

SENTENCING DATA COLLECTION

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

A. SENTENCING DOCUMENTATION SUBMISSION

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

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

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

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

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

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

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

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

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

The completeness and accuracy of the Commission's sentencing data are directly dependent on the documentation it receives from the sentencing courts. The judicial districts generally are highly compliant with document submission requirements, and in fiscal year 2001 the Commission received court documents for approximately 60,000 cases sentenced under the Sentencing Reform Act between October 1, 2000, and September 30, 2001.⁶⁷

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

The overwhelming majority of judicial districts submitted Statements of Reasons to the Commission for well over 90 percent of their cases sentenced in fiscal year 2001.⁶⁸ There are a handful of judicial districts, however, for which the Commission routinely has not received Statements of Reasons. In fiscal year 2001, for example, the Commission did not receive Statements of Reasons for 70.7 percent of the cases sentenced in the Central District of California, 56.5 percent of the cases sentenced in the District of Utah, and 42.1 percent of the cases sentenced in the Eastern District of Virginia. Departure information for a substantial proportion of cases sentenced in those districts, therefore, is missing in the Commission's database, and as a result, the departure rates (for both substantial assistance and nonsubstantial assistance departures) reported in the Commission's Sourcebook of Federal Sentencing Statistics

⁶⁷ USSC 2001 Sourcebook of Federal Sentencing Statistics, tbl 1.

⁶⁸ *Id.*

for such judicial districts may be less reliable.⁶⁹

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

B. DEPARTURE INFORMATION CONTAINED IN STATEMENT OF REASONS

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

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

⁶⁹ *See id.* at tbl 26, fn. 1.

⁷⁰ *See id.* at tbl 24.

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

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

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

C. PROTECT ACT REMEDIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸¹ See USSG, *supra* note 7.