UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

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Thurgood Marshall Federal
Judiciary Building
Federal Judicial Center
Classrooms A-C
Washington, D.C.
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PROCEEDINGS

CHAIRMAN MURPHY: I'd like to call the hearing to order. In this very intimate room, I think it's a little harder to give up on our conversations.

We're very pleased to be holding this public hearing today and to have the various witnesses who are with us.

Past experience has shown that for the Commission it's particularly valuable to have enough time to have a give-and-take with the witness. So we have received written statements in advance. Not all of them have come in in quite the time frame we had hoped, but the Commissioners have had a chance to go over them. And just to keep us on track so that we're sure that we don't take up too much time with the oral presentations so that there isn't time for questions, I've asked my right arm, Frances Cook, to have a little bell ring at seven minutes, because we have allocated eight minutes for each person's direct statement. And then after each person has had a chance to talk,
then we'll be able to ask questions.

So on the first panel, William Mercer, the
United States Attorney in the District of Montana
and the Chair of the Attorney General's Advisory
Council's Subcommittee on Sentencing Guidelines.
Mr. Mercer has testified--or, actually, talked with
the Commission before on issues of mutual concern
and is representing the Department of Justice here
today.

And then we're very pleased to have a
former member of the Sentencing Commission,
Professor Michael Goldsmith from Brigham Young
University, who has also published articles and
written on the guidelines and on a topic related to
what we're dealing with under the PROTECT Act.
So we will hear from each of these two
gentlemen, and then we'll have time for questions
of the first panel. Mr. Mercer?

MR. MERCER: Thank you, Judge Murphy, and
I thank the Sentencing Commission for the
opportunity to appear before you once again on
behalf of the Department of Justice. Before I
begin my comments on the PROTECT Act, I want to first commend the Commission for holding this hearing and for soliciting and considering our views.

The department also would like to thank the Commission and its staff for its hard work in addressing the important issues before it. The task now before this Commission includes some of the most significant issues it has had to address since the guideline system was first established.

The continued success of the reforms sought to be achieved by the Sentencing Reform Act of 1984 and the PROTECT Act will depend in large measure on the actions this Commission takes in the next ten weeks.

In our August 1, 2003, letter to the Commission, we lay out a number of sentencing policy issues beyond those already identified by the Commission that we think need to be examined. Let me first turn to downward departures.

It goes without saying at this point that both the department and key Members of Congress
have been very concerned for some time about the increasing number of non-substantial assistance downward departures and the impact an increasing rate of departures has on the basic principles underlying Federal sentencing policy.

In passing the Sentencing Reform Act, Congress rejected what it described in the accompanying Senate report as the "almost absolute discretion" traditionally exercised by Federal judges in handing down criminal sentences, and instead adopted a system of determinant sentences calculated pursuant to the pre-established guidelines. Congress intended this system, considered a radical change at the time, to "eliminate unwarranted disparities in Federal sentenced," which is codified at Title 18 U.S.C. 3553(a)(6). Then, as now, the discretion of sentencing judges was not to be eliminated but, rather, to be limited, and in most circumstances the exercise of that discretion resulting in sentences outside the applicable guideline range would be subject to appellate review.
Indeed, both the Congress and the Commission in promulgating the original sentencing guidelines contemplated the vast majority of defendants would be sentenced within the applicable range. And as the Guideline Manual still provides, departures in general should be rare occurrences, and departures based on factors not mentioned in the Sentencing Guidelines should be highly infrequent.

Unfortunately, these laudable goals of sentencing reform have not been fully achieved. While the Commission has not established quantitative benchmarks for the terms "not very often," "highly infrequent," "exceptional," and "extremely rare," all of which could be used to define the appropriate range of non-substantial assistance downward departures, the national percentage of such departures as well as the rate of such departures in many individual districts have been, we believe, plainly out of compliance with the reasonable definition of these terms.

During the Senate hearings in 2000, the
Commission produced data that properly analyzed the trends in downward departures by seeking to tease out the effect of, one, uncontroversial but atypical fast track programs on the Southwest border that significantly boosted both case volumes and departure rates; and, two, equally uncontroversial but more typical substantial assistance downward departures.

The data produced by the Commission showed an unmistakable and steady increase in downward departure rates. Setting aside the Southwest border cases and substantial assistance cases, the Commission found that 5.5 percent of the remaining cases in fiscal year 1991 received a downward departure. By fiscal year 1996, this figure had risen to 8.9 percent, and in fiscal year 1999, it was 12.4 percent.

We have extrapolated these statistics using the more recent data sets now available, and they show the relevant departure rate in 2001 has, for the time being, leveled off at 13.2 percent. Moreover, the rates of non-substantial assistance
downward departures differ widely and unjustifiably from one district to another. In South Carolina, it's 2 percent of all cases. In Connecticut, it's nearly 34 percent.

Some of the public comments submitted to the Commission criticize these statistical measures, but we believe that this approach, which the Commission itself used in analyzing the data and which the American Bar Association has more recently used in advocating against the PROTECT Act, properly controls for the relevant variables and is, statistically speaking, the most accurate and informative measure that has been suggested.

It was, I note, one of the measures used in the department's April 4, 2003, letter to the House-Senate Conference Committee urging support for the Feeney amendment. Likewise, the approach used by Senator Hatch during the floor debate on the PROTECT Act also excluded Southwest border cases and substantial assistance cases.

Others have suggested that a general downward departure rate as high as 13 percent is
within the range that Congress contemplated, which
they claim was 20 percent. This is wrong for two
reasons. First, as Commissioner Steer correctly
noted in connection with the 2000 Senate hearings,
the 20-percent figure which is mentioned in the
1983 Senate report was based on pre-guidelines
Parole Commission data that included a 12-percent
upward departure rate from parole guidelines and an
8-percent total downward departure rate that
included what we would now call substantial
assistance departures. As Commissioner Steer
stated, this suggests that current downward
departure rates are substantially greater than
Congress expected.
Second, whatever Congress' expectation in
1983, it is now clear beyond all doubt that
Congress deems the current downward departure rates
to be too high. Congress spoke clearly in
exercising its prerogative as architect of
sentencing policy.
As Chief Justice Rehnquist recently
remarked, such a decision is for Congress, just as
the enactment of the Sentencing Guidelines nearly 20 years ago was. The Chief Justice's remarks also emphasized an obvious point that seemingly has been lost on some of those who have submitted written comments. Congress has directed that this Commission take measures within 180 days to "substantially reduce" the rate of downward departures. That directive was added to the legislation in conference as a substitute for much broader, more sweeping proposed reforms at the behest of this Commission, representatives of the Federal judiciary, and other advocacy groups, which requested time to study data, obtain additional information from the public, and consider amendments in a more deliberative manner. Although several commentators now in essence encourage this Commission to defy that directive, we are confident that you will not accept that unhelpful invitation.

The department supports Congress' judgment that the consistent and unchecked increase in the number of cases where the specified guidelines penalties are not applied will inevitably undermine
the most basic principles of consistency,
transparency, and predictability that Congress
sought to achieve in the Sentencing Reform Act of
1984.

Unless the Commission adopts more specific
measures to regulate the ability to depart, this
steady increase, coupled with an unjustifiably wide
geographic and subject area of variability in
departure rates, will likely continue.

Before I discuss the changes we think the
Commission should take to implement the relevant
sections of the PROTECT Act, I want to touch on the
recent changes already taking place that we think
will have a positive impact on Federal sentencing
policy generally and on departure policy in
particular.

We have made substantial changes through a
memo at the Department of Justice that was issued
by the Attorney General on the 28th of July.
Prosecutors' discretion must be exercised in a
manner that does not undercut the consistency and
equality in enforcement of the law that must be
maintained in a national system of justice. This Attorney General takes those principles very seriously and insists that the prosecutorial power entrusted to department prosecutors must be exercised fairly, consistently, and in a manner that ensures accountability.

Consistent with Section 401(l) of the PROTECT Act, the Attorney General last month issued a new internal policy directive to all Federal prosecutors concerning sentencing recommendations, litigation, and appeals. In his memorandum to all Federal prosecutors, the Attorney General prohibits prosecutors from engaging in any type of fact bargaining. Agreements about the applicability of the Sentencing Guidelines must be fully consistent with the readily provable facts.

Accordingly, if readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the probation office. This directive specifically addresses a concern that has been raised in the past by this Commission as well
as a number of Federal judges, and there are a
couple of case citations noted in the written
testimony.

The memorandum also establishes that
prosecutors have an affirmative obligation to
oppose any sentencing adjustments, including
downward departures, that are not supported by the
facts and the law. This memorandum makes clear
that prosecutors cannot evade this responsibility
by agreeing to stand silent with respect to an
improper departure. The policy also requires that
in specific circumstances prosecutors promptly
report adverse appealable decisions to the
appropriate appellate section and that each of
those cases be reviewed for appealability. This
policy treats the adverse Sentencing Guidelines
decisions just like any other adverse decision.

For years, the department has required
reporting of adverse decisions on the civil side
and accepting Sentencing Guidelines cases on the
criminal side as well. The PROTECT Act effectively
required the department to extend this well-established
mandatory reporting process to a subset
of guideline cases. We have done so. This
extension of the ordinary appellate review process
to guideline cases is entirely appropriate in light
of the additional and significant appellate
remedies afforded by the PROTECT Act.
Contrary to much recent media coverage and
editorial comment, this department policy regarding
litigation and appeal of downward adjustments and
departures is not intended to create a black list
of judges who depart from the guidelines. The new
charging plea, appeal, and fast-track policies are,
first, a required response to the PROTECT Act and,
second, an important reaffirmation of the Justice
Department's commitment to the principles of
consistency and effective deterrence embodied in
the Sentencing Reform Act and the guidelines.
Every aspect of this policy advances principles of
the Sentencing Guidelines and the Sentencing Reform
Act.
The department has long contended that the
deferential standard of review--I'm going to skip
over that given time. I'll skip the standard
review section.

I want to turn to the section dealing with
disfavored factors.

First, the Commission should
cомprehensively review all non-substantial
assistance departure factors now mentioned in the
Guidelines Manual. We think the Commission should
make it a goal to catalogue all such factors in
Chapter 5 within the next two amendment years to
the extent and in a manner consistent with
limitations of 401(j)(2) of the PROTECT Act.
Wherever possible, the Commission should replace
departures authorized in Chapter 2 with appropriate
amendments to the underlying guideline. We would
be pleased to work with the Commission staff in
developing specific proposals to accomplish this
goal.

