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OVERSIGHT OF THE UNITED STATES SENTENCING COMMISSION: ARE THE GUIDELINES BEING FOLLOWED?

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

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OVERSIGHT OF THE UNITED STATES SENTENCING COMMISSION: ARE THE GUIDELINES BEING FOLLOWED?

FRIDAY, OCTOBER 13, 2000

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:12 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the subcommittee) presiding.

Also present: Senator Sessions.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. The subcommittee will come to order.

I am pleased today to hold this oversight hearing on the Sentencing Commission. When I chaired this committee in the 1980's, one of our most important objectives in the crime area was to reform sentencing. At the time, there was no consistency in the length of time Federal criminals received or how long they actually served in prison.

Through the Sentencing Reform Act of 1984, we created the Guidelines System, which established ranges within which the offender could be sentenced based on his conduct and characteristics. The fundamental purpose was to provide similar punishment for similarly situated defendants. Contrary to many people's expectations at the time, the Guidelines have succeeded for over a decade in making sentencing fairer and more equitable for criminals and victims alike.

Today, the purpose of the Guidelines is being threatened by the increasing trend of sentencing criminals below the range established in the Guidelines. Sentences lower than the Guidelines provide, called downward departures, should be rare because they are permitted only for factors not adequately considered by the Commission.

Although we would expect these cases to be more rare as the Commission has reformed the Guidelines, just the opposite is occurring. Just in the past 8 years, the number of downward departures has increased steadily from 20 percent to about 35 percent of cases, which is more than 1 out of 3. If the trend continues much longer, we will see more criminals being sentenced below the Guidelines than within them.

Downward departures are rising most severely in illegal immigration cases. However, the trend is much broader. These departures are rising annually for drug trafficking and even firearms violations.

The Clinton Justice Department apparently has shown little concern about this trend toward reduced and more inconsistent punishment.

It would seem that as judges grant departures for more and more creative reasons, the number of appeals should increase. In fact, the number of Guidelines cases the Government appeals have actually declined since 1993. Of the over 8,000 downward departures last year, the Government appealed only 19. Of course, if the Government does not appeal a judge's wayward sentence in a criminal's favor, it will never be corrected, no matter how egregious.

Also, there is a great disparity in how U.S. attorneys apply the Guidelines. Prosecutors can ask the court to reduce a sentence based on a defendant's substantial assistance in their efforts to solve crimes. However, U.S. attorneys vary drastically in how often they seek departures for substantial assistance, and apparently even in how they define what constitutes cooperation with the Government. The Department of Justice should be concerned about great disparities because this also undermines the consistency the Guidelines were intended to create.

The Sentencing Commission and the Department of Justice must address these problems. They cannot be ignored. Criminals are getting a break as fairness in sentencing is becoming more elusive every year. The Commission has worked hard since it was reconstituted late last year to effectively address directives from the Congress and other issues. It needs to consider important matters in the coming year.

I look forward to the testimony as we review the status of the Commission and whether the Guidelines are being adequately followed.

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. I appreciate very much the opportunity to be with you. This will be a most interesting discussion for me. I was a Federal prosecutor when you led the effort to pass the Sentencing Guidelines. There is no doubt in my mind that the Sentencing Guidelines were the most historic change in law enforcement ever rendered in this century, the last century, or whatever century we are in.

The fact was that in the late 1970's and into the 1980's, we had a lot of judges who just didn't believe in sentencing. But they were appointed with lifetime appointments. You could try a case and prove a person guilty of the most serious crime and go into the sentencing phase and a judge would simply give them probation or a light sentence, and there was nothing that could be done about that. There was no way to appeal. There was no consistency.

I remember as an assistant U.S. attorney and as a U.S. attorney having criminal defense lawyers going before one judge and citing that a similar defendant down the hall they had represented 6

months before got probation, whereas this judge may have been considering 10 or 15 years in jail. It was a system out of control and without consistency. It raised suspicions that some people were being sentenced heavier than others because of their background, their lack of wealth, their lack of articulateness, attractiveness, or whatever came about. And it was a very frustrating time.

This Senate acted with historic—it was a historic act when you created these Guidelines. I don't think a single State had anything like it. If they did, it was only very few that had such a procedure to sentence. Since then, a number of States have followed similar guideline practices.

I believe the conduct of the Sentencing Guidelines is a matter of integrity and discipline on the part of the Department of Justice and the judiciary and that if it is not worked at on a daily basis with determination and consistency, the integrity of the Guidelines can be undermined and we could be in a worst position than we were before we started. So I salute you.

I also want to commend the Sentencing Commission for accomplishing a substantial amount of work in the short time the commissioners have been appointed last year. The amendments to the Guidelines and the resolution of the circuit conflicts have shown that the new complement of commissioners is serious about their business. They are fulfilling their duty.

I am also impressed by the Commission's fulfillment of another part of its duty, public integrity. It would be very easy for the Commission to avoid publishing data concerning whether the Guidelines are being adhered to. It would be politically expedient to shy away from criticism of the Department of Justice or what might be considered criticism of judges who may be too lenient in seeking and approving an excess amount of downward departures.

A downward departure is a circumstance in which the Guidelines call for, let's say, a minimum sentence of 5 years and a judge gives 3 years or 2 years. They depart downward from the approved Sentencing Commission standard. Of course, the prosecutor, if they didn't recommend it themselves, could appeal that, though as Senator Thurmond noted, there have been only 19 appeals out of some 8,000 cases. So we were not having many appeals here.

As long as the critical data that we are having and finding is being produced by the Commission is constructive—and I believe the data we have been reviewing is constructive—I think it is the duty of the Commission to produce that data. While it may make some uncomfortable, being a sentencing commissioner is a big job. It requires a strong leader to fulfill the duty of that office, for only if that duty is fulfilled with integrity will we have an effective criminal justice system that delivers equal justice under law.

So I commend the Commission for dealing with these issues and publishing this data that raises, I think, some serious questions about the Department of Justice's sentencing policy and to some degree the attitudes of certain Federal judges. I look forward to working with the Commission and the Department of Justice to ensure that the growth of downward departures is curbed because, like you, Senator Thurmond, I don't want to get to the point where half the cases are being sentenced below the Sentencing Guidelines.

So at bottom we are talking about a question of integrity and discipline and attention to detail that is required of every assistant U.S. attorney, every U.S. attorney, the Attorney General of the United States and his or her staff, as well as the judiciary who handle these cases, and probation officers who can help judges.

I have been in these situations, and I know Federal judges who would not approve an improper plea. I know judges who look the other way; I have heard of judges who look the other way in the face of improper pleas. I opposed a judge for the ninth circuit in the *John Huang* case who I believed did not follow the Sentencing Guidelines. He did not have any enhancement for a position of trust. He didn't have an enhancement for international activities.

And I don't think that is good, even though it may have made some people happy that John Huang got probation. I don't think he should have gotten probation and I didn't think under the Guidelines he was entitled to probation. So it is a dangerous thing if judges and prosecutors get in cahoots and just sort of look the other way and ignore facts and don't proceed in a proper way.

Mr. Chairman, again, let me express on behalf of the thousands of Federal prosecutors throughout this country my great appreciation for your historic leadership in creating the Sentencing Guidelines system that has worked exceedingly well. If it is time for us to improve it and to fix it in some way, I am open to that, but I believe in it and I think it was indeed a historical act that you helped make a reality.

Thank you very much.

Senator THURMOND. Thank you very much.

Our first witness is the Chair of the Sentencing Commission, Judge Diana Murphy. Judge Murphy is also a judge on the U.S. Court of Appeals for the Eighth Circuit and has served on the Federal bench since 1980.

Our second witness is Mr. John Steer, vice chair of the Sentencing Commission. Mr. Steer has had extensive experience with the Guidelines from their inception. He served as general counsel of the Commission from 1987 until he was confirmed as vice chair of the Commission last year.

I also welcome other commissioners who are present.

I ask that each of you please limit your opening statements to 5 minutes, and we will place your written statements in the record, without objection. We will start with Judge Murphy.

Judge Murphy.

PANEL CONSISTING OF HON. DIANA E. MURPHY, CHAIR, U.S. SENTENCING COMMISSION, WASHINGTON, DC; AND JOHN R. STEER, VICE CHAIR, U.S. SENTENCING COMMISSION, WASHINGTON, DC

STATEMENT OF HON. DIANA E. MURPHY

Judge MURPHY. Thank you, Mr. Chairman. I am happy to be here to tell the story of this hard-working Commission that the President and the U.S. Senate put into being in the middle of last November. I have been asked to talk about what we have been up to since we were appointed, and Vice Chair Steer has been asked to comment on some of the data on downward departures.

We also have other members of our Commission here. We happen to be having an economic crimes symposium at George Mason University Law School today, so we are all in town. And I would like to call attention to Vice Chair Reuben Castillo, Vice Chair William Sessions, and Commissioner Joe Kendall. We have got some of our ex officio members here. One of them is going to be on the second panel, I understand, Laird Kirkpatrick, from the Department of Justice, and then Michael Gaines from the U.S. Parole Commission. And the remaining commissioners, Sterling Johnson and Michael O'Neill, are presiding at the economic crimes symposium across the river this morning.

There is a lot to say about what we have done and it is in the written statement that will be in the record, so I will try to use the time in the best way.

Both Chairman Thurmond and Senator Sessions have referred to the fact that one of the responsibilities of the Sentencing Commission is to keep data on all of the sentences that are given. And that is a very important function that we have, and we furnish information about that data when we are asked to.

And you have expressed some interest recently in data relating to downward departures and the Commission itself has not yet had an opportunity to study that data and to discuss it. So my colleague, Mr. Steer, is going to be talking about some of his thinking on first look at this data today, but it is his own view and the whole of us haven't had a chance to talk about it with each other yet.

We really have two main goals. One is to maintain and strengthen the Federal Guidelines System. Obviously, we all believe in it or we wouldn't have come in to work at the Commission. We also want to strengthen our working relationship with the Congress and with the other groups that are important to the sentencing system.

When we came into office in the middle of November, there really had been a vacuum of time in which there wasn't a Commission and we had an awful lot of work waiting for us—all the legislative directives that had been built up and new statutes without sentencing guidelines.

We met in Washington immediately only 2 days after our appointments, and since that time we have met once, or many times twice a month in Washington to work. And we also have met with the Criminal Law Committee. We have participated in the National Sentencing Institute. We have participated in national training for probationers and practitioners in correct guideline application. We have gone out and spoken with judges and other groups.

I can say that this is a group of very hard-working people that listen to each other and that listen to all of the people that are trying to talk to us about the Guidelines and about proposed options that we have under study.

We have some charts here that show the various things that we did in this cycle—No Electronic Theft Act, telemarketing fraud, identity theft, wireless telephone cloning, sexual predators, methamphetamine, firearms.

Senator SESSIONS. In other words, those are new laws which were passed by Congress for which no guidelines had been approved by the Commission?

Judge MURPHY. In many cases, or in some cases there was a concern in Congress that the Guidelines weren't strong enough or there was some need to reexamine them, and so we worked in all of these areas.

And just to take the No Electronic Theft Act, of course, you all are very familiar with it, but there were great complexities there because the copyright industry and the trademark industry had very different ideas about it. At any rate, I won't go into the detail of it, but we did accomplish what seems to have worked out pretty well.

We also did a number of circuit conflicts, and those take a lot of time. And I would say that is where we have gotten the most feedback at this point on it, and maybe that is not surprising. We have learned that we need to set up new means of communication. The judges have complained that they don't really know what we are studying. And we said, well, we publish in the Federal Register to the whole world. Well, that wasn't accessible enough for them.

So we have investigated a way to let judges know more about what we are up to, so that if they want to express their views, they can, by publishing all of our notices on the J–NET. And we also have in our written testimony the very many things that we have underway for our coming cycle ready for promulgating amendments for May 1. And it covers a lot of areas, but this whole economic crimes, money laundering, counterfeiting area works somewhat together and that is why we are having the symposium to help us study appropriate measures to deter crime and to sentence appropriately.

We are hoping that as you reach the conclusion of this very busy year that we are going to get our full budget request because we get a lot of requests from Congress and from other people for data, as exemplified by what your interest is today. And we see the new laws that Congress is coming up with and some of them have emergency amendment authority with a 60-day time line for us to respond. We are down in our staff by 20 percent. We really need to get the staff back up and we hope we will receive our full budget request.

Just finally I would say that I will, of course, be happy to answer any questions. Something new is coming up all the time. It is not just from the Hill, but the Supreme Court creates new work. With the *Apprendi* decision in June, that is going to be more work for Congress; it is going to be more work for the Sentencing Commission, and we appreciate your support.

Again, Mr. Chairman, I want to thank you for coming to our investiture in January and speaking at it. It was very important to us. Thank you for your support.

[The prepared statement of Judge Murphy follows:]

PREPARED STATEMENT OF DIANA E. MURPHY

Mr. Chairman, members of the Subcommittee, I am Diana Murphy, Chair of the United States Sentencing Commission (the "Commission") and a judge on the United States Court of Appeals for the Eighth Circuit. I appreciate the opportunity to testify today about the ongoing work of the Commission, and we thank you for your continued support of the agency.

As you know, on November 15, 1999, a full complement of seven voting commissioners was appointed to the Commission, and I am proud to serve as Chair of this important agency. Our appointment ended an extended and unprecedented hiatus

of more than a year during which the Commission was without any voting commissioners. We take our new responsibilities so seriously that we convened the day after our appointment in Washington, D.C. for two days of meetings and adopted a very ambitious policy agenda for the abbreviated guideline amendment cycle that ended May 1, 2000. I am particularly proud of how quickly and thoughtfully the new Commission has acted in less than a year to address many of the policy issues we found on our plate upon our appointment.

As a group, we bring extensive and varied experience to our new jobs. Among the seven voting and two non-voting members of the Commission, five are federal judges, three have prosecutorial experience, two have criminal defense experience, two formerly were police officers, and several have had prior experience working as congressional staff. We all have two goals in common: (1) to strengthen the Commission's good working relationship with Congress and others in the federal criminal justice community, and (2) to maintain and improve the federal sentencing guideline system.

In order to achieve those goals, the new Commission has made it a priority to reach out to all who have an interest in the federal criminal justice system and to listen to their views about the sentencing guidelines and related issues and to engage in an open dialogue. This oversight hearing is one opportunity for us to conduct that dialogue, and it is in fact the second congressional hearing at which we have been invited to testify. We have also met with a number of members of Congress throughout the past year, as well as key staff. In turn we have instructed members of our staff to keep Congress fully informed of our work.

The new Commission has also met regularly with the Criminal Law Committee of the Judicial Conference, the Probation Officers' Advisory Group, the Practitioners' Advisory Group, and the Federal Public Defenders to gain their insights on the matters before us. We have worked closely with the Department of Justice through its ex officio member, and have obtained informal feedback when appropriate from representatives of concerned industry groups and relevant federal agencies. Throughout the amendment process, we held regular public meetings, published in the Federal Register for comment all of our proposed amendments, and conducted a public hearing in March so that concerned constituents could testify about proposed amendments.

In order to obtain input in a more informal way, Commissioners have attended and spoken at numerous seminars on sentencing issues around the country so that we can hear what users of the guidelines have to say about them. Just last week, all seven commissioners attended the National Sentencing Policy Institute in Phoenix, Arizona, where we were able to interact with many of the federal judges who use the guidelines every day. Because of this interest in our work, we are about to begin posting all of our official notices on the J–NET so that those judges who have an interest will be better informed about our ongoing work. We are committed to taking a very inclusive approach to our decision making process.

With that brief introduction, I would like to focus my testimony today on three areas. First, I would like to report on the work we accomplished during the last guideline amendment cycle that ended May 1, 2000. Second, I would like to provide an overview of the policy development work we are planning for the current guideline amendment cycle, including the beginning of an extensive new research endeavor. Finally, I would like to address the Commission's critical budget situation and its need for the full $10.6 million that it requested for fiscal year 2001.

NEWLY APPOINTED COMMISSIONERS ADDRESS CRITICAL BACKLOG OF LEGISLATION

With no voting commissioners for 13 months, from October 1998 through mid November 1999, the Commission could not fulfill its most important ongoing statutory responsibility under the Sentencing Reform Act—to update and promulgate amendments to the sentencing guidelines for federal criminal offenders. Even before the earlier Commission went out of business, it found it difficult to promulgate amendments in 1997 and 1998 because it operated with only four voting members for much of that time, requiring a unanimous vote. See 28 U.S.C. § 994(a).

As a result of these chronic commissioner vacancies, important sentencing policy issues had gone unaddressed over several years. Those issues arose in a number of contexts. Crime legislation enacted by the 105th Congress specifically directed the Commission to make changes to the sentencing guidelines for a number of criminal offenses, most notably in the areas of intellectual property infringement, telemarketing fraud, fraudulent cloning of wireless telephones, unlawful identity theft, and criminal sexual offenses against children. Other recently enacted crime legislation did not contain express instructions to the Commission but did make changes in the substantive criminal law, such as in the areas of firearms and methamphet-

amine offenses. In addition to these legislative items, a large number of conflicts among the United States Circuit Courts of Appeal regarding interpretation of the guidelines accrued during the absence of voting commissioners. As you are aware, the United States Supreme Court declared in *Braxton* v. *United States,* 500 U.S. 344 (1991), that the Commission has the initial and primary responsibility to eliminate conflicts among the circuit courts with respect to guideline interpretation.

We were confronted with a very abbreviated time frame in which to begin addressing them because of our mid-November appointments. The Sentencing Reform Act requires the Commission to submit amendments to the sentencing guidelines to Congress by May 1 in any given year for a 180 day review period. The May 1 submission to Congress is the culmination of a careful deliberative process that typically starts in June or July of the previous year.[1] So you can see the challenge we faced by being appointed in mid November, well into that cycle.

As I mentioned at the outset, we met immediately after our appointment and began to address the outstanding policy issues and to select those which were especially urgent that could be dealt with in the shortened amendment cycle. Although we recognized that there were many important sentencing policy issues facing the federal criminal justice system, we unanimously agreed to focus our efforts during our initial amendment cycle on the two areas of most pressing concern: (1) addressing the significant backlog of crime and sentencing related legislation enacted by the 105th Congress that required implementation by the Commission and (2) resolving a limited number of circuit conflicts on the application of the guidelines.

The outreach to our varied constituents, preparation by staff, and our own careful deliberations served us well for the many decision making votes we made throughout the amendment cycle. As a result we made great progress in clearing the backlog of crime legislation. On May 1, 2000, we submitted to Congress fifteen amendments to the guidelines that cover a wide range of criminal conduct that has been of great concern to Congress and other members of the federal judicial system. These amendments are scheduled to become effective November 1, 2000 (with the exception of the amendments implementing the NET Act and the Telemarketing Fraud Prevention Act of 1998, which are already in effect).

Although I cannot go into great detail on each of the amendments here, I would like to highlight some of the amendments:

Intellectual Property Offenses.—The No Electronic Theft (NET) Act of 1997, Pub. L. 105–147, expanded the scope of the criminal copyright infringement provisions to include infringement that occurs through electronic means, regardless of whether the defendant benefited financially or commercially from the crime. In addition, Congress directed the Commission to ensure that the guideline penalties for all intellectual property offenses generally provide sufficient deterrence and specifically provide for consideration of the retail value and quantity of infringed items. In response to the Act, the Commission promulgated an amendment to USSG § 2B5.3 (Criminal Infringement of Copyright or Trademark), that modifies the sentencing enhancement in § 2B5.3(b)(1) to use the retail value of the infringed item, rather than the retail value of the infringing item, as a means for approximating pecuniary harm in most cases. Among other things, the amendment also increased the base offense level and added a sentencing enhancement of two levels (which represents an approximate 25 percent increase in sentence), and a minimum offense level of level 12, if the offense involved the manufacture, importation, or uploading of infringing items. The Commission believes that these changes will result in significantly more severe sentences for those offenders specifically targeted by the Act: offenders who upload infringing material, such as counterfeit software, to illegal Internet sites, thereby making them readily available for others to download illegally at no cost.

Telemarketing Fraud.—In The Telemarketing Fraud Prevention Act of 1998. Pub. L. 106–160, Congress strengthened criminal statutes relating to fraud against consumers, particularly the elderly. In addition to providing enhanced penalties for conspiracies to commit fraud offenses that involve telemarketing, the Act directed the Commission to provide substantially increased penalties for persons convicted of telemarketing offenses. The previous Commission promulgated temporary amendments to the guidelines that provide for three separate sentencing enhancements for fraud offenses that involve mass marketing, a large number of vulnerable victims, and the use of sophisticated means to carry out the offense. The Commission repromulgated this emergency amendment as permanent so that it would not expire by November 2000.

Identity Theft.—The Identity Theft and Assumption Deterrence Act of 1998, Pub. L. 105–318, criminalized the use or transfer of an individual's social security num-

[1] See generally 18 U.S.C. § 994; 5 U.S.C. § 553; USSC Rules of Practice and Procedure.

ber, date of birth, credit cards, and any other identification means (including unique biometric data), without that individual's authorization to do so, in order to commit any federal or state felony. In addition, the Congress directed the Commission to review and, if appropriate, amend the guidelines to provide an appropriate penalty for each offense under 18 U.S.C. § 1028, relating to fraud in connection with identification means. In response to the Act, the Commission promulgated an amendment to the fraud guideline, USSG § 2F1.1 (Fraud and Deceit), that, among other things, provides a sentencing enhancement and minimum offense level of level 12 for offenses involving (1) the possession or use of equipment that is used to manufacture access devises, (2) the production of, or trafficking in, unauthorized and counterfeit access devises, such as stolen credit cards, or (3) affirmative identity theft (i.e., unlawfully producing from any means of identification any other means of identification). The Commission believes that this amendment will address Congress's primary concern that penalties be significantly increased for offenses involving the illegal use of an individual victim's means of identification, even if no economic loss accrues to a financial or credit institution.

Telephone Cloning.—The same amendment that implemented the Identity Theft Act also addressed the Wireless Telephone Protection Act of 1998, Pub. L. 105–172. That Act, among other things, eliminated the intent to defraud element for defendants who knowingly use, produce, or traffic in certain equipment used to clone cellular telephones, and it clarified the statutory penalty provisions for cellular telephone cloning offenses. Congress also directed the Commission to review and, if appropriate, amend the guidelines to provide an appropriate penalty for offenses involving the fraudulent cloning of wireless telephones. In response to the Act, the Commission added sentencing enhancements to the fraud guideline that recognized that offenders who manufacture or distribute are more culpable than offenders who only possess them.

Sexual Offenses Against Children.—The Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314, created two new crimes: (1) the transmittal of information identifying minors for criminal sexual purposes; and (2) the distribution of obscene materials to minors. The Act also provided increased statutory penalties for existing crimes that address sexual activity with minors and child pornography and expressed Congress's zero tolerance for the sexual abuse and exploitation of children. In addition, the Act contained six directives to the Commission, many of which directly respond to recommendations the Commission made a few years ago in a report to Congress on sexual abuse and exploitation. In response, the Commission has undertaken a comprehensive reassessment of the guidelines pertaining to sexual offenses involving minors and passed a multi-part amendment to the guidelines for sexual abuse, child pornography, and obscenity distribution offenses that implements many of the directives in the Act. The amendment provides sentencing enhancements in six guidelines if the offense involved (1) the use of a computer or other Internet-access devise and/or (2) the misrepresentation of a participant's identity. These separate enhancements—each representing about a 25 percent increase in guideline punishment levels—reflect the concern of Congress and the Commission over the increased access to children provided by computers and the Internet, and the anonymous nature of on-line relationships, which allows some offenders to misrepresent their identities to the victim. In addition to adding these enhancements to the statutory rape guideline, the amendment also increased by three levels the base offense level in USSG § 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)) if the offense involved a violation of chapter 117 of title 18, United States Code (relating to transportation of minors for illegal sexual activity) (this latter change represents about a 40 percent increase in guideline punishment level).

Methamphetamine Trafficking.—The Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. 105–277, increased the penalties for manufacturing, importing, or trafficking in methamphetamine by reducing by one half the quantity of pure substance and methamphetamine mixture required to trigger the separate five and ten year mandatory minimum sentences in the drug statutes. Although the Act contains no directives to the Commission, the Commission promulgated an amendment that conforms methamphetamine (actual) penalties to the more stringent mandatory minimums established by the Act. In taking this action, the Commission followed the approach set forth in the original guidelines for the other principal controlled substances for which mandatory minimum penalties have been established by Congress. (No change was made in the guideline penalties for methamphetamine mixture offenses because those penalties already corresponded to the mandatory minimum penalties as amended by the Act.)

Firearms Offenses.—Congress addressed certain serious firearms offenses in Public Law 105–386, which amended 18 U.S.C. § 924(c) to create a tiered system of sentencing enhancement ranges. Each range has a mandatory minimum and presumed

life maximum for cases in which a firearm is involved in a crime of violence or drug trafficking offense. The pertinent minimum sentence in that tiered system is dependent on whether the firearm was possessed, brandished, or discharged. The Act also changed the mandatory minimum for second or subsequent convictions under section 924(c) from 20 to 25 years, and it broadly defined the term "brandish." Although the Act did not contain any directives to the Commission, the legislation required the Commission to promulgate amendments to the guidelines to incorporate the tiered statutory sentencing scheme into the guideline pertaining to section 924(c).

The Commission also resolved five circuit court conflicts by promulgating amendments to the guidelines that (i) clarify that the enhanced penalties in USSG § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only when the defendant is convicted of an offense referenced in that guideline; (ii) clarify that the enhancement in the fraud guideline for "violation of a judicial or administrative order, injunction, decree, or process" applies to false statements made during a bankruptcy proceeding; (iii) prohibit post-sentencing rehabilitation as a basis for downward departure at any resentencing; (iv) clarify that a court can base an upward departure on conduct that was dismissed or uncharged as part of a plea agreement, and (v) define the parameters of conduct that may warrant a downward departure in an extraordinary case based on aberrant behavior, as well as delineating types of cases for which a downward departure based on aberrant behavior is prohibited. In addition, the amendments in response to the Sexual Predators Act and the firearms legislation described above addressed two other circuit conflicts; thus, in total we resolved seven such issues.

