Statement of John R. Steer, Vice-Chair,
U.S. Sentencing Commission
before the Subcommittee on Criminal Justice Oversight,
U.S. Senate Judiciary Committee
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Mr. Chairman and Distinguished Members of the Committee:

I appreciate this opportunity to join my esteemed Chair of the U.S. Sentencing Commission, Judge Diana Murphy, in apprising the Subcommittee of the recent actions and plans of the Commission, and in sharing some observations about the operation of the sentencing guidelines within the federal criminal justice system. I would like, at the outset, to note for the record that the views I am about to express are my own and should not necessarily be attributed to my fellow Commissioners. While I have no doubt that the Commission as a whole will stand behind its data and excellent research staff, whose assistance in preparing this testimony I gratefully acknowledge, individual Commissioner conclusions from the data may well differ.

Mr. Chairman, I commend you and the members of the Subcommittee for having this oversight hearing. I believe this is only the third such hearing by the Senate Judiciary Committee since the initial set of guidelines were submitted for congressional review in April 1987. Yet, although formal oversight hearings of the Commission and the guideline system by this Committee have been infrequent, over the years we have benefitted from, and are deeply appreciative of, a close working relationship with you, Chairman Thurmond, and with other members of the Committee on both sides of the political aisle. The legislation that authorized the Sentencing Commission and the ensuing system of federal sentencing guidelines — the Sentencing Reform Act of 1984 ("SRA") — stems directly and primarily from the bipartisan, collaborative efforts of this Committee. That legislation was enacted under the leadership of Senator Thurmond during his tenure as Judiciary Committee Chair and enjoyed the strong co-sponsorship of Senator Kennedy, who had introduced the first sentencing reform bill some years before in 1975, Senator Hatch, Senator Biden, and others.

The initial set of sentencing guidelines was delivered to Congress on schedule in April 1987 and took effect on November 1, 1987. After a turbulent period of constitutional challenges, the U.S. Supreme Court upheld the legality of the guidelines and the Commission in January 1989 in *Mistretta v. United States*, 488 U.S. 361. The guidelines have been applied nationwide since that time; accordingly, by the end of this fiscal year, more than 500,000 defendants will have been sentenced under them.

Like my colleague, Judge Murphy, my experience as a member of the Sentencing Commission has been relatively brief, beginning with our appointments in November of last year. However, the views and perspectives on guideline operation that I share with you today are also grounded in my more extended, prior experience as the Commission's chief legal officer, dating almost to our agency's inception. Much has happened over that period of time, and it has been my privilege to have been a part of the guidelines' historical development and evolution. Today, I hold steadfast in my belief that the grand sentencing experiment Congress and the first Sentencing Commissioners crafted was and remains a fundamentally sound concept. It is a system that has helped to bring about appropriately tough and more uniform punishment, thereby contributing positively and substantially to the fight against crime.

Of course, as with any dramatic change, it has taken time for the various players in the federal criminal justice system to adjust to this new way of doing business, but on the whole, judges, probation officers, and attorneys have made a successful transition to guideline sentencing. This said, I believe the information that we are prepared to share with the Committee this afternoon shows that the guideline system demands continued, vigilant attention by the Commission, the Department of Justice, and the other institutional contributors within the federal criminal justice arena, in order for it to fully achieve the goals Congress intended.

I understand that the Committee is particularly interested today in reviewing the degree to which the guidelines are being followed, or expressed a bit differently, whether the frequency of "departures" from the guideline range should be of concern. This issue, of course, relates directly to the question of whether the guidelines are effectively achieving one of the basic statutory goals Congress envisioned — "avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct ...". 28 U.S.C. § 991(b)(1)(B). *See also* 28 U.S.C. § 994(f).[1] As Judge Murphy indicated in her testimony, the Commission is in the early stages of a major research endeavor that we hope will comprehensively assess the effectiveness of the guidelines in meeting each of the statutory objectives enumerated by Congress. The information that I present today might appropriately be viewed as a *preliminary* and *partial* response to some of the research questions that we hope to