The Commission should also carefully
review and reform the existing ground of departure
authorized in Chapter 5. Consistent with concerns
we have previously voiced to the Commission and the
Congress during debate over implementation of the Sarbanes-Oxley act, we believe the Commission should convert certain disfavored departure factors, factors often associated with white-collar and fraud defendants to prohibit factors or, at the very least, severely limit the availability of these factors as a basis for departure as well as the extent of the permissible departure. These factors include community service, age, employment record, civic or charitable service or prior good works, rehabilitation, physical condition, and gambling and abuse dependence. Health and/or mental and emotional conditions should be prohibited factors unless the Bureau of Prisons indicates it does not have the capacity to accommodate the specific medical problems of the defendant. We also believe a defendant's willingness to be deported should be a prohibited departure factor.

Despite the fact that existing policy statements generally discourage such grounds for departure, prosecutors report an ever increasing
number of cases where these departures are granted. This phenomenon further erodes the relatively less onerous guideline ranges in white-collar cases and feeds the public perception that business people and other fraudsters who steal get unduly lenient sentences.

Criminal history departures. In 2001, district courts departed 1,315 times on the basis that the defendant's criminal history overrepresented his involvement in the criminal justice system. In some of those cases, the departure was substantial. Senate bill 151, as passed by the House and supported by the department, would have effectively banned such downward departures entirely. We continue to favor that position. To the extent that the Commission believes that this would result in unduly severe sentences for certain offenders, it should attempt, in light of the 15 years of experience under the guidelines, to articulate such circumstances by making appropriate adjustments to the underlying rules that govern the calculation of criminal history categories.
At a minimum, we believe the Commission should make significant reforms concerning the use of this departure. Instead of allowing an unlimited reduction in the offense level or the overall sentence, the guidelines should explicitly cap such departures to a specified reduction in the criminal history category. We further think such a reduction should in no event exceed one criminal history category.

Use of unmentioned factors. The version of the PROTECT Act initially passed by the House and supported by the department would have effectively banned all unmentioned factors as grounds for downward departure in all cases. That across-the-board reform, however, was not included in the final legislation, which preserved in many cases the authority to depart if the statutory standards in 18 U.S.C. 3553 are met. Instead, the Congress directed the Commission to take measures to ensure that the rates of downward departure would be "substantially reduced." We believe that the centerpiece of that effort must be the adoption
of additional measures to ensure that the use of
unmentioned factors is very sharply reduced.

The Commission's initial rationale for
allowing unmentioned departure factors was "for two
reasons."

First, the Commission noted that it could
not prescribe a single set of provisions governing
all relevant human conduct, and it did not need to
do so at the outset because "over time" it would be
able to refine the guidelines to specify more
precisely when departures should and should not be
permitted.

Second, the Commission stated its belief
that, "Despite the court's legal freedom to depart
from the guidelines, they will not do so very
often."

Both rationales have been undercut by the
passage of time. The Commission now has 15 years
of experience under the guidelines, and greater
specificity is both possible and warranted. We
think the Commission should, given its exhaustive
and comprehensive work now spanning 15 years,
promulgate a policy statement that establishes a
strong and effective presumption that in
establishing the applicable guideline and specific
offense characteristics and in cataloguing
permissible and impermissible grounds for
departure, the Commission has indeed considered
virtually all factors that might be relevant to
setting the guideline range of sentencing, leaving
other factors to be considered as appropriate only
in determining the sentence within the range.

The exact formulation of such a policy
statement must be carefully considered, especially
in light of the fact that the existing policy
statement stating that such departures should be
highly infrequent has proved to be ineffective. In
conjunction with issuing such a new policy
statement, the Commission may wish to consider
whether there are any unmentioned factors that
should be specifically mentioned. We also believe
that thereafter the Commission should annually
review departures based on unmentioned factors and
consider whether to address them in the Guidelines
Finally, combination of factors. The commentary to 5K2.0 currently provides that in an extraordinary case in which a combination of offender characteristics or not ordinarily relevant circumstances takes the case out of the heartland, even though none of the characteristics or circumstances individually distinguishes the case, a departure may be warranted. Since this provision was enacted, despite the commentary that such cases will be extremely rare, this amorphous, catch-all provision has been used in sentencing courts all too frequently—has been urged on sentencing courts all too frequently by defendants and has been relied upon by the courts to grant downward departures.

I thank you again for the invitation to appear before you and for taking up these important issues. I'd be happy to address any questions.
appreciate the invitation to testify before you folks today, and it's good to see some old friends and also some new members on the Commission. I commend you for your fine work and thank you for holding this hearing. And I might add that it would have been helpful had Congress conducted similar hearings prior to enactment of the PROTECT Act so that it could have examined to what degree departures are, in fact, a problem. I think, however, that had Congress conducted such hearings, in honesty it would have said that departures are a problem. The departure rate, as reported in fiscal 2001, was 18.3 percent. And if you take out substantial assistance departures, in effect that meant that in more than 20 percent of the cases courts were departing for reasons other than having substantial assistance situations. And that is more than the Sentencing Reform Act contemplated. Now, the PROTECT Act has caused all kinds of alarm within the criminal justice community. It has been criticized by a wide array of individuals;
not just defense attorneys but even some
prosecutors and judges have felt very strongly that
it is the wrong way to go. I think for the
Commission, however, what you folks might want to
do is view this as an opportunity to provide
guidance for judges. And, indeed, in a survey
conducted by the Federal Judicial Center in 1994,
judges rated very highly the need for increased
guidance from the Sentencing Commission on when to
depart. And so time passed. The Commission didn't
do much by way of providing guidance, and I accept
some responsibility for that as well. Now,

I recall at some point when I was on the
Commission, someone said that the Commission acts
with glacial speed. And I took issue with that
because I thought it gave a misleading impression
of undue haste and speed. We tend to act very
slowly, and now you have a 180-day time limit.

The truth is that I don't think this job
can be done effectively in 180 days. What is
required at this point is a comprehensive
evaluation of departure trends based upon departure
rates for each guideline and judicial explanations
in connection with those departures. The
Commission could then determine which guidelines
are most problematic, which produce the highest
rates and why. I think that outside professional
commentary and staff studies are required,
consultation with the Department of Justice, the
Criminal Law Committee of the Judicial Conference,
the Practitioners Advisory Group, FAMM, and other
members of the criminal justice community--all that
is required.

The Commission, of course, has begun this
process, but six months just isn't enough time to
get the job done properly. Even so, I think that
ways do exist for the Commission to respond to the
PROTECT Act in a manner that addresses congressional
concerns. I'd like to outline for you
essentially a five-step approach to responding to
Congress.

First, I would suggest a targeted response
which reduces departures in the area of kidnapping. After all, kidnapping involves the underlying crime that gave rise to the PROTECT Act, so if you respond to the kidnapping guideline, that might be one way to go, and I'll go into more detail in a moment.

Second, correct the policy statement in Section 1A.4.b which implicitly modified the statutory standard for judicial departure determinations. The standard is not the heartland concept but the statutory standard based upon what the Commission considered in formulating the guidelines. I'll go into more detail on that shortly as well.

Third, I would add the Commission's statement of reasons, which accompany your amendments annually, to the guidelines' official commentary. This will reduce departures by expanding and clarifying the range of factors that the Commission considered in formulating guidelines.

Next, I would propose an amendment to the
Sentencing Reform Act to broaden the range of materials that courts may examine in determining what the Commission considered in formulating guidelines.

And, finally, when all that is said and done, then conduct a comprehensive review of departure rates which is required before you can intelligently respond to this problem.

Step by step in more detail now. Amending the kidnapping guideline. Such an amendment would directly respond to the crime that initially led Congress to enact the PROTECT Act. I would reduce kidnapping departures by removing selected Section 5K2 factors as departure factors or designating them as not ordinarily relevant in these cases. That would, as I said, directly respond to the concern that led Congress to enact the PROTECT Act.

More importantly, however, I think it's up to the Commission to begin to correct the standard that judges employ in departing. Judges typically think in terms of the heartland concept. That reflects language in the Guidelines Manual that
essentially equates heartland or uses heartland as
a proxy for when departures may occur, heartland,
in effect, as a proxy for what the Commission
considered, and presumably anything that's outside
the heartland is something that the Commission did
not consider when it formulated the guideline.

There are problems, however, with this
heartland concept. First of all, it really isn't a
functional concept. What is one person's heartland
is somebody else's non-heartland, and there's
really no necessarily reasonable way to reach
agreement on those factors.

Secondly, the guidelines themselves
oftentimes reflect non-heartland factors that the
Commission considered, and, indeed, your annual
source book refers to certain guidelines which are
applied--rather, certain specific offense
characteristics that are applied in less than 1
percent of the cases. So the guidelines themselves
I'm saying oftentimes include non-heartland
factors.

The difficulty with the heartland concept
is that it's ambiguous and it promotes confusion
and circuit conflicts, and I think it's why judges
want more guidance.

I would revise the policy statement in
Section 1A.4.b. to emphasize the correct statutory
standard for departures. This can be done
immediately to alleviate congressional concerns.
I'll go into more detail on that shortly.

I would also reduce departures under the
existing statutory standard. Let me back up for a
moment.

The problem is that judges are asking
themselves whether something is within the
heartland or non-heartland. What they should be
asking themselves is what did the Commission
consider in formulating the guideline. That's
really the question, and that's not what judges are
doing, and they're not doing that because there's
language in the original Guidelines Manual which
has not been amended that essentially says
departures occur when something falls outside the
heartland.
If you correct that language and you do so immediately, you will substantially reduce departure rates because you will point judges to what they should be looking to, which in turn is what did the Commission consider. And the next step would then be to broaden the range of materials available for courts to look to in deciding what the Commission considered.

For example, if you take the statement of reasons that accompanies amendments and you include them as part of the commentary to the guidelines, that in turn, under the Sentencing Reform Act, would allow judges to consider those reasons in evaluating whether departure is warranted. And those statements of reasons oftentimes give policy reasons and justifications for your decision that are different from the types of comments contained in your official commentary.

More detailed statement of reasons by the Commission will in turn broaden the range of evidence available for what you considered and narrow the scope of departures. I think if you
take that action, you can respond to Congress in a
good-faith fashion and say we have taken steps to
significantly reduce departures.

I also suggest that you amend the
Sentencing Reform Act to broaden the range of
materials courts may review in deciding whether
there exists a mitigating factor not adequately
taken into consideration by the Commission.