As you can see by the shear volume of amendments, we had a very busy and productive first amendment cycle. But what you cannot see from a written list is how well this group of commissioners is working together. Each commissioner approached the guidelines discussions in a manner that was open minded and respectful of differing views. The commissioners listened to each other and to all interested parties. They were always well prepared and committed to improving the guidelines. Indeed, I am pleased to report that every vote we have taken to date—whether it be a vote to publish a proposal or to actually promulgate an amendment—has been unanimous except in two instances when it was six to one. Thus, Congress can be assured that the Commission is speaking with a unified voice with the amendments we submitted for your review on May 1.

PRIORITIES FOR THE CURRENT AMENDMENT CYCLE

Shortly after our congressional submission, the commissioners held a retreat so that we could reflect on the work we had just completed. We reviewed both our work product as well as the processes we used to reach our decisions and we were overall quite satisfied. We also took that opportunity to start planning our priorities for the coming amendment cycle and to begin thinking about the longer term.

After publishing in the Federal Register a tentative list of policy priorities and receiving public comment from a variety of constituents, once again we have set a very ambitious policy agenda.

Economic Crime Guidelines.—This year, the Commission hopes to complete a comprehensive reassessment of the economic crimes guidelines. Economic offenses account for more than a quarter of all the cases sentenced in the United States federal district courts. The Commission has received comment from the Federal Judiciary, the Department of Justice testimony and survey results that indicated that the sentences for these offenses were inadequate to punish appropriately defendants in cases in which the monetary loss was substantial. After approximately one year of data collection, analyses, public comment, and public hearings, a comprehensive "economic crimes package" was developed to revise the loss tables for fraud, theft, and tax offenses in order to impose higher sentences for offenses involving moderate and large monetary losses. Related amendments would consolidate the theft, fraud, and property destruction guidelines and clarify the definition of loss for selected economic crimes. Working in conjunction with the Criminal Law Committee of the Judicial Conference, a field test of the proposed loss definition by surveying federal judges and probation officers and applying the new definition to actual cases was conducted. Among the findings of the field test, more than 80 percent of the judges stated that the proposed loss definition produced results that were more appropriate than the current definition.

The Commission has planned a Symposium on economic crimes, "Federal Sentencing Policy for Economic Crimes and New Technology Offenses" for October 12–13, 2000. The Criminal Law Committee, the American Bar Association White Collar Crime Committee, and the National White Collar Crime Center have agreed to be

co-sponsors. The symposium is designed to (1) discuss current sentencing issues pertaining to economic crimes; (2) identify how new technologies are being used to further "traditional" criminal activity, e.g., fraud, and the novel forms for criminal activity new technologies have created, e.g., denial of service attacks, cyberterrorism, and the misuse of data encryption; and (3) identify how new technologies impact law enforcement, and the sentencing policy implications of these offenses. With the advent of the Internet and increasing prevalence of computers in our daily lives, the Commission recognizes that technology is changing how traditional crimes are committed, making new types of crimes possible, and generally lowering barriers to criminal activity. All of this creates unique challenges to law enforcement and sentencing policy makers.

The symposium will be held at the George Mason University School of Law, with approximately 175 invited guests from the federal legal community (federal judges, prosecutors, defense attorneys, and probation officers), academia, and technology companies such as AOL, Microsoft, and Yahoo. Deputy Attorney General Eric Holder and FBI Director Louis Freeh are scheduled to speak. Of course, we hope that you or a member of your staff can attend the symposium.

Money Laundering.—This year the Commission also expects to address money laundering offenses. As you know, in the past a prior Commission passed an amendment to the money laundering guideline in 1995 that was subsequently disapproved by Congress. We expect to start anew, and are working closely with the Department of Justice and others on a new approach. We hope to develop a guideline structure that ties money laundering penalties more closely to the underlying offense conduct which generated the laundered proceeds. Penalties for money laundering offenses involving proceeds generated by drug trafficking, crimes of violence, terrorism, and sexual offenses might also be more severe than penalties for other money laundering offenses. I assure you that we are taking a careful and thoughtful approach to this.

Counterfeiting.—The Commission also is working on another economic crime this year—counterfeiting bearer obligations of the United States. The Commission has received comment from the Department of Treasury and Secret Service that the current guideline, USSG § 2B5.1 (Counterfeiting), does not sufficiently deter or punish counterfeiting offenses in light of recent technologies changes. Historically, counterfeiting was accomplished using offset printing, which requires expensive equipment, a large indoor space to house the equipment, and persons with printing expertise. Now, increased availability and affordability of personal computers, ink jet printers, and other digital technology make it possible for great numbers of people to engage in counterfeiting. While counterfeiters previously made large "runs" of counterfeit currency and typically maintained a sizeable "inventory," they now typically only print counterfeit currency on an "as needed" basis.

The Department of Treasury proposed specific modifications to the guidelines to address this changing technology. Commission staff also has recently completed a report on the impact of technology on counterfeiting sentences. We are in the process of reviewing Treasury's proposals as well as our staff's report and expect that we may be able to promulgate amendments to the guideline this amendment cycle.

Sexual Offenses Against Children.—Because of the limited time available between our appointments on November 15, 1999, and the statutorily required May 1 date for submitting guideline amendments to Congress, we were unable to complete our response to the Sexual Predators Act directive requiring that the guidelines "provide for an appropriate enhancement in any case in which the defendant engaged in a pattern of activity of sexual abuse and exploitation of a minor." The Commission is aware that a variety of legislation is pending in both the Senate and the House that, if enacted, would significantly impact our work in this area. This is an area of critical importance and a complicated one. You can be assured that the Commission shares Congress's concern about these particularly heinous offenses, and we fully expect to implement this remaining directive, as well as complete a proportionality review of the relevant guidelines, during this amendment cycle.

Firearms.—During the last amendment cycle the Commission made a number of changes to the guidelines pertaining to firearms offenses in order to conform with recently enacted legislation. One item that we did not have time to address, however, was whether the current sentencing enhancement for offenses involving multiple firearms should be increased. The Bureau of Alcohol, Tobacco, and Firearms has requested that the Commission consider expanding the enhancement for multiple firearms in USSG § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms) to differentiate among offenses with more than 50 firearms. The Commission is considering this proposal, as well as other possible modifications to the firearms guidelines.

Nuclear, Biological, and Chemical Weapons.—Within the past few years there has been a growing interest by Congress, and the public generally, about the threat posed by criminal behavior that involves nuclear, biological and chemical weapons, materials, and technologies. Some congressional action in this area specifically relates to sentencing policy. For example, in section 1423 of the National Defense Authorization Act of Fiscal Year 1997, Congress expressed the sense that the sentencing guidelines were inadequate for certain offenses involving the importation and exportation of such material. Congress also recently created several new offenses in this area. Section 511 of the Antiterrorism and Effective Death Penalty Act of 1996 incorporated attempt and conspiracy into 18 U.S.C. § 175, which prohibits the production, stockpiling, transferring, acquiring, retaining or possession of biological material. Section 201 of the Chemical Weapons Convention Implementation Act of 1998 also created a new offense at 18 U.S.C. § 229, which makes it unlawful for a person unknowingly to develop, produce, or otherwise acquire, transfer, receive, stockpile, retain, own, possess, use, or threaten to use any chemical weapon, to assist or induce any person to do so, or to conspire to do so. In light of these legislative developments, the Commission has formed a policy development team to examine the relevant guidelines and hopes to make any necessary modifications to the guidelines this amendment cycle.

Criminal History.—The Commission has identified a number of circuit conflicts relating to Chapter Four of the guidelines, which the court uses to determine an offender's criminal history category. This suggests that certain provisions relating to criminal history are unclear and require clarification. In addition, we have received public comment requesting that the Commission examine the criminal history guidelines. As a result, the Commission has formed a policy development team to begin a review of the guidelines relating to criminal history. Although we do not expect to complete this work this amendment cycle, we hope to make significant progress in developing amendments that would resolve these circuit conflicts.

Safety Valve.—The area of mandatory minimum sentences, particularly for drug offenses, has received a great deal of attention of late. For instance, in May 2000, the House Government Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources asked me to testify about drug sentencing trends, mandatory minimum penalties, and how these statutory penalties interact with the federal sentencing guidelines. Because of short notice and a scheduling conflict, I asked Vice Chair John Steer to testify on my behalf. He did so, both orally and in writing. The Criminal Law Committee of the Judicial Conference suggested that the Commission update its August 1991 report to Congress, Mandatory Minimum Penalties in the Federal Criminal Justice System, and a variety of other constituents, including members of Congress, have suggested that the Commission further study these matters.

During this amendment cycle the Commission plans to begin analyzing the operation of the "safety valve" guidelines, USSG § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). We have been told a recidivism study conducted by the Bureau of Prisons will soon be available which could help inform our deliberations. We hope to work closely with Congress, the Department of Justice, the Bureau of Prisons, and others as we explore whether any adjustments to the safety valve would be advisable.

Circuit Conflicts.—As I mentioned earlier, the Commission resolved five circuit conflicts during the last amendment cycle. Commission staff has identified approximately 40 remaining circuit conflicts. Such conflicts threaten the uniform application of the guidelines throughout the nation, and elimination of unwarranted sentencing disparity is a cornerstone of the Sentencing Reform Act. Although the Commission cannot reasonably expect to resolve all of these conflicts in one year, we have identified eleven circuit conflicts which we will address during this cycle.

New Legislation.—The Commission also has been following closely the legislative developments of the 106th Congress and is prepared to implement any crime legislation as appropriate. For instance, Public Law No. 106–172 provided for the emergency scheduling of Gamma Hydroxybutyric Acid (GHB) as a Schedule I or Schedule II drug, and the addition of Gamma Butyrolactone as a List I chemical. The Commission also is mindful of and shares concerns over the increased use of ecstasy and other so called "club drugs." The Commission has formed a policy development team to study whether the guideline penalties for these particular drugs are sufficiently severe and, if not, to develop appropriate amendments to the guidelines.

NEW RESEARCH INITIATIVE

The Sentencing Reform Act requires the Commission to do much more than promulgate amendments to the guidelines. It requires the Commission to serve as an

expert agency on sentencing policy. The Commission acts as a clearinghouse and information center for information on federal sentencing practices and is statutorily responsible for monitoring how well sentences imposed under the guidelines are achieving the purposes of sentencing as set forth under 18 U.S.C. § 3553(a). See 28 U.S.C. 995(a)(12), (a)(15).

November 2002 will mark the 15 year anniversary of the guidelines. Since their implementation in November 1987, the guidelines have been used to sentence over 400,000 defendants. Soon we will experience the 15 year anniversary and 500,000 defendants sentenced under the guidelines, and the Commission believes it prudent to step back and examine the operation of the guidelines over these years. We are undertaking an analysis that we hope will culminate with a published report sometime around November 2002. Questions that we hope to address include how well the guidelines are accomplishing the statutory purposes of sentencing, including crime control, as set forth at 18 U.S.C. § 3553(a)(2).

The Commission believes that the federal sentencing guidelines have advanced the goals of Congress as expressed in the Sentencing Reform Act by providing certain, fair, and markedly more uniform punishment for similar offenders. This has strengthened the ability of the criminal justice system to combat crime. We hope that our empirical research will confirm our belief.

COMMISSION FACES DIRE BUDGET CONSTRAINTS

I discussed at the outset that the new Commission faced a substantial backlog when we arrived, and we have experienced renewed interest in many areas of the guidelines and in their impact. Unfortunately, we have been forced to tackle an unusually heavy workload at a time when the staff has been severely diminished because of the severe reductions in the Commission budget while there were no voting commissioners. As a result, we are busier than ever with far fewer resources, and we cannot accomplish what we have before us without receiving our full budget request to Congress.

The Commission cannot meet all of its statutory obligations in a timely and thorough manner unless it receives the full $10.6 million that it requested for fiscal year 2001. In addition to the extraordinary heavy workload this year in terms of both policy development and research that I have outlined, the Commission must continue to perform its many other important statutory obligations. Because I am sure you are well aware of the numerous requirements imposed on the Commission by the Sentencing Reform Act, I will highlight just a few of them.

In order to comply with the statutory requirement to collect and disseminate information concerning sentences, in fiscal year 1999, the Commission received court documents for more than 55,000 cases sentenced between October 1, 1998, and September 30, 1999. For each case, the Commission extracts and enters into its comprehensive database more than 260 pieces of information, including case identifiers, sentence imposed, demographic information, statutory information, the complete range of court guideline application decisions, and departure information. In 1999, as required by statute, Commission staff provided training on the sentencing guidelines to more than 2,200 individuals at 47 training programs across the country, including programs sponsored by the Commission, the Federal Justice Center, the Department of Justice, the American Bar Association, and other criminal justice agencies.

The $10.6 million requested by the Commission for fiscal year 2001 is the bare minimum necessary to restore staffing levels to that of fiscal year 1998, the last time the agency had a fully functional Commission in place. We appreciate the efforts that many members of this Subcommittee, and of the Full Judiciary Committee, have made on our behalf to increase funding for the Commission. However, your continued assistance is urgently needed. The $9.9 million mark approved by the Senate Appropriations Committee is not sufficient to get the Commission fully up and running.

CONCLUSION

In closing, I assure you that this Commission is committed to working thoughtfully to accomplish as much as we reasonably can, not only during this amendment cycle but throughout our terms of appointment. I think we demonstrated our commitment last amendment cycle by working very hard in a very short time—less than six months—to clear the significant backlog of crime and sentencing legislation that awaited our implementation. Every week brings new issues that require our careful attention. For example just days ago at the National Sentencing Institute, several federal judges raised serious questions about the impact of the recent Supreme Court decision in *Apprendi* v. *United States,* 120 S.Ct. 2348 (2000), on the constitu-

tionality of current practices and certain mandatory minimums and guidelines for firearms and drug trafficking offenses. This is just one example of how new matters regularly occur to create unexpected work areas.

We welcome this opportunity to report to the Subcommittee and value highly a good working relationship with Congress and others interested in federal sentencing. We thank the Subcommittee, and in particular Chairman Thurmond, for providing us the opportunity to share with you our accomplishments from the last amendment cycle and our goals for the current cycle.

Senator THURMOND. Mr. Steer, do you have any opening comments?

STATEMENT OF JOHN R. STEER

Mr. STEER. Yes, Senator, I do have some brief opening comments. I want to join with Judge Murphy, our distinguished chair, in thanking you for having this oversight hearing and to express on behalf of all commissioners our profound respect and gratitude for the leadership that you have shown over the years on sentencing and crime control issues generally.

Senator Sessions, we appreciate your support of the Sentencing Commission and its work, and your interest in these issues as well.

The focus of my remarks, as Judge Murphy indicated, is to present some data from the Sentencing Commission's research on trends in departures, and to offer some observations which are my personal observations at this point on some of the factors that may be underlying these trends. Before I get into the data, I just would like to briefly review for the committee the basic legal structure that governs departures from the Sentencing Commission.

There is, first of all, the statute that this committee framed and Congress wrote as part of the Sentencing Reform Act and it basically says that a court must sentence within the Sentencing Commission unless there exists an aggravating or a mitigating circumstance of a kind or to a degree not adequately considered by the Commission in formulating the Guidelines that should result in a different sentence.

In addition to that basic law, the Commission has added its own pronouncements with regard to departure circumstances throughout the guidelines manual in the form of policy statements and commentary. And then, of course, over the years the courts have added a vast and growing gloss, you might say, of departure decisions that provide the law in the respective circuits with respect to these issues.

The Supreme Court itself has spoken directly to departure issues on two occasions, first in 1992 in the *Williams* case, which among other things basically stands for the proposition that courts must respect and generally follow Commission policy statements regarding circumstances that might warrant, or not, sentencing outside the guideline range.

The second case, and probably no doubt the more important one, the *Koon* case in 1996, generally established a more deferential abuse of discretion review overall of departure decisions by the lower courts when those decisions are appealed.

With that background, I would like to turn to the data. The first exhibit that we have here on the left basically just provides a change in the picture of cases, the kinds of cases that have been sentenced under the Guidelines over an 11-year period starting in

the first full year of guideline application after the Guidelines' constitutionality was upheld in *Mistretta* in 1989, through fiscal year 1999, the last year for which we have complete data. Basically, the story of these pie charts is that over the years, relatively speaking, we have had somewhat less drug cases and more immigration and more fraud cases.

The second chart on the right here shows the picture today, or in fiscal year 1999, of the way that the sentences fall out with respect to sentences within the range, upward and downward departures. As the data indicate, in fiscal year 1999 about 65 percent of the cases were sentenced within the guideline range found by the court. Less than 1 percent were upward departures. About 19 percent were sentenced below the guideline range based on the defendant's cooperation and the motion of the Government finding substantial assistance by the defendant. And then this latter category, 15.8 percent, were sentenced below the guideline range for other departure reasons found by the court.

I mentioned the *Koon* case. There has been a great deal of comment about what has been the effect of *Koon* on the rate of downward departures. This is one way of looking at the data. And basically in this chart we have, in the blue, going across the chart, the changing monthly rate of downward departures before and after the *Koon* case. The *Koon* case came down in June 1996, and basically that dividing line is shown here.

As you can see from this data, prior to the *Koon* decision downward departures were already on an increasing track and were growing at a rate of about 3 per month, if you look at the regression line track that our excellent statistician, Dr. Maxfield, has prepared here. After *Koon*, the rate of increase has changed dramatically and increased to about 9.5 per month. This chart also indicates that the rate of growth in overall cases has not been as fast as the rate of growth in downward departures from the Sentencing Guidelines.

Mr. Chairman, as you mentioned in your statement, the trends in downward departures go across offense types. As you can see from this chart, there has been a growth in downward departure rates, an increase in downward departure rates in all of the major offense types—robbery, firearms, drug trafficking, fraud, and especially in immigration, which reflects the pressures that occur in the border States with the greatly increased volume of cases that have occurred there recently.

Just to follow up on the immigration issues briefly, we have two charts here sequentially that will show a little bit more information about the growth of downward departures and the caseload growth in the immigration area.

Immigration cases are basically of two types. Alien smuggling cases are shown in this first chart. The blue line plotted across here shows the increase in case volume. And as you can see, from 1992, the case volume sentenced increased from about 580 cases almost triple to about 1,500 cases sentenced for alien smuggling. The green bars indicate a declining rate of within-guideline sentencing, while the red bars show the increased rate of downward departures for reasons other than substantial assistance.

Senator SESSIONS. Now, that is smuggling. That is not just an alien individual who crosses the border illegally. Those are smugglers who bring others with them?

Mr. STEER. That is correct, Senator Sessions.

This next chart deals with the other major category, the unlawful entry cases. Again, the volume of cases of this type has increased even more dramatically, about an eight-fold increase over that same time period.

The combination of the green bars and the green-checked bars shows the within-guideline sentencing rate, and again there has been a decline there. The red bars show an increase in the downward departure rate in this type of cases.

The green-checked area is a bit of a complicated picture here, but what we are trying to present here is to show that in these types of cases, in many instances the defendants are sentenced below what the Guidelines would have called for, but their sentence is capped by the statutory maximum.

This is a result of a special procedure that has been initiated in a number of districts to limit the exposure of the defendant through a charge arrangement that basically caps the sentence. The current arrangement is at 30 months, and without that charge procedure the Guidelines would in these cases typically call for a much higher sentence.

Senator SESSIONS. Well, that would be in violation of the traditional Department of Justice rule that the plea would be to the most serious offense, would it not?

Mr. STEER. Well, I think that the Department will be prepared to comment on that. I think that what it reflects is arrangements that are made in districts because of the tremendous case volume.

This next chart presents very quickly that there are varying rates of departure among the circuit courts of appeals. Generally speaking, the ninth circuit has the highest downward departure rate for other than substantial assistance. The third circuit has the highest rate of substantial assistance downward departures.

Focusing specifically on the caseload growth in the border courts and the border districts and some of the other districts, these percentages indicate some of the States where you have had the highest percentage growth in cases sentenced under the Guidelines. You can see all the border courts are represented; also, others where there has been a tremendous increase either in immigration cases or drug cases. In many cases, the drug cases are methamphetamine.

Here is a picture of the changes in departure rates over time, comparing the national data to the five border court districts. And you will see the effects of the heavy caseload volume there and the arrangements that have been made with respect to handling that volume, Arizona with a very high downward departure rate, and Southern California also in that area. Texas-South and Texas-West at least nominally appear to be similar to the national picture.

Now, in my written statement I do make some observations about possible contributing factors. I will just briefly list them here, and perhaps either I or the Department of Justice can comment on them further in response to any questions you have.

A number of those factors might be the Commission policies themselves over the years and things that the Commission has done or has not done; of course, the increase in volume in the border districts; policies and practices of the prosecutors on the front line; the appellate review practices of U.S. Attorneys and the Department of Justice; the effect of the *Koon* decision; and perhaps any number of other factors.

Let me just say in conclusion that as I look at these data today, my personal observation is that this should not set off any alarm bells. The guideline system is still fundamentally sound, in my view, and is working. But what it indicates is it raises some questions and some areas of concern that the Commission and the Department of Justice need to explore together. It indicates areas where we need to work together over the coming months to address these issues of possible concern.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Steer follows:]

PREPARED STATEMENT OF JOHN R. STEER

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 *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 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 know 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. 19 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; 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 *Wil-*

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[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.

[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.

liams v. *United States,* 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 appeal 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 by 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.

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[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.

DEPARTURE TRENDS OVER TIME

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 ⅔ (64.9%) of defendants within the guideline range found by the court. Slightly less than ⅕ (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 the 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 I, 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 sentencing 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 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 applications 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 average.

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 of 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 the 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 their 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 suggests that the Department of Justice and prosecutors generally are not as aggressive as perhaps they could 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.

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 pen-

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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).

alties (e.g., in the alien smuggling offenses—see infra), and 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.

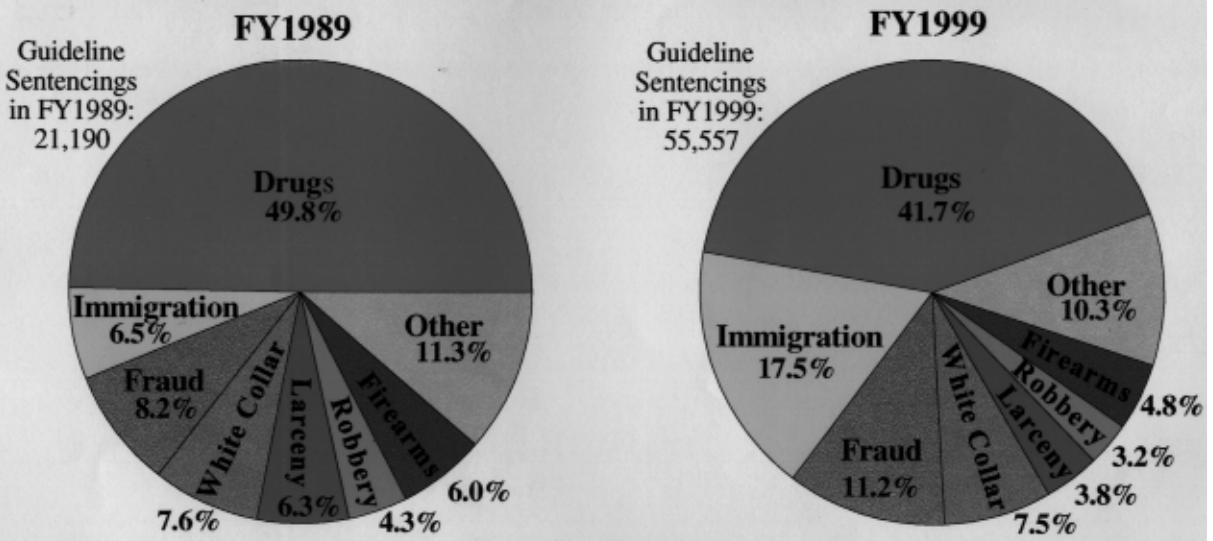
The Sentencing Commission clearly has a continuing responsibility under the SRA to carefully monitor court sentencing practices and to take appropriate actions, through the guideline amendment process or through other avenues, when these practices substantially vary from SRA goals. The Department of 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.