[1] Granted, whether the guidelines are adequately addressing unwarranted disparity is a broader and more complicated matter than the more limited issue of departure frequency. However, I believe most would agree that an excessive or geographically very uneven rate of guideline departures is likely to be at odds with the overarching goal of alleviating unwarranted sentencing disparity.

examine more fully in this comprehensive assessment. Our data analysis and research efforts at the Commission are aided by a wealth of sentencing data sent to us by the courts on each case sentenced under the guidelines. This rich database of sentencing information is an invaluable resource, both for the Commission and the Congress, in considering proposed changes in sentencing policy, be they changes in the guidelines or in statutory criminal penalties.

In my forthcoming data presentation, I will be discussing information from a series of exhibits attached to my testimony. I will begin by briefly discussing two pie-chart "snapshots" that, taken together, show changes in the types of offenses sentenced under the guidelines between FY 1989, the first year of nationwide application, and FY 1999, the last year for which we have complete statistical data. As the data in Exhibit 1 show, the federal caseload sentenced under the guidelines has grown dramatically[2], and there has been a relative shift among offense types over the course of this eleven-year period. Over these years, the caseload has changed toward proportionally fewer drug cases and proportionally more immigration cases. This reflects, among other developments, the increased law enforcement efforts in the southwest border districts aimed at illegal reentry and alien smuggling offenses.

The next series of exhibits relate directly to a principal topic of today's hearing — whether the guidelines are being followed. I would like to introduce this empirical material by briefly reviewing the basic legal framework for application of the guidelines and the Commission's posture toward sentencing outside the prescribed guideline range. First, it is important to note that Congress expressly provided that courts *must* sentence within the applicable guideline range, with an important caveat. As stated in 18 U.S.C. § 3553(b), the important caveat is that a court may impose a reasonable sentence above or below the applicable range (commonly known as a departure) upon finding "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately considered in formulating the guidelines that should result in a sentence different from that described." The court must give specific reason(s) justifying any departure sentence. 18 U.S.C. § 3553(c). In formulating and amending the guidelines, the Commission has provided policy statement and commentary guidance regarding its basic approach to departures (*see* USSG Ch. 1, Pt. A4(b), Ch. 5, Pt. H, *Intro. Comment.*, §5K2.0), and also has given guidance regarding factors that may or may not be appropriate bases for departure in a particular case (*see*, *e.g.*, USSG §§5H1.1-5H1.12;

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[2] The guidelines apply to crimes committed on or after November 1, 1987. In FY 1989, more than half of federal district court sentencings were guideline cases. The total number of guideline and pre-guideline cases sentenced in that year was about 38,000.

5K2.1-5K2.18; §2F1.1, *comment. n.11* (the latter suggesting circumstances that may warrant departure in a fraud case)).

Over the years, the courts have added a vast and growing case law "gloss" to these basic statutory and guideline pronouncements on departures. The U.S. Supreme Court has directly addressed departure issues on two occasions, first in *Williams v. United States*, 503 U.S. 193(1992) and, more recently, in *Koon v. United States*, 518 U.S. 81(1996). In *Williams*, the Court established an important proposition that the courts are bound by Sentencing Commission policy statements forbidding departures on specific grounds, and the failure to follow such policy guidance may constitute an "incorrect application of the guidelines," reversible under the sentence appellate review statute, 18 U.S.C. § 3742.

The *Koon* case has come to be viewed as a landmark decision in guideline departure jurisprudence. In that case, the Court held that lower court departure decisions must be reviewed by the courts of appeals under a generally more deferential, "abuse of discretion" standard, out of respect for district court judges' "institutional advantage" in assessing whether a particular case is exceptional and, therefore, warrants a departure sentence. 518 U.S. at 90, 97. The Court went on to classify potential departure factors into four categories — forbidden, encouraged, discouraged, or unmentioned — according to how the factors are characterized and treated in the *Guidelines Manual*.