For example, Commission hearings are often
tape-recorded by not transcribed. If you have a
transcript of the actual Commission meeting and
hearings, that transcript could serve as the basis
for helping judges determine what the Commission
considered, and that in turn, by expanding the
range of materials available for courts to
consider, would in turn narrow the scope of
departures and give appellate judges also room to
consider what the Commission used as the basis for
formulating any particular guideline.

This would require an amendment to the
Sentencing Reform Act, but it then allows you as
Commissioners to go back to Congress and say:
We're taking your mandate seriously. We need your help. We ought to amend the Sentencing Reform Act to allow reviewing judges to have a better understanding of what the Commission considered in formulating a guideline. And I would suggest that you amend the act to include the right for judges to consider Commission transcripts, hearings conducted by the Sentencing Commission, public comment received by the Commission, and possibly even your briefing books, which really provide, in effect, a legislative history so that any reviewing court could better understand exactly what the Commission considered in formulating a guideline.

If you open the pool of information available, it will allow judges to determine what you considered, and the benefit of this approach is that it will avoid a divisive, confrontational battle over individual guidelines which will pit liberals against conservatives. You'll essentially have a blood bath over individual guidelines. Instead, this is a policy-neutral approach that really returns to the intent of the Sentencing
Reform Act and allows judges to make departure
determinations based upon what the Commission
considered or failed to consider in formulating a
particular guideline.

Thank you for your time.

CHAIRMAN MURPHY: Now is the opportunity
to ask questions.

COMMISSIONER CASTILLO: Mr. Mercer, do you
agree with former Commissioner Goldsmith that this
job just cannot be effectively done within the 60
days left?

MR. MERCER: You've got a congressional
mandate, and I'm not sure that it's appropriate for
me to make a determination as to whether the
Commission--I think you've got to make--

MR. GOLDSMITH: It helps to be a tenured
professor.

[Laughter.]

MR. MERCER: I don't advise any
prosecutors or any of our client agencies to ignore
what the statutes say. So I think the Commission
has an obligation and needs to meet it.
COMMISSIONER CASTILLO: To try and meet it. But you do say in your written materials that it would take a two-year period to re-evaluate all these downward departure--

MR. MERCER: No, I think that's specific to the notion of cataloguing the various departure factors. I don't believe we--it's not our position that you need to evaluate.

As you know, during Sarbanes-Oxley the position of the department that I advanced on behalf of the department was that this Commission should make a number of factors prohibited factors. I think the Commission has heard those views before, and we believe that the Commission is in a position to act based upon its evaluation over time of those issues.

CHAIRMAN MURPHY: I'd like to ask you about the fast-track provisions in the PROTECT Act because the Commission, of course, is given the task of considering adjustments, considering provisions related to fast-track programs, and we have been trying to get information from the
Department of Justice about what early disposition programs or fast-track programs there are. And, apparently, the department is having a hard time identifying all the different programs that exist and what actually is part of those programs.

I wonder if you would comment on that, whether it's possible for us to--I know in your written materials you say that you think probably the best thing for us is just to track statutory language. But why is this so difficult? I know the department has been working on gathering information, but we're left holding the bag, so to speak.

MR. MERCER: Well, the answer, as you note--although I didn't say anything about it in my oral statement, the written statement indicates that we believe that the Commission should take the language in the statute and convert that into 5K2.23, which will set forth the fact that a court may depart in a program in which both the Attorney General and the U.S. Attorney have authorized a departure--an early disposition program.
That provision allows up to a four-level departure, and we believe if that language is inserted into the manual, based upon the oversight of the department and the request of a U.S. Attorney, that will be an appropriate mechanism to establish that program.

In response to the question about the data, I believe that the department has provided the Commission with an analysis of where we stand in terms of fast-track programs, and hopefully that's responsive. And I'm sure if it's not responsive that we would--

CHAIRMAN MURPHY: Well, I think it's responsive, but it doesn't have--it's pretty skimpy. I think it's responsive, but it isn't as much information as we might like.

MR. MERCER: Well, we would be happy to get a sense from the Commission of where the Commission believes there are shortcomings in the analysis. It was my view that it was a fairly complete analysis, but I know that we'd be happy to respond to questions from the Commission on that.
I think, you know, it's clear that a significant number of cases have been managed through fast-track programs over time. Congress responded to that as part of this act in order to codify it. And we believe with inclusion of that language in the manual, coupled with the fact that it's got to be authorized by both the U.S. Attorney and the Attorney General, there will be proper use of that particular departure language.

COMMISSIONER SESSIONS: I kind of thought with the related question, because you talked about—well, you talked about a number of things. First you started with an argument that prosecutors were going to be consistently applying the guidelines. We then look at the fast-track system that you're proposing, and essentially if the U.S. Attorney and the Attorney General agrees to a particular fast-track program, then there will be a significant reduction in the guidelines in that particular area, which, needless to say, suggests that if one crosses the border in that particular jurisdiction, one receives a substantially reduced
sentence. But if by chance one enters the United States in an adjoining area which does not have a fast-track program, then the sentence is very different.

My question is: Is that inconsistent in some way with the purpose of the guideline, especially in light of the fact that a second part of your argument is that there should be no departures for any other grounds related to immigration other than pursuant to a fast-track situation? And then the secondary question, as I'm speaking, is: Is this really wise? Because I wonder if sophisticated alien-smuggling rings on the border would, therefore, identify which jurisdictions have the fast-track system and which jurisdictions don't have the fast-track system and, in light of the huge swing in possible sentences, focus their efforts in one particular jurisdiction, i.e., that jurisdiction that has a fast-track system?

MR. MERCER: It's the department's position that the Congress through the PROTECT Act
has said, in reviewing disposition of cases particularly on the Southwest border, that in order to have effective administration of justice, there needs to be the authority for the Attorney General of the United States to say when we're trying to process X thousands of cases in Arizona, the only way to accomplish the end is to have some opportunity to have early disposition programs.

So my answer to the Chair really is that the Commission doesn't have, as I read the statute, a whole lot of discretion. The Congress has said early disposition programs are authorized by this language in the PROTECT Act and the Commission needs to adopt something that would facilitate this, as long as it's been authorized by the Attorney General and the U.S. Attorney.

And in terms of your second question, I think the answer is that if you--there are going to be certain cases that may not be covered by a fast-track program. That's going to be up to a recommendation from the U.S. Attorney and, if it's adopted, by the Attorney General. And whether
alien smuggling is going to be captured by that early disposition program, I don't know. And I imagine that there would be some variability from district to district. It will be based upon the particular crime problem in that state.

Now, in my district--I'm the U.S. Attorney in a border district--we don't have an early disposition program. We won't have an early disposition program. If we have an alien-smuggling case in Montana, that person will be prosecuted, and there won't be any sort of a fast track. I don't have the crush of cases that my colleague, Mr. Charlton, has in the District of Arizona.

COMMISSIONER SESSIONS: The question was less actually the fast-track system, because obviously Congress has directed us to implement a fast-track system. There's no question about that, and we would follow that. But the second part of your argument is that for those jurisdictions that don't have a fast-track system, there should be no grounds for departure. So that as a result, the disparities between the fast-track jurisdictions
and the non-fast-track jurisdictions are necessarily heightened by your position.

MR. MERCER: Right, and the Congress clearly contemplated that. Congress clearly contemplates as part of the PROTECT Act that some districts may have a fast-track program and other districts may not, and that there may be disparity in a defendant in the District of Arizona when compared to a defendant in the District of Montana. But that's been clearly authorized by the PROTECT Act and the notion that there are pressure points in the Federal criminal justice system in which it would just simply break down if we didn't have some sort of flexibility.

And, again, there's going to be considered judgment on this issue by both the U.S. Attorney and the Attorney General as to whether it's appropriate. But I think Congress has made a policy determination that if those two thresholds are met--the U.S. Attorney says we should have an early disposition program based upon these factors, and the Attorney General ratifies that--then there
is a judgment of the Congress that that's appropriate.

CHAIRMAN MURPHY: I think the two Michaels down here have questions.

COMMISSIONER HOROWITZ: I want to focus still on the fast-track issue. One of the concerns I have is this disparity among districts and how they implement a program. Some do it through the guidelines. Some engage in charge bargaining and do it that way.

Is there any process at Main Justice to try and regularize what the various districts are doing? I'm concerned also, having been a prosecutor in a district that had a significant number of illegal immigration cases but did not engage in any bargaining on these issues, that given where the guidelines are now, you're talking about potentially 50 percent or more difference in sentences between them. And I would hope that the department would try and regularize that process in some way.

MR. MERCER: I think that's an important
observation and one that we're taking a look at seriously.

COMMISSIONER O'NEILL: What about circumstances--I mean, is it appropriate for--I mean, clearly, I recognize that Congress has made this call. But if, in fact, what we're looking for is the consistent enforcement of Federal law, and if it's appropriate for the Department of Justice to be able to pick and choose--because there are resource questions, obviously. As you point out, the crush of cases dictates in the border districts that we've simply got to have provisions that are slightly different than cases we might have in Montana or a district that perhaps doesn't face that same crush of cases.

Is it then appropriate for the Sentencing Commission to do much the same thing the Department of Justice has done and allow for certain sorts of departures in districts or in circuits that are different, recognizing the same sort of resource scarcity issues that they have and recognizing that there are different sorts of pressure points that
different districts and different jurisdictions will face?

MR. MERCER: Is there any way you can be--well, let me answer it, and if there can be any more specificity, then I'd be happy to take a particular departure.

I notice in some of the work that the Commission staff has done that the family ties departure is invoked as a basis for a departure in 19 percent of the cases in the Second Circuit, of the cases that involve departures.

Now, I think the premise of your question is: Shouldn't we assume, based upon the fact that we have this observation from the Second Circuit, that maybe there are particular circumstances in places like Vermont that would maybe make a family ties departure more relevant? I don't think that's right. I don't see how the rate in the Second Circuit would be different on family ties departure than it would be in the Sixth Circuit.

COMMISSIONER O'NEILL: What if we find out, for example, that the Second Circuit
prosecutes a high number of white-collar fraud cases given the fact that New York is a financial center? And given those particular circumstances where New York does far and away more than any other district, say perhaps Chicago, in terms of financial prosecutions, that there needs to be some sort of--something taken into account for that district?

MR. MERCER: It's the government's view that you should be very troubled if that's a finding that you observe in that the whole purpose of trying to minimize unwarranted disparity of similarly situated offenders is going to be undercut to the extent that in the Second Circuit you've got a bunch of people who are committing fraud crimes that are somehow getting lower sentences based upon family ties departures than would occur in Chicago or on the West Coast.