Exhibit 1

Comparison of Guideline Offense Distribution
FY1989 and FY1999

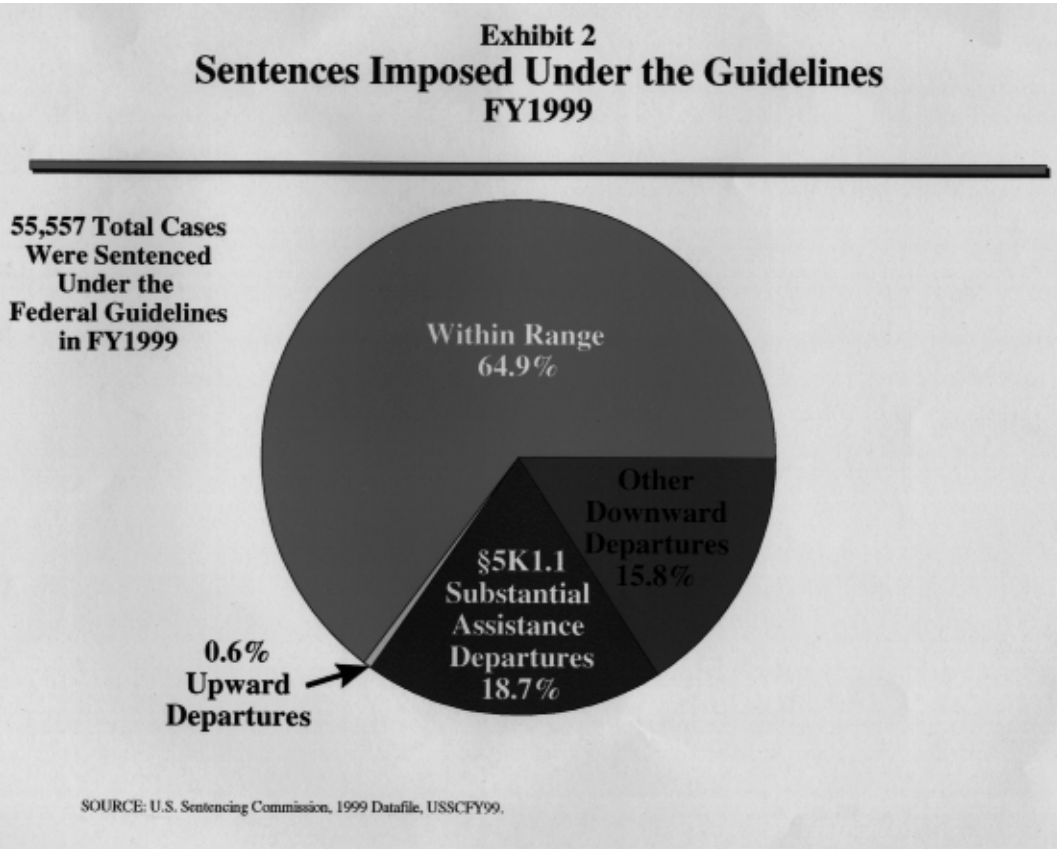
During the eleven years since 1989, the federal caseload changed toward proportionally fewer drug cases and proportionally more immigration cases.



Source: U.S. Sentencing Commission, 1989 and 1999 Datafiles, USSCFY89 and USSCFY99.

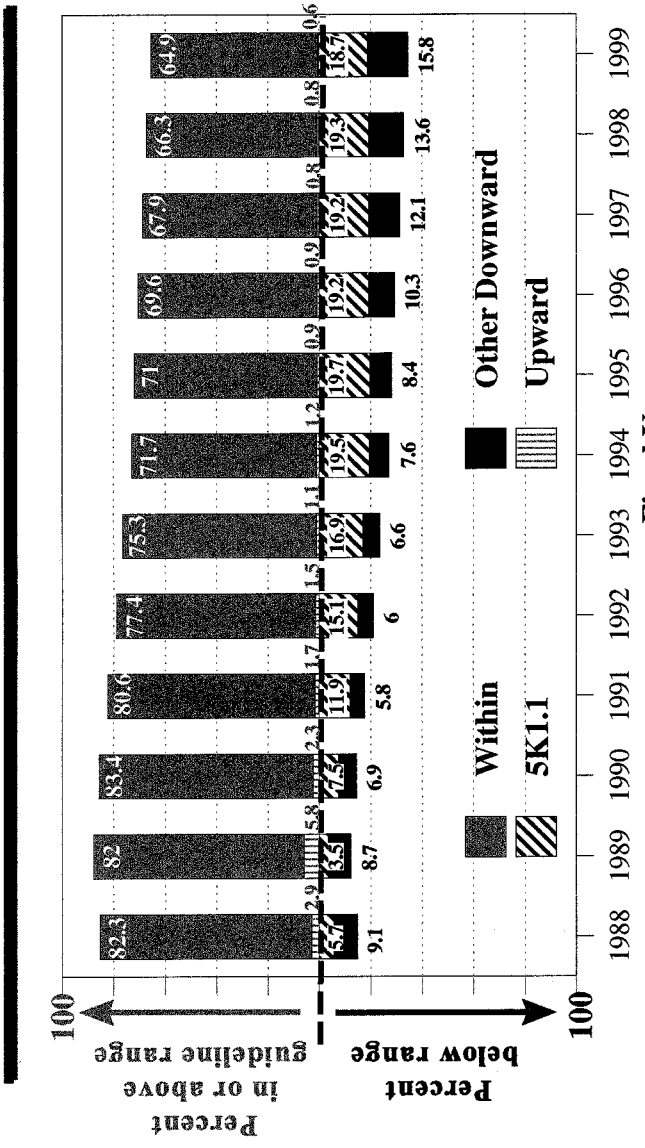
Exhibit 2

Sentences Imposed Under the Guidelines
FY1999



SOURCE: U.S. Sentencing Commission, 1999 Datafile, USSCFY99.

Exhibit 3
Departure Status by Fiscal Year
FY1988 through FY1999

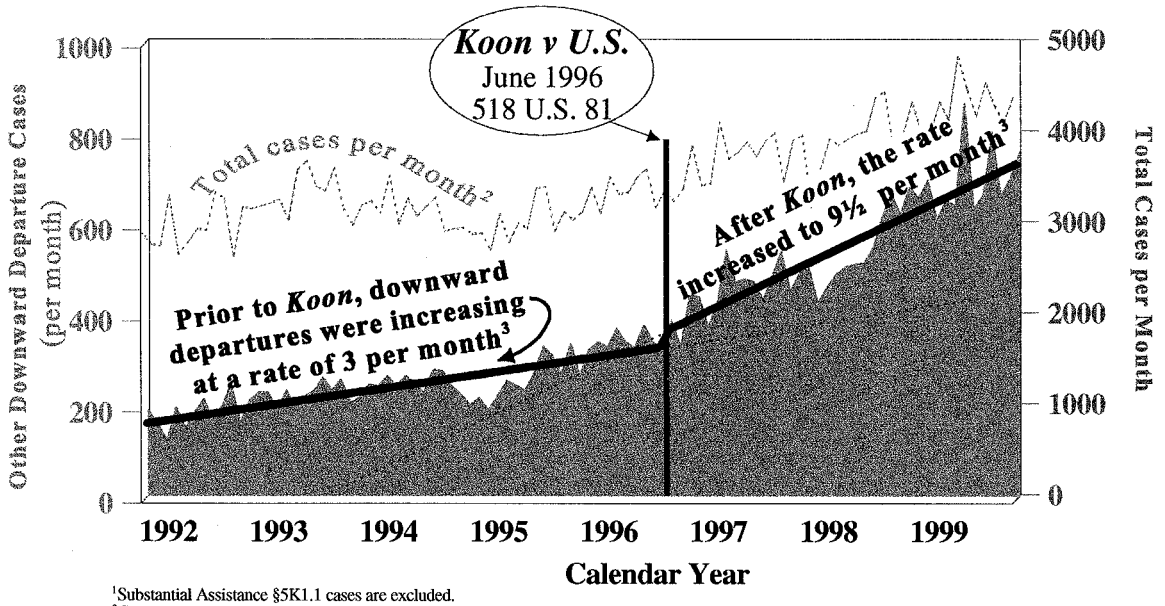


SOURCE: U.S. Sentencing Commission, 1988-1999 Datafiles, USSCFY88-USSCFY99.

Exhibit 4

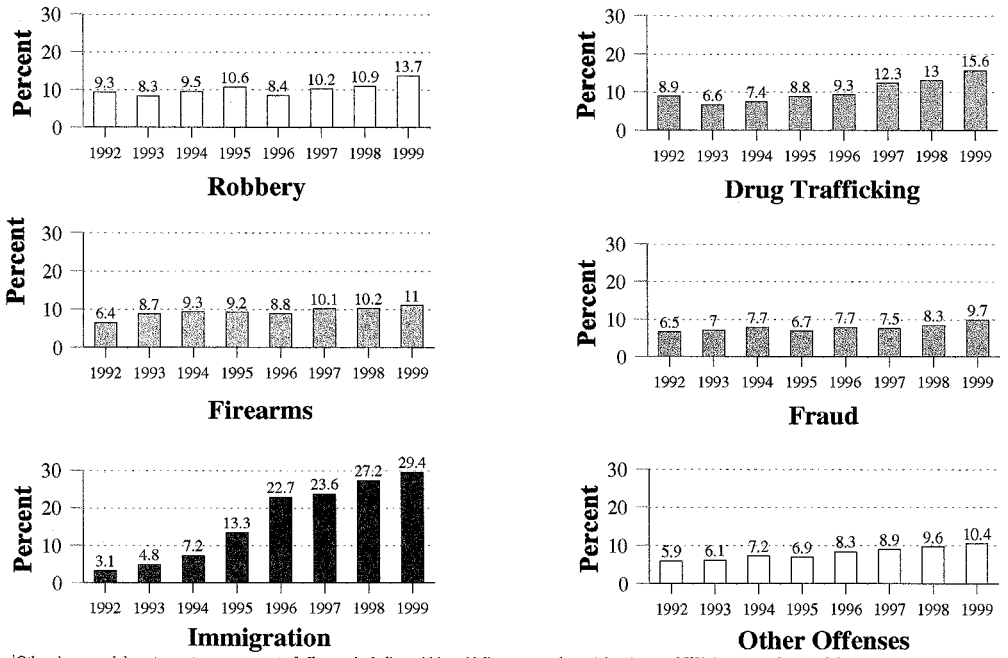
Monthly Number of Other Downward Departures [1]

October 1991 through September 1999



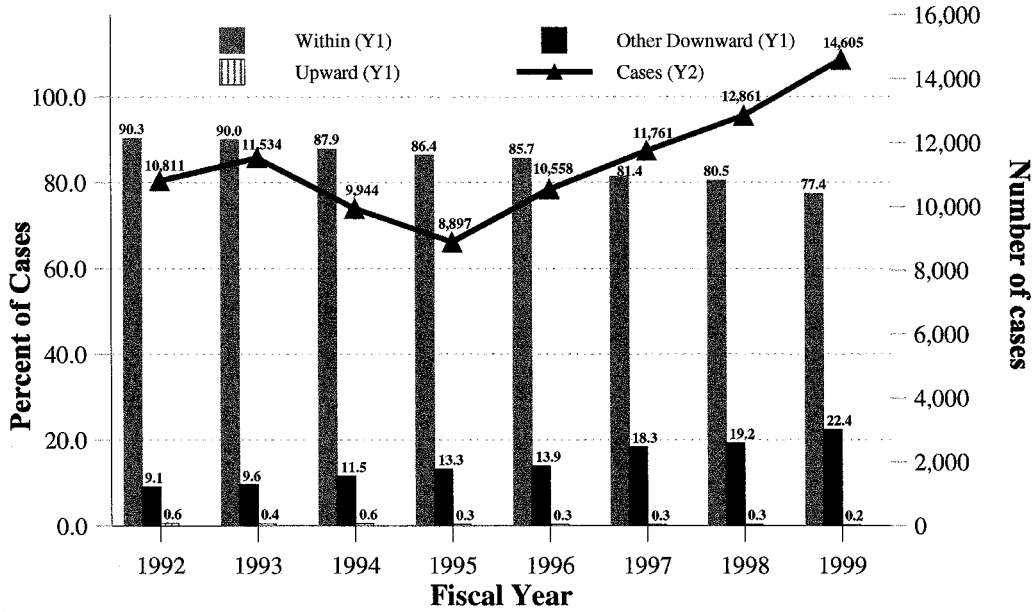
[1]Substantial Assistance §5K1.1 cases are excluded.
[2]Cases sentenced each month where departure status is reported by the court.
[3]A statistical regression estimates the slope of the pre-Koon other downward departure rate line at 2.98 ($p<.0001$) and the slope of the post-Koon other downward departure rate line at 9.62 ($p<.0001$).
SOURCE: U.S. Sentencing Commission, 1992-1999 Datafiles, USSCFY92-USSCFY99.

Exhibit 5
Trends in Other Downward Departure Rates:[1] Selected Offense Types FY1992 through FY1999



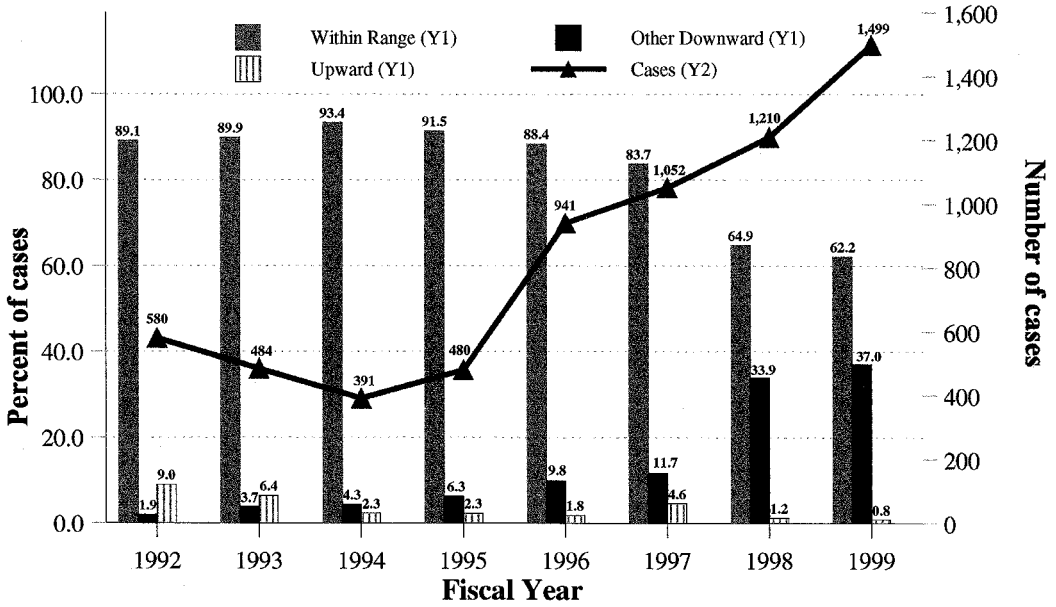
[1]Other downward departure rates as a percent of all cases including within guideline cases, substantial assistance §5K1.1 cases, and upward departure cases.
SOURCE: U.S. Sentencing Commission, 1992-1999 Datafiles, USSCFY92-USSCFY99.

Exhibit 6
§2D1.1 Drug Trafficking:[1] Departure Status (excluding §5K1.1)
FY1992 through FY1999



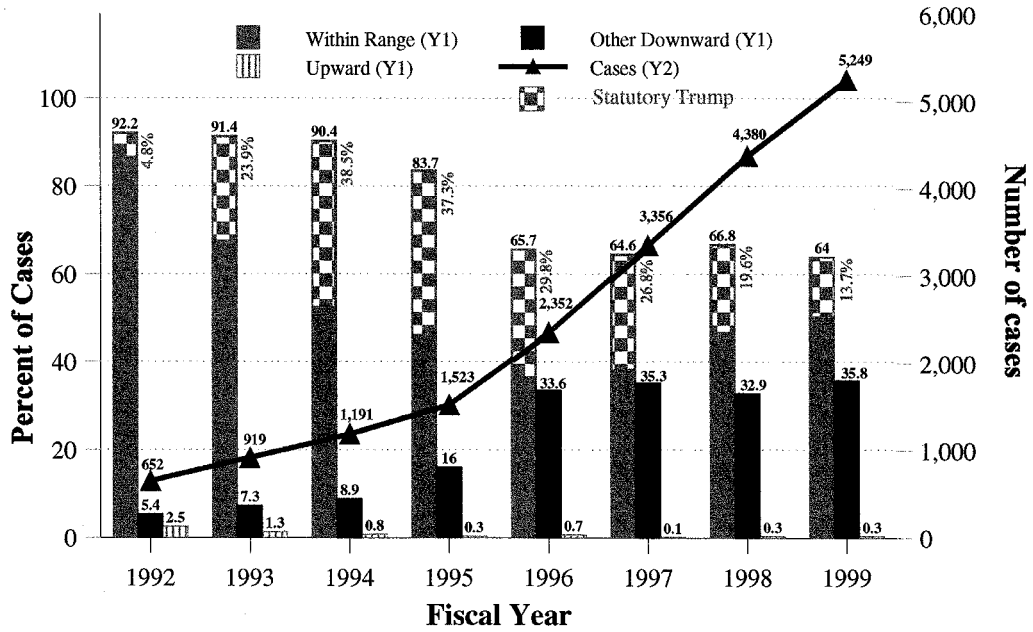
[1]Cases with one guideline computation of §2D1.1 (unlawful manufacturing, importing, exporting, or trafficking, including possession with intent to commit these offenses) sentenced within the guideline range, or as an upward or other downward departure. Substantial Assistance §5K1.1 cases are excluded.
SOURCE: U.S. Sentencing Commission, 1992-1999 Datafiles, USSCFY92-USSCFY99.

Exhibit 7
§2L1.1 Alien Smuggling:[1] Departure Status (excluding §5K1.1)
FY1992 through FY1999



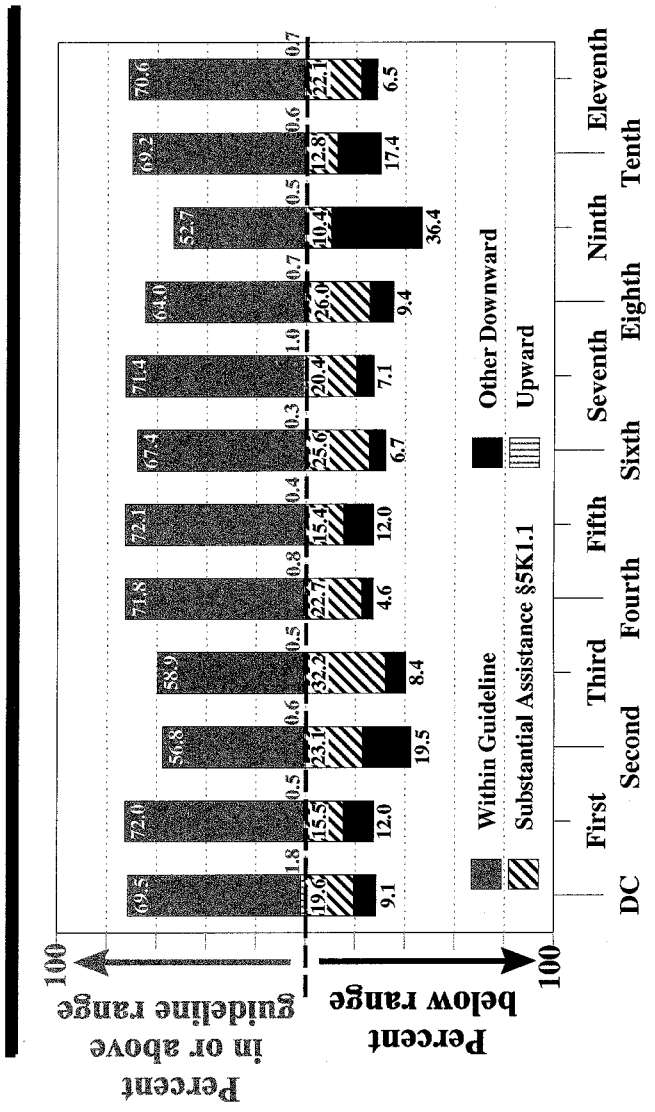
[1]Cases with one guideline computation of §2L1.1 (smuggling, transporting, or harboring an unlawful alien) sentenced within the guideline range, or as an upward or other downward departure. Substantial Assistance §5K1.1 cases are excluded.
SOURCE: U.S. Sentencing Commission, 1992-1999 Datafiles, USSCFY92-USSCFY99.

Exhibit 8
§2L1.2 Unlawful Entry:[1] Departure Status (excluding §5K1.1)
FY1992 through FY1999



[1]Cases with one guideline computation of §2L1.2 (unlawfully entering or remaining in the United States) sentenced within the guideline range, or as an upward or other downward departure. Substantial Assistance §5K1.1 cases are excluded.
SOURCE: U.S. Sentencing Commission, 1992-1999 Datafiles, USSCFY92-USSCFY99.

Exhibit 9
Departure Rate by Circuit
FY1999



SOURCE: U.S. Sentencing Commission, 1999 Datafile, USSCFY99.

Exhibit 10

Districts with Highest Departure Rates

Fiscal Year 1999

Substantial Assistance (%)		Other Downward (%)		Overall (%)[1]	
1. NC Western (N=661)	52.3	1. Arizona (N=2,830)	57.9	1. Arizona (N=2,830)	66.0
2. N. Mariana Islands (N=14)	50.0	2. CA Southern (N=4,012)	49.1	2. CA Southern (N=4,012)	57.7
3. New York North PA Eastern (N=378; N=846)	43.1	3. WA Eastern (N=291)	40.8	3. NC Western (N=661)	57.2
4. MO Western (N=469)	41.0	4. Connecticut (N=271)	31.7	4. NY Eastern (N=1,469)	56.1
5. MS Northern (N=164)	39.6	5. NY Eastern (N=1,469)	30.6	5. NY Northern (N=378)	55.2
6. IN Southern (N=236)	38.2	6. Vermont (N=160)	28.3	6. Vermont (N=160)	52.8
7. OH Southern (N=581)	38.1	7. WA Western (N=672)	26.3	7. PA Eastern (N=846)	50.9
8. IA Southern (N=372)	35.2	8. New Mexico (N=1,138)	25.9	8. N. Mariana Islands (N=14)	50.0
9. New Hampshire AL Middle (N=142; N=221)	34.5	9. OK Eastern (N=88)	25.0	9. IN Southern (N=236)	48.4
10. AL Southern (N=297)	33.7	10. Massachusetts (N=464)	22.6	10. WA Eastern (N=291)	48.2

[1]"Overall" category includes upward departures, other downward departures, and substantial assistance departures.

SOURCE: U.S. Sentencing Commission, 1999 Datafile, USSCFY99.

Exhibit 11
Districts with Lowest Departure Rates
Fiscal Year 1999

Substantial Assistance (%)		Other Downward (%)		Overall (%)[1]	
1. South Dakota (N=380)	5.3	1. Virginia East (N=1,285)	1.8	1. Kentucky West (N=410)	8.8
2. Utah (N=528)	5.9	2. Alabama North (N=319)	1.9	2. Virginia East (N=1,285)	9.1
3. Alaska (N=159)	5.9	3. WV North (N=157)	1.9	3. WV North (N=157)	9.7
4. Kentucky West (N=410)	6.3	4. Virgin Islands (N=94)	2.2	4. Virgin Islands (N=94)	10.1
5. WV North (N=157)	6.5	5. Kentucky West (N=410)	2.3	5. Illinois South (N=364)	13.0
6. Wash. East (N=291)	6.7	6. Arkansas East (N=269)	2.3	6. Texas East (N=605)	13.3
7. Virgin Islands (N=94)	6.7	7. Wisconsin West (N=130)	3.2	7. Puerto Rico (N=521)	14.1
8. Virginia East (N=1,285)	7.0	8. South Carolina (N=851)	3.3	8. WV South (N=236)	17.0
9. Rhode Island (N=114)	7.0	9. Maine (N=124)	3.3	9. Oklahoma West (N=219)	18.1
10. Arizona (N=2,830)	7.3	10. NC Middle (N=429)	3.3	10. South Dakota (N=380)	18.6

[1]"Overall" category includes upward departures, other downward departures, and substantial assistance departures.

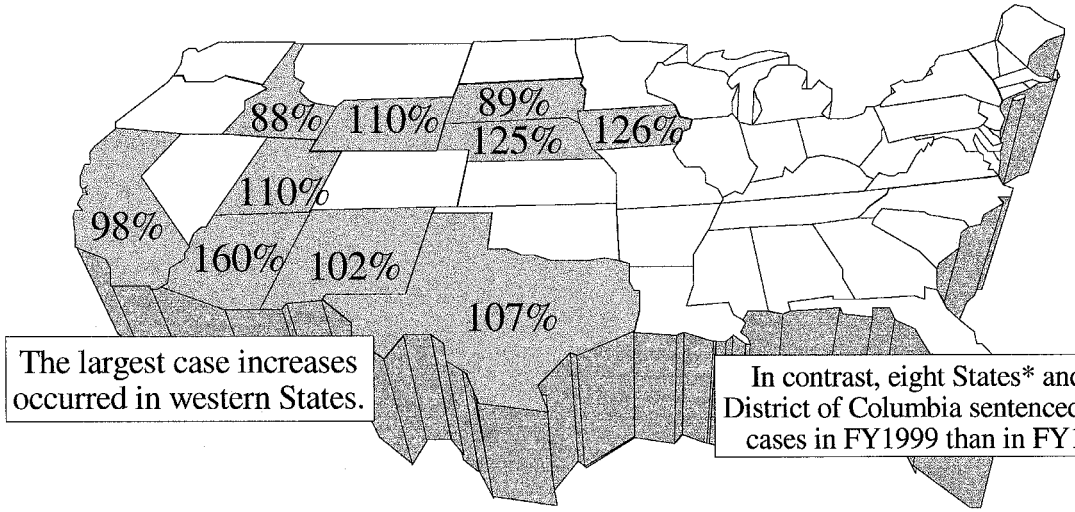
SOURCE: U.S. Sentencing Commission, 1999 Datafile, USSCFY99.

Exhibit 12

States: Largest Increases in Number of Guideline Sentencings

FY1992 to FY1999

Cases increased by 45% overall from FY1992 to FY1999. The average percent increase per State was 60%. Arizona, Iowa, and Nebraska led the States with the largest increases: 160%, 126% and 125% respectively.



The largest case increases occurred in western States.

In contrast, eight States* and the District of Columbia sentenced fewer cases in FY1999 than in FY1992.

