate between defendants whose relative culpability or potential for dangerousness or recidivism varies widely. Defenders have offered a number of suggested amendments, including some during this past cycle. As the Commission knows, the 16-level bump for a prior aggravated felony in U.S.S.G. § 2L1.2, still does not sufficiently differentiate for severity, particularly with respect to prior drug convictions which can range from the sale of small quantities of drugs to involvement as a leader of a large scale drug trafficking offenses.

2. Criminal History Departures

The incidence of criminal history downward departures has in fact decreased in recent years. In 1995, criminal history departures accounted for 15.1% of the overall downward departure rate whereas in 2001 they accounted for a modest 11.9% of the overall downward departure rate.[22] There is no indication that district courts are improperly exercising discretion under this provision. In fact, there is a body of very considered appellate law that has developed in this area to guide judicial discretion.[23]

Criminal history departures are necessary for reasons that the Commission has explicitly identified –"in recognition of the imperfection of this measure."[24] This is particularly true where a

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[22] USSC *Annual* Report, Table 29-30 (1995); USSC *Sourcebook* at Table 24-25 (2001).

[23] *E.g., United States v. Mishoe,* 241 F.3d 214 (2d Cir. 2001) (explaining that courts may not depart down simply because prior drug offense involved small quantity without making a more considered totality of circumstances review); *United States v. Collins*, 122 F.3d 1297 (10th Cir. 1997) (Tacha, J) (affirming downward departure from career offender designation, setting out appropriate factors to consider).

[24] The commentary to U.S.S.G. § 4A1.1 explains the need for the discretion to depart from the criminal history score:

> Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of this measure

number of state jurisdictions have admitted, some in response to suits brought by the Civil Rights Division of the Department of Justice, that they have engaged in unconstitutional racial profiling. District courts must be free to adjust the criminal history of persons who have been affected by such unconstitutional practices. This is consistent with the fairness and flexibility principles that Congress laid down in the Sentencing Reform Act. There is no need to reduce discretion in this area as such departures have been used sparingly by district courts, with only two reported district court cases even identifying this measure. If anything, the Commission should add language encouraging consideration of such disparate state practices to eliminate any unwarranted disparity that may creep into the criminal history calculation as a result.

The Commission needs to address, however, the provision for counting minor offenses set out in U.S.S.G. § 4A1.2(c), which we believe would reduce a number of criminal history departures. Indeed, the Commission has been reviewing this provision for some years, even receiving a recommendation from the Probationers Advisory Group that these minor offense not be included in the calculation of criminal history at all because of problems with the accuracy of the records available for these cases. These also are the types of cases that may be imbued with the convictions based on unconstitutional racial profiling and other disparate state practices.

In any event, it would be advisable for the Commission to await the results of its two-year recidivism study before it makes any changes to limit discretion to depart in this area.

3. Family Ties

The rate of downward departures based on family ties has diminished throughout the years. In 1996, there were 290 departures granted for family ties out of 42,436 cases. That represented 6.2% of the 4,201 downward departures that were granted during that year. In 2001, there were 418 departures based on family ties out of 59,897 cases that year, meaning that the departure rate for family ties had thus been reduced to only 3.8% of the 10,026 departure granted that year. This also reflects that district judges granted departures based on family ties in only .6% of the cases that appeared before them in 2001. Through the years, appellate courts have clarified the standard for granting a departure on this ground; district courts have also exercised discretion to grant and deny

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> however, §4A1.3 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.

U.S.S.G. § 4A1.1, comment (backg'd)

departures on this ground.[25]

On these numbers alone, one would be hard-pressed to say that this departure ground is being abused. In theory, every defendant who is convicted and has family ties could potentially seek a departure on this ground. More to the point, with 8,641 female offenders in 2001, and statistics showing that women offenders tend to be first time, single parents in greater proportions than men, it is clear that this departure is "not ordinarily" granted, in accordance with its designation as a discouraged factor in U.S.S.G. § 5H1.6. The discretion to grant this departure should certainly not be narrowed. If anything, this ground is not being used often enough particularly in light of the *Family Unit Demonstration Project* that Congress passed in 1994 to mitigate the separation of small children from their primary care-taking parent, a project that has never been fully implemented.[26]

Also, because this factor has become a prohibited factor in child-related offenses, its incidence as a ground for departure will be reduced.

4. **Diminished Capacity**

Departures for this reason were granted in fewer than .4% of cases in 2001 (286/59,897). Although we do not have statistics as to the number of persons with mental disabilities who are prosecuted and sentenced in federal courts, our experience with indigent clients is that many of them suffer from a number of mental disabilities, including mental retardation and bipolar disorders that do in fact contribute to their commission of the offense. In our experience, which seems borne out by the low rate of departures on this ground, courts often reject downward departures on this ground

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[25] *See, e.g, United States v. Dyce.* 874 F. Supp. 1 (D. D.C. 1994), *rev'd*, 78 F.3d 610 (D.C. Cir. 1994) (reversing family ties departure); *Rivera v. United States*, 994 F.2d 942 (1st Cir. 1993) (Breyer, then CJ) (remanding for consideration of family ties departure to a first-time offender, a single mother of three children who had accepted payment to courier cocaine).

[26] In 1994 Congress itself recognized the importance of preserving family unity. The "Family Unity Demonstration Project Act", was enacted, in part, to

> (1) alleviate the harm to children and primary caretaker parents caused by separation due to the incarceration of the parents; [and]
> (2) reduce recidivism rates for prisoners by encouraging strong and supportive family relationships;

42 U.S.C. § 13881. The Act provides for the establishment and evaluation of community correctional facilities, not within the confines of a prison, where primary caretaker parents facing sentences of less than seven years could be housed with their minor children. To date, the Federal Bureau of Prisons has not implemented this project.