COMMISSIONER O'NEILL: But in response to Judge Sessions' question, isn't that precisely what Congress has told us to do, at least with respect to fast track, that we're required to make those
same sorts of considerations largely based upon resource scarcity, nearly as I can figure out?

MR. MERCER: Well, I think Congress has asked the Commission to do two things--well, multiple things, but two of the key points are:

You need to be able to stretch your fast-track program under 5K2.23 that allows, with U.S. Attorney approval and Attorney General approval, to have early disposition programs.

At the same time, they're saying to you that you need to substantially reduce the incidence of downward departures, and those things seem to--you know, they're not mutually exclusive. They've asked you to do both at the same time, and the Congress has not expressed a concern that the early disposition programs are going to create unwarranted disparity that cannot be tolerated. In fact, they seem to be saying we, based upon the overall concerns of the criminal justice system, are willing to introduce a certain amount of inequity because it's the only way that the system can function. But at the same time, they're saying
it is intolerable, or at least you should make a significant attempt to try to substantially reduce the incidence of departure because it is contributing to unwarranted disparity in other case categories.

COMMISSIONER O'NEILL: Does the department have a target--

CHAIRMAN MURPHY: Commissioner Steer has a question.

COMMISSIONER STEER: I wanted to ask a question of Professor Goldsmith, which is, first, this will sound more like a comment. I agree with your analysis of the inadequacy or the erroneous nature of the heartland standard. In fact, I would go further. I think it has been problematic from the outset because the Commission did not initially write the guidelines purely from a statistical analysis of prior cases but, rather, took into account factors that were directed by the Sentencing Reform Act itself. And as you well know, over the years many other enactments of Congress have directed that this or that factor be
added, which may not correspond to the presence of
that particular factor in the actual caseload that
is being prosecuted and sentenced to any--you know,
closely at all.

I guess my question--if you want to
comment on my observation, you may, but my question
really goes to your recommendation about amending
the statute to add these other things that the
court could look at. And it's really a two-part
question.

One, is it really necessary? Because
aren't the courts really doing that kind of
sentencing, courts, aren't they really going beyond
the four corners of the manual and looking at other
things now?

And, two, if the statute was so amended,
isn't there a danger, a risk that the focus would
shift from looking at those materials to ascertain
the factors that were taken into account to
actually a focus on the Commission's processes and
the adequacy of our processes? Did we have enough
hearings? Did we debate and consider enough a
particular issue? Which is not what I think the
framers of the original act had in mind at all.

MR. GOLDSMITH: Let me respond as follows:

First, if I could, I wanted to clarify a point
possibly raised by Judge Castillo's question of my
colleague.

I want to emphasize that the Commission
does need to respond to Congress. Obviously,
you've got the directive and you must do so.
That's just the nature of democracy, and there's no
going around that. But the gist of my remarks
was that the type of comprehensive review that's
required to take care of departures comprehensively
and systematically simply can't be done in six
months' time. And I think that Feeney instead
poses a challenge to the Commission to better
articulate what it considered in formulating
guidelines. And if you do that--and my suggestion
is that you do that by broadening the scope of
materials available for courts to look to. That
will, in fact, produce a significant decrease and
bring it more within the parameters contemplated by
the Sentencing Reform Act initially.

To respond to Commissioner Steer's questions directly, if a court is going beyond the materials set forth in 3553(b), it's acting improperly, and I think it makes itself vulnerable to reversal. To the degree that a court looks to materials that are not specified as within the scope of what judges may consider in deciding what the Commission used as the basis for formulating a guideline, that is going to be a plain error and, especially given the change in standard under Peeney, I think will more readily produce reversals of erroneous departure decisions.

With respect to your other concern, I don't think that my suggestion goes to the quality—or has any basis for a court to criticize the quality of a Commission enactment. It doesn't give rise to a qualitative review. It just broadens the scope of materials that judges may look to in deciding whether, in fact, the Commission considered something, yes or on.

I know that on a few occasions I've gone
back to take a look at minutes of Commission
hearings, and they, in fact, allowed me to reach a
determination that the Commission did consider
something and obviously chose to reject it by not
including it in the guideline itself. And,
therefore, it really shouldn't have been a basis
for a departure. But unless you looked at the
minutes and could in turn use them in deciding
whether departure was appropriate, you're acting
outside the bounds of law.

So I think you're safe, and especially
since the Commission is not governed by the
administrative Procedure Act, I just don't see any
type of a concern that a court might say, well,
qualitatively the level of consideration wasn't
enough. The question really is whether the
Commission considered it adequately within the
meaning of 3553(b).

CHAIRMAN MURPHY: The Eighth Circuit just
ruled that it is governed by--I wasn't on the
panel, but that it is governed by the APA.

MR. GOLDSMITH: You know, that's another
example of what happens when the only people that
read my law review articles are my mother and my
sister.

[Laughter.]

MR. GOLDSMITH: They're just wrong.

CHAIRMAN MURPHY: Well, Judge Castillo has

his hand up. You've got just a minute or two more.

COMMISSIONER CASTILLO: Okay. I just want
to say this: One, a lot of statistics have been

bandied about. I have to say, just as one

Commissioner, the more I dig into this data, the

more questions I have about the reliability even of

the reported data. So the one good thing that can

come out of this PROTECT Act is probably more

reliable data in the future.

But as we've talked about--and this

question is going to be addressed to either of our

panelists--reducing and especially substantially

reducing the non-cooperation departure rate, does

the Department of Justice or, former Commissioner

Goldsmith, do you have in mind what that rate it?

Commissioner Goldsmith, you said "as originally
contemplated." Do you know what rate that is?

Does the Department of Justice have a rate in mind as to what the non-cooperation downward departure rate should be nationally?

MR. GOLDSMITH: I think it ought to be less than what it presently is.

[Laughter.]

MR. GOLDSMITH: You're all laughing and that's fair enough. But--

COMMISSIONER CASTILLO: I'm not laughing.

MR. GOLDSMITH: I was surprised, frankly, when I saw that the rates were as high as they were because I think clearly the Reform Act and the Commission originally contemplated that departures would be reserved for unusual circumstances, and no one really defined what was unusual. But I would imagine it would be somewhere in the range of 10 percent--10 percent, 5 percent. I mean, the article which you referred to--

COMMISSIONER O'NEILL: That's the appropriate range, 10 percent, 5 percent?

MR. GOLDSMITH: Five to 10 percent
departure range I think would be acceptable. When your departure rate is higher than that, then you're basically saying every case is above average, every case is unusual. And that strikes me as inappropriate.

MR. MERCER: I want to talk a little bit—without giving a specific answer on the rate, I want to talk about a couple things I think the Commission has really got to worry about in doing this. I'm not sure that it's going to be feasible for the Commission to look at the national average. When I look at the data, when I look at the spread sheet, the thing that jumps out at me is the outliers. You've got a number of districts—and this cannot be an aberration because it's year after year after year—that have rates that exceed 20 percent. There are ten districts, or thereabouts, that fit into that box for 2000 and 2001. So the first answer to the question is what do we do to substantially reduce. You're going to have to cut those in half in the short term.

The other problem you're going to have, I
think, from a data perspective--I know there is some suggestion in some of the public comment that the Commission should try to take that national number and figure out what it is today and reduce it by some percentage. Again, that doesn't address this district-by-district problem. But what it also doesn't do is, in my view, it doesn't take into account Footnote 1, I think it's Table 26, that says we're missing information on well over 4,000 cases where the PSR and the judgment do not line up. And we can't figure out what happened in those cases.

So you're reporting an 18.3-percent rate for 2001, but you're missing departure data potentially on 8 percent of the overall number sentenced.

COMMISSIONER CASTILLO: You agree that there is a data collection problem that might be ameliorated by the PROTECT Act?

MR. MERCER: Oh, the PROTECT Act is going to advance--it should advance this in a substantial way, not only in terms of what the district court
will need to say about the basis for departure in
the judgment, but then the directive to the chief
judge to ensure that that information is
transmitted to the Commission, because you're
missing a huge subset of the cases.

COMMISSIONER CASTILLO: We're going to
have to close, and Judge Hinojosa hasn't had a
chance to ask a question. I know he has one.

COMMISSIONER HINOJOSA: I had two quick
questions for Mr. Mercer.

I guess the first one is: It's not the
Justice Department's position--or is it?--that fast
track in the PROTECT Act is limited to districts in
the Southwest border.

MR. MERCER: It is not.

COMMISSIONER HINOJOSA: Okay. The second
question is: Would it be the department's position
that if we adopted the specific language in fast-track
departure that's in the PROTECT Act, the
Commission would be prohibited from expressing some
viewpoint as to some of the factors that might be
considered by the U.S. Attorney and the Attorney
General as these positions change--they won't always be the same individuals--that these are some of the factors that should be considered in deciding whether to approve and adopt a fast-track program in a particular district or particular area?

It's not addressed in the PROTECT Act, and I just wondered if the department felt that the way it's worded the Commission should not specifically offer some opinion as to commentary about these are some of the factors that should be considered by a district in adopting a fast-track program, try to keep them uniform.

MR. MERCER: Well, the uniformity in the department's view will be achieved by virtue of the fact that no program will be authorized without the authority--without the authorization of the Attorney General of the United States. And we believe that that internal policy will result in effective programs and programs that have a significant amount of deliberation in terms of what goes into them before they're authorized.
COMMISSIONER HINOJOSA: But that would depend on the individual who holds that position as opposed to a general set of principles, I take it?

MR. MERCER: Well, certainly whoever serves as Attorney General will be in a position to authorize or refuse to authorize. But I think it's our view that that authority within the PROTECT Act not only will authorize this program, but it will delegate back to the Attorney General to make a determination about what's appropriate and whether it should be done.

But I agree with your assessment. There isn't anything in the legislative language, legislative history that limits the scope of that to just the Southwest border.

COMMISSIONER HINOJOSA: But you still don't--

CHAIRMAN MURPHY: Before you--

COMMISSIONER HINOJOSA: You won't express an opinion as to whether we would have the authority to--

MR. MERCER: I think I'd like to take a
look at that before I--I think that we should get
back to you on that request.

CHAIRMAN MURPHY: I realize that you think
you're off the hot seat, but there's popular demand
from this end of the table to be able to ask a
question about the presentence report.

COMMISSIONER HOROWITZ: I just want to ask
one question. We talked about data collection. Is
there a concern at the department about the data
collection with regard to presentence reports,
particularly with regard to cooperation,
information cooperators? And is there any effort
underway within the department on how to deal with
that in connection with the PROTECT Act?