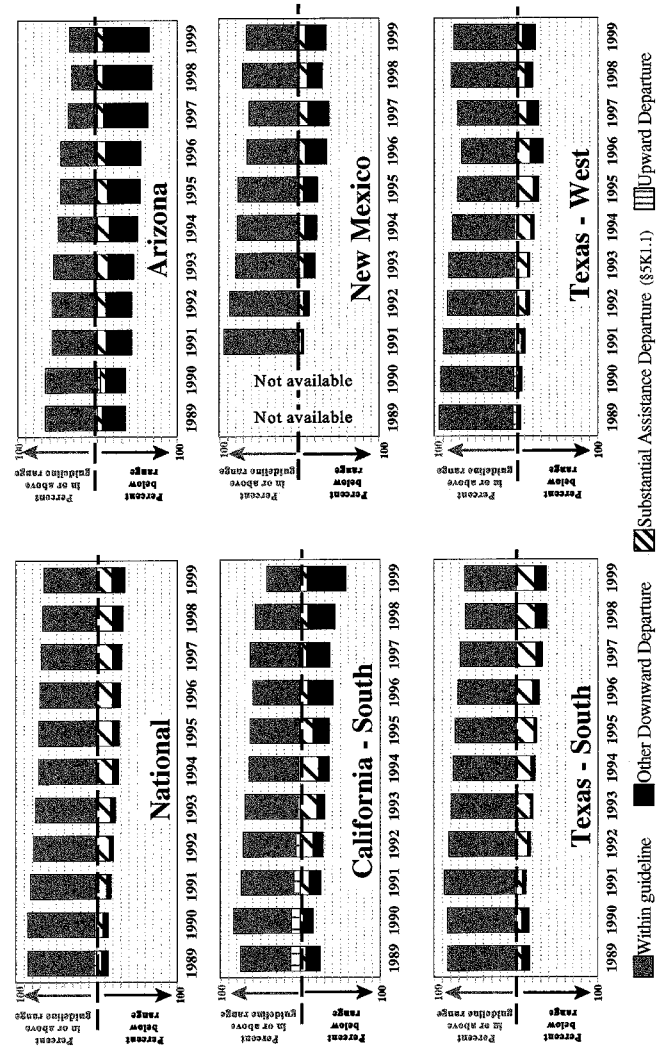
SOURCE: U.S. Sentencing Commission, 1992 and 1999 Datafiles, USSCFY92 and USSCFY99.

* WI, ME, TN, AL, AK, DE, WV, and RI.

Exhibit 13

Trend in Departure Status: Southwest Border Districts

FY1989 through FY1999

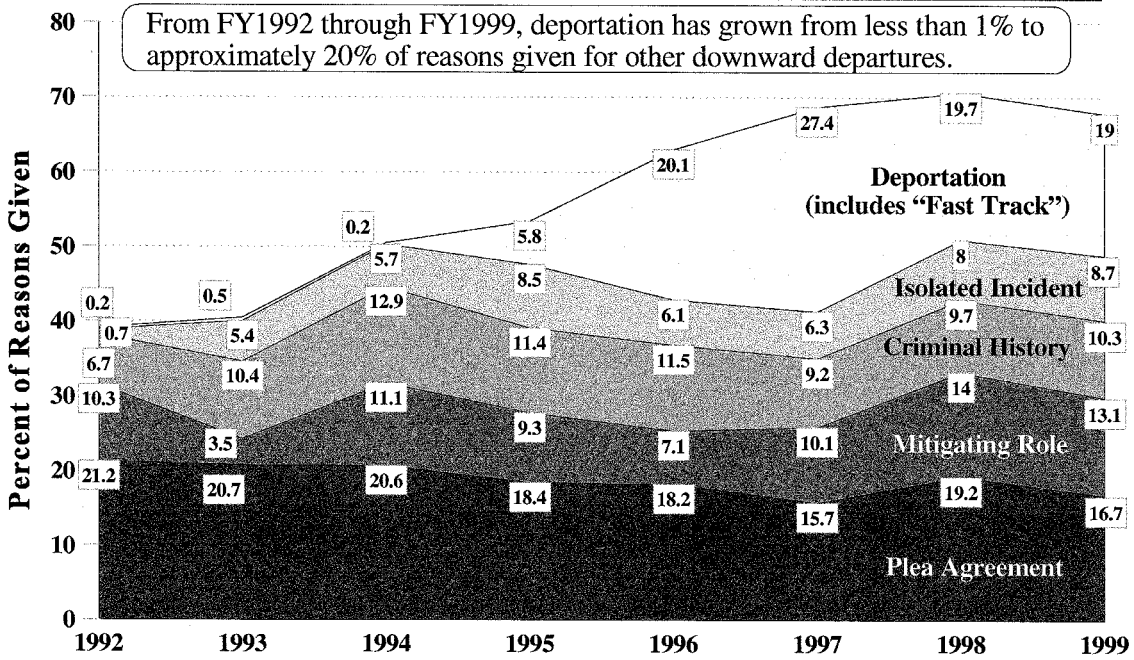


SOURCE: U.S. Sentencing Commission, 1989-1999 Datafiles, USSCFY89-USSCFY99.

Exhibit 14

Five Most Frequent Reasons for Other Downward Departures[1]

FY1992 through FY1999



[1]Cases with more than one guideline computation are excluded from the analysis. Analysis includes only cases with other downward departures; Substantial Assistance §5K1.1 cases are excluded. In FY1999, these top five reasons are approximately 68% of all reasons for other downward departures.
Source: U.S. Sentencing Commission, 1992-1998 Datafiles, USSCFY92-USSCFY98.

Senator THURMOND. Senator Sessions, before we begin questions, do you have any comments?

Senator SESSIONS. I thought it was very interesting that we are looking at, and I think it is important to consider the immigration matters, but also important to look at the numbers on nonimmigration cases, too. It looks like you have a 40-percent, 50-percent increase across the board on issues such as robbery, firearms, and other cases where the departures have been downward.

Mr. Chairman, you do your questions now, if you would like, and I will follow you.

Senator THURMOND. Thank you.

Judge Murphy, are you concerned about the increasing number of downward departures from the Guidelines, and do you view this trend as a problem?

Judge MURPHY. Well, Senator, as I say, the Commission hasn't been able to study these data. You know, we have certainly looked at them briefly. We haven't talked about it. As Mr. Steer has pointed out, departures are an inherent part of the guideline structure, but we need to monitor them because one of the main goals of your statute, the Sentencing Reform Act, is to prevent disparity in sentencing, and so obviously that is something that the Commission has to be looking at.

We hope by the fall of 2002 for the 15th year of the operation of the Guidelines to have conducted a review to see how well the Guidelines are doing in terms of the goals of the Sentencing Reform Act. So this is an area that, of course, we will be looking at.

If you take out the substantial assistance, our data show that 82 percent of the offenders are being sentenced within the guideline range. And looking at our data, it shows that the most serious offenders are getting very serious sentences. Some of the lesser ones are getting lesser sentences.

The Southwest border problems have been brought to congressional attention. They have also been brought to our attention, and we have seen the great rise in disparity there which accounts for an awful lot of it, although I notice that of those States that Mr. Steer had on his chart, three of them are within the eighth circuit and that is not the Southwest border where there has been such a great increase in drug trafficking. These courts are really hard-pressed to handle it all, and that accounts for part of the disparity there. So this is something that we will be looking at. We do have data on the reasons that judges give for departing, and this isn't part of what you have looked at yet. We will be looking at all of this.

Senator THURMOND. I have a question for Judge Murphy and Mr. Steer, both. Has the Justice Department expressed concern to the Commission in the past few years about the increasing trend in downward departures?

Judge MURPHY. Well, the Justice Department has been working with us mainly through, of course, the ex officio member that is under the statute part of our Commission working on the issues that come up. And I would say that in my experience on the Commission since November, the Justice Department has expressed concerns about departures, expressed concerns about possible guidelines that would not accomplish something that would be a

deterrence for crime. So I haven't seen any softening, if that is what the concern is.

Senator THURMOND. Mr. Steer, do you want to answer that same question?

Mr. STEER. Mr. Chairman, under the statute the Department of Justice is required to report annually to the Commission on areas of concern and the issues that they want us to address. As Judge Murphy indicated, they do that regularly through the ex officio designee of the Attorney General.

I don't recall a letter that expresses a generalized concern about departure trends, but certainly there have been, as Judge Murphy indicated, a number of specific issues that the Department has brought to the Commission and on which we have worked together.

Senator THURMOND. Mr. Steer, does the Department of Justice need to maintain oversight over the U.S. attorneys' offices regarding sentencing cases that need to be appealed to make certain that the Guidelines are not undermined by unwarranted downward departures?

Mr. STEER. Mr. Chairman, I think the answer is clearly, yes, that they do need to do that. You mentioned in your opening statement some of the data that we presented from our appeals databank that indicate the rate at which appeals are being taken from downward departure cases, and generally that rate has been declining and is very low overall relative to the total number of downward departure decisions that are rendered.

Senator THURMOND. Mr. Steer, do you believe the Department of Justice should encourage U.S. attorneys to be more consistent in how they apply substantial assistance and how they define what it means?

Mr. STEER. Yes, Mr. Chairman, I do. I think it should be recognized that the Department has undertaken a number of initiatives in the substantial assistance area. Arguably, more could be done. Substantial assistance, without a doubt, in my view, is a critically important law enforcement tool.

Congress made the decision that the downward departure for substantial assistance would be made only upon motion of the Government. In my view, that was the correct decision, and the Commission has followed suit and I think that was the correct course of action.

What that means, though, because it is so important in the scheme things, is it, I think, warrants very close and continued monitoring from the Department of Justice down through the U.S. attorneys to the field to ensure that these departures are made in appropriate cases where they do further the goals that Congress had in mind, and at the same time substantial assistance downward departures are not used in cases where that kind of assistance has not been rendered as another way of achieving a lower sentence.

Senator THURMOND. Mr. Steer, it seems that downward departures are being given for more and more creative reasons. For example, one of the top reasons for downward departures is for a defendant's mitigating role in the offense, but he can already get the benefit of this under a straightforward application of the Guidelines. Is this a problem?

Mr. STEER. Well, it may be. I think that the data that we capture on the synopsis of the judge's reasons that the court indicates as reasons for downward departure—the shorthand in many instances may not indicate the full story. There may have been other factors that the court had in mind when it downwardly departed. But certainly the basic premise that you present is that when the Guidelines take a factor into account fully, then the court is not supposed to downwardly depart for that particular reason.

Senator THURMOND. Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

We are talking about an important issue. I believe the Department of Justice needs to be considering this and studying it to make sure they are consistent. And I think the judges need to watch it when we have a steady trend toward more departures for reasons outside of cooperation which should be properly utilized. So I am concerned about that.

Judge Murphy, in general, we have many judges that come to the bench that have had no criminal experience. They have civil backgrounds, which is fine, but don't you think that the Guidelines help give them guidelines and help give them some comfort when they first walk into that courtroom and have to start sentencing people that are before them?

Judge MURPHY. Well, Senator Sessions, I am a convert to the Guidelines because I was appointed in 1980 under the old system. And like human nature, I guess, you know, you work in a system and you like it and you are suspicious of something new that comes along. But I am a big fan of the Guidelines and I think that they provide objective standards that are so useful.

When I compare sentencing under the Guidelines to the prior difficulties that a judge would have in trying to make sure that you were dealing fairly with similar cases, it is vastly superior. And I think that the judges who have come on since the Guidelines have been in place accept them, and even those who were there before have used them.

I know that you mentioned a case that I am not familiar with in the ninth circuit, and as an appellate judge I see cases sometimes where we reverse the judges because they haven't followed the Guidelines. But overall I think the judiciary has accepted them and see the value of them.

Senator SESSIONS. I agree, I agree. Overall, the system accepted them, the appellate courts insisted that they be followed, and the Guidelines have been followed fundamentally.

What we are seeing—and I think it is a bit troubling as a trend if it continues—could lead us to a point that we have a real concern. If you allow too many loopholes and you have 8,000 cases and only 19 appeals and an awful lot of departures for novel reasons, then we could undermine that. I just think it is important that we do it.

You mentioned your economic crimes conference. Are you reviewing economic crimes and considering changes in the Guidelines—I am just curious—for those kinds of cases?

Judge MURPHY. Yes; there has been a lot of concern about some of the Guidelines not punishing especially the higher-end economic crimes severely enough. There have been criticisms from a lot of

judges about the loss tables, and I know that there was a package that was presented at an earlier time, money laundering, and so on, that didn't fare too well in Congress.

Our staff has gone back and studied what the problems were there. We are working with the Department of Justice and other interested parties to come up with something that we hope will fly and that will be acceptable to Congress.

On almost all of our votes this year, they were 7 to 0, and that wasn't because it is a lock-step group at all. It is seven independent individuals, but we spend a lot of time considering various options and talking them out, listening to people, and that was how we were able to come up with those votes.

Senator SESSIONS. I think that is wise to consider that. My observation is we have muddled criminal law a lot. We have criminalized what would have been civil fraud in a lot of instances, perhaps, and maybe the defendant does not need a huge sentence, even though the large amount of money is significant, because the degree of criminality was not great.

But there are a lot of crooks out there, really serious con men who, as soon as they are out of jail, will go right back to it again. I hope that you can continue to improve that area. I think in many instances it has been too light. This idea that only violent criminals need to go to jail is wrong. A lot of repeat economic criminals need to be in jail, too.

Mr. Steer, I wanted to run through a few questions with you. You mentioned the *Koon* decision. There has been a shift. It also shifted some responsibility, or more, to the Department of Justice under *Koon*. Would you agree with that?

Mr. STEER. In answer to your question, Senator, I think that *Koon* clearly, because it has necessarily meant that the courts of appeals were to be more deferential and more hands-off in their reviewing of departure decisions, puts a greater responsibility both on the Department and the Commission to serve as a check through the policymaking process when there is found to be an excessive or unwarranted rate of departure or departures for circumstances that are inappropriate.

Senator SESSIONS. We have seen a steady increase in departures. Let me ask you, do you think that at this point in time based on these trends that the Department of Justice needs to take seriously and try to address them, and that the Sentencing Commission needs to take seriously, and has the Sentencing Commission discussed it overall and does it have any plans to deal with the increase?

Mr. STEER. Yes, it should be taken seriously by the Department and by the Commission. No, the Commission has not had an opportunity to discuss these issues overall. The data that we have presented today—as we indicated, the press of business has been so great since our initial appointment and it is not letting up. Nevertheless, I do think and hope, and I am sure the Commission will be considering these issues in conjunction with the Department of Justice in the future.

Senator SESSIONS. Well, you mentioned in your statement, the written portion, that one of the problems involves the Department

of Justice and the prosecutor, their lack of centralized tracking, oversight, and management of plea bargains around the country.

And these numbers you have provided are pretty stunning. For example, the States with the lowest departure rates for other factors are Virginia-Eastern, 1.8; Alabama-Northern, 1.9. The ones with the highest departures are Arizona, 57; California-Southern, 49; Washington-Eastern, 40. Those are factors up to 20 times. Some may be driven by immigration, others are not. So I think your suggestion that we may be not having the uniformity of sentencing that we desired as a result of departures is a real and legitimate concern.

Let me ask you, to your knowledge, is there someone in the Department of Justice who, to your knowledge, has responsibility for monitoring these kinds of issues, or was it only you that raised them and dug up these numbers?

Mr. STEER. Well, the numbers were suggested by our data. I didn't have to dig. These are straight out of our annual report, redacted for the purpose of the hearing. I am not knowledgeable of the internal processes of the Department. To the best of my knowledge, there is not that single person, but certainly that question should be posed to the Department's witness.

Senator SESSIONS. Thank you, Mr. Chairman.

Senator THURMOND. Thank you.

Senator SESSIONS. I thank both of you for your fine work on this issue. Justice needs to be even and fair. It should not be based on factors other than legitimate sentencing issues. I think the Guidelines have done a good job of identifying the most prominent sentencing issues, and most people today are sentenced according to that. We just need to maintain constant discipline and oversight, or I think these things can slip away from us.

Thank you.

Senator THURMOND. I wish to thank both of you for testifying today.

Mr. STEER. Thank you, Mr. Chairman.

Judge MURPHY. Thank you.

Senator THURMOND. Representing the Department of Justice is Mr. Laird Kirkpatrick. He is the Attorney General's designee to the Sentencing Commission and is counsel to the Assistant Attorney General for the Criminal Division. He is accompanied by Ms. Denise O'Donnell, the U.S. attorney for the Western District of New York.

Mr. Kirkpatrick, please limit your remarks to no more than 5 minutes. Your written statement will be included in the record, without objection. You may proceed.

STATEMENT OF LAIRD KIRKPATRICK, ATTORNEY GENERAL DESIGNEE TO THE U.S. SENTENCING COMMISSION, AND COUNSEL TO THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; ACCOMPANIED BY DENISE O'DONNELL, U.S. ATTORNEY, WESTERN DISTRICT OF NEW YORK

STATEMENT OF LAIRD KIRKPATRICK

Mr. KIRKPATRICK. Thank you, Mr. Chairman. We appreciate the opportunity to appear before you today at this hearing concerning the U.S. Sentencing Commission and Federal sentencing policy.

We at the Department of Justice believe strongly that the U.S. Sentencing Commission and the Federal Sentencing Guidelines promulgated by the Commission play critical roles in the Federal effort to control crime. We are pleased to provide our views on current Federal sentencing policy, the important work being done by the Sentencing Commission, and the issues faced by the Commission in the coming years.

Mr. Chairman, today's Federal sentencing system brought about by the Sentencing Reform Act of 1984 is very different from the inconsistent and uncertain system in place before the Act. It is a highly structured system that has brought greater uniformity and greater predictability to Federal sentencing.

We think it is important to first express our overarching view that structured sentencing policy such as that under the Federal Sentencing Guidelines is far superior to the unstructured sentencing scheme that it replaced. And we would like to applaud you, Mr. Chairman, for your key role in passing the Sentencing Reform Act of 1984 which led to the creation of the Commission and the Sentencing Guidelines.

Although the Sentencing Reform Act and the Federal Sentencing Guidelines have now been in place for well over a decade, we think there remains a critical role for the U.S. Sentencing Commission. The Sentencing Reform Act lays out many ongoing responsibilities for the Commission, responsibilities we think are vital to keeping the Federal Criminal Justice System working well.

They include promulgation of new guidelines in response to new criminal legislation, monitoring the operation of the Federal Sentencing System, making adjustments to the Sentencing Guidelines as directed by Congress and as experience and research show to be necessary, and to serve as an important resource both to the Congress and the executive branch with respect to sentencing policy.

We are particularly pleased that the Commission was reconstituted last year after an extended hiatus. We are exceedingly impressed with the ability and the dedication of the seven new voting members that are serving on the Commission. Speaking from a personal point of view, it is privilege to serve with these seven individuals.

I think the Commission under Judge Murphy's strong leadership has accomplished a prodigious amount of work during its first amendment cycle, and the Commission only had 4 or 5 months to do that work. The Department had urged the Commission to respond to the numerous congressional directives to enact new guidelines in response to new criminal legislation. We expected the Com-

mission perhaps to deal with four or five of those directives. Instead, the Commission was able to amend 15 guidelines in its first amendment cycle.

We also urged the Commission to respond and attempt to resolve the numerous circuit conflicts in interpreting the Guidelines that were creating inconsistencies and disparities throughout the country. We thought the Commission might be able to deal with two or three during its first amendment cycle. It was able to resolve five of them.

The Commission has now turned its attention to an ambitious new agenda of issues for the second amendment cycle, and the Department has put forth its issues which are accepted by the Commission as priorities to be considered during this amendment cycle. And we very much look forward to working with the Commission during the cycle to make the upcoming year an equally productive one.

We believe that there are a number of areas where amendments are needed. I will just emphasize three in my testimony here today. The first is a very high priority for the Department of Justice, economic crimes. Economic crimes constitute nearly one out of four cases prosecuted in the Federal System, and serious questions have been raised as to whether the Guidelines for these offenses are appropriate in their current form or whether they need to be amended. We think it is vitally important that this area of law be comprehensively examined, and we commend the Commission for convening the 2-day conference that is now being held at George Mason Law School to explore these issues.

Second, we think it is important that the Commission address the guidelines for money laundering offenses. This has been a source of contention and concern for almost 10 years. Congress has urged the Commission and the Department to work together, and we are doing so with the Commission and hope to be able to have guidelines in this area by the end of this amendment cycle.

Third, we urge the Commission to continue its work implementing the Sexual Predators Act. Last year, the Commission made great strides in addressing the very serious problem of child exploitation and child sex crimes, including crimes facilitated by the Internet and involving interstate travel. As with economic crimes, the Internet and other technologies are changing the way sex crimes against children are being committed. We believe that it is critical that our laws keep current and that this devastating crime problem be forcefully addressed.

Thank you, Mr. Chairman, for the opportunity to appear before you today, and I would be pleased to answer any questions that the committee may have.

Senator THURMOND. Mr. Kirkpatrick, is the Attorney General aware that more and more criminals are receiving sentences below the Guidelines every year, and does she view this trend as a problem?

Mr. KIRKPATRICK. We are certainly aware of the statistics, Mr. Chairman. We have the same data that the Sentencing Commission does and we do monitor this and track it. We are concerned and are reviewing the situation. We do feel that a major part of

the Department's resources in sentencing matters are to defend the Guidelines, to keep the sentences within the range.

Apart from substantial assistance which we view as a law enforcement tool, and we will talk about that separately if you would like, the guideline sentences are within 84 percent of the cases nationwide. If you exclude the Southwest border, the sentencing within the Guidelines is even higher. And it is the Department on a case-by-case basis that is resisting efforts by defendants to have downward departures.

So in a very high percentage of the cases, the Department is playing an active role to urge the court not to grant a sentence outside the Guidelines range. And we feel there is other data that should perhaps be put before this committee about the number of cases where it is the defendant that is seeking to have the sentence outside the Guidelines range and the Department is resisting.

Last year, there were 4,000 cases that reached appeal alone. There were many more cases than that that were resolved at the trial level, but there were 4,000 cases where the defendants were trying to have a sentence outside the Guidelines range where the Department was responding to the defendant's appeal and urging that that sentence be confined to the Guidelines range and we won 80 percent of those cases. So I think the Department is playing a very key role in monitoring the Guidelines and trying to keep the sentencing within the appropriate Guidelines range.

Senator THURMOND. Mr. Kirkpatrick, you state in your prepared testimony that the Commission should examine the trend in downward departures and determine whether there is cause for concern. Does the Department of Justice also have a duty to do its part to uphold the Guidelines?

Mr. KIRKPATRICK. We certainly do have a duty, Mr. Chairman, and we try to do that in every case where we feel a departure outside the Guidelines is inappropriate to represent the Government's view on that issue.

I think what we are finding and what I was referring to in my testimony is a particular concern in the Southwest border States where that is what is playing the most significant role in driving the upward departure range. And we have discussed that issue with the Commission, put some of the Southwest border issues on the agenda of the Commission to see if there is a way to deal with the exigencies that are causing sentencing outside the Guidelines in that area. And we look forward to working with the Commission in this amendment cycle to deal with those issues.

Senator THURMOND. Mr. Kirkpatrick, it appears that only a little over 60 percent of Federal defendants are sentenced within the Guidelines today. If the downward departure trends continue, does there reach a point where the Guidelines system is undermined?

Mr. KIRKPATRICK. We certainly would be concerned if it reached a higher point, Mr. Chairman, and that is why with substantial assistance we are monitoring that. And as your chart indicates, the substantial assistance departures are actually declining in recent years, a slight downward trend. We do monitor those, although we view those as an extremely important law enforcement tool that must be considered separately from the issue of departures on other grounds.

The way we largely deal with departures on other grounds, in addition to litigating attempts by defendants to depart downward, is to try to treat these cases that involve new areas of law as a test case and try to persuade the courts that a certain type of downward departure is inappropriate.

We have litigated, for example, the issue of whether post-conviction rehabilitation should be a ground for downward departure. We won in some circuits, we lost in others. But we were ultimately successful by taking that issue to the Sentencing Commission last year and the Sentencing Commission agreed that that should not be an appropriate ground of downward departure and added it as a prohibited factor, and that amendment will become effective November 1.

We also took two other issues to the Commission where we felt downward departures were inappropriate. One involved aberrant behavior, where we asked the Commission to adopt a guideline narrowing the definition of aberrant behavior as a basis for downward departure. Some circuits have given a very broad definition of that term. And the Commission did adopt a version that is narrower than many circuits were applying.

The third issue that we took to the Commission last year had to do with a case from the third circuit, the *Smith* case, *United States* v. *Smith,* where the third circuit had taken a money laundering conviction and decided it really was more of a fraud conviction and sent it down to be sentenced under the fraud guidelines. That, in our opinion, very much undermines the guidelines structure if courts can pick and choose and sentence on a different guideline than the guideline of conviction.

So we proposed to the Sentencing Commission that the rule be amended, the guideline be amended, and require judges to use the guidelines from the sentencing guideline index that is applicable to the crime of conviction. The Commission agreed with us. They changed the guideline, and that is now the law and that will prevent us having to litigate that *Smith* case issue throughout the country.

Senator THURMOND. Mr. Kirkpatrick, as more defendants are sentenced below the Guidelines, it would seem that the Department would appeal more Guidelines cases. However, just the opposite has occurred. Should the Department place more attention on appealing sentencing decisions as a way to uphold the Guidelines?

Mr. KIRKPATRICK. We do, Mr. Chairman, attempt to take those cases up where we feel it can have a significant impact. The problem we are having is after the *Koon* case, the standard for appellate review of a sentencing judge's decision is now abuse of discretion, and it is very difficult to win those cases on appeal.

In fact, of the cases that we are taking up, according to the Sentencing Commission data—it has it right in the green book that is being used as a basis for these charts—we are losing over 50 percent of those appeals. It is hard to persuade the appellate courts to reverse on an abuse of discretion standard.

We are also finding that even if we win, it doesn't have a lot of precedential value. One court was reversed for abusing its discretion. That doesn't necessarily affect another court. So we find it more effective to litigate the legal issue—is this a permissible basis

for downward departure—or to take that issue to the Commission. But we certainly urge the U.S. attorneys to bring cases to us where they feel an appeal has a possibility of success and we do take up a number of those cases.