Under the *Koon* terminology, a factor may be "forbidden" as a basis for departure, in which case the court may not depart for that reason. A factor may be an "encouraged" basis for departure, in which case departure would be authorized unless the factor was adequately taken into account in the guideline calculus. A factor may be "discouraged" as a basis for departure, in which case the court may depart only if the factor was present in an exceptional form or degree, thereby making the case sufficiently atypical to warrant departure. Finally, a factor may be "unmentioned" in the guidelines, in which case the court, bearing in mind the Commission's expectation that departures on unmentioned grounds will be "highly infrequent," must consider the "structure and theory" of the guidelines to decide whether the factor was sufficient to take the case "out of the Guideline's heartland" and warrant departure. *Id*., at 95, 96.

As these legal sources show, departures are an integral part of sentencing under the guideline system. A sentence outside the guideline range may be the legally appropriate sentence in situations where the guidelines do not adequately account for one or more important aggravating or mitigating factors that justify a different sentence. Clearly, then, as we examine today the question of whether courts and prosecutors are

adequately following the guidelines, we should begin by acknowledging that "departure" is not inherently a "dirty word." Nor should there be any hostility to departures *per se*. Like so many policy issues, the question is one of degree.

In its development of the Sentencing Reform Act, Congress did not express concrete expectations about an appropriate rate of departures. However, the Senate Judiciary Committee Report did state that "the bill seeks to assure that *most* cases will result in sentences within the guideline range and that sentences outside the guidelines will be imposed *only in appropriate cases*" (emphasis added). S.Rep. No. 225, 98th Cong., 1st Sess. 52 (1983).[3]

In constructing the initial set of guidelines, the first Commissioners also did not quantify specifically an expected rate of departures. That Commission did say, however, that it expected judges would not depart "very often," despite their "legal freedom" to do so under the statute and the guidelines. USSG Ch. 1, Pt. A(4)(b). That expectation was based on several considerations, including (1) the fact that the Commission had made each guideline range as broad as the statute allowed, (2) the Commission's attempt to build into the guidelines those factors that pre-guideline sentencing data indicated had made a significant difference in sentencing, and (3) the intention that the guidelines would be amended in the future to add other factors that actual sentencing practice suggested were important. *Id*. With respect to this third consideration, the Commission in fact has added a number of factors to various guidelines over the years, often at the suggestion or direction of Congress, thereby accomplishing greater proportionality and individualization of guideline punishment levels. Granted, however, most of these additions have involved aggravating factors that added to sentence severity in applicable cases. Thus, the net effect of these amendments may have been to actually increase downward departures.

Departure Trends Over Time

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

Turning now to the departure data that our research staff has assembled, the pie-chart in Exhibit 2 summarizes the distribution of sentences imposed in FY 1999, with reference to the applicable guideline ranges. As the exhibit indicates, in FY 1999, judges sentenced slightly less than 2/3 (64.9%) of defendants within the guideline range found by the court. Slightly less than 1/5 (18.7%) received a below-guideline sentence based upon the Government's motion certifying the defendant's substantial assistance in the investigation or prosecution of other criminals, 15.8% received a downward departure for other mitigating reasons recognized by the court, and .6% received a sentence above the guideline range based upon an aggravating factor found by the court.

Exhibit 3 shows how these departure rates have changed over a 12-year period, from FY 1988, the earliest year for which we have data, to FY 1999. The green bars show an almost steady decline in the rate of within-guideline sentencing. The red striped bars show that the rate of substantial assistance downward departures grew rapidly in the early years, but has been relatively flat since 1994, falling back a bit last year. As indicated by the solid red bars, there has been a virtually steady increase across this 12-year time period in the rate of other downward departures granted by courts, whereas the rate of upward departures has progressively decreased to the current .6% rate.