MR. MERCER: In terms of...I think there
is a general concern about whether that--how that
information is going to be disseminated, and we
would like to work with the Commission and the
Congress in terms of making sure that there aren't
any sort of inappropriate disclosures in that
regard.

CHAIRMAN MURPHY: Okay. Thank you--
COMMISSIONER JASO: Can I ask a real quick question of Professor Goldsmith? I'm sorry.

CHAIRMAN MURPHY: Well, I think at some level it's rude to the other people who are waiting to testify if we--

COMMISSIONER JASO: I'm sure that they would agree with you. It's up to you. I have a question and hopefully he could answer it very briefly.

CHAIRMAN MURPHY: Okay.

COMMISSIONER JASO: The question is this: Judge Castillo asked about the ideal sort of platonic rate of downward departures, and you said something, 5, 10 percent. I wondered if you could very briefly address the question of the rate, because I think in the context of the internal deliberations of the department as well as the view on Capitol Hill is that the rate of the non-substantial assistance downward departures increase over the past six, eight, ten years has been of concern.

MR. GOLDSMITH: I'm not sure I understand
your question.

COMMISSIONER JASO: I guess the question is: Is the rate—if there is an increase in the rate of downward departures, or, frankly, of upward departures, is that also a cause for concern? And how should the Sentencing Commission react to it?

MR. GOLDSMITH: I think that the increased rate is a concern, and it goes beyond what the Sentencing Reform Act contemplated. My own view is that the PROTECT Act, nevertheless, was an overreactive response in a situation where Congress really didn't carefully study this problem and has put undue pressure on the Commission to respond in a short time frame unrealistically. The true rate is probably closer to about 23 percent, once you take out substantial assistance departures, and that I think is too high. But the answer is to give judges more guidance, which is what the judges have been asking for. I think there are ways of doing that that simply require the Commission to articulate the factors that it considered. And if you do that, you will, again, broaden the range of
materials courts may look to, and in turn that will serve to cut down the number of departures substantially. It certainly will give appellate judges more leeway and a better feel for knowing when a departure was incorrect.

CHAIRMAN MURPHY: Thank you very much, Professor Goldsmith, and thank you very much, Mr. Mercer.

MR. GOLDSMITH: Thank you.

MR. MERCER: Thank you, Judge, and we look forward to working with you, and we'll be at your beck and call to provide any sort of further--

CHAIRMAN MURPHY: Well, we are going to remember that quote.

MR. MERCER: Please do.

[Laughter.]

CHAIRMAN MURPHY: Okay. Then we'll move on to the second panel: James Felman, who is the Chair of our Practitioners Advisory Group, a very active member of the criminal defense bar and very helpful to the Commission; John Rhodes, who was on detail to the Commission for a six-month period,
but he is gone now, but he is assistant public
defender in the District of Montana. We've got a
heavy representation from Montana here. And Jon
Sands, who is assistant Federal public defender in
the District of Arizona and chairs the Federal
Sentencing Guidelines Committee for the Federal
Public and Community Defenders, and is also a
member of our Native American Advisory Group, a
frequent contributor.

So we'll start in the order in which we've
just listed people. Mr. Felman?

MR. FELMAN: Thank you, Judge Murphy and
members of the Sentencing Commission. On behalf of
the Practitioners Advisory Group, of course, we
always appreciate the opportunity to express our
views and to be of whatever assistance we can.

I must say, however, that I am utterly
chilled by Professor Goldsmith and am tempted to
think that I should not open my mouth for fear that
anything that I say, given that it likely will not
be enacted, will then be evidence that the
Commission considered it and rejected it.
MR. FELMAN: So I'm going to specifically ask that you do not now or ever take into consideration anything I ever said.

[Laughter.]

COMMISSIONER JASO: Consider yourself immunized.

COMMISSIONER O'NEILL: That testimony was brief.

[Laughter.]

MR. FELMAN: Having given that proviso, let me begin by agreeing with Mr. Mercer. I agree with Mr. Mercer fully when he says that the tasks now before the Commission--

CHAIRMAN MURPHY: Are you trying to ruin his reputation?

[Laughter.]

MR. FELMAN: I agree with him when he says, and I quote, that "the task now before the Commission includes some of the most significant issues it has had to address since the guidelines system was first established." I think he's right
about that.

It compels me, however, to observe that the process by which the Feeney amendment to the PROTECT Act was enacted, calculated as it was to avoid any significant debate or discussion of any of its critically important provisions, was antithetical to every principle for which our nation stands. It was, in a word, un-American.

Having said that, it is the law, and the Commission must comply with it, and the only useful topic of today's hearing is how best to do so.

When I turn to the task at hand, the act doesn't tell us what downward departures are to be reduced. And in light of the process by which it became law, I'm simply unaware of any study or data that would give us any understanding of why Congress sought to reduce the departures or what types of departures it wants reduced, other than, I assume, non-substantial assistance and non-fast-track.

So I must say that I feel like the task at hand much resembles a solution in search of a
problem. I don't know where to look first for the problem that we're supposed to be solving. I feel compelled to respond first to the suggestion from Mr. Mercer in his submission that we should simply eliminate all unmentioned factors as grounds for departure, and that we should take all of the ones that are mentioned and make them highly discouraged, and we should take all the ones that are encouraged and put them all in one place, so that presumably we can slowly get rid of them, too.

And it strikes me that I think we need to remember how utterly integral departures have to be to a just sentencing process. It just seems every day, as I practice law, that human behavior is so diverse as to be beyond our imagination. How frequently those of us who are participants in the criminal justice system do we say to ourselves, "Truth is just stranger than fiction"?

The result of that is that justice suffers greatly where it is driven exclusively by a set of rules that are written down in advance. The achievement of human justice in the sentencing of
criminal behavior calls into play a mix of information so rich that there are times when it must best be described as art and not science. There are and there always will be cases in which justice can only be achieved through a departure from the guidelines.

So I say that not because it's somehow optional to substantially reduce their incidence. You have to do that. But I think as you do so, we want to be very careful not to eliminate them. They are important to the twin goals of uniformity, and it's not just making sure that similar cases are treated alike. That's pretty easy. The difficult one has always been to make sure that different cases are treated differently. What makes it so hard is how to describe what makes a case and an offender different from one another, but it is an endeavor we must undertake.

So I simply could not support ever getting rid of all the unmentioned grounds or converting mentioned ones into adjustments. You'll never be successful there. And so instead, I think we have
to look for something else, and the proposal that
seems easiest--and, you know, given the limited
period of time, my fear is that that is all we'll
ever do--is to just take out the source book and
list--you know, look at the list on page 52 of the
reasons for downward departure, figure out which
ones are used the most, and let's limit them, and
that will cut out a bunch of them and then our
numbers will look better.

You know, you can look at it quickly, and
you can see that general mitigating circumstances
is listed a lot. Pursuant to plea agreement,
whatever that is, is listed a lot. And criminal
history being overstated is listed a lot.

But before I get to what I call that
categorical approach, I agree--and I'm serious
about this--with Mr. Mercer about the geographic
disparity. And you'll never be able to do that in
the time that's allowed, and so I think what you
have to do is do whatever you need to do to satisfy
Congress in the short term, but maybe they'll live
with a little bit less in that regard if you tell
them the real issue here is in some sense geographic disparity.

I practice law in the Middle District of Florida where the incidence of other downward departures is 6.6 percent, and there's not a whole lot of playing around in the guidelines. There is from time to time, but not typically. The judges just simply don't depart downward, and they follow the law and they apply the guidelines as they're intended in most of the cases, I believe.

The overall departure rate in the Second Circuit was 20 percent, triple the rate in my district. And I'm not pointing fingers there, but, I mean, I just look at the statistics in New York. In the Eastern District, the rate is 28 percent. And if you go across the river to the Southern District, it's 12 percent. What's going on there? In Connecticut, it's 33 percent.

Just, you know, travel on out to the heartland and look in Iowa. In the Southern District of Iowa, it's 17 percent, which is twice that of Northern Iowa, which is 8 percent. A
defendant in the Middle District of Alabama is four times more likely to receive a downward departure as a defendant in the Northern District of Alabama.

There are things out there in the field that are happening, and I think we all know that. Is that my timer? Okay. Well, let me just mention that it's complicated because it's not just obviously the departure rates, because there are other districts in which, quite candidly--and I'm sure this is a dirty secret that nobody would want me to say, but the judges have told the probation officers: Don't look behind the plea agreements. You can get a plea agreement, write up the PSI so that it followed the plea agreement, and just put in the impact of the plea agreement section of the PSI what you think the guidelines really are. Then the judge just sentences according to the PSI, and everybody goes along with that, and it doesn't even show as a departure.

So there are districts out there where the departure rates are very low, but they're the same sentences that are being achieved in sentences
where the departure rates are very high. The only
way you're really going to solve the problem of
getting rid of unwarranted downward departures, you
know, if they're out there--I mean, they're not
happening in my district, but if they're out there--is to go
out and really try to undertake and find
out what the actual practices are in these various
districts.

If you get to the categorical approach--and I'll
be happy to respond to questions about
that--the top two listed on there aren't even valid
grounds. General mitigating circumstances and
pursuant to a plea agreement are just simply not
valid grounds for a plea agreement. And so it just
seems to me that if you just nail that down, you're
going to get rid of a huge number of these. And it
may be that that alone would satisfy the Feeney
act, particularly in conjunction with the things
that the Department of Justice is doing.

The only other point that I would make is
that in Mr. Mercer's written materials, he has the
suggestion that this long list of grounds for
downward departure are fodder in virtually every sentencing in a white-collar case. If you add up every ground for downward departure he listed there, it's like 3 percent of cases. They may be fodder, but that's about all they are. It isn't happening. And the best he can cite in support of that is prosecutors report an ever increasing number of cases where these departures are granted. Well, who are these prosecutors? And what are the cases they're reporting?

I could easily sit here in front of you and say, well, defense attorneys are reporting an ever decreasing amount of downward departures. It sure feels that way.

And so, you know, these things are meaningless. This is really at bottom all about a power shift. Obviously, if a defendant can't get a break from the judge, the only way they can get it is from Mr. Mercer, and, you know, that is deeply unfortunate. But it is truly what is at stake here, I believe. And so I think the Commission must follow the law. It must substantially reduce
the incidence of downward departure. I think in
the short term, it can make clear that the top two
leaders in those categories are not appropriate,
and there may be some things that eventually once
the recidivism study is done and criminal history
that could be done there. It sure would be a shame
to start tinkering with criminal history before all
that work is done. But that appears to be an area
in which there are a lot of departures, although
maybe there should be. Just because there's a lot
of them, that may be an indication that they should
be departures in that area.