Senator THURMOND. Senator Sessions.

Senator SESSIONS. Well, I am troubled by that philosophy. I think, first of all, you concede the case at hand if you don't appeal. Isn't that correct, the injustice that may have occurred?

Mr. KIRKPATRICK. I am sorry, Senator.

Senator SESSIONS. On the appeals question, deciding to go to the Commission will not reverse the injustice that occurred in the trial court. It just may potentially help in the future those kinds of cases from occurring.

Mr. KIRKPATRICK. Well, usually, Senator, we have tried to litigate that issue beforehand, like post-conviction rehabilitation. We litigated that. We won that in some circuits, we lost it in others.

Senator SESSIONS. You are talking about in general, but I am talking about real life. Real life is everybody knows what the Guidelines are. The judge doesn't like the Guidelines and he departs downward, for some reason. You have got 19 appeals out of 8,304 in 1999. If you don't appeal more than that, judges, in my experience, will get the message that they can do what they want to and nobody is going to appeal. Isn't that a problem?

Mr. KIRKPATRICK. Well, we are looking at that issue and we are willing to have further discussions with the Sentencing Commission about that issue. I think the statistics show there were 35 appeals back in 1993. I don't think there has been that dramatic a drop. So far this year, we have got about 20 and we may be back up to 35.

But I think our view is that that is an effective tool. It is something we want to do. We want to appeal cases where we feel judges have really gone beyond their scope of discretion under the Guidelines. But given the resources we have, we find we are having more impact by litigating a legal issue or getting it simply resolved that that is an improper ground of departure.

Senator SESSIONS. Well, one of the factors in gaining control of a system that may be slipping out of control is to use the appeal process. Wouldn't you agree?

Mr. KIRKPATRICK. I agree, Senator.

Senator SESSIONS. And would you not agree that with regard to other reasons for other downward departure reasons that in 1992, when I left office as U.S. attorney, there were 6.1 percent downward departures for other reasons and now it is 15.8 in 1999, which is a 150-percent increase in that area?

I think all of us are concerned that that other reason can become the door through which too much can occur. So, that concerns me. Have you all discussed that in the Department of Justice that we have got a 150-percent increase in other departures?

Mr. KIRKPATRICK. We have, Senator, and we are monitoring that and the biggest source of those statistics is the Southwest border area. We are concerned about that.

Senator SESSIONS. I think that is true, although I am not sure what to do about it, but that is true.

If somebody would put up chart number C–3.

If you look at the chart that has been produced there, on robbery you have got a 50-percent increase, or more. Look at firearms. This administration is beating up all of us on Congress on a regular basis; we don't do enough to pass more laws about firearms. But since this administration took office in 1992, you have got almost a doubling of downward departures in firearms cases.

You do show the huge increase there in immigration, but the trend is up in every area, more than a 30-percent increase, I suppose, in economic fraud cases. But those are trends across the board, and I guess what I am asking you is do you think that there is a responsibility on behalf of the Department of Justice and the Attorney General to examine these numbers, to study what is happening, and to ensure that U.S. attorneys are watching these matters in their districts and attempting to have some uniformity here?

Mr. KIRKPATRICK. I agree totally, Senator. I think we do have that responsibility. I do feel that the Department is defending the sentencing system, though. We did not have a chance actually to review this document at a formal Sentencing Commission meeting and would like to supplement it with the cases where the Department was successful in resisting other downward departures.

I mean, there are numerous motions for downward departure that we have been successful on. To some extent, this trend that you are seeing, going from 9 percent to 11 percent in a particular crime, are cases where we were unsuccessful in resisting the downward departure, and we remain concerned about that. We usually are opposed at the trial level.

I do think the *Koon* case, as Commissioner Steer acknowledged, has created a very difficult problem for us. It has changed the standards that the appellate courts apply in reviewing our appeals and it has made it much more difficult for us to take those cases and be successful at the appellate level.

And I think just institutionally the Department of Justice is concerned about its credibility. If we get down to a point of winning only 20 percent of the cases, we kind of lose our institutional credibility. I think we like to take cases up where we think we can win and we can persuade the appellate court that the case should be reversed.

Senator SESSIONS. Well, let's take a case like John Huang, in California. I don't believe that the guidelines were followed. The U.S. attorney just knuckled under or agreed to a factor so that John Huang could be given probation and not serve a day in jail. So they were in cahoots, in my view, the judge and the U.S. attorney. Both knew, or should have known that in that high-profile case probation wasn't justified. But no appeal was taken, no complaint was rendered.

All I'm saying to you is if the leadership is not strong from the Department on even high-profile cases, then the word is going to get out to assistants who maybe don't want to prepare for trial next week and spend all weekend getting ready for trial to just take this plea and let it go away.

Your trials are down for the Department, are they not, throughout the country?

Mr. KIRKPATRICK. I don't have the statistics in front of me for that, Senator, but we would be happy to get them for you.

Senator SESSIONS. Well, your budget has doubled since 1992. You have got a 19-percent increase in assistant U.S. attorneys. The number of cases tried to completion has declined by 40 percent. So, that suggests to me that there has been an increased emphasis on pleas. Pleas are important. You can't try every case. Plea bargains have got to be done, but the trends are troubling to me, is all I am saying to you.

And I hope that you will listen to the concerns here and realize that sometimes the Attorney General has got to send a signal that you have got to be more disciplined. The U.S. attorneys have got to supervise their assistants and look at these districts that have widely differing sentencing rates between districts and ask some of the most aberrational districts why they are so far out of shape.

Mr. KIRKPATRICK. We do share your concern, Senator, and we do hear your concerns and we share them. And we will continue to monitor the enforcement of the Guidelines.

Senator SESSIONS. I will just ask you, has any U.S. attorney been called on the carpet to discuss these issues?

Mr. KIRKPATRICK. I would not be the one to do that, so I guess I can't answer the question whether somebody in the Department has. I do have with me Denise O'Donnell, from the Attorney General's advisory committee who is representing the U.S. attorneys nationwide, and perhaps she would want to respond to some of these issues herself.

Senator SESSIONS. I am sorry to take the chairman's time. I am taking too much time. This is an issue of interest to me. Briefly, I would be delighted to hear from you, Ms. O'Donnell.

Ms. O'DONNELL. Well, thank you very much, Senator. I too would like to thank Senator Thurmond for the leadership that you have shown in this area, Senator, with the Sentencing Guidelines. Like Judge Murphy, I am a big fan of the Sentencing Guidelines.

I can tell you, Senator Sessions, that the U.S. attorneys community is very grateful that we have someone sitting in the U.S. Senate who has been an assistant U.S. attorney, as well as a U.S. attorney.

Senator SESSIONS. Assistant was the best job.

Ms. O'DONNELL. I agree with that.

I have been in the Department of Justice for 15 years, Senators, and I can tell you that the U.S. attorneys today are as committed as they ever were during the last 15 years to the goal of uniformity in sentencing. We share your concerns.

I believe that the factors that we have discussed here—the *Koon* decision and the particular situation on the Southwest border—are responsible for the great majority of the departures that we are seeing, and I think this hearing is demonstrating that today.

I would like to talk for a minute about the Southwest border because the U.S. attorney in Arizona, Jose Rivera, has told me that last year, in 1999, there were over 550,000 Border Patrol apprehensions of illegal aliens in Arizona alone. Those individuals could be prosecuted if we had the resources to do that. We don't, but we are doing the best job that we can on the Southwest border issues.

Congress has provided for a substantial increase in Border Patrol resources on the Southwest border, but we don't have the same kind of resources in the U.S. Attorneys' Offices and in the courts to address that kind of a workload and it has created an emergency crisis in terms of law enforcement on the Southwest border.

And the response has been a troubling one in terms of uniformity in sentencing throughout the country, and I think that is a profound challenge for all of us to figure out how we can maintain uniformity in sentencing in those districts and at the same time meet this huge law enforcement challenge. And we have found so far that we can't unless we devise plea policies that will result in substantial departures for the individuals that we are prosecuting in those cases.

In more direct response to your question, I don't know if we could call it calling people in on the carpet. Our problems in our districts are very different. I think you know, Senator Sessions, that the reason we have 93 U.S. attorneys is we have very, very different situations within our districts. We have different crime problems, we have different resources, we have different priorities, we have different partnerships with our State and local partners that determine the kinds of cases that we prosecute within our different districts.

And that provides for on the investigation side and the prosecution side a great deal of difference between our various districts. Yes, because of that, we still have to find a way to wrestle with those problems and still result in a substantial uniform way of sentencing under the Sentencing Guidelines. And we are working very, very hard to do that within our districts.

We on the Attorney General's advisory committee do discuss these issues. We haven't had an opportunity to share this particular data yet with the Attorney General or with the U.S. attorneys on the advisory committee. We have discussed the situation on tahe Southwest border. We have discussed the *Koon* situation, the extent to which our circuits vary with the kinds of departures that they are allowing and permitting judges to make, and these issues are issues of great concern.

But I just want to really assure you that this is a very important issue to us and that we are committed to the goals that you have discussed here and brought up at these hearings.

Thank you.

Senator THURMOND. Ms. O'Donnell, I recognize that some districts must handle an ever-increasing number of aliens crossing the Southwest border. However, it appears that today almost half of those who are caught smuggling aliens across the border are being sentenced below the Guidelines, many with Government approval, even though Congress expressly ordered harsher penalties for alien smugglers in 1996.

Should fast-track policies benefit alien smugglers?

Ms. O'DONNELL. Well, Senator, I don't think that I can answer the question quite in that form. I think we are not trying to benefit alien smugglers. What we are trying to do is enforce the Federal law which is in alarming proportions of cases in those districts.

I think the real question to us is do we prosecute these cases in the best way that we can with the resources that we have, or do

we have to back away from the challenge that it presents, or can we get more resources from Congress in order to do the job the way that we need to do it. Given the choices, which is either right now to do the cases under a fast-track system or not to do the cases in the record number in which we are trying to address the cases, it presents a very difficult situation for us.

Senator THURMOND. Mr. Kirkpatrick, in some districts defendants get the benefit of a substantial assistance departure about 50 percent of the time, while in others they only get it 5 percent of the time. What specific action has the Attorney General taken during her tenure to encourage U.S. attorneys to have some consistency on how they define and seek to grant substantial assistance for cooperating with the Government?

Mr. KIRKPATRICK. Senator, we are concerned about having consistency with respect to substantial assistance motions. In the U.S. Attorneys Manual, it is required that within each district a supervising attorney or even a review committee has to approve substantial assistance departures. So, that is a way of ensuring consistency within each district.

The U.S. Attorneys Manual goes on to say that the co-defendants in a similar case—if you recommend a certain level of downward departure for one defendant, you have to make that proportionate to another defendant in that case. The issue you raise is disparities among the different districts. That does concern us. We are looking at that data.

One thing we have found from that data is that sometimes it makes it look as though the disparity is greater than it is because the data only picks up substantial assistance departures made under 5(k)(1). It does not pick up substantial assistance under rule 35. Some districts that look like they don't have any substantial assistance departures compared to a district next door actually have the same level of departures, but they are simply doing it by rule 35.

So we have found that the disparities are not quite as great as the data makes it appear. We have also found that sometimes the sentence length, despite differences in substantial assistance, is very close between districts. But we are concerned about this issue and are monitoring it and, in fact, have drafts of guidelines we are thinking to possibly promulgate to the U.S. attorneys.

We are working with the Attorney General's Advisory Committee on Sentencing Guidelines, circulating possible draft criteria to define substantial assistance to further create uniformity among districts throughout the country.

Senator THURMOND. Mr. Kirkpatrick, should an offender be able to get the benefit of a downward departure for substantial assistance when he only provides the prosecutor information the Government already knew?

Mr. KIRKPATRICK. Generally, that would not qualify, but there is some discrepancy, some disparity among districts on that issue. It is perhaps an issue that should be addressed by the Sentencing Commission and given further definition. We would be happy to work with the Commission on that.

I don't know if Ms. O'Donnell has anything to add.

Ms. O'DONNELL. Well, the only thing I would add is if the individual is testifying, for instance, the Government may have known the information. But we require defendants to actually provide substantial assistance against another individual in order to qualify for a 5(k)(1.1) departure.

I think the other point is that these departures are reviewed very carefully by the court. We are required to file memoranda under seal with the court explicitly describing the nature of the cooperation, the cases and the results of the cooperation, whether in our district or other districts, to provide a full record to the court before the court actually sentences the defendant and determines the amount of the departure.

Senator THURMOND. Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

That was a very interesting question. I am somewhat of the belief that two witnesses may be more valuable than one. Just because one has given the testimony first doesn't mean you might not want three witnesses testifying against the main culprit if you are moving along wisely. So, that is a difficult question. I am inclined to think that more than one person can get a benefit from a downward departure in a certain case, but you have to use good judgment in that.

Thank you, Mr. Chairman.

Senator THURMOND. I wish to thank both of you for being here today and you are now both excused.

Mr. KIRKPATRICK. Thank you.

Ms. O'DONNELL. Thank you very much.

[The prepared statement of Mr. Kirkpatrick follows:]

PREPARED STATEMENT OF LAIRD KIRKPATRICK

INTRODUCTION

Mr. Chairman, members of the Subcommittee: My name is Laird Kirkpatrick, and I serve as Counsel to the Assistant Attorney General for the Criminal Division of the Department of Justice and also as Commissioner ex-officio on the Sentencing Commission representing the Attorney General. With me is Denise O'Donnell, United States Attorney for the Western District of New York, and Daniel French, United States Attorney for the Northern District of New York. We very much appreciate the opportunity to appear before you today at this hearing concerning the United States Sentencing Commission and federal sentencing policy. We at the Department of Justice believe strongly that the United States Sentencing Commission and the federal sentencing guidelines promulgated by the Commission play critical roles in the federal effort to control crime, and that Congress is to be commended for establishing the Commission and the procedures under which is operates. We are very pleased to be here today to provide our views on current federal sentencing policy, the important work being done by the Sentencing Commission an the Commission staff, and some important issues facing the Commission in the coming years.

CURRENT SENTENCING POLICY IS A SIGNIFICANT IMPROVEMENT OVER THAT WHICH EXISTED BEFORE THE SENTENCING REFORM ACT OF 1984

We believe it is government's first responsibility to protect the well-being of its citizens. For more than three decades now, this country has been struggling with the profound problem of crime. As you know Mr. Chairman, crime rates began to rise dramatically from historic norms in the early 1970s. And while the national violent crime rate has fallen significantly in each of the last seven years, crime continues to occur at an unacceptably high level. Just as importantly, as technological and social change has accelerated, new criminal threats continue to emerge. At the same time, new opportunities arise—as a result of technology and otherwise—to fight crime through innovative policies and strategies. Federal, state, and local gov-

ernments have been working hard to develop and implement successful policies to combat crime. And it has become increasingly clear that an effective sentencing policy is one crucial element of any effective crime fighting policy.

The federal sentencing system in place before the Sentencing Reform Act of 1984—the Act that created the Sentencing Commission—was almost entirely discretionary. Choosing a sentence for those convicted of federal offenses was left almost entirely to the unfettered discretion of federal judges and essentially was ungoverned by law. Beyond a statutory direction limiting the maximum sentence, individual judges had the choice to decide what factors in a case were relevant to sentencing and how such factors should be weighted. Not surprisingly, sentencing outcomes under this system were inconsistent from judge to judge and from district to district.

In 1984, Congress found this discretionary system too often resulted in unacceptable outcomes and that inconsistent sentences were not compatible with effective crime fighting, equity or fundamental fairness. Mr. Chairman, today's federal sentencing system—brought about by the Sentencing Reform Act, as implemented by the Commission, federal judges, prosecutors, probation officers, and defense attorneys—is very different from the inconsistent and uncertain system in place before the Act. It is a highly structured system that has brought greater uniformity and greater predictability to federal sentencing. It is a system not without significant flaws, some of which I will touch on in a few minutes. But we think it is most important to first express our overarching view that structured sentencing policy—such as that under the federal sentencing guidelines—is far superior to unstructured sentencing policy. And we believe sentencing guidelines are a key component of an effective structured sentencing policy.

THE ROLE OF THE SENTENCING COMMISSION AND THE NEWLY RECONSTITUTED SENTENCING COMMISSION

Although the Sentencing Reform Act and the federal sentencing guidelines have not been in place for well over a decade, we think there remains a critically important role for the United States Sentencing Commission to play now and in the years to come. The Sentencing Reform Act lays out many ongoing responsibilities for the commission—responsibilities we think are vital to keeping the federal criminal justice system working well. These include monitoring the operation of the federal sentencing system, making adjustments to the sentencing guidelines as directed by Congress and as experience and research show necessary, and serving as an important resource that, together with Congress and the Executive Branch, can ensure that the country has effective crime control and sentencing policies.

Guidelines amendments ensure that federal sentencing policy is up to date and as Congress and the Commission intend by resolving interpretive conflicts among the courts, responding to changing criminal justice priorities, and making the guidelines as workable as possible for real practitioners. The commission's extensive monitoring and research capabilities track the federal criminal justice system and specifically the way of the guidelines are applied within the federal criminal justice system. These capabilities are invaluable tools to track the cases flowing through the federal criminal justice system and the effectiveness of various crime and sentencing policies. And the Commission's training programs help to educate practitioners—judges, probation officers, prosecutors, and defense counsel—on the mechanics of guideline application. All in all, the commission and its staff help to ensure that federal sentencing policy is as effective and efficient as possible.

We are especially pleased that the Commission was reconstituted last year after an extended hiatus and that it is working hard to address the significant backlog of congressional directives and important pending sentencing issues. Under Judge Murphy's strong leadership, the Commission has quickly found its footing, and in about six months after being confirmed by the Senate in late 1999, it has already sent to Congress important sentencing guideline amendments addressing issues like child sex offenses and methamphetamine trafficking. The Commission has now turned its attention to examining a new agenda of issues, and we look forward to working with the Commission to make this upcoming fiscal year a productive one.

SENTENCING ISSUES OF CONCERN

As the Commission moves into the new fiscal year, there are many serious sentencing policy issues of concern to us, to other federal criminal justice practitioners, and to the nation at large. Some of these issues deal with individual sentencing guidelines and particular classes of crime; others with the guidelines as a whole; and still others with national and macro trends in sentencing and corrections. We

believe the commission is in a unique position to address all of these types of issues, and we believe it must make time for all of them. Let me address each briefly.

1. Individual guidelines and crime types

As I stated earlier, one of the Commission's important responsibilities is to amend the guidelines as needed to bring about the most effective, efficient, and just sentencing policy. We believe there are many individual guidelines and specific crime types that call out now for guideline amendments. I will mention just three here, although there are many. First, the Commission has been studying for several years sentencing policy for economic crimes. These crimes constitute nearly one out of every four cases prosecuted in the federal system, and serious questions have been raised as to whether the guidelines for these offenses are appropriate in their current form or whether they need to be amended. We think it is vitally important that this area of the law be comprehensively examined, and we commend the Commission for convening a two-day conference, to be held next month, to explore the many issues surrounding sentencing policy for economic crimes. We also commend the Commission for seeking to develop guideline amendment proposals to address many of the issues that have already been raised surrounding sentencing policy for economic crime and for striving to vote on such proposals in this amendment year.

Second, we think it is important that the Commission address the guidelines for money laundering offenses. Significant concern has been raised around these guidelines—from Congress and otherwise—and we have begun working with the Commission to develop proposals that address the areas of concern.

Third, we urge the Commission to continue and finish its work implementing the Sexual Predators Act. Last year, the Commission made great strides in addressing the very serious problem of child exploitation and child sex crimes, including sex crimes facilitated by the Internet and those involving interstate travel. As with economic crimes, the Internet and other technologies are changing the way sex crimes against children are being committed. We believe it is critical that our laws keep current and that this devastating crime problem be forcefully addressed.

2. The guidelines as a whole

As I said, in addition to crime- or guideline-specific issues facing the Commission, we believe there are a number of issues impacting the guidelines as a whole that need thorough examination. Again, let me mention just a few here. First, over the last five to ten years, fewer and fewer cases are being sentenced within the sentencing range dictated by the guidelines. In 1990, well over 80 percent of all federal criminal cases resulted in sentences within the guideline sentencing range. That number has steadily declined over the last ten years. In fiscal year 1999, only 65 percent of cases were sentenced within the guideline range. We think the Commission ought to seriously examine this trend and determine whether there is cause for concern and/or some reform.

Second, over the past several years, the number of federal criminal cases arising from the southwest border states has increased significantly. This has been a result of increased resources requested by the President and provided by Congress going back five or more years. Unfortunately, this increased enforcement has not been accompanied by commensurate increases in judges, defense attorneys, probation officers, or prosecutors. This has resulted in a number of districts, including the Southern District of California, the District of Arizona, the District of New Mexico, and some of the districts in Texas, where court personnel face caseloads that cannot be processed through the very labor intensive sentencing procedures mandated by the guidelines for most cases. Different border districts have confirmed and addressed these caseload issues with different strategies, each of which raises policy matters concerning the concerning the guidelines, uniformity in sentencing, and crime control. We at the Department of Justice have been examining some of these issues recently, and we believe that further discussion if needed.

3. National and macro sentencing issues

Finally, we believe that the Sentencing Commission ought to seriously examine a number of national, macro trends in sentencing and corrections policy. While the Commission has seen the guidelines as its primary responsibility, we believe that some of these broader areas are certainly also within the Commission's mandate, and we hope Judge Murphy and the other commissioners will make time to address them. Let me again mention just two.

First, as most people here are now well aware, at this moment, there are somewhere around two million people in our nation's prisons and jails. While there is nothing scientifically significant about this number, it is nonetheless a startling number and should cause us to being to serious examine our national sentencing and corrections policies. Of equal or greater concern for those working in the federal

criminal justice system, in a time of decreasing crime rates, the growth in the federal prison system is actually accelerating. These facts, together with realization that tens of thousands of prisoners are being released from federal prisons into our communities each year—and over 600,000 prisoners nationwide are being released into the community—are cause for out attention. We think the United States Sentencing Commission ought to be leading the examination of these matters, and we look forward to the chance to work with the Commission on them in the near future.

Second, as we have seen all around us and as I have referred to already, technology is changing our society. Emerging technology present vast new opportunities for increased productivity. Successful private sector companies are using technology to deliver better products and services less expensively. Criminals of all stripes are using technology to prey on victims—using the Internet to lure children from state to state to commit sex offenses; committing securities and other types of frauds using advanced telecommunications; or laundering drug proceeds using the international banking system facilitated by technology. We believe that in the public sector we must also use technology to find new ways of addressing crime and of making our criminal justice system more productive.

At the Department of Justice, we are already utilizing new technologies to root out and prosecute crime and in the operations of the Federal Bureau of Prisons. However, in the coming years, as new technological development accelerates, we believe that sentencing and corrections will be fundamentally transformed. In addition to the development of technologies we cannot now even imagine, existing technologies such as tracking and location systems, treatment regimens, and risk assessment vehicles will all continue to develop and present vast new opportunities to make sentencing and corrections much more effective in controlling crime and to result in better outcomes for victims, offenders, and society as a whole. We again urge the Commission to be at the forefront of these technologies changes and help lead up to these new opportunities.

Mr. Chairman, I thank you again for giving me the opportunity to be here. I would be happy to respond to any questions the Subcommittee might have.

Senator THURMOND. Our next witness is Ms. Carmen Hernandez, who serves on the board of directors of the National Association of Criminal Defense Lawyers. She has been a criminal defense attorney for nearly 2 decades.

Our final witness is Mr. Bill Otis. In 1974, Mr. Otis joined the Criminal Division of the Justice Department and later moved to the U.S. Attorney's Office for the Eastern District of Virginia, where he was chief of appeals from 1993 to 1999.

We ask that each of you speak for no more than 5 minutes, and we will place your written statements in the record, without objection. We will start with Ms. Hernandez.

PANEL CONSISTING OF CARMEN D. HERNANDEZ, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WASHINGTON, DC; AND WILLIAM G. OTIS, FORMER ASSISTANT U.S. ATTORNEY, EASTERN DISTRICT OF VIRGINIA, FALLS CHURCH, VA

STATEMENT OF CARMEN D. HERNANDEZ

Ms. HERNANDEZ. Good morning, Mr. Thurmond. Good morning, Mr. Sessions. Thank you very much for inviting me.

The Sentencing Guidelines were born of a very noble concept to provide fairness in sentencing, to eliminate unwarranted disparity, and to bring the sentencing process into the open, to bring it out of the dark room of the Parole Commission into the open.

Very wisely, I think, you retained the discretion of Federal judges to depart, and that is what has provided the fairness in the Guidelines. That is the theory. I am here to tell you that in practice the Guidelines have created a problem, although the testimony before me doesn't seem to have brought it out. In fact, sentences

on defendants are very harsh these days, I mean, make no mistake about it.

Almost 90 percent of Federal defendants who are convicted—and that is all types of crimes, from class A misdemeanors to the most serious offenses—go to jail. The mean sentences for crack offenders, for example, are 10 years, even though drug offenders, almost 90 percent of them, do not involve guns or violence and almost 50 percent of them are first-time offenders.

The flaw, I believe, at the core of the Guidelines is that it has transferred authority and discretion from Federal judges, who are constitutional officers, article III judges who are appointed by the President and confirmed by you, to prosecutors over whom there is absolutely no authority in Congress or the President really to hire. They may be good, they may be bad.

And the decisions made by prosecutors are made in the darkness of their offices, just like the decisions made by the Parole Commission. A Federal judge who departs has to, according to the Guidelines, give reasons, make a statement. His decision is appealable, his decision can be reversed by a Federal court. The decisions of Federal prosecutors for the most part are unreviewable. So I want to suggest to you that, if anything, you should make changes to give Federal judges more discretion, not less discretion.