Debate continues about the effects of the U.S. Supreme Court's 1996 *Koon* decision on the rate of downward departures by the district courts. For example, the Commission recently participated in a Sentencing Institute in Phoenix at which departures and the impact of *Koon* were among the topics discussed. A judicial panelist there noted that the rate of downward departures has gone up less than 4% in three years, from 12% in FY 1997 (the first full year after *Koon*), to less than 16% in FY 1999. Granted, this is one way of looking at the data, while another might be to note that the aggregate 4% change also represents a proportional increase of about 33%. Still another way of examining the correlation of *Koon* with other downward departure rates is shown in Exhibit 4. This graph does not answer definitively the question of *Koon*'s impact, but the data clearly show a distinct and sharp change in departure rates after *Koon*. Before that momentous case, downward departures already were increasing at a growth rate of 3 per month; in contrast, after *Koon* the average rate of increase was 9.5 per month. This figure also shows that the growth rate in downward departures post-*Koon* has exceeded the growth rate in the total number of cases sentenced.

Looking at the growth in downward departure rates among offense types, Exhibit 5 shows that the greatest changes since 1992 have occurred in immigration and drug trafficking offenses. As was pointed out in Exhibit 1, these two categories have the greatest number of cases sentenced under the guidelines; thus, the relative contribution of these two offense categories to the total number of downward departures is very

substantial.

Our next three exhibits focus more precisely on changes over time in downward departures rates for three major types of offenses sentenced under their respective sentencing guidelines — drug trafficking, alien smuggling, and alien unlawful entry. In each of these exhibits, we have excluded the substantial assistance downward departure cases (under §5K1.1 of the guidelines) in order to simplify the presentation. In Exhibit 6, the blue line shows that the number of defendants sentenced under the drug trafficking guideline grew by about 40%, from 10,811 in FY 1992 to 14,605 in FY 1999. At the same time, the rate of within-guideline sentencings dropped from 90% at the beginning of this period to 77% at the end, while the rate of other downward departures grew from 9.1% to 22.4% over the same time frame.

Exhibit 7 presents similar data for alien smuggling and harboring offenses: (1) the aggregate number of cases sentenced almost tripled, from 580 to 1,499; (2) the percent of within-guideline sentencings dropped from 89% to 62%; and (3) the downward departure rate accelerated from 2% to 37%. In examining these trends, it is important to know that, effective May 1, 1997, the Commission dramatically increased the guideline penalties for these offenses in response to specific directives from Congress in the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. 104–208, 110 Stat. 3009-569. The ensuing, dramatic increase in downward departure rates in FY 1998 and FY 1999 correlates with the expected phase-in of these heightened penalty levels, suggesting (but not proving) that judges and prosecutors thought the upward revisions too severe in a substantial number of cases.

The third graph in this series, Exhibit 8, depicts a somewhat complicated story of guideline sentencing patterns for alien unlawful entry cases. First, the number of such cases grew phenomenally across the eight-year period, from 652 in FY 1992 to 5,249 in FY 1999. This, of course, correlates with the increased law enforcement emphasis, particularly along the southwestern border, with respect to these offenses. The combined solid green plus green-checkered bars illustrate a decline over the same time period in within-guideline rates from 92% to 64%, while the red bars show a concomitant growth in downward departure rates from 5.4% to 35.8%. With the checkered portion of the green bars, we attempt to illustrate the effects of a prosecutorial initiative labeled in the graph as a "Statutory Trump." This label corresponds to a case disposition procedure popularly known in the districts where it has been employed (primarily the Southern District of California but also several others) as a "Fast Track" procedure. Under this *quid pro quo* procedure, defendants arrested for illegal re-entry agree to waive their rights to indictment, trial, appeal of sentence, and post-conviction appeal, and agree to not contest their deportation. In return, the Government agrees to charge the

offense in a novel way so that the aggregate statutory maximum penalty caps the guideline sentence at 30 months (24 months under an earlier formulation). Without this "statutory trump," the applicable guideline sentence would be substantially higher (typically within a range of 57-71 months for aliens re-entering after conviction and deportation for an aggravated felony). This procedure represents one of multiple accommodations, initiated by prosecutors and largely concurred-in by courts, in the southwest border districts, a matter about which I will subsequently elaborate.