These judges and prosecutors and defense
attorneys were not bad people trying to do bad
things. We're out there really trying to achieve
justice, and if departures are occurring, there's
probably a reason.

So, anyway, I've more than used my time.

Thank you.

CHAIRMAN MURPHY: Mr. Rhodes?

MR. RHODES: Thank you, Judge Murphy, and
thank you, Commission, for this opportunity to
comment on a decision which will literally impact
tens of thousands of individuals in nearly every
community in America. I'm obligated to preface my
remarks with a disclaimer that what I say are my
personal opinions and do not reflect my employer,
the Federal Defenders of Montana, or my current
workstation, the Administrative Office of the
United States Courts.

The focus for the Commission, and rightly
so, is the PROTECT Act directives, what the PROTECT
Act is telling the Commission to do. But in
considering that, it's also important to consider
what the PROTECT Act didn't do. It didn't change
the fundamental or guiding principles of the
guideline. 3553(b) remains. Where there are
circumstances not adequately considered by the
Commission in formulating the guidelines, the
district court, now subject to the appellate
court's de novo review, can depart.

The PROTECT Act didn't say do away with
fairness in sentencing. It didn't say do away with
flexibility in individualizing sentences. And it
didn't say do away with uniformity.

That's important because when it's suggested that there should be some sort of mechanical or categorical ban on certain departures, if that was to occur, it would do away with uniformity because cases that were different would be treated the same. It would also do away with individualized sentencing, so in my opinion, that's not the route for the Commission to go because doing so would undermine the guidelines. Instead, I agree with the comments of Professor Goldsmith and of Mr. Pelman that specificity is what the Commission should focus on.

The PROTECT Act is encouraging the Commission to reduce unwarranted or unlawful departures, and I believe by expounding upon the specificity requirement now at 3553(c), the Commission can do that. Specificity will not only be important, as Professor Goldsmith alluded to, in guiding the judges, what I would call guided discretion, not only for the district court judges in making the initial departure decision, but also
for the appellate judges in reviewing that
decision; it's also going to benefit the Commission
because it's going to provide for reportable
departures that the Commission can utilize in
reviewing the departures, studying the departures,
and moving forward.

My specific recommendation to the
Commission is that it create a new guideline or
policy statement, as I said, expounding upon the
specificity requirement in the PROTECT Act. And I
would suggest that that either be as an amendment
to Section 5K2.0 or perhaps as a new guideline or
policy statement at 5L. And I believe that the
specificity requirement which is now in 3553(c) can
only be achieved if the courts articulate exactly
why the offender or offense characteristic is so
unusual that a departure is warranted, and in doing
so not only will the courts comply with 3553(c),
but they're also complying with 3553(b).

The courts should not only have to be
specifying the facts that warrant the departure,
but in categorizing the departure, if the district
court chooses to do so, be it at their oral
sentencing hearing or in the written judgment, it
should have to be specific and can no longer fall
back on the general mitigating circumstances or
pursuant to plea agreement catch-all provisions, as
alluded to by Mr. Felman. And I think the
Sentencing Commission can help guide the courts in
being specific by including language in Chapter 5,
be it in 5K2.0 or 5L, forcing the courts to do so
and making it clear that if the courts don't do so,
the departure is going to be reversed on appeal.

Outside-the-heartland departures are a
good example of this. The circuits--and they've
done so in different fashions, and perhaps that's
something the Commission needs to consider. But
the circuits have directed the district courts on
how to proceed in outside-the-heartland departure
analysis. My case United States v. Parrish is such
an example where the district court was affirmed
because the district court judge did exactly what
the Ninth Circuit had prescribed in previous case
law. And I think that something the Commission
should consider is looking at how the circuits have prescribed outside-the-heartland analysis and incorporating that into the guidelines.

I also think in this new guideline or policy that I'm suggesting, the Commission should ban vague departures, not only in the general sense, which would, as I say, reflect the specificity directive from Congress, but also in the specific sense of banning departures such as pursuant to plea agreement or general mitigating circumstances.

A couple others on the list from the 2001 statistics that may not meet the specificity requirement or this new departure--or new guideline language that I'm suggesting would be time served or sufficient punishment. To me, those are a shorthand euphemism for outside the heartland. Require the district court to engage in that specific analysis. Doing so will force defense attorneys, such as the three of us sitting here, to provide the specific facts that show pursuant to 3553(b) that there are circumstances that haven't
been adequately considered by the Commission in
formulating the guideline, and it will also reflect
the new Ashcroft memorandum, which, as I see it, is
a directive to the AUSAs to be more vigilant. To
me, with this new, what I would generally call
guided discretion, the Commission can substantially
reduce the incidence of departures.

My sense is that the criminal history
departures are in the cross hairs, so I feel
compelled to comment on those.

First, they should not be banned
categorically. As the Commission has reflected in
its previous deliberations, the reason that such
departures are identified in the guideline as being
possible both upward and downward is because of the
disparate sentencing practices in the states. And
should the Commission ban categorically such
departures, it would not reflect the reality of
what every lawyer and certainly every defendant
knows how things operate in the state court
systems.

So, instead, I would suggest that the
Commission guide the calculation that district
courts undertake in reaching the extent of the
criminal history departure, and specifically, the
Commission should require the district courts to
specify exactly which conviction warrants reduced
criminal history points, why that reduction is
justified, and why the precise amount of that
reduction is justified.

A further step if the Commission wants to
be more strict in its guidance to the district
court is to say that reductions are only justified
to a certain degree. For instance, if it's a
three-point felony conviction, then it can be
reduced to no more than two points in calculating
the criminal history category. Or if it's a two-point
conviction, it can only be reduced to one
point. Or if it's a one-point conviction, it can
result in only a lowering of one criminal history
category. That's a specific example of the type of
guided discretion that I feel the Commission should
provide to the district court and appellate judges
in meeting Congress' directive.
I would just emphasize and encourage the Commission to undertake general guided principles to direct the courts because I fear that if the Commission takes the more draconian step and does what the Department of Justice is encouraging and categorically bans departures that otherwise comply with the law, then the very purpose of the guidelines--rationality, certainty, fairness, and uniformity--are going to be undermined.

Thank you.

CHAIRMAN MURPHY: Thank you, Mr. Rhodes.

Mr. Sands?

MR. SANDS: I have seven questions, hopefully some answers, and a Lego set to address the PROTECT Act. The seven questions are for the seven Commissioners.

First, has the PROTECT Act changed the Sentencing Reform Act? Short answer: No. The PROTECT Act, they tweak it, might try to refine it, but it doesn't change the underlying ground rules, which is that we have a guideline system and the departures allow the flexibility, guided
discretion, that judges exercise with the help of Mr. Mercer and the Department of Justice and defense counsel.

Second, why haven't they been changed? Well, once again, the Congress in passing the PROTECT Act emphasized that there had to be a transparency. It seems that the PROTECT Act is saying that they want an accounting. They want to know why departures are done. They want to know statistics. But they aren't saying category no for this or no for that. They want reasons, and we're here to help with that.

What has the PROTECT Act done? It has addressed certain offenses--kidnapping, sexual offenses--made changes there, and it questioned departures by requiring reasons and specific reasons for that, which has been a theme from the previous panelists. What the PROTECT Act is doing is saying judges can exercise a discretion, but we want to know why and we want the Commission to justify these reasons.

Four, what must the Commission do?
Obviously, act on the PROTECT Act. It has to study it, but it has to study--it has to study the departures, it has to act within the context of the principles of the Sentencing Reform Act and what the Commission has done in the past. It has a database. It can examine the data. It can understand why departures are being done, for what reasons, what factors are inappropriate, what factors are appropriate, but to categorically take out sections does no one any good. So the Commission must study them, and the Commission must understand that there are certain what I call mushy grounds that can be taken away. These grounds particularly are pursuant to a plea agreement or the unspecified reasons. The PROTECT Act is requiring specific reasons, and I dare say most of this are fast-track in nature. The District of Arizona has approximately 2,500 to 3,000 cases a year. The vast majority of those are immigration. In Tucson, the reason for the fast track is pursuant to a plea agreement. In Phoenix, an hour and a half away, the reasons are 5K2.0, a
totality of circumstances. But both of those are
really dealing with the same thing, which is the
fast track, which the Department of Justice and the
PROTECT Act both bless. If we can deal with the
fast track and get to that, the departure rate will
drop dramatically.

Now, five, we have to be wary of just
numbers, and Mark Twain once said, "There are lies,
there are damn lies, and there are statistics."
And so I'm about to enter into that fray.

What I have in front of me, Legos, which I
borrowed from my child and which got me through the
metal detector at the airport, is the total number
of cases. The yellow are the sentencing within the
guideline range; the red is substantial assistance
controlled by the Department of Justice; and the
green are the other departures. And you can see in
this visual that the departures not authorized by
the Department of Justice is not dominating the
color landscape.

Now, in terms of category approach, if we
take--people have mentioned that criminal history
is one of the top three. But that is just looking
at criminal history as a percentage of the
departures itself. If you look at it as total
number of departure cases, because every case has a
criminal history--a person is either 1 through 6 or
above--you will see that it's that small green
block which represents 1,250 cases against that
whole block.

Turning it around, let's ask questions.

What would be, for example, aberrant behavior? It
would be the sixth prong block in--

COMMISSIONER SESSIONS: Is that before or
after the changes to the aberrant behavior

MR. SANDS: It's 2001, so we're two years
in the past. Now it would go down because we have
narrowed it for those districts.

Green would be diminished capacity. This
is a slight two-prong Lego. You can see that. And
this little--

COMMISSIONER O'NEILL: Are these Legos for
sale?
MR. SANDS: --although unseeable, is age.

So you can see that departures, when you look at the whole range, is not overwhelming.

And, for example, since fast track is controlled by the government, as Mr. Mercer made abundantly clear--DOJ has to approve it and the U.S. Attorney--we should actually take half of these, which would be the immigration, and move it to the substantial assistance or the government-controlled block. And you can see then that the departures actually go to that magical, mystical, wonderful 5 to 10 percent that was mentioned by the previous panel.

This shows you that departures are not overwhelming and that by taking the PROTECT Act's mission of using specific reasons, the Commission can get down to it.