The second bad thing in practice that has coincided with the Sentencing Guidelines is that there is an increased disparity in the racial and ethnic makeup of the Federal prison population. Almost 39 percent of Federal prisoners are now Hispanic. Much of that is due to our immigration laws, but it is an issue.

Almost 27 percent of Federal prisoners are black. That is a disparate impact which I suggest to Congress you should review. It is inconsistent with the primary purpose of the Guidelines to bring fairness and to take away unwarranted disparity, and much of that disparity can be attributed to the crack statute and to the immigration policies. And I truly commend to the Congress that you take a look at these issues.

I understand that your greatest concern today is to discuss departures, and so I will tell you that departures are probably the only thing in the Guidelines from my perspective that is working properly and according to the way Congress intended.

I will tell you that, in fact, in most districts, with the exception of a handful of them that involve either the border States or districts that have a lot of immigration cases, the departure rate, excluding substantial assistance, is less than 10 percent. Congress intended that departures be around 20 percent. And we all know the statistics, if you don't really look at what is underlying the statistics, can lie, and I think this is that situation.

You shouldn't be concerned about substantial assistance departures. For every substantial assistance departure, you have convicted, in essence, another person. It means that you got cooperation to convict another person. So you should not be concerned about substantial assistance departures. I think that there aren't enough, in fact, departures of the other kind.

I am really happy to answer any questions you have about what happens in the border districts because what is happening in the border districts is that they have become almost municipal courts.

Sixty immigration defendants who are looking at jail time are brought into a courtroom, pled, and sentenced. The type of thing that you see in traffic courts in America is what is happening in the border districts. If you are going to have those kinds of policies, you ought to provide more funds.

De novo review would be a very bad thing, in general, for sentencing issues. It would, in fact, make courts of appeals who are not adept at that the sentencing court. That just doesn't make any sense. They don't have the institutional knowledge. They have to write an opinion every time they would sentence. They can't make fact-finding.

Nevertheless, after *Koon*, courts of appeals are still applying a de novo standard to the extent that they review application of the guideline. If a departure ground is one that is prohibited by the Guidelines, the court of appeals is still looking at it as a de novo issue. Is it a violation of the guidelines? Is it a violation of law?

Another issue that has been raised here is in terms of post-offense rehabilitation departures. I must tell you that only 194 cases out of 55,000 cases involved post-offense rehabilitation. It is not something that defense attorneys can generate because the presumption in drug cases is that defendants are detained. We cannot have them do any kind of funny rehabilitation when they are in jail. Immigration defendants are detained.

Just to bring some focus——

Senator THURMOND. You have exceeded your time, so wind up as soon as you can.

Ms. HERNANDEZ. Yes, sir. Thank you very much.

The first appellate court in the Nation to uphold the post-offense rehabilitation ground was the fourth circuit in an opinion written by Judge Wilkins reversing the district court. I just want you to understand that it is a perfectly legitimate and integral part of the Sentencing Guidelines.

I really have a lot of answers for a number of the questions you have asked and I would be prepared to respond to them.

[The prepared statement of Ms. Hernandez follows:]

PREPARED STATEMENT OF CARMEN D. HERNANDEZ

Mr. Chairman and Distinguished Members of the Subcommittee, the Sentencing Reform Act and the Sentencing Guidelines were born of a noble concept that federal sentencing should be fair and certain and honest. You set up a system that in theory at least was designed to avoid unwarranted disparity among persons convicted of similar crimes. At the same time you wisely built into the system through the departure mechanism the flexibility to permit individualized sentencing—a venerable tradition in the federal system—so that a United States District Court Judge when he or she imposes a sentence can account for factors that the Sentencing Commission had not considered, and indeed no commission sitting in Washington, D.C. could ever consider, those factors that Justice Kennedy so eloquently referred to as "the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensure." [1]

As in so many things, theory and reality diverge.

I. TRANSFER OF DISCRETION FROM ARTICLE III JUDGES LEAVES UNFETTERED DISCRETION IN FEDERAL PROSECUTORS

The reality of the Sentencing Guidelines is that they are flawed at their very core. The Guidelines have transferred discretion and authority and responsibility from constitutional officers, the men and women who have been appointed by the President and confirmed by you to serve as judges of the lower federal courts to persons who have no express constitutional role, the prosecutors, who are hired without the

careful scrutiny given to federal judges. And history has taught us time and again, and continues to teach us—and the founding fathers knew this well when they set up our system of checks and balances—that you cannot leave such power unchecked in the hands of anyone, least of all in the hands of men and women whose decisions are made in the privacy of their offices, who are caught up in an adversarial role, and whose public function often serves as a stepping stone to higher political or judicial office.

Indeed, although Congress intended to take sentencing decisions away from the darkness of the Parole Commission into the openness of the courtroom, sentencing decisions are now mostly resolved in the darkness of the prosecutors' office and the probation department rather than in a public courtroom at the time that the person convicted of a crime appears for sentencing by a federal judge.

Very recently for example, you held hearings in the case of Wen Ho Lee to determine whether federal prosecutors were doing the right thing. These hearings were no doubt held because of the case's notoriety, the issues involved and because the ultimate resolution—a guilty plea to a single count with an agreement to time served of some 10 months—seemed completely out of proportion to the charges which involved a multi-count indictment with potential life sentences. The judge in the Lee case was without authority to hold such a hearing.

In the run-of-the-mill drug case where the process runs its course without the light of media scrutiny, a defendant is much less fortunate. Defendants are left at the mercy of the prosecutor's good will in most cases because of the operation of the Guidelines. The burden at sentencing requires merely proof by a preponderance of the evidence. Judges must consider drug quantities not proved at trial, quantities not charged, and even quantities that are not part of the same offense but merely part of a similar scheme as the offense of conviction. The information presented at sentencing is often based upon the stories of other defendants who seek to have their own sentences reduced in return for offering "substantial assistance" in the prosecution of others.[2] Furthermore, these procedural rules worsen the problem because the guideline system for scoring drug, fraud and other offenses focuses on the amount of drugs almost to the exclusion of all other factors relating to culpability. This has resulted in the imposition of disproportionately harsh sentences on those who are merely peripheral agents of the drug kingpins and middlemen whom Congress sought to punish harshly with mandatory minimum sentences. Thus, a person, who quite often is young, poor, undereducated or addicted to drugs, and increasingly female, and is paid $200 by a drug trafficker for transporting 50 grams of crack from one city to another is subject to the same mandatory minimum 10-year sentence as the trafficker who controls the drug organization and will receive the bulk of the profit.[3]

Congress cannot hold hearings in every one of the 55,408 federal convictions obtained last year. Yet by transferring so much sentencing power to federal prosecutors, the Sentencing Guidelines prevent federal judges from asserting any check on the almost unfettered discretion that prosecutors hold over the life and liberty of persons accused of crimes in this country. In so doing, the Sentencing Guidelines have also limited our ability as citizens to defend ourselves from unwarranted charges that result from unscrupulous, or vindictive or ill-founded prosecutions.

A. The racial disparity of the federal prison population has increased since the Guidelines went into effect

At the same time, the Sentencing Guidelines are not accomplishing the ideals of uniformity and fairness. Since 1987 when the Guidelines went into effect, there has been an increase in the racial disparity of the federal prison population. That is what the Sentencing Commission found and stated in its 1995 Annual Report.[4] This is the exact opposite of the uniformity and fairness that Congress set out to obtain under the Sentencing Reform Act of 1984. It is wrong and needs to be corrected.

1. Mandatory minimum penalties are being disproportionately applied

One of the causes of this racial disparity again seems to lie at the transfer of power to federal prosecutors that allows them to control departures below mandatory minimum sentences, a power which Senior Circuit Judge (and former Senator from New York) James Buckley has referred to as an "extraordinary power."[5] In a 1991 Report to Congress, the Sentencing Commission found that mandatory minimum penalties were being applied disproportionally to Blacks and Hispanics. The Commission found that substantial assistance departures that allow judges to sentence below the mandatory minimum were more likely to be granted to Whites than to Blacks or Hispanics. This disparity could not be accounted for by considerations related to the nature of the offense and the prior criminal record of the defendant.[6] In fact, the Sentencing Commission was unable to identify any relevant factors—

such as the severity of the offense or the extent of the cooperation—that would explain the disparity. These findings were confirmed in a subsequent study conducted in 1998 by staff at the Sentencing Commission.

Again, the lack of any check on the prosecutor's discretion in this area is problematic. Federal prosecutors have chosen to exercise this extraordinary power in a very secretive and effectively unreviewable manner. In plea agreements, federal prosecutors reserve onto themselves the absolute power to determine whether the defendant has provided substantial assistance. At the same time, federal prosecutors refuse to spell out in writing the magical quantum of assistance which will satisfy them that a defendant has sufficiently cooperated and is to be rewarded with the departure motion. In some districts, the decision is further insulated from review and disclosure because it is made by Departure Committees made up of prosecutors whose names are not disclosed and whose deliberations are kept secret. A defendant can only challenge the decision if he can prove that it was made with unconstitutional motive or in bad faith. Such claims are nearly impossible to prove in any case but are particularly difficult to prove where the decision is made behind closed doors. Once again, it is difficult to reconcile this reality with Congress' intent to make sentencing fair and uniform and open.

2. Recent sentencing policies increase disparity

Congress must address the growing racial and ethnic disparity in the federal prison population. During the past decade Congress has continued to increase penalties for certain crimes in the face of the indisputable evidence that the majority of persons convicted of these crimes are Blacks and Hispanics. As in the criminal law, it is no defense that Congress had deliberately ignored the problem.

The enhanced penalties for the crack form of cocaine continue to be one of the primary reasons for the disparate increase in the number of Blacks imprisoned in federal institutions. Last year, 84.7% of persons convicted of these offenses were Black.[7] These numbers are particularly stark because federal statistics reflect that more than 40% of crack users are white. In 1995, at Congress' direction, the Sentencing Commission published a book detailing the problem, including the fact that this form of cocaine is the only drug where the penalties are inverted so that bulk importers and distributors of the powder form of cocaine, the basic ingredient for making crack cocaine, receive more lenient sentences than the street dealer. Congress has yet to act on the recommendations made by the Commission.

Penalties for immigration offenses have become so harsh that in many cases they exceed the penalties for violent offenses. Congress continues to increase the penalties for immigration offenses. The Sentencing Commission, at the express direction of Congress and in the exercise of its own discretion, has also increased the offense levels and other enhancements for immigration offenses. This is a major cause for the disparate increase in the number of Hispanics in the federal prison population.

As with addiction in drug offenses, it is clear that at the core of many immigration offenses are issues of poverty and persecution in the home country of these persons that are not present in other criminal offenses. Persons who act of such desperate circumstances are not as likely to be deterred and are not as deserving of harsh punishment as others whose criminal conduct is motivated by more mundane reasons. Equally important, this seems to be an expensive exercise in futility. Enhanced penalties do not seem to be reducing the violation of our immigration laws.

It has been clear for some time that these enhanced penalties are merely filling our jails and costing us greatly without reducing the conduct which we seek to prevent.[8]

Congress and the Sentencing Commission need to look at this problem and act to correct the racial and ethnic disparity in the federal prison population which is being created.

II. FEDERAL SENTENCES CONTINUE TO BE RATCHETED UP TO REQUIRE PRISON TERMS IN AN INCREASING NUMBER OF CASES AND LONGER SENTENCES OF IMPRISONMENT

The Sentencing Commission has amended the Guidelines approximately 600 times since 1987. Fewer than a dozen of those amendments has involved reductions in (1) the term of the prison sentence to be imposed for a given offense, (2) the enhancement value of a given fact or circumstance, or (3) the likelihood of imprisonment for any given offense. Indeed when it comes to federal sentencing, Congress and the Commission seem to have a single tool—a ratchet that permits sentences to be increased but never reduced.

The "upward ratcheting" of federal sentences may explain why the United States recently reached the 2 million mark in the number of persons in prison. Our rate of incarceration is greater than the rate of incarceration in South Africa at the height of apartheid. We have the highest per capita rate of incarceration of any in-

dustrialized nation in the world. It should be clear, therefore, that the Sentencing Commission has been no slouch when it comes to requiring the imprisonment of persons convicted of federal criminal offenses.

III. DEPARTURES PRESERVE SOME MEASURE OF FAIRNESS IN THE GUIDELINES

Departures are the one area of the Sentencing Guidelines where Congress granted federal judges discretion to adjust sentences to take into account individual aspects of the crime and the person committing it that the Commission did not. The discretion is not unlimited. It is cabined by a number of restrictions imposed by the Commission. For example, the Commission has established that a person's diminished capacity may warrant a departure unless "the defendant's criminal history * * * indicate[s] a need for incarceration to protect the public." U.S.S.G. § 5K2.13.

Without the discretionary authority to depart, all crimes regardless of the circumstances would have to be sentenced exactly the same. The secretary who aids her boss in processing the fraudulent claim for fear of losing her job must receive the same sentence as the boss who profited and devised the fraudulent scheme because she is responsible for the same amount of loss as he is. The Guidelines permit district courts in such a case to depart downward in recognition of the fact that the amount of loss in her case overrepresents the severity of her offense. Without the authority to depart, one size must fit all, predetermined by the body of experts sitting in Washington, D.C.

The national downward departure rate of 15.8% is well within the level envisioned by Congress when it first enacted the Sentencing Reform Act. It is misleading, moreover, to include departures for substantial assistance in the general departure rates. Substantial assistance departures are within the sole discretion of prosecutors and were enacted by Congress as a tool for prosecutors. One must also be careful in comparing departure rates across states or circuits because of the unique mix of cases and circumstances. A case in point is the departure rate in immigration cases in some of the border states. The increased departure rate reflects the overwhelming number of cases in those districts. Such overwhelming case load increases have required district courts and prosecutors to fashion a remedy to keep the system afloat. For example, approximately half the cases in the District of Arizona involved immigration cases. In the District of Arizona with 1,483 immigration cases, district courts granted departures at a rate greater than the norm for other districts.

But one cannot ignore the impact of immigration cases on those statistics both in terms of caseload and in terms of the unique circumstances that were not likely to be considered by the Commission in formulating the guidelines. For example, the number of immigration cases in that one district exceeds the number of all cases in the entire First Circuit (1,337 total cases in 1999). The immigration cases in Arizona also exceed the number of all federal cases in the combined two districts in the state of Virginia (1,305 total cases in 1999). I am told that in some of the border districts, federal sentencing of immigration offenses resembles the procedures that are used in municipal courts to deal with traffic offenses in state courts throughout the United States. Sixty immigrant defendants are brought into a courtroom and mass sentencings are conducted. To compare departure rates in Viriginia's districts or the First Circuit with those in the District of Arizona is to compare apples and oranges.

Moreover, the number of immigration cases in Arizona almost tripled since 1997 (608 cases in 1997). Knowing the pace at which new federal judges are appointed, I am quite certain that judicial resources did not keep pace with the exploding case load.

Lastly, departures are the one area of the Guidelines where the Commission can see if its sentencing policies are working or whether an adjustment needs to be made. The high departure rate in immigration cases generally and in Arizona in particular reflects a problem with the most commonly applied immigration guideline. The guideline for cases involving reentry after deportation (U.S.S.G. § 2L1.2) includes a 16-level bump if the defendant was previously deported based on an aggravated assault. This is such a gross measure that it encourages departures. The 16-level bump—the most severe in the Guidelines—does not differentiate between a prior number conviction, for example, or a $20 sale of a small amount of marijuana. Moreover, when Congress broadened the definition of an "aggravated felony" in the immigration code (in its attempt to address immigration policy), it tacitly changed the scope of the enhancement in the § 2L1.3 guideline. Yet that enhancement has not been modified by the Sentencing Commission to address unintended consequences of the immigration amendment. In light of the statutory mandate in

18 U.S.C. § 3553(b) to depart where circumstances are not adequately considered by the guidelines, a district court would be derelict if it did not depart in such cases.

The drug cases in Arizona also tend to involve circumstances unique to such border states, such as a higher percentage of defendants who merely served as "mules." A combination of the application of the relevant conduct guidelines and the particular circumstances of these circumstances tend to generate more downward departures.

For these reasons, the high departure rates in the few districts such as Arizona provide the Commission with the type of information that Congress intended the Commission to amass and use to adjust the guidelines. These departure rates do not reflect an avoidance of the law by federal judges but rather their conscientious compliance with the Congressional mandate to impose a guideline sentence unless the court finds a circumstance not adequately considered by the Commission that warrants departures.

ENDNOTES

1. *Koon* v. *United States,* 518 U.S. 81, 116 S. Ct. 2035, 2053 (1996).

2. Somewhere in a federal prison sits a man serving a sentence of life for his involvement in a marijuana conspiracy. Under the federal system, that means he will not be released from jail until he dies. There is no reduction in sentence for doing "good time," nor early parole, nor is a motion to reduce the sentence available to him. At trial the government introduced evidence that the man sold 10 ounces of marijuana. The jury had so much difficulty with the evidence that twice, the judge had to deliver to the jury an *Allen* charge, a statement which tells the jury, after it has informed the court that it is having difficulty reaching a verdict, to try harder to reach a verdict. Only after the second *Allen* charge did the jury convict and then it convicted of a single count of conspiracy and acquitted of all the remaining charges. At sentencing, the government claimed that the conspiracy involved 1000 kilograms of marijuana—despite having only proved 10 ounces at trial—and that the defendant was therefore subject to a mandatory life sentence of life based on his two prior convictions. In dissent from the 7th Circuit's decision that it would not review the case en banc, Chief Justice Posner eloquently stated what should be obvious:

> [T]he difference between the standard of proof by a preponderance of the evidence, a standard that in this case permitted the judge to send the defendant away for life if he thought the odds 51–49 in favor of the defendant's having sold the 1,000 kilograms, and proof beyond a reasonable doubt, is so large that there is room for an intermediate standard that can be practically, not merely conceptually, distinguished from the extremes.
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> * * * * * * *
>
> Conceivably the intermediate standard of proof would reduce the number of errors both in favor of and against defendants, for it would induce the government to conduct a more thorough investigation in preparation for the sentencing hearing, thus putting before the judge a more complete and accurate picture of the facts. More thorough investigation implies, I acknowledge, a cost to the government, a cost that might in turn reduce the government's ability to prosecute the guilty or obtain adequate sentences in every case. Few benefits come without a cost. But to imprison for life a person who sells 10 ounces of marijuana is a miscarriage of justice of sufficient magnitude to warrant some expenditure of resources to prevent.

United States v. *Rodriquez,* 73 F.3d 161, 163 (7th Cir. 1996).

3. The emphasis of quantity to determine the mandatory minimum penalties flows from the statutory scheme established in 21 U.S.C. § 841. The Sentencing Guidelines follow this scheme without sufficient reducing the sentence of those persons who are much less culpable.

4. "Traced over time, the relative proportion of Whites in the defendant population has steadily declined since 1990, while increasing considerably for Hispanics, and to a lesser degree for Blacks." U.S.s. Annual Report 46 (1995). See also U.S.S.C. Annual Report 33 (1996). That trend continues into today:

	Whites (percent)	Blacks (percent)	Hispanics (percent)
1995	39.2	29.2	27.3
1996	35.9	28.4	31.0
1997	34.7	27.1	33.7
1998	32.0	26.5	37.0
1999	30.8	26.2	39.0

5. United States v. *Jones*, 58 F.3d 688, 691–91 (D.C. Cir.), cert denied, 116 S.Ct. 430 (1995) (Buckley, J.)

6. United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System ii, 82, 89 (1991).

7. United States Sentencing Commission, Annual Report 69 (1999). Seventy percent of these offenses did not involve a gun possession, *id.* at 74, and thirty-one percent of these offenders were in the lowest criminal history category. *Id.* at 72.

8. Jonathan P. Caulkins et al., Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money? (RAND 1997).

CARMEN D. HERNANDEZ

Ms. Hernandez is a member of the Board of Directors of the National Association of Criminal Defense Lawyers ("NACDL") and chairs its Post-Conviction and Sentencing Committee. She is also a member of the United States Sentencing Commission's Practitioners Advisory Group. Ms. Hernandez has been a criminal defense attorney for nearly two decades. During much of that time, she has repesented indigent defendants in federal court. Following law school, she served as a law clerk to the Honorable Herbert F. Murray, United States District Judge for the District of Maryland. She received a J.D. with honors in 1982 from the University of Maryland School of Law and a B.A. from New York University in 1975. Ms. Hernandez has taught as a adjunct professor at the University of Maryland School of Law and at the Columbus School of Law, and Catholic University of America. She also lectures nationally on federal sentencing and criminal defense trial issues. She is the co-author of the chapter on departures in Practice Under the Federal Sentencing Guidelines (P. Bamberger & D. Gottlieb, eds., 2000).

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Senator THURMOND. Mr. Otis.

STATEMENT OF WILLIAM G. OTIS

Mr. OTIS. Mr. Chairman and Senator Sessions, I am grateful for your invitation to appear here today and speak about improving the implementation of the Federal Sentencing Guidelines.

Although some of the things I will have to say will be critical of the Commission and the Department of Justice, I want to make it clear from the outset that I have great respect and affection for many of my former colleagues in the Department of Justice and I think the country is well served by them over the long haul, and also for my friends on the Sentencing Commission and its staff.

The question posed in this hearing is whether the Guidelines are being followed. Increasingly, they are not. Indeed, they are on the brink of being effectively nullified by rampant downward departures. That trend must be reversed.

Mr. Chairman, under your leadership, but with strong bipartisan support, Congress took a giant step for the rule of law by adopting the Sentencing Reform Act. Among the Act's principal purposes were to reduce unwarranted disparity in sentencing so that the length of the sentence would no longer so much depend on the draw of the judge, and to require more serious sentences for particularly dangerous kinds of crimes.

To achieve those objectives, Congress intentionally cabined the previously sprawling discretion of district judges to impose sentence almost entirely without recourse to established standards. At the same time, Congress realized that there would be the occasional rare case featuring some factor the Sentencing Commission had not adequately considered. In such a rare case, but only then, it allowed the judge to depart from the Guidelines.

In the late 1980's and early 1990's, the Federal Criminal Justice System implemented this new approach with great success, despite significant resistance from some judges and many members of the criminal defense bar. By and large, rules-based sentencing prevailed.

In recent years, we have seen how that approach has paid great dividends to the substantial benefit of our citizens. Hundreds of the most dangerous criminals are now serving substantial prison terms with no parole. And not surprisingly, the crime rate has been headed down. One part of this accomplishment was keeping unwarranted downward departures in check. The Sentencing Commission, the Federal judges, and the Department of Justice all played a key role in doing that.

First, the original Sentencing Commission, under the leadership of Judge Wilkins, understood the peril that free-floating downward departures posed to the central purposes of a determinant sentencing system. It wrote the Guidelines and their commentary to steer judges away from departing, except in rare and clear-cut cases.

Second, with some notable exception, district judges accepted these new limits on their discretion. Admittedly with an occasional nudge from the courts of appeals, they came to understand that the Guidelines preserve a reasonable place for discretion in sentencing even as they shift the balance more toward consistency and ac-

countability. They came to realize, in other words, that the rule of law is better than the luck of the draw.

Finally, the Justice Department demonstrated its determination to meet the resistance it knew that the new regime would face from practitioners who had become used to practicing the old way. The Department recognized, as Judge Wilkins once said, that the battle cry of the defense bar would be depart, depart, depart, and that the Department's response to excessive departures should be appeal, appeal, appeal. For that reason, through the early 1990's, the Department and the U.S. Attorneys' Offices were aggressive and largely successful in taking appeals of excessively lenient sentences.

But trouble is brewing. The Guidelines are being increasingly swallowed by downward departures. These departures, both in absolute numbers and as a percentage of all sentences, have increased every year from 1992 through 1999. At the beginning of the 1990's, sentences were imposed within the Guidelines range about four-fifths of the time. Last year, it was less than two-thirds.

The current Guidelines compliance rate, therefore, is a little over 60 percent. That means that, as we speak, we are perilously close to sliding back to the subjective, idiosyncratic, and gratuitously lenient sentencing of the past, but less honest than the past system because the public has been led to believe that now we have rules, when increasingly as a practical matter we don't.

This slide has not been uniform, however. In my own former jurisdiction, the Eastern District of Virginia, it is nowhere in evidence. While the national Guidelines compliance rate hovers at about 60 percent, in Eastern Virginia it is above 90 percent. And while nationally downward departures not linked to a defendant's cooperation are given in about 16 percent of the cases, in Eastern Virginia they are given in fewer than 2 percent.

Now, what are the reasons for this slide in the Nation? It began when the Sentencing Commission, whose term recently ended, replaced clear guidance about the limited role of departures with more ambivalent language, creating increased wiggle room for judges who wanted to take it, and in many jurisdictions they did.

Fuzzy language in the Guidelines expanded into gigantic new loopholes, and downward departures sprang up for novel reasons that range from questionable to ridiculous. In one case I litigated, for example, the judge allowed a downward departure because the defendant was overweight. Meanwhile, the Justice Department showed no serious determination to combat these trends by taking the necessary appeals.

Despite the lack of leadership from the Sentencing Commission and the Department, Eastern Virginia has avoided this ominous trend, for two principal reasons. First, our court of appeals has demonstrated a clear willingness to correct unwarranted departures. Chief Judge Wilkinson, together with other leaders on the court such as Judges Wilkins, Williams, Luttig, Traxler, and until his recent death the great Judge Donald Russell, have been uncompromising in requiring district courts to abide by the Guidelines in letter and in spirit.

And, second, our outstanding U.S. Attorney Helen Fahey has maintained the commitment of her predecessors to public safety,

the rule of law, and to full implementation of the Guidelines that serves both. Our 90-percent Guidelines compliance rate is largely a result of those two factors.

Now, I know I am over my time so I will try and finish up quickly.