Geographic Variations in Departure Rates

Just as departure rates have changed over time, so also do they vary considerably among sentencing jurisdictions. Exhibit 9 presents within-guideline and departure sentencing rates for each judicial circuit for FY 1999. Three circuits, the Second, Third, and Ninth, have within-guideline rates of less than 60%, and jurisdictions within the Ninth Circuit as a whole sentence only slightly more than half of their cases within the guideline range. The Third, Sixth, and Eighth Circuits have the highest rates of substantial assistance downward departures, while the Ninth, Second, and Tenth have the highest rates of other downward departures.

Attached to my testimony (but not presented in our enlarged graphs today) are two tables, Exhibits 10 and 11, showing the individual districts with the highest and lowest rates of departures. While there obviously is considerable variation among districts at the extremes, the within-guideline and departure rates for most districts tend to cluster fairly closely around the national averages. *See* U.S. Sentencing Commission, *1999 Sourcebook of Federal Sentencing Statistics*, Table 26, at 53.

Looking further at the southwest border situation, one can see from Exhibit 12 that each of the states along the Mexican border has experienced phenomenal increases in its sentenced caseloads within the last eight years, and most of this growth has occurred with regard to immigration offenses. Several other states in the west and midwest have experienced very high increases in volume of either immigration offenses, drug trafficking (particularly methamphetamine) offenses, or both. Exhibit 13 charts the changes over time in within-guideline and departure rates for each of the five southwest border districts in comparison to the national averages. The two Texas border districts are at least superficially similar to the national trends, although there are some indications that accommodations in guideline application are occurring in those districts in response to huge caseload volume. The other three border districts show substantially higher downward departure rates than the national averages.

While participating in the Sentencing Institute in Phoenix about two weeks ago,

we Commissioners had an opportunity to visit with the Arizona federal district court judges and learn about their difficult problems in coping with a greatly increased volume of immigration-related offenders. We heard, for example, that each of the district court judges in Tucson is faced with over 1000 criminal cases per year. We also had occasion to interact during the Institute with several judges from other border districts, as well as with a number of prosecutors, defense attorneys, and probation officers from these districts. During these various conversations, we received considerable feedback that the sentencing guideline for unlawful entry cases needs to be adjusted to provide penalties more proportionate to the seriousness of these cases.

Clearly, the southwest border districts face exigencies that help explain the very high guideline downward departure rates and other accommodations – typically initiated by the several U.S. Attorneys and concurred in by the judges – that are occurring in those areas. One can have concern about the manner of guideline application and sentencing practice in some of these areas while also understanding the need for increased judicial and other system resources in order to handle the greatly increased caseloads.

Observations and Suggested Improvements

The data heretofore presented suggest a number of factors that are contributing to the increase in downward departure rates, and my experience at the Commission suggests several others. I would like to briefly discuss some of these factors for the Committee. My focus herein is on the so-called "other downward departures," *i.e.*, those granted for reasons other than a defendant's substantial assistance.

1. *Koon and its Progeny*. The impact of the U.S. Supreme Court's *Koon* decision on departure determinations and their appellate review has been momentous, in my opinion. *Koon* has had the effect, as the Supreme Court no doubt intended, of loosening appellate scrutiny of front-line, district court departure decisions. The resultant, more flexible appellate scrutiny probably has encouraged more district court departure decisions and made it marginally more difficult for the Department of Justice to successfully appeal downward departure decisions that prosecutors may believe unwarranted.

Despite *Koon's* probable impact on departure trends, neither the empirical departure data nor the subsequent appellate decisions suggest, in my judgment, that the *Koon* decision is substantially problematic in meeting Sentencing Reform Act goals. At the same time that *Koon* has decreased the role of the appellate courts in policing district court downward departure decisions, it has shifted greater responsibility in this

area to the Department of Justice and, especially, the Sentencing Commission. Advised by the Department of Justice, the Commission must monitor and act where necessary to counter excessive or otherwise unwarranted departure actions. Consequently, the policy effects of *Koon*, at least at this point in time, point mainly to the need for greater vigilance by the Department of Justice and the Commission.