The final two questions are:

What about the Department of Justice?

Interesting. What the Department of Justice is trying to do is take all the discretion to itself.

It wants to control the 5K1s, which they do now,
substantial assistance. They want to control the
fast track, but no one else, principally judges,
can control that discretion.

Finally, can the Commission stay true to
its principles and deal with the PROTECT Act? Yes,
but only if it does the changes with the principles
that it came with set out in 3553: that sentences
not be higher than necessary, that they look at the
data, and that they understand that flexibility and
departures are an integral part of the guidelines.

Thank you.

CHAIRMAN MURPHY: You have a question

about the Legos?

[Laughter.]

COMMISSIONER STEER: My son would have
been very pleased to--he'd probably offer up his
box.

A question along this specificity theme.

First, I commend each of you as a skilled advocate
for the defense, for being willing to step up to
the plate in the future and advocate with
specificity for reasons for departure. In that
area, what would you think of similar changes in the criminal history area that would require the court, in essence, in identifying a downward departure for overstatement of criminal history to state with greater specificity what aspects of the criminal history score, in terms of prior convictions or other aspects of the score, such as recency or whatever, cause the criminal history to be overstated? Do you think you could apply the specificity principle in that area?

MR. SANDS: Not only apply it, we would embrace it. It's one of those things that we do, Judge--

COMMISSIONER STEER: I'm not a judge.

[Laughter.]

MR. SANDS: I'm so used to making the argument and putting on evidence and spending hours convincing a court that a prior conviction that was for theft and was one point was really just two pears that the person shoplifted, bringing in witnesses. This is something that defense counsel and the government seeking upward departures can
and should do. It serves no one--the Commission, society, the defendant, or the government--any good to go in there and not make a specific finding and a specific argument. We will be more than happy to submit our proposed findings of fact and conclusions of law.

COMMISSIONER STEER: Thank you.

CHAIRMAN MURPHY: Commissioner Sessions?

COMMISSIONER SESSIONS: First, I've got to ask--I mean, I was a trial lawyer for a long time. I never used Legos. Do you use Legos in Arizona during your summations?

MR. SANDS: It's very good for DNA.

[Laughter.]

MR. SANDS: So if you want your expert to be intelligible to the jury, you give each jury a baggie with the colors of DNA, and the expert builds it, and everyone understands and your client goes home and doesn't have to face the guidelines.

[Laughter.]

MR. SANDS: It lightens the appellate load, too.
COMMISSIONER SESSIONS: Well, let me ask it to the whole panel, a broad-based question, and maybe it requires your thinking in a little bit different way. But what do you think about the possibility of looking at, let’s say, offender characteristics in 5H or criminal history category and looking at the criminal history, and rather than leave open the issue of a court’s ability to depart, put those factors right within the guidelines and then give the court the authority to adjust an offense level or a criminal history level within a small range, and then indicate that in all other situations those factors should not or should be severely discouraged?

MR. SANDS: That’s an interesting--

COMMISSIONER SESSIONS: What do you think about that?

MR. SANDS: I like it a lot. I like it a lot because it goes to Mr. Mercer’s concerns and raised by Mr. Felman about the geographic differences. You have adjustments. It will be across the board from California to New York with
similarly situated defendants. The Commission can also focus and graduate certain factors.

Let's just take immigration, for example. If you wanted to do an adjustment for cultural assimilation, the Commission can figure out the factors that it feels are important or factors that shouldn't be included, and that could be an adjustment. A similar adjustment could be for criminal history or for other aspects. But the graduated approach, which this Commission has done recently in aberrant behavior in immigration, seems to work well and you get a more individualized sentence.

COMMISSIONER SESSIONS: But you understand the second part of that, perhaps the part that you would not be particularly in favor of, would be a severe restriction on departures. So that basically if you are using, let's say, family circumstances as an example or some other factor, like a particular criminal history category, you can adjust that within a limited range without departing, but then the departures would be
extraordinarily discouraged from that point forward.

In that world, do you think that's a better world than today or a worse world?

MR. SANDS: As a policy matter, it would be a better world because then Mr. Felman's clients could probably take advantage of it, and my clients, and Mr. Rhodes. If I had an individual right here, then I would argue that he or she may possess those extraordinarily difficult circumstances. But an adjustment is transparent. It gets the factors out. The Commission can consider it, and courts of appeal can review it. We would be in favor of adjustments, especially large ones.

[Laughter.]

CHAIRMAN MURPHY: Judge Castillo, then Commissioner O'Neill.

COMMISSIONER CASTILLO: One of the things we're confronting is a quickly evolving world, as we have data that is, at best, incomplete; now the PROTECT Act which should lead to more complete
data; and just recently, in the last two weeks, the Attorney General implementing the PROTECT Act.

Since all three of you are experienced criminal defense attorneys, what's your view as to what is going to be the effect now of the Attorney General's policy as written on downward departures?

MR. FELMAN: I think the judges are going to read the policy and they're going to know that as long as they depart two levels and not three, they're likely okay, as long as they keep putting the person in prison for some period of time. They're going to read the memo, and they're going to say as long as I stay within the DOJ guidelines, they're not going to have to report me.

And so it's yet another example of the department basically aggregating authority. I think that's what's going to happen, although in my district it won't happen much, anyway. I mean, I've seen three departures in my career in 15 years—not for lack of trying. And the idea that I would go in there and argue an unspecified route for departure, I can't even imagine it. You know,
go in there and say, "I want a downward departure
on general mitigating circumstances," I'd get
laughed out of court.

But, anyway, to answer your question, yes,
I think it will have directly that effect. It will
limit the instances in which departures--I think
the mood in the courthouse in my district right now
is departures are bad, Congress said so, so we're
going to get our 6.6 percent down to, you know, 2.2
percent, or whatever. But in the instances in
which they are willing to depart, they're going to
look at that memo, and that's going to guide what
they do.

MR. RHODES: Your Honor, I would add, I
think there's going to be decisions made in
individual U.S. Attorney's Offices, and even more
specifically with each AUSA, of how much they want
to play Main Justice's game. In other words, if
that AUSA is in a case--and I've had these cases
previously in Montana; no longer are they permitted
to do this--where they feel that a departure is
warranted and they feel the facts are so unusual
that the right, just thing to do is to tell the
district court that, they're going to have to make
a decision. Do they want to do that, perhaps
jeopardizing their future in their current
position? Or would they rather, as I say, play the
Main Justice game, oppose it, even though they
personally disagree with that position? And I
think those decisions are going to be made both in
the U.S. Attorney's Offices at a management level
and then specifically by each AUSA.

CHAIRMAN MURPHY: Commissioner O'Neill--oh, go
ahead.

MR. SANDS: Most of the time, Judge, the
departures are given with the consent of the
government. The government recognizes that there
are issues or problems with their case or justice
needs to be done. This is especially true in
border states, especially true in states that have
specialized jurisdiction, like Indian country.

CHAIRMAN MURPHY: Commissioner O'Neill?

COMMISSIONER O'NEILL: Mr. Pelman's
testimony, at least initially, had me pretty well
I'm convinced that the Department of Justice's position was absolutely right. Isn't part of what we're trying to seek here the uniform and consistent enforcement of Federal law without regard for individual jurisdiction? And I guess I'd like to turn the question a little bit. How much in your--as has been pointed out, you're all very experienced criminal defense lawyers, and if the sort of baseline notion is that we want to treat like cases alike, we want to make sure that similar offenses of conviction with similarly situated defendants are basically given roughly equivalent sentences, how much do things like acquitted and relevant conduct that come in at sentencing that are not subject to the conviction--not subject to the charge of conviction, how much does that, do you think, lead to inconsistency in terms of results among defendants that you've had just in your personal experience?

MR. FELMAN: First of all, you have to remember the other half of the equation that I always stress, which is not just making sure that
similar cases are treated alike but that different cases are treated differently. And that's been my consistent frustration, because I repeatedly find factors that I find overwhelmingly relevant that are simply not in the guidelines and that dramatically impact on the culpability of the offender, such as whether the defendant got any of the money. And I've told you that before. You know, to me that's relevant, not in the guidelines, and, you know, I have to ask for a departure on that if I can get it.

I don't know if that--what was the rest of the question?

COMMISSIONER O'NEILL: Basically, does the use of uncharged or acquitted conduct relevant in terms of sentencing, does that enter in, inconsistency ultimately--

MR. FELMAN: My clients can't go to trial, so there's never any acquitted conduct because the threat of what they would get if they went to trial is usually overwhelming; although occasionally they do, they're not acquitted of much.
In terms of relevant conduct, that's where all the bargaining is. You know, if you play ball and you do the deal, they'll say, well, we'll limit your relevant conduct to this period of time, and we'll assume that the loss amount is this amount. But if you go to trial, the relevant conduct is going to be this.

And so that's where the relevant conduct comes into play. It's like a huge hole in the bucket. I mean, procedurally, of course, it's—and I've talked about this before, too. The relevant conduct is sort of, to some extent, whatever they want to tell me it is because I have no right to discovery and I have no access to any facts other than what they want to tell me, for the most part. And so relevant conduct is very malleable and pliable. It leads to tremendous disparity.

MR. SANDS: Relevant conduct is the cornerstone that the guideline says, one author has scholarly termed it. But what has happened is that relevant conduct has been eroded through cross-references. Be that as it may, courts have come
back, at least some circuits, by imposing a higher
standard of proof. When there's cross-references,
that leads to unjust or a disparate sentence.
Relevant conduct is something that is in play in
any plea negotiation and in any sentencing.

MR. RHODES: I deal with the same small
pool of AUSAs and probation officers in every case.
So my experience, relevant conduct, for instance,
is consistently applied in my cases, the problem
being you get a different small pool of AUSAs and
probation officers in some other part of the
country and relevant conduct may be approached from
a very different angle.

And so I'd say within my division, within
my district, it's consistently applied, but I
seriously doubt if you could extrapolate that to
the country as a whole.

COMMISSIONER SESSIONS: Do you think the
Attorney General's regulations now will impact
that? They're supposed to.

MR. SANDS: No, Judge. Each district is
different. Each situation is different. And from
what I understand, there has been a dissent in the ranks, and Main Justice may have a facade, but out in the field things are very different.

MR. FELMAN: I didn't read anything in the memo that was going to change anything that prosecutors did much. I think that what will change is what the judges do, as I mentioned earlier. The memo allows prosecutors to agree to departures that are supported by the law and the facts. I'm sure they would never do otherwise. So if they want to agree to a departure, they can.