What is needed is a more resolute commitment to appealing, with the circuit courts generally ready to stand behind the rule of law in sentencing and elsewhere. It is particularly curious and unfortunate the Department of Justice is taking fewer and fewer appeals of departures just as the need to appeal has become greater and greater.

As you have pointed out, Mr. Chairman, in fiscal 1999, the number of downward departures have ballooned to more than three times to the number 6 years earlier. Yet, the number of Government appeals have dropped by almost half. The figures speak for themselves. Out of more than 8,000 downward departures that year not owing to a defendant's substantial assistance, the Government appealed 19 times, or less than one-quarter of 1 percent.

Senator THURMOND. Your time is about up. Could you put the rest in the record?

Mr. OTIS. Yes, I certainly will, Mr. Chairman. I will be happy to answer your questions.

[The prepared statement of Mr. Otis follows:]

PREPARED STATEMENT OF WILLIAM G. OTIS

Mr. Chairman and distinguished Members of the Committee, I am grateful for your invitation to speak today about improving implementation of the Federal Sentencing Guidelines. The question posed in this hearing is whether the guidelines are being followed. Increasingly they are not. Indeed they are on the brink of being effectively nullified by rampant downward departures. That trend must be reversed.

Mr. Chairman, under your leadership, but with strong bi-partisan support, Congress took a giant step for the rule of law by adopting the Sentencing Reform Act. Among the Act's principal purposes were to promote more uniformity in sentencing, so that the length of the sentence would no longer so much depend on the draw of the judge, and to require more serious sentences for particularly dangerous crimes.

To achieve those objectives, the Guidelines intentionally cabined the previously sprawling authority of judges to impose sentences almost entirely without established standards. At the same time, Congress realize that there would be the occasional rare case featuring some factor the Sentencing Commission had not adequately considered. In such a rare case, but only then, it allowed the judge to depart from the guidelines.

In the late 1980's and the early 90's, the federal criminal justice system implemented this new approach with great success, despite significant resistance from some judges and many members of the criminal defense bar. By and large, rules-based sentencing prevailed. In recent years we have seen how that approach has paid dividends, to the great benefit of our citizens. Hundreds of the most dangerous criminals are now serving substantial prison terms with no parole—and not surprisingly the crime rate has been heading down.

One key part of this accomplishment was keeping unwarranted downward departures in check. The Sentencing Commission, the federal judiciary, and the Justice Department all played critical roles in doing so.

First, the original Sentencing Commission, under the leadership of Judge Wilkins, understood the peril that free-floating departures posed to the central purposes of a determinate sentencing system. It wrote the Guidelines and their Commentary to steer district judges away from departing except in rare and clear-cut cases.

Second, with some notable exceptions, district judges accepted these new limits on their discretion. Admittedly with an occasional nudge from the courts of appeals, they came to recognize that the Guidelines preserve a place for reasonable discretion in sentencing even as they shift the balance toward more consistency and accountability. They came to realize, in other words, that the rule of law was better than the luck of the draw.

And finally, the Justice Department demonstrated its determination to meet the resistance it knew the new regime would face from practitioners who had grown used to operating the old way. The Department recognized, as Judge Wilkins once noted, that the battle cry of the criminal defense bar would be, "depart, depart, depart," and that its response to excessive departures should be "appeal, appeal, appeal." For this reason, through the early 1990's, the Department and the U.S. Attorneys offices were aggressive, and largely successful, in taking appeals of excessively lenient sentences.

But trouble is brewing. The Guidelines are being increasingly swallowed by downward departures. These departures, both in absolute numbers and as a percentage of all sentences, have increased every year from 1992 through 1999. At the beginning of the 1990's, sentences were imposed within the guidelines range in about four-fifths of the cases; by last year, it was less than two-thirds. The current guidelines compliance rate is, in other words, a little above 60%. That means that, as we speak, we are perilously close to sliding back to the subjective, idiosyncratic and gratuitously lenient sentencing of the old system—but less honest than the old system, because the public has been led to believe that now we have rules, when increasingly, as a practical matter, we don't.

This slide, however, has not been uniform. In my own jurisdiction, the Eastern District of Virginia, it is nowhere in evidence. While the national Guidelines compliance rate hovers above 60%, in the ED of VA it is above 90%. And while nationally, downward departures not linked to a defendant's cooperation are given in about 16% of the cases, in the ED of VA they are given in fewer than 2%.

What are the reasons for the national slide, and why has the Eastern District of Virginia escaped it? The slide began when the Commission whose term recently ended replaced clear guidance about the limited role of departures with more ambivalent language, creating increased wiggle room for judges who wanted to take it. In many jurisdictions they did. Fuzzy language in the Guidelines expanded it into gigantic new loopholes, and downward departures sprang up for novel reasons that ranged from the questionable to the absurd (in one case I litigated, for example, the court departed downward because the defendant was overweight). Meanwhile, the Justice Department showed no serious determination to combat these trends by taking the necessary appeals.

Despite the lack of leadership from the Sentencing Commission and the Department, the Eastern District of Virginia has avoided this quiet but ominous trend. This is so for two principal reasons. First, our Court of Appeals has demonstrated a clear willingness to correct unwarranted departures. Chief Judge Wilkinson, together with other leaders on the Court such as Judges Wilkins, Williams, Luttig and Traxler—and until his recent death, the great Judge Donald Russel—have been uncompromising in requiring district courts to apply the guidelines in letter and in spirit. And second, our outstanding U.S. Attorney, Helen Fahey, has maintained the commitment of her predecessors Henry Hudson and Richard Cullen to public safety, the rule of law, and in particular to the implementation of the Guidelines which serves both. Our 90% guideline-compliance rate is largely the result of these two factors.

If it chooses, the new Sentencing Commission can play a significant role in controlling the epidemic of downward departures. What the experience of the Eastern District of Virginia suggests, however, is that even if the Commission neglects these matters, the Justice Department can do much on its own by a more resolute commitment to appealing. With the circuit courts generally ready to stand behind the rule of law, in sentencing and elsewhere, it is particularly curious that the Department is taking fewer and fewer appeals of departures just as the need to appeal has become greater and greater/ In fiscal 1999, the number of downward departures had ballooned to more than three times the number six years earlier, yet the number of government appeals dropped by almost half. The figures speak for themselves: out of more than 8,300 downward departures that year not owing to the defendant's assistance, the government appealed 19 times, or less than one quarter of one percent. Since the Administration came to power, there have been more than 32,000 such unappealed downward departures.

This is an alarming number. Every downward departure means another criminal back on the street before he would have been had the Guidelines been followed—back on the street to rob your bank, hijack your car, or sell drugs to your child. Yet, over the last seven years, the Department's efforts to constrain these departures have all but vanished.

Mr. Chairman, even the best of laws is no more effective than its enforcement. The Sentencing Reform Act is in my view—a view formed through more than 20 years as a federal prosecutor—among the best of laws, because of the fairness, consistency and visibility it has brought to sentencing, and perhaps even more because

of what it has done to depress the crime rate and secure for our citizens their right to live in peace and safety. Congress has done its job; it's time for the Sentencing Commission and the Department of Justice to do theirs as well.

I shall be pleased to take your questions.

APPENDIX: ADDITIONAL SPECIFIC RECOMMENDATIONS

There are a number of specific changes that would be helpful in putting the Sentencing Guidelines back on the right track.

—The courts of appeals should have a stronger hand in reviewing departures. Specifically, they ought to be enabled to undertake de novo review, rather than the more deferential review required under the abuse of discretion standard. Implementing this change would require legislative correction of the holding in *Koon* v. *United States,* 518 U.S. 81 (1996). In that case, the Court held that the Sentencing Reform Act, and particularly language in 18 U.S.C. 3742, indicated that Congress intended the Act to preserve broad discretion in the district courts. While broad discretion may well be appropriate in many areas, experience has shown that the courts of appeals are more vigilant in safeguarding the determinate sentencing system whose creation was Congress' principal goal in adopting the Act.

Since *Koon* was based on the Court's perception of congressional intent, Congress is free to change the result in that case. In doing so, moreover, it will support the Administration's view, which, as its brief in the Supreme Court demonstrates, likewise would have preserved the relatively stronger hand of the appellate courts.

—Specific kinds of departures should be more closely regulated. In recent years, the criminal defense bar has sought to make increasing use of downward departures for "post-offense rehabilitation." While genuine rehabilitation ought to be encouraged and rewarded, this sort of departure is subject to manipulation, and should be applied with far greater caution than it is now.

As things stand, when a client appears in his attorney's office, indictment in hand, the wise attorney knows then and there that it is time to start preparing for sentencing. Increasingly, part of the preparation is to have the client visit persons called "mental health professionals" or other sorts of "counselors" who will produce reports at the right moment attesting to the client's new-found understanding that his previous ways of living were wrong. In addition, the attorney is likely to sign up the client to participate, or at least to say he is participating, in some sort of charitable endeavor. This too is designed to produce a letter to be put on display at sentencing as evidence of the defendant's new and improved behavior.

To a judge who dislikes the guidelines sentence, or who for some reason views the defendant as sympathetic, the "post-offense rehabilitation" file, duly compiled by counsel but not necessarily attesting to anything like authentic rehabilitation, provides a nearly fool-proof method of circumventing the guidelines.

Sentencing SHOULD reward real rehabilitation. It should not reward, however, what is far too often simply an attempt to game the system. Accordingly, the Commission should adopt the following rule: (1) When a defendant takes substantial steps to rehabilitate himself before he has reason to believe that the authorities have learned or are about to learn of his involvement in the offense of conviction, a downward departure may be appropriate; (2) When a defendant takes substantial steps to rehabilitate himself after that time, but before he is indicted, arrested or otherwise formally charged with the offense, a downward departure is ordinarily inappropriate, and may be allowed only on clear and convincing evidence that his efforts at rehabilitation were undertaken for the purpose of producing a genuine change in his criminal behavior and not for purposes of litigation; and (3) When a defendant takes steps toward rehabilitation only after he has been indicted, arrested or otherwise formally charged with the offense, a downward departure for rehabilitation is impermissible.

—Current language in the Guidelines permitting a departure based on a "combination of factors" should be revised to prevent abuse. Some years ago, the Commission added Commentary to the effect that, even if no single ground for departing would be adequate to justify a below-the-guidelines sentence, in an unusual case, a "combination of factors" could be adequate grounds to depart.

This language permits guidelines circumvention. It all but invites a judge who still tacitly (or sometimes not to tacitly) supports luck-of-the-draw sentencing to grant a downward departure based on a laundry list of misfortune, or what will be portrayed as misfortune, even though no single factor would warrant more lenient treatment than some other, similarly situated defendant would get in the courtroom down the hall. This is exactly the kind of disparity the Sentencing Reform Act was written to stop.

There may be some extremely unusual case in which a "combination of factors" legitimately warrants a departure even where no single factor would. But the current Guidelines language goes too far. As the Fourth Circuit noted in *United States,* v. *Withers,* 100 F.3d 1142, 1148 (4th Cir. 1996), allowing departures on this sort of basis effectively "'resurrect[s] the pre-guidelines regime of discretionary sentencing.' (quoting *United States* v. *Pullen,* 89 F.3d 368, 371 (7th Cir. 1996)). To set such a low threshold * * * would create incentives for defendants to comb their personal circumstances in order to find evidence of hardship and misfortune. This search, we suspect, would almost always be fruitful given that adversity in its infinite variety comes with the journey of life."

Even more than others, persons convicted of criminal behavior need—for their own good and ours—to turn away from the culture of grievance-building and excuse-making and join the culture of personal responsibility. The "combination of factors" theory of departures looks in exactly the wrong direction. The Commission should study this problem, or be directed to study it if needed, and devise more disciplined language that will end this loophole.

The Commission should publish a Crime Impact Statement with each proposed revision of the Guidelines sent to Congress.

When courts have employed their discretion to depart, the results have not been even-handed. Downward departures outnumber upward departures by the astonishing ratio of 57 to 1. Even excluding substantial assistance departures, downward departures outnumber upward departures 26 to 1.

There is a lesson in these numbers. More "discretion" means lower sentences. Proposals for still more discretion, although ostensibly neutral, are thus all but certain to result in across-the-board lower sentences and thus the earlier release of criminals. We know in advance that some of those criminals, on being released, are going to commit more crime. In the aggregate, a reasonable "ballpark" estimate of how much more should be possible. Accordingly, any proposed amendment to the Guidelines should be accompanied by a statement revealing (1) through case examples, its probable effect on actual sentences; and (2) its probable effect in the aggregate—i.e., how many criminals will benefit from the proposed amendment, and an estimate of how much additional crime they will commit when they are back in the community, rather than continuing to serve the prison sentence at the length it would have been absent the amendment.

The public is owed this information. Indeed, Crime Impact Statements would be directly analogous to the cost impact estimates we wee now, detailing how much additional prison funding is likely to be needed if the Commission (or,sometimes, Congress) creates longer sentences. If longer sentences will mean more costs in bedspace and security, shorter sentences will mean more costs in recidivism. The public is entitled to know both sides of the story.

—Establish a Crime Victims Advisory Group. For several years, the Commission has recognized and solicited the views of a Practitioners Advisory Group, which consists of many of the most energetic and dedicated criminal defense lawyers in the country. But it would seem self-evident that crime victims deserve at least the same independent voice at the table that criminal defendants have now through their counsel. I believe that a number of our new Commissioners stated at their confirmation hearings that they would support the formation of such a group. Now is not too soon to put that pledge into action.

Senator THURMOND. Mr. Otis, based on your experience as a former career prosecutor and former member of the Attorney General's Advisory Subcommittee on the Guidelines, do you believe that this administration has been less dedicated to upholding the Guidelines than previous administrations?

Mr. OTIS. I am afraid to say that it has. The reason that you see this consistent line starting in 1992 and ending last year, a consistent line upward in criminal sentences below the Guidelines range, which of course would also mean a consistent line downward in compliance with the law and compliance with the Guidelines, is directly linked to the Department of Justice's determination, or increasing lack of determination, to see that the Guidelines are backed up.

As Senator Sessions was pointing out in some of his questions earlier today, if district judges come to know that downward depar-

tures are just going to be left sitting on the table by the U.S. Attorney's Office, then of course there is an incentive to grant more and more downward departures, and that is what has happened. We can't leave them on the table. We need to have the same strong commitment to appealing that we used to have.

Now, both Mr. Kirkpatrick and Commissioner Steer pointed out that the Government success rate in taking appeals from downward departures was about 50 percent, or a little less than 50 percent. Of course, that is an extraordinarily high percentage of success for an appellant. Most appellants lose in the court of appeals. Ninety-five percent of appellants lose in the court of appeals. If you are winning anything close to half of your cases, you have got a great track record, and it is a track record of which district judges will be aware.

If the district judges know that your U.S. Attorney's Office is serious about appealing and that questionable downward departures are going to be reviewed by the higher court, there are going to be fewer questionable departures.

Senator THURMOND. Senator Sessions.

Senator SESSIONS. I agree with that, Mr. Otis. Let me ask you as a former prosecutor for some time, if a mentality gets afoot that suggests that we are really not too serious about that and we really don't want to appeal to many of these cases, does that not undermine the morale and the courage and discipline of those prosecutors out there who are having to make the tough calls day after day after day?

Mr. OTIS. That is an excellent question, Senator Sessions, and you make quite a good point. U.S. Attorneys' Offices, like any organization, have some who are there to spend the time and draw a paycheck, but many more who are there because of their dedication to the rule of law, because they want to see improvements in public safety for all our people.

That latter group, which is by far the greater group, is of course disheartened to see when the Guidelines which in their cases they fight for—they fight for compliance, they fight for the serious sentences and the fair sentences that the guidelines produce. And when they see that in other districts that fight isn't being waged and the Department has nothing to say about it, that is very disheartening.

And I think among the better group of assistant U.S. attorneys, which again is by far the larger number of them, to understand that during the years of this administration, from 1992 to the present, to see that there have been a total of 32,000 unappealed downward departures not related to a defendant's substantial assistance, to understand that every one of those 32,000 cases involves a criminal who is not serving the sentence that he would have served had the Guidelines been followed and who therefore is out early to ply his trade to hijack your car, to rob your bank, to sell drugs to your child——

Senator THURMOND. I don't want to interrupt you, but we have got to move on. Make your answers shorter.

Mr. OTIS. Thirty-two thousand times is way too many and it ought to be brought to a halt.

Senator SESSIONS. Ms. Hernandez, you raised a question about the discipline and integrity of assistant U.S. attorneys and the prosecutors.

Ms. HERNANDEZ. Well, I——

Senator SESSIONS. Well, you did, in my view. I am not criticizing you. I think it is a matter we ought to discuss. If a prosecutor does not charge the primary lead offense, the most serious offense available as part of a plea bargain process, do you agree, being the good adversary you are, that they have not been the advocate they are supposed to be for the system?

Ms. HERNANDEZ. For the most part, I don't know why they charge what they charge or what evidence they have. Sometimes, it is because they can't prove what they believe the defendant committed. That often happens. The proof is just not there.

But let me just say that my challenge is more to the institutional manner in which the system is set up. We shouldn't have to rely on the integrity of an individual. We have systems, is the way our system of justice works best, a system of checks and balances. And we are in trouble if the only way our freedoms are safeguarded for all of us is if we have to rely on the integrity of an individual. We would rather rely on the integrity of the system of checks and balances, the ability of the Senate to confirm a judge rather than someone who is hired, who may be of very high integrity or may not.

Senator SESSIONS. Well, the prosecutors are advocates and they normally push for the most serious legitimate charge that they can. I do think there are occasions, for whatever reasons, that the judge may even want them to dismiss the more serious offense and let this case go for a lesser offense, and they are in a difficult position. I just feel like you will never remove all of that, but I do think U.S. attorneys and the Department of Justice do need to monitor it.

I will just mention this. I think on the statistics that show up, some problems don't show up. My concern that I discovered by almost inadvertence in the *John Huang* case where he didn't plead guilty to a $300,000 contribution to the Democratic National Committee that helped President Clinton, but pled guilty to a contribution to a city race—and even for that, they didn't follow the Guidelines that would have had him go to jail.

That won't show up, will it, Mr. Otis, as a departure?

Mr. OTIS. No, it will not.

Senator SESSIONS. On the statistics, it does not show as a departure.

Mr. OTIS. It won't show up as a departure.

Senator SESSIONS. So, to me, from the Attorney General and the Sentencing Commission and each judge in each district, they have got to make clear that they expect everybody in the system to operate with integrity and to do their role in the system, you to defend them as aggressively as you can, seek every departure that is legitimate or quasi-legitimate, and the prosecutor to seek the most serious offense, or else the system doesn't work. That is how we operate in this country.

Ms. HERNANDEZ. May I put in a plug for the defense attorney for Mr. Huang, whom I happen to know?

Senator SESSIONS. Well, he did a good job.

Ms. HERNANDEZ. Ty Cobb, a former very distinguished assistant U.S. attorney in Baltimore. That may have a part in the reason for the good results, I may say, if anybody knows Ty Cobb, a die-hard Republican, by the way.

Senator SESSIONS. Well, I will just say this. Any lawyer, Republican or Democrat, is going to get the lowest guideline he can when he is defending somebody going before a court. But I don't believe it was justifiable. I read it and it shouldn't have happened. I just say that to say that we need to maintain discipline. It wasn't his fault. It was the prosecutor in the Department of Justice's fault.

Mr. Chairman, I am sure you have questions. I have talked too much.

Senator THURMOND. Ms. Hernandez, if current trends continue, we may see more defendants sentenced outside the Guidelines than within the Guidelines in a few years. Do you believe that the number of downward departure cases could reach a level that would undermine the consistency that the Guidelines were designed to create?

Ms. HERNANDEZ. Mr. Thurmond, as I look at the statistics, less than 10 percent of cases in most districts, in like 90 percent of the districts, are getting downward departures. And I would say to you that you built that into the system, and the Senate report at the time the Guidelines were instituted indicated that you thought that a departure rate of about 20 percent or more would be adequate.

So at this point, we are not seeing sentences that are too lenient. We are getting a lot of district courts rejecting departures out of hand, and a lot of reversals, sir.

Senator THURMOND. Mr. Otis, judges have the discretion to depart either upward or downward from the Guidelines in certain circumstances. How often do judges apply their discretion in favor of the offender?

Mr. OTIS. Mr. Chairman, downward departures outnumber upward departures 57 to 1. Not counting substantial assistance, putting that entirely to one side, downward departures outnumber upward departures 26 to 1. As a practical matter, there is no such thing as upward departures, and to promote more discretion among judges, more discretion than they already have, is to my way of thinking simply a code word for promoting across-the-board lower sentences because that is what the discretion we see now does.

Senator THURMOND. Mr. Otis, we have discussed today how the Guidelines may be circumvented by the increasing number of cases in which defendants receive downward departures. Do downward departures tell the whole story about how the Guidelines are being circumvented?

Mr. OTIS. No, Mr. Chairman, unfortunately they do not. As Senator Sessions has pointed out in some of his remarks, judges already have considerable discretion to lower sentences without ever getting to anything that either is or would be called a downward departure. And this is one of the big misconceptions about the Sentencing Guidelines system that it is a straightjacket for judges. It is no such thing. It preserves, as it was intended to preserve, a considerable although cabined discretion within judges.

For example, the Guidelines do not designate a particular sentence; they designate a sentencing range that differs by 25 percent

from bottom to top. The judge has unfettered discretion to allow a substantial downward adjustment within the Guidelines for acceptance of responsibility, another 25 percent, or in serious cases up to 33 percent off the sentence. And, of course, the judge has the ability to make factual determinations, for example, about the amount of drugs with which a defendant has been involved that substantially affects the sentence.

So, in fact, the judge under the present system and without even getting to departures has an enormous ability to get the sentence to be pretty low if that is what he wants to do. To go beyond that with departures is, in my way of thinking, to put the Sentencing Reform Act and the determinant sentencing system very much at risk.

Senator THURMOND. We will place a statement from Senator Leahy in the record.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

Today, the Judiciary Committee's Subcommittee on Criminal Justice Oversight will conduct a hearing on the United States Sentencing Commission which will focus on the work of the Commission generally and the frequency with which sentencing judges grant downward departures from the range of punishment applicable under the Sentencing Guidelines. Some believe that we need to change the law because sentencing judges are granting too many downward departures and are thereby undermining the effectiveness of the Sentencing Guidelines. I disagree. While it is appropriate that we monitor and understand sentencing trends and modify existing law when necessary, our federal sentencing scheme is fundamentally sound and in my view is part of the reason why the rate of crime around the United States is declining and, in some places, plummeting. This is no time to sound an alarm for change. We can best assure the proper implementation of existing sentencing laws if we support and fully fund the indispensable work of the Sentencing Commission.

We can only address and understand sentencing trends if we support the Sentencing Commission and appropriate to it sufficient funds so it can do its work. It is the Commission, after all, which has the responsibility to maintain and analyze 260 pieces of information from each of over 50,000 sentencings under the Guidelines every year. It is regrettable that the Commission struggled without any voting commissioners for over a year in 1998 and 1999. It would be equally regrettable if Congress does not grant the President's request for $10.6 million to fund the Commission in FY 2001. The House of Representatives has voted to appropriate $9.6 million to the Commission. The Senate Appropriations Committee has appropriated $9.9 million. Last year, I successfully offered an amendment to add $5 million to fully fund the Sentencing Commission's budget and I again urge the full Senate and the Congress to appropriate the full $10.6 million requested by the President. Our discussion today about downward departures and future discussions about implementation of the guidelines will be largely irrelevant unless we support the people we have asked to monitor and implement our sentencing laws.

Though the Commission has my unwavering support, I question the timing of and need for today's hearing for two independent reasons. First, while there may be reason to believe that the rate of downward departures has increased, the statistics appear to show that the lion's share of the increase is attributable to immigration and border-related issues. Excluding downward departures based on cooperation, the largest percentage increase in downward departures is in immigration cases. According to Commissioner Steer's testimony, immigration-related prosecutions have increased from 6.5% of the federal caseload sentenced under the guidelines in FY 1989 to 17.5% in FY 1999; deportation of aliens is the reason most often given by judges for downward departures; and the rate of departures based on deportations has grown from less than 1% of departures in FY 1992 to about 20% in FY 1999. Indeed, the three districts which by far lead the nation in rate of downward departures are the District of Arizona and the Southern District of California, two districts which border Mexico, and the Eastern District of Washington, which borders Canada.

Of course, the nation's districts that routinely deal with immigration issues have borne the brunt of our increased law enforcement efforts aimed at illegal immigration and face special circumstances. Some districts have experimented with special policies to deal with immigration-related issues. For example, Arizona and the Southern District of California are among districts which have offered departures as an incentive for defendants charged with border-related crime to dispose of their cases quickly and with a minimum of litigation. These districts have implemented these policies because of the overwhelming increase in border-related arrests and prosecutions which was not matched in a commensurate increase in prosecutorial and judicial resources. The Justice department wisely decided that subjecting more border-related offenders to federal prosecution would help deter border-related crime even at the minimal expense of subjecting these offenders to marginally less jail time. I believe that the Justice Department's policy in this area has been a resounding success. One question we need to have answered is whether the current rate of downward departures overall would represent a significant increase from rates of prior years if we eliminated border states from our calculations. I believe that we may need more information about the sentencing policies and practices of such districts before we hold a hearing and sound the alarm that there is a nationwide sentencing problem that needs fixing. It appears to be that policies and practices in a few districts disproportionately affected by increased emphasis on deportable aliens accounts for the increased rate of downward departures.