2. *Prosecutorial Charging and Plea Bargaining Initiatives*. While *Koon* probably has been an important contributor to the recent growth in downward departure rates, the overall biggest set of influences, in my judgment, has been an array of prosecutorial charging and plea bargaining initiatives. For the most part, these widely varying practices have sprung from different U.S. Attorneys and line prosecutors acting with little or no guidance, centralized tracking, or oversight management by the Department of Justice. To help illustrate the importance of these prosecutorial practices, I have one final exhibit that I would like to share with the Committee. Exhibit 14 portrays changes over time in the most frequently cited reasons for non-substantial assistance downward departures, as gleaned from district court sentencing orders. Judges often give more than one reason for their departure decisions, but the data summarized in this graph indicate that the two largest categories of reasons are agreements to deportation involving unlawful aliens (including various "Fast Track" plea arrangements) and plea agreements generally, both of which stem from prosecutorial initiatives or acquiescence. Whether motivated by caseload volume or other factors, the actions of prosecutors have greatly influenced the growth in downward departure rates.

The Sentencing Reform Act's legislative history suggests that this Committee, at least to some extent, considered the potential for plea practices to undermine or hinder guideline goals. The legislation directed the Commission to write policy statements to guide courts in evaluating and accepting plea agreements, which the Commission has done. *See* USSG Ch. 6, Pt. B. The Committee Report indicates an expectation that, guided by these policy statements, courts would use their authority to review and reject, if necessary, plea agreements that result in "undue leniency or unwarranted sentencing disparities." S.Rep. No. 225, *supra*, at 167. In practice, however, courts rarely have exercised their authority to reject plea agreements and plea recommendations, no doubt for a variety of reasons. Judges rely on attorneys in today's more adversarial system of sentencing practice to generally achieve mutually acceptable results through the plea process; they often face substantial case processing pressures; they themselves may prefer a more lenient result; and they are inherently disadvantaged in calling witnesses and finding facts that might support a greater sentence when the prosecutor already has agreed to a lower sentence, perhaps including a sentence below what the guidelines prescribe. For these and other reasons, the plea agreement review process does not appear to be functioning as well as may have been hoped.

3. *Government Appellate Review Practices*. Another factor possibly contributing to downward departure increases over time may be the lack of vigorous appeal practices by prosecutors in the field and at the Department of Justice. Under the statute governing appellate review of sentences, the Government may appeal a sentence adverse to its interests only upon the approval of the Attorney General, the Solicitor General, or a designated deputy solicitor general. 18 U.S.C. § 3742(b). Consistent with this policy, the Department of Justice has established procedures which line prosecutors and their supervisors must follow in securing the requisite, highest-level approval for Government appeal initiatives. Of course, under these policies, the initial decision to pursue an appeal begins with the line prosecutor. The Commission has no data on how often Assistant United States Attorneys seek, or decline to seek, the Department's approval to appeal sentences, including downward departures. However, as part of our monitoring of the appellate review processes, we do collect data on the frequency with which the Government actually exercises its legal right to appeal. These data show that since 1993, the Government has tended to appeal downward departures less and less often, despite its relative success rate (generally 50% or higher). Specifically, of the total number of cases involving sentencing issues resolved by federal courts of appeals in FY 1999 (4068), the Government had appealed a downward departure in only about 20 such cases, down from a high of over 40 such appeals out of 4,327 appellate decisions in FY 1995.

Understandably, the Government wants to pick its fights carefully, and as indicated *supra*, *Koon* probably has had the effect of making those fights somewhat more difficult. Nevertheless, the low, and generally declining, frequency with which downward departure appeals are being pursued raises questions about whether the Department of Justice and prosecutors generally are as diligent as perhaps they should be in carrying out their appellate review responsibilities under the SRA.

4. *Sentencing Commission Training and Guideline Amendment Initiatives*. Under the SRA, Congress gave the Sentencing Commission important responsibilities to train judges, probation officers, and attorneys in how to apply the guidelines. Over the years, the Commission has endeavored to diligently carry out this responsibility. One judicial panelist at the recent Phoenix Sentencing Institute observed that, in the early 1990s when Commission training staff introduced him as a newly appointed judge to guideline sentencing practices, staff emphasized guideline application but said virtually nothing about how to depart. The judge was no doubt accurate in his observations of Commission training program content in the early 1990s, but much has changed since that time. At least since the mid-1990s, Commission staff have presented information — in a neutral, non-advocacy fashion — about departure authority, procedures, and jurisprudence, in addition to the correct mechanics of guideline application. Over the

years, individual Commissioners also have given greater emphasis to the subject of departures in their various remarks to judges and other audiences. These various training initiatives no doubt have had an effect, in the overall scheme of things, on departure practices.