CHAIRMAN MURPHY: Any other questions?

[No response.]

CHAIRMAN MURPHY: Thank you very much for an enlightening and enjoyable presentation.

MR. RHODES: Thank you.

MR. SANDS: Thank you.

MR. FELMAN: Thank you.

CHAIRMAN MURPHY: When we go for our hearing in Congress, maybe we'll borrow your Legos.

[Laughter.]

CHAIRMAN MURPHY: Well, Judge Hamilton,
you are there on the hot seat all by yourself. We really appreciate your coming. Judge David Hamilton from the Southern District of Indiana and a member of the Criminal Law Committee of the Judicial Conference of the United States.

JUDGE HAMILTON: Judge Murphy and members of the Sentencing Commission, I did not bring any visual aids. However, on behalf of the Judicial Conference Committee on Criminal Law, I appreciate the opportunity to provide our views concerning the Sentencing Commission's implementation of Section 401(m) of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, also known as the PROTECT Act. The act directs the Commission within 180 days of its enactment to review the Sentencing Guidelines grounds for downward departure, to amend the guidelines to substantially reduce the incidence of downward departures, to promulgate a policy statement authorizing a downward departure of not more than four levels if the government files a motion to pursuant to an early disposition program;
and to make other conforming amendments, including a revision of Chapter 1, Part A, and Policy Statement 5K2.0 of the guidelines.

While the Sentencing Reform Act revolutionized criminal sentencing in the Federal system, it did not replace all individualized sentencing decisions by judges, nor did it eliminate all judicial discretion. The Senate report that constitutes the principal legislative history of the Sentencing Reform Act stated that the purpose of the Sentencing Guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

The ability to depart was an important, if not the major vehicle to preserve this traditional judicial function. As the guidelines themselves repeatedly acknowledge in the offense conduct provisions and the criminal history provisions, there simply are too many relevant variables to capture them all in the guidelines themselves.
Departures provide the flexibility needed to assure adequate consideration of circumstances that the guidelines cannot adequately capture.

Given the critical role that departures play in the guidelines regime, the committee urges the Commission to preserve, to the fullest extent possible, the ability of judges to exercise individualized judgment and to do justice in each case before them. Historically, the Commission has amended the guidelines only after careful deliberation and study. The Commission, an independent body of experts appointed by the President and confirmed by the Senate, is best suited to develop and refine Sentencing Guidelines based upon its research and after examining a wide spectrum of views.

Therefore, we defer to the Commission's expertise on determining where it should focus its efforts on implementing the specifics of the PROTECT Act. As always, the committee will review and comment, if appropriate, on specific proposals the Commission publishes for comment.
Since Congress did not comprehensively review downward departures before issuing its directives to the Commission under the PROTECT Act, Congress surely anticipated that the Commission would develop a thorough understanding of the underlying reasons for current departure rates before changes are promulgated. We do not envy the task of the Commission to complete this review and promulgate guidelines within those 180 days.

The committee understands that the percentage of downward departures has reportedly increased in recent years. Various presentations of the data suggestion that the downward departure rate has increased anywhere from 10 to 20 percent. By using highly selective data on a low number of emotionally charged cases, accompanied by anecdotes containing selective recitations of the facts from carefully selected cases, an argument has been made that downward departures are overused. Those advancing this argument suggest that judges are abusing their departure authority. This is not true.
As I believe the Commission understands, at the present time the percentage of downward departures that are attributable solely to the courts is unknown. We believe the percentage of downward departures made over the objection of the government is very low.

The Commission's data showed that about half of all downward departures are pursuant to substantial assistance motions filed by the government, pursuant to Section 5K1. We also believe that many non-substantial assistance downward departures also occur pursuant to some type of agreement with the government. These agreements arise in a variety of ways. They can be part of a plea agreement, including a binding plea agreement, that cites specific grounds for a downward departure, or a plea agreement that indicates the government will not object to a downward departure motion made by the defense.

Many non-substantial assistance downward departures are also based on motions made at sentencing. These include government motions
pursuant to early disposition or fast-track programs that we have heard about today; government motions that cite specific grounds for downward departures; and defense motions for downward departures. Separate and apart from formal motions, a number of non-substantial assistance downward departures arise at sentencing when the government attorney agrees with defense counsel, the probation officer, or the court that a departure is warranted or the government does not oppose a downward departure.

The committee believes that most non-substantial assistance downward departures are concentrated in a handful of courts, particularly in the border districts. These departures often occur in immigration and drug, primarily marijuana, cases and are either initiated, supported, or unopposed by the government.

If one seeks a dramatic reduction in the rate of downward departures, the simplest solutions would be restrictions on the use of substantial assistance departures under 5K1 or on the use of
so-called fast-track or early disposition programs. Obviously, however, there are substantial practical reasons for not interfering with current practices regarding these departures, which together make up a substantial majority of all departures and which were probably not the target of Section 401(m) of the PROTECT Act.

Assuming that the target of Section 401(m) is the minority of downward departures that are neither proposed nor agreed to by the Department of Justice, the complexity of this issue and the importance of departures under the Sentencing Guidelines make it imperative that any significant adjustment to that authority be based on a precise understanding of how the court's departure authority has been used. By studying when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission should be able to more precisely refine the guidelines. We're confident that the Commission will take these issues into consideration as it confronts this difficult task.
The committee is aware that the current data collection efforts have not always yielded the specific information that would be useful in analyzing departures. As you know, the committee is working closely with the Sentencing Commission to help improve the quality of information that the Commission receives from the courts.

We appreciate your support in our efforts to revise the statement of reasons to facilitate better documentation of sentencing departure actions taken by the courts. We also look forward to working with you at the upcoming National Sentencing Policy Institute and other judges conferences to alert judges to the importance of the statement of reasons and the Commission's heavy reliance on its accuracy.

We understand that the Federal Judicial Center will develop needed training to educate court staff, courtroom deputies, law clerks, and probation officers on the proper way to complete the statement of reasons.

The Guideline Manual reflects the
Commission's belief that courts will not depart very often. There may never be a consensus as to the proper quantification of this term. In a recent floor statement, one of the original drafters of the Sentencing Reform Act stated that a 20-percent departure rate was anticipated. There is every indication that the current rate, whatever that may be, is well below that rate.

Others argue that only a far lower percentage rate would meet the requirement of relatively few. In any event, only better recordkeeping and precise data collection will ensure that the extent of downward departures is clearly defined and the reasons for them are accurately explained.

Thank you for the opportunity to present the views of the Criminal Law Committee on the implementation of the PROTECT Act, and I'd be pleased to answer any questions you may have, or to try to answer them.

CHAIRMAN MURPHY: Commissioner O'Neill?

COMMISSIONER O'NEILL: Judge, thank you so
much for coming here, and I neglected to say it to
the other two panels as well, but I am sure we all
appreciate all of you coming and taking the time to
testify.

Judge, one question I had is one of the
difficulties that we have--and this has been
pointed out by Judge Castillo and others as we've
gone through and started crunching a lot of the
numbers. There are a number of individuals
districts where we're just having a difficult time
getting data. Is there any way that we can work
with you all or do you have any suggestions to us
as to how we might be able to sort of better ensure
compliance to make sure that we're getting the
numbers that we need ultimately not only to report
to Congress but also just for our internal purposes
of keeping our statistics?

JUDGE HAMILTON: My impression,
Commissioner O'Neill, is that under the PROTECT
Act, some of those reporting provisions that are
going to be put into place are likely to do that,
along with the improvements that are being made to
the statement of reasons.

I guess I should say "improvements" in quotation marks because I'm not sure all judges are going to appreciate the additional detail as an improvement. But I think for purposes of the committee and the Commission, it will be a big help. If there are problems in that, I'm sure we'd be happy to work with you.

COMMISSIONER CASTILLO: I also want to thank Judge Hamilton--I know, coming from my circuit, you are very busy in Indianapolis--for taking on the responsibilities on the Criminal Law Committee. And I really appreciate you pointing out to the general public a very important point, which is, really, it is unknown how many downward departures are being made by judges over the objection of government prosecutors in the courts, because right now the data is very uncertain. And with your help, improving the judgment and commitment order which you referred to, which we've worked on over the past few months, and with the PROTECT Act provisions, I think that will be
improved. I'm sure you would agree.

JUDGE HAMILTON: I do.

CHAIRMAN MURPHY: I wonder if--I know that the subcommittee headed by Judge Moore has sent on some letters from individual judges in response to our request for comment. And I wonder if the committee or members of the committee have heard much from the judiciary about the PROTECT Act. Is it mainly an anecdotal basis?

JUDGE HAMILTON: I can offer only anecdotes as the singular data, I guess, or vice versa. I will not try to speak for the committee as a whole on that, Judge Murphy. I think that goes beyond my brief. I think all of us recognize that the act is significant and the issues that the Commission faces are significant. And as I indicated, in terms of specific proposals that you all are considering, the committee as a whole and the Sentencing Subcommittee will try to respond as quickly as possible.

CHAIRMAN MURPHY: We'll appreciate your help.
Judge Sessions?

COMMISSIONER SESSIONS: I'd like to ask about the disclosure requirements of the PROTECT Act. Is there concern on your committee about disclosure of, let's say, pre-sentence reports, confidentiality agreements, cooperation agreements, those kinds of things? And, if so, is there anything that the committee is doing about it or the AO is doing about it?

JUDGE HAMILTON: Judge Sessions, there is I think consistently in the Criminal Law Committee a great deal of concern about issues of security and confidentiality of information that may affect matters of public safety, witness safety, and the like. I can't provide specifics with respect to the reporting mechanisms under the PROTECT Act at this time, but I know in a number of related contexts, including access to--electronic access, for example, to criminal case files, there are major concerns along those lines, and those are subjects that we and other committees in the Judicial Conference are continuing to work on.
But I think that with respect to, in particular, anything touching on 5K1 departures, we've taken action, for example, to make sure that portions of the statement of reasons remain confidential and not accessible, for example, within prisons, which has become a major concern for our committee in recent years.

CHAIRMAN MURPHY: Well, Judge Hamilton, thank you so much for coming. We really appreciate it.

We do have a daunting task because it's hard to gather all the data we need and to authenticate it. We have very limited time in which to respond, and we recognize very much how many lives and interests these issues touch. So we are going to do our best to respond in the best way we can to the PROTECT Act by October 27th, which is the 180th day, if we have calculated it correctly.

So thank you very much.

[Whereupon, at 4:57 p.m., the public hearing was adjourned.]