The Commission's policymaking function of amending the guidelines in response to departure decisions of the courts also has evolved over the years. Relatively early in the history of guideline application, the Commission responded aggressively to several appellate court departure decisions that Commissioners believed would undermine the goal of reducing unwarranted disparity.[4] Some commentators criticized these actions as premature and/or unwarranted. Subsequently, after the appointment of successor Commissioners in the mid-1990s and the *Koon* Supreme Court decision, the Commission affirmatively embraced that decision as the law of the land[5] and took several other amendment actions that encouraged departures.[6]

The point is that the Sentencing Commission, in a number of ways, has been a contributing player in the mix of factors that may have affected departure rates. How one views these various changes in Commission action and attitude depends, of course, on where one sits. While still relatively new in our respective terms, the current Commission has already faced several discrete departure issues in our first guideline amendment cycle. For example, we proposed a compromise on departures based on a defendant's *aberrant behavior* that should curtail downward departures in several circuits but may increase them slightly in others; we foreclosed courts' ability to depart in their initial choice of the applicable guideline before determining the applicable guideline range; and we encouraged upward departures in a number of case circumstances. I expect that this group of Commissioners will continue to wrestle with a wide variety of departure issues as they are brought to our attention by others and by our own ongoing monitoring of the case law and data.

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[4] *See, e.g.*, USSG Appendix C, Amend. 386 (stating that a defendant's youth, in and of itself, was not ordinarily relevant as a basis for downward departure; also that a defendant's physical appearance or physique was not ordinarily relevant as a basis for downward departure); and 466 (forbidding downward departure based on a defendant's lack of guidance as a youth and similar circumstances).

[5] *See*, *e.g.*, USSG Appendix C, Amend. 585 (citing *Koon* with approval).

[6] *See*, *e.g.*, USSG Appendix C, Amend. 583 (broadening the grounds for downward departure based on diminished capacity), and 562 (inviting downward departure in certain alien unlawful entry cases).

No doubt there are other factors affecting downward departure growth rates that could be postulated. For example, the advent of the "safety valve" for low level drug defendants, various Commission amendments that have increased guideline penalties (*e.g.*, in the alien smuggling offenses — *see infra*), and a variety of other causes may have played a role. I have mentioned four factors that the data and my own experiences suggest may have been contributors, to a greater or lesser degree, along the way.

The question then arises: What should be made of all of this? No doubt some would react to the data and other information I have presented by fully applauding the trends, both with respect to the increase in downward departures generally and the various geographic variations. Others may survey the same scene, particularly the regional variations, and see a guideline system that already is broken beyond repair. Still others might react to the data by seeing some reason for concern, particularly if the trends continue unabated, while also seeing a guideline sentencing scheme that remains fundamentally sound. While our current Commissioners have not had an opportunity as a group to carefully evaluate and discuss these data, I believe most would associate themselves with this latter view.

The Sentencing Commission clearly has a continuing responsibility under the SRA to carefully monitor court sentencing practices and to take appropriate actions, through the guideline amendment process or through other avenues, when these practices substantially vary from SRA goals. The Department of Justice and U.S. Attorneys, in my view, need to pay closer attention to these same goals when carrying out prosecutorial functions and institute concerted actions to ensure their attainment. Both the Commission and the Department need to cooperatively share sentencing data, discuss the implications, and act to ensure that the guideline sentencing system is as just and effective as possible.

Mr. Chairman and Members of the Committee, recognizing that periodic oversight by an interested Congress is also a very important part of this process, I wish to thank you again for holding this hearing and inviting us to participate in it. I will be glad to join with Judge Murphy in answering any questions you may have.