Second, I question why we are rushing to conduct this hearing on one of the last days of this session when we do not have any specific information from the border districts that would substantially assist our understanding of the issue. My fear is that this hearing has been scheduled to provide a soapbox for partisan criticism of the Justice Department and the Administration as we approach a national election. Any effort to trot out the old standby campaign theme that Democrats tolerate lenient sentences would be nonsense. According to the Bureau of prisons (BOP), the population of our federal prisons has almost doubled over the last eight years. The total population of prisoners in BOP facilities in 1992 was about 67,768 inmates. By contrast, the population as of July 2000 was 124,667. Those numbers do not even include federal inmates now lodged in facilities under contract with BOP. Meanwhile, we have never seen as dramatic a drop in the crime rate as we have seen since over the last eight years. The need of some jurisdictions to address unique issues, such as border-related crimes, is one reason why I believe that our system properly tolerates some degree of disparity in sentencing, as Congress intended by providing for both downward and upward departures. We confirm our federal judges after an arduous process because we trust their judgment to fashion an appropriate sentence within the bounds of the law. Indeed, the Supreme Court in a case title *Koon* v. *United States,* 518 U.S. 81 (1996), said that the sentencing judge is in the best position to assess whether the particular circumstances of a case justify a downward departure, and that such departures are entitled to the deference of the appellate court reviewing the sentence, subject to modification on appeal only under very limited circumstances. In so holding, the Supreme Court ruled that Congress intended appellate courts to show deference to the wisdom of sentencing judges rather than require appellate courts to review sentences de novo, that is, review sentences as if the appellate courts were imposing sentence for the first time. The Supreme Court correctly recognized that the sentencing judge, before whom the parties personally appear during the entire pendency of a case and who has the discretion to conduct any appropriate inquiry at sentencing, has a far better sense of the defendant and all the relevant circumstances than appellate judges whose entire knowledge of a case is limited to a cold review of transcripts and typically about twenty minutes of legal argument by the lawyers, if any oral argument is granted.

Some have suggested that the interest in sentence uniformity requires Congress to pass legislation that would effectively overrule *Koon* and require appellate courts to review every sentence de novo. To do so, in my view, would unwisely and necessarily transfer the ultimate responsibility for sentencing away from the federal judge, who is in the best position to evaluate whether an upward or downward departure is appropriate. Some blame the Justice Department for not taking enough appeals from downward departures to assure sentence uniformity. But such criticism cannot be intelligently levied until we first understand the deportation-related issues that seem to account for the lion's share of downward departures. Moreover, it has never been the Justice Department's role to appeal every adverse ruling on sentencing or any other issue. The Justice Department needs to pick its fights wisely when it seeks to appeal a district court's ruling. There is no basis of which I am aware on which to conclude that the Justice Department has failed to exercise its right to appeal in appropriate cases.

Downward departures, like upward departures, are an integral and necessary part of our sentencing scheme. The provision for downward departures which we discuss today was incorporated into the guidelines so that federal judges can make appropriate adjustments where there are circumstances of a kind or degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. While I support steps that Congress and the Sentencing Commission have taken to lessen sentence disparity and assure that the punishment fits the crime, the provision for downward departures recognizes that Congress and the Sentencing Commission cannot possibly anticipate and enact a guideline that accounts for every conceivable set of facts. Even in as comprehensive a framework as the sentencing guidelines, our judges need room for flexibility. Quite simply, fixing a precise sentence that fairly reflects the unique mix of a particular defendant's circumstances does not always lend itself to a mechanical formula that produces a predetermined sentence.

Those who believe that we should ratchet the existing Sentencing Guidelines to achieve a goal of 100% sentence uniformity fail to appreciate that a certain degree of disparity is inevitable and acceptable in our system. Two different prosecutors from different parts of the country may review the same case and reach different conclusions, both consonant with Justice Department guidelines, about what charge is justified by the facts and to what charge a defendant should be allowed to plead guilty under the particular circumstances of a case. Sometimes Congress plays a role in treating similar offenders unevenly by focusing attention on a particular type of crime which is in the public spotlight for one reason or another but not addressing other similar crimes not in the spotlight. These types of disparities are inevitable in as disparate a county as ours, and we should not put our sentencing laws in a vice and try to squeeze away every drop of disparity as if it were poison. We should not lightly tinker with a system that appears to be working.

Notwithstanding my concerns about this hearing, I strongly support the Sentencing Commission and its mission. The Sentencing Commission plays an essential role in the administration of justice in our federal courts. The Commission establishes and maintains sentencing guidelines for over 50,000 criminal cases sentenced in the federal courts each year. The Commission's most critical responsibility today is to adjust the guidelines to implement the important crime legislation we enact every year. Let me emphasize this point: when we enact legislation that calls for increased criminal penalties, it is the Commission's job to make sure that convicted defendants suffer the impact. These directives appear in virtually every piece of new crime legislation we enact. For example, Congress drafted legislation this session aimed at the production and trafficking of methamphetamine. The bill directs the Commission to ensure that the sentencing guidelines for methamphetamine reflect the threat to public safety posed by that drug and are comparable to similar drugs. Similarly, Congress drafted legislation enhancing the penalties for crimes that target computer systems. That bills directs the Commission to ensure that the guidelines reflect the loss caused by a crime and a level of sophistication in planning the crime, among other relevant factors, as a way of deterring the growing incidence of computer crimes.

Because we went over a year without Commissioners, the new Commissioners appointed in November 1999 were required to address an alarming backlog of directives on legislation such as the No Electronic Theft Act of 1997, the Wireless Telephone Protection Act of 1998, the Identity Theft and Assumption Deterrence Act of 1998 and the Protection of Children from Sexual Predators Act of 1998. The new Commissioners have worked hard to catch up and eliminate the backlog. They have my thanks for successfully addressing a problem that was created by Congressional inaction.

The importance of the Commission's other statutory obligations show why the Commission must have strong support for Congress. For example, the Commission has the initial and primary responsibility to resolve conflicts on guidelines interpretation among the circuit courts. While today's hearing examines whether too many downward departures threaten the sentencing uniformity for which the guidelines were enacted, our new Commissioners long ago began working diligently to achieve that goal, identifying numerous circuit conflicts, resolving some of those conflicts and now addressing others.

The Commission also has an ongoing statutory obligation to serve as the lead instrumentality for training newly appointed judges and probation officers regarding application of the sentencing guidelines and related sentencing issues. Similarly, the Commission has an ongoing responsibility to provide needed continuing education for all those who use the sentencing guidelines to ensure that they are sufficiently informed of recent amendments to the guidelines and significant court decisions. Ac-

cording to Judge Murphy's testimony, the Commission's staff trained more than 2,200 people at 47 training programs around the country in 1999 alone.

The Commission also has an ongoing statutory obligation to serve as a clearing house of information on sentencing-related topics and to stay current on advancements in the knowledge of human behavior and the degree to which the guidelines are achieving the purposes of sentencing such as deterrence and rehabilitation. If we are going to have guidelines and require federal judges to impose guidelines sentences, the Sentencing Commission must be empowered to do its work. That means we need to appropriate sufficient funding to enable the Commission to fulfill its critical role in the federal criminal justice system. Perhaps a better focus of this hearing would be how the Congress does its job of sustaining and respecting the work of the Sentencing Commission.

Senator THURMOND. Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Ms. Hernandez, you raised the crack cocaine sentences. They are tough, and it may be appropriate for us to look at those sometime and I am open to that. There are some other areas that may be tougher than we need in the Guidelines, and I respect the concerns that are expressed there.

In the long run, we will all be better off and justice will be better served if we utilize the factors that Senator Thurmond and the Commission created to allow departures upward and downward within that system. And if it is not quite perfect, maybe we ought to strengthen the economic crime penalties. Maybe we can review some of the drug penalties that are there and help maintain a fair system. But at the same time, the critical component to justice under the Guidelines is making sure that we conduct them with integrity, and that is what I think we are right to do.

Mr. Chairman, you helped create this system and you have seen now departures for other reasons, the most dangerous area of departures increase 150 percent since 1992. And so I think you rightly have every legitimate reason to have this hearing to inquire about it and make sure we are not letting something slip away from us that has served us very well for some time.

I thank you for your leadership. I thank the members of this panel. I think they all did an excellent job, and I hope the Department of Justice particularly will realize that you have got to exert some leadership from the top, send a clear message that they expect these Guidelines to be followed, that assistant U.S. attorneys out there in the field—nobody may know precisely the decisions they are making and wrestling with. But if they know you expect them to do right, to follow the Guidelines and not to give away their cases, more often than not they will. If they think people really don't care and that nobody is going to appeal, they will be more likely to give in under pressure and let a case go for less than it is worth.

Thank you, Mr. Chairman.

Senator THURMOND. We will leave the record open for 1 week for follow-up questions and additional materials.

If there is nothing else to come up, we stand adjourned.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

RESPONSES OF DIANA MURPHY TO QUESTIONS FROM SENATOR PATRICK J. LEAHY

Question 1. According to Commissioner Steer's testimony, deportation of aliens is the reason most often given by judges for downward departures. His testimony shows that the districts that lead the nation in rate of downward departures are Arizona and San Diego. The caseloads of those districts and others that border Mexico have dramatically increased over the past eight years due to the Clinton Administration's resoundingly successful efforts to patrol our borders more effectively and bring more border-related prosecutions in federal court to deter illegal immigration and drug smuggling at the border. This extraordinary increase in caseload has not been matched by an equal increase in prosecutorial and judicial resources. Thus, border districts have implemented so-called "fast-track" programs by which departures are granted as an incentive for defendants who commit border-related crimes to resolve their cases quickly and with a minimum of resource-consuming litigation.

Question a. Contrary to patently partisan accusations that there is a nationwide trend among our federal judges and that Justice Department to ignore or defeat the guidelines, do these facts suggest that the spike in the rate of increase of departures is due to districts trying to develop strategies to address increased emphasis on border-related law enforcement?

Question b. Commissioner Steer's statistics show that the Eastern and Western Districts of Washington, districts which border Canada, are among the districts that lead the nation in rate of downward departures. Is the high rate of downward departures in those districts attributable to border-related issues as it is in the southwestern districts?

Question c. What would the rate of sentencings within the applicable guideline range be since 1990 if border districts were eliminated from the calculation?

Answer a. It appears that judges are overwhelmingly sentencing cases within the guideline range if substantial assistance departures are disregarded. Judges impose sentences within the guideline range 82.1 percent of the time. This percentage has decreased only very slightly for 84.0 percent in fiscal year 1997. The figures for the southwest border districts tend to skew the total percentages, and more departures have resulted because of the exigencies created by the huge number of cases and too few resources. If we omit both cases receiving substantial assistance departures and the southwest border districts from our analysis, we find that 86.8 percent of cases sentenced throughout the country are sentenced within the range prescribed by the guidelines.

Answer b. The high rate of departure in the districts of Washington also appear to be affected by border-related issues. Immigration offenses comprise 33.8 percent of the caseload in the Eastern District of Washington, and courts in that district depart from the guidelines in 84.4 percent of their immigration offense cases. Downward departures for immigration offenses thus account for 69.8 percent of all of these departures. The district departure rate excluding immigration offenses is 18.6 percent.

The Western District of Washington has a smaller immigration caseload, 14.7 percent of its cases, but the effect of these cases on its departure rate is similar. Courts in the Western District of Washington depart from the guidelines in 78.8 percent of their immigration offense cases, which accounts for 44.0 percent of all of their departures. The departure rate for the district excluding immigration offenses is 17.2 percent.

Answer c. See Exhibit 1 and Exhibit 2, attached. Exhibit 1 shows the national downward and upward departure rates from fiscal year 1991 through fiscal year 1999, excluding the southwest border districts and excluding cases from the remaining districts in which the defendant received a substantial assistance departure. Exhibit 2 shows the national downward and upward departure rates for the same time period, excluding the southwest border districts only.

Question 2. As United States Attorney Denise O'Donnell testified at the hearing, the nation is divided into 93 geographic federal districts each headed by its own United States Attorney. The districts are not identical. The types of crimes that predominate in one district may be very different from another district. Each district has its own law enforcement priorities and a unique relationship with state and local law enforcement. while the Sentencing Guidelines serve the goal of sentence uniformity, the provision for downward and upward departures in Guideline Section 5K2.0 recognizes that some flexibility is necessary so that the sentencing judge in an appropriate case can account for compelling and otherwise unaccounted-for circumstances. Is some degree of disparity inevitable and acceptable in a nation as disparate as ours, and does Section 5K2.0 reflect the wisdom that room for some flexibility is an essential ingredient in a fair sentencing scheme in which the American people can have confidence?

Answer 2. Congress recognized in the Sentencing Reform Act that some flexibility is necessary in the sentencing guideline scheme. One of the fundamental responsibilities of the Commission, as set forth in 28 U.S.C. § 991(b)(B), is to establish sentencing policies and practices for the Federal criminal justice system that "maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices," this portion of the Sentencing Reform Act is reproduced in USSG 5K2.0. The purpose of the guidelines is not to eliminate disparity, but to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." Id.

Question 3. The claim has been made by some that the number of appeals taken by the Justice Department has not increased commensurately with the increase in the rate of downward departures. That claim ignores that the increase in downward departures is largely due to policies and practices in border states to deal with caseloads resulting from increased emphasis on border-related crime. That claim also ignores *United States* v. *Koon,* 518 U.S. 81 (1996), in which the United States Supreme Court made it more difficult to appeal a downward departure by holding that appellate courts should only overturn a departure where the sentencing judge makes a mistake of law or abuses discretion. Mr. Kirkpatrick testified at the hearing that there are ways of assuring compliance with the Sentencing Guidelines other than taking appeals in particular cases, such as working with the Commission to resolve conflicts among the circuit courts of appeal about interpretation of the guidelines.

Question a. If border-issues and *Koon* are considered, has there in fact been any significant change in the rate with which the Justice Department takes appeal from downward departures?

Question b. What are the ways in which the Justice Department endeavors to assure the effectiveness of the Guidelines other than taking appeals from downward departures?

Question c. Should the Justice Department's policy be to pursue an appeal of every downward departure no matter the circumstances? What factors does the Justice Department consider in determining whether or not to pursue an appeal from a downward departure?

Answer a. These factors appear to account for much of the difference. As an appellate judge I am aware that an appellant is more effective overall by focusing on the most significant cases.

Answer b. By actively participating in the ongoing work of the Commission through its ex officio member and by providing expert commentary and testimony throughout amendment cycles.

Answer c. These are issues more appropriately addressed by the Department of Justice itself.

Question 4. Ms. Hernandez expressed concern about relentless attempts by some to ratchet up the Guidelines and create unduly harsh sentences with an intended disparate impact. Mr. Kirkpatrick in his written testimony expressed concern that our federal prison population continues to grow even as the crime rate decreases. Indeed, the population in our federal prisons has almost doubled in the last five years, and there are now about two million people in our nation's federal, state and local jails.

Question a. Is there reason for concern that our sentencing laws have become too harsh and retributive?

Question b. Is the Sentencing Commission as sensitive to unduly harsh sentences as it is to inappropriately lenient ones?

Question c. If application of the Guidelines creates an unintended racially disparate impact, what steps should Congress take to address that impact?

Answer a. and b. Some say that the guidelines are too severe, but others say that certain guidelines are too lenient. Feedback from southwest border judges that the illegal reentry guideline is disproportionately severe, has caused us to examine that guideline this amendment cycle. On the other hand, the Commission has received public comment for many years that the economic crimes guidelines are too lenient. As a result, we hope to complete a comprehensive review of the economic crimes guidelines this year. The Commission must also respond to congressional directives to increase penalties in certain areas. For example, in the past few weeks Congress has passed legislation directing the Commission to increase penalties to certain methamphetamine, amphetamine and ecstasy offenses, as well as human trafficking offenses.

Answer c. It is our responsibility always to keep in mind the goals of the Sentencing Reform Act, and this Commission is sensitive to the issue of disparate racial impact. We expect to study that issue as part of our 15 year review, and we will of course share any resulting data or recommendations with Congress.

Question 5. The Supreme Court in *Koon* held that the sentencing judge is in the best position to evaluate whether a departure is warranted, and any downward departure should be reversed on appeal only under very limited circumstances here, for example, the judge abused discretion or made a mistake of law. Some say that *Koon* is good for the system because it supports the authority of judges to fashion an appropriate sentence where there are unforeseen or compelling circumstances. Others have suggested that the Congress should pass legislation that would effectively overrule *Koon*. What factors should the Congress consider in evaluating the wisdom of a legislative effort to statutorily overrule *Koon* including, for example, the increase in federal appellate ligitation?

Answer 5. Response. in my opinion the *Koon* decision has helped win over many judges to embrace the guidelines system and sentence within it because they know that under *Koon* they are also able to react to unique or extraordinary circumstances not foreseen by the system. The guideline system is well developed and sound, but it cannot possibly anticipate all circumstances that will arise. Today there is generally a high rate of compliance with the guidelines.

RESPONSES OF JOHN R. STEER TO QUESTIONS FROM SENATOR STROM THURMOND

Question 1. Mr. Steer, do you believe that the trend in sentencing below the Guidelines is extensive and extends far beyond the illegal immigration context? Please explain.

Answer 1. There ia a general increase in the rate of sentencing below the Guidelines for reasons other than substantial assistance (i.e., "other downward departures"), across all major offense types. The high rate of downward departures for immigration offenses has substantially added to, but does not fully account for, this overall trend. The Commission plans to carefully study this trend as part of the 15-year study described by Chair Murphy.

Question 2. Mr. Steer, is the trend toward downward departures more extensive in certain judicial circuits, such as the Ninth Circuit, that others? Please explain.

Answer 2. Yes. Exhibit 9 attached to my written testimony shows that, in FY1999, the rate of other downward departures exceeded 15 percent in three circuits, as follows: Ninth Circuit—36.4 percent; Second Circuit—19.5 percent; and Tenth Circuit—17.4 percent. In contrast, the rate of other downward departures was lowest in the Fourth (4.6 percent), Eleventh (6.5 percent), and the Sixth (6.7 percent) Circuits.

With regard to substantial assistance downward departures at sentencing, the Third (32.2 percent), Eighth (26.0 percent), and Sixth (25.6 percent) Circuits each exceeded 25 percent in FY1999, while the Ninth (10.4 percent) and Tenth (12.8 percent) Circuits had significantly lower rates of substantial assistance downward departures at sentencing than the other circuits.

Question 3. Mr. Steer, it was suggested at the hearing that sentences are too harsh in the federal system. However, it appears that statistics from the Commission show that for drug offenses, and indeed for all offenses combined, the average

length of sentences in federal court has been declining in recent years. Do you agree that this trend is toward lower sentences?

Answer 3. Imprisonment sentences imposed under the federal sentencing guidelines are significantly longer than pre-guideline sentence for most types of offenses; however, the length of imprisonment sentences imposed under the guidelines for all offenses combined has trended downward in recent years. It appears that this overall downward trend is influenced heavily by the downward trend in sentence length for drug trafficking cases. For a number of other types of offenses, average sentence length has stayed about the same or increased in recent years.

Question 4. Mr. Steer, to what extend do downward departures exceed upward departures, and in general has the disparity between these two types of departures been increasing in the offender's favor over the years?

Answer 4. In FY1999, the rate of all downward departures exceeded the rate of upward departures by 57.5 to 1; the rate of other downward departures exceeded the rate of upward departures by 26.3 to 1. These ratios have widened over the years as the rate of other downward departures has grown, while the rate of upward departures has declined. For example, in fiscal year 1989, the rate of all downward departures exceeded the rate of upward departures by only 2.1 to 1. Five years later, in fiscal year 1994, that ratio was 22.6 to 1. These differences appear to be rather large in part because the rate of upward departures has been relatively low throughout the history of the guidelines (less than 2.0 percent in every year since 1991).

Question 5. Mr. Steer, it was argued during the hearing that the Congress expected a 20 percent departure rate from the Guidelines excluding substantial assistance departures. Do you agree?

Answer 5. Footnote 3 in my written testimony briefly alluded to this "congressional expectation." As I noted there, the 1983 report of the Senate Judiciary Committee (S. Rep. No. 225, 98th Cong. 1st Sess.) described an expectation that the rate of departures—up and down—from the contemplated sentencing guidelines would be about the same or less than the prevailing rate at which the U.S. Parole Commission set release dates above or below their parole guidelines. That "departure rate" was about 20 percent at the time, consisting of aboue 12 percent above and 8 percent below. Moreover, the approximate 8 percent of parole guideline "downward departures" *included* cases in which release dates were set below the parole guidelines to reward inmates' assistance to the government in the investigation and prosecution of other crimes (although the concept of substantial assistance was not formally recognized and codified by Congress until 1986). Thus in my judgment, it is off the mark to claim, as some have, that today's 15.8 percent other downward departure rate is less than Congress expected. If anything, it apparently is substantially greater.

Question 6. Mr. Steer, it appears that the Commission could help control the number of sentences below the Guidelines. For example, it could establish more forbidden or discouraged factors for departures, which was an issue that the Supreme Court discussed in *Koon.* Do you think the Commission should create more forbidden or discouraged factors to help prevent unwarranted downward departures?

Answer 6. Chair Murphy has answered this same question for the Commission. I simply add by way of emphasis a point I make at the hearing: By curtailing (but not eliminating) the role of the appellate certain in policing departure decisions by district court judges, *Koon* necessarily has had the effect of placing greater responsibility on the Sentencing Commission, working in consultation with the Justice Department, to regulate departures through the Commission's powers to promulgate or amend guidelines, policy statements, and commentary. These amendment powers include actions characterizing particular departure factors as "forbidden" or "discouraged" where appropriate.

Question 7. Mr. Steer, the Guidelines currently permit a departure for a "combination of factors." Does the Commission plan to review this ground for departure to determine whether the current language permitting this departure may be too broad?

Answer 7. Chair Murphy has answered this question for the Commission.

RESPONSES OF JOHN R. STEER TO QUESTIONS FROM SENATOR PATRICK J. LEAHY

Answer 1–5. Chair Murphy has answered these same questions for the Commission, and I have passed along my thoughts for her consideration.

RESPONSES OF LAIRD KIRKPATRICK TO QUESTIONS FROM SENATOR STROM THURMOND

Question 1. Mr. Kirkpatrick, there is only about a 65 percent compliance rate with the Guidelines today. If the downward departure trends continue, does there reach a point when the Guidelines system breaks down, and if so, what do you view as an essential minimum compliance rate for the system to operate appropriately?

Answer 1. A clear distinction must be drawn between substantial assistance departures under § 5K1 and judicial departures on other grounds under § 5K2. Substantial assistance departures are an important law enforcement tool. It would be difficult to prosecute many types of organized criminal activity, including racketeering and drug distribution, if prosecutors did not have the ability to grant substantial assistance departures to defendants who aid in the apprehension and prosecution of other members of the criminal enterprise. Such defendants deserve a different sentencing range than defendants who refuse to provide any assistance to the government in prosecuting others involved in the crime. Since long before the adoption of the sentencing guidelines, sentencing concessions have been a well-established way to reward cooperating defendants, and substantial assistance departures were specifically recognized by Congress as an appropriate law enforcement tool in the Sentencing Reform Act of 1984. The current substantial assistance departure rate of approximately 18%—a rate that has been relatively consistent over the past several years—seems well within the range contemplated by Congress. It has enabled the number of drug prosecutions to increase from 15,000 a year to over 23,000 a year between 1995 and 1999. If substantial assistance departures were not available and defendants stopped cooperating with the government, there would undoubtedly be a significant reduction in the number of criminal cases that the government could successfully prosecute.

Judicial departures on other grounds under § 5K2 are also specifically authorized by the Sentencing Reform Act. It was understood by Congress that the Guidelines could not apply uniformity to all defendants and that in some cases upward or downward departures would be necessary and appropriate. In Commissioner Steer's written testimony (at footnote 3), he quotes a statement from the Senate Judiciary Committee Report anticipating 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%. However, the Department has not endorsed this statement or taken a position on what an acceptable § 5K2 departure rate would be. The Department is continuing to monitor current trends and to challenge downward departures that it believes to be illegal or inappropriate, both before the courts and the Commission, Judicial departure rates in certain districts, particularly those along the Southwest Border, have raised concerns within the Department of Justice, and we look forward to exploring these concerns and determining what actions, if any, are appropriate. We also believe it is important for Congress to allocate more prosecutorial and judicial resources to the Southwest Border districts to help them respond to the overwhelming caseloads they are currently facing.

Question 2. Mr. Kirkpatrick, you testified at the hearing that taking appeals has become more difficult in the years after the *Koon* decision, because that case instructed appellate courts to give greater deference to the district court. The Department's position in *Koon* was that the Supreme Court should continue to give the courts of appeals the power of de novo review of sentencing decisions, based on Congress' intent in providing for review of sentences under the Sentencing Reform Act. In light of the difficulties *Koon* poses for successful government appeals as you emphasized in your testimony, should the Congress correct *Koon* to provide by statute the understanding of the Sentencing Reform Act which was advocated by the Solicitor General in that case?

Answer 2. We think it is premature for Congress to consider legislation overruling the Supreme Court's decision in *Koon* on the standard of review federal appellate courts must use in reviewing most departure decisions by district courts. As we have indicated, we believe the Sentencing Commission and the Department of Justice should continue to monitor the extent of departures—as well as specifically how the district and appellate courts are applying current departure law—to determine whether the purposes of sentencing reform are being substantially achieved by current law. In addition, we believe that if significant concerns are identified, the first remedy for such concerns ought to be with the Commission and with its authority to amend the sentencing guidelines and to issue policy statements. Only if such efforts fail do we believe that legislation ought to be considered.

Question 3. Mr. Kirkpatrick, is the Department considering taking any specific action to appeal more Guidelines cases as a way to uphold the Guidelines?

Answer 3. The Department of Justice examines each case individually to assess whether it is a good candidate for appeal. Our decisions are not influenced by a statistical count of the number of appeals taken in any year. We consider many factors, including whether a weak appeal will lead to an adverse decision that may harm our future efforts to enforce the sentencing guidelines. It may do so in several ways. First, an affirmance of a downward departure sends a clear signal to the district judge that his or her action was appropriate, and it may embolden that judge to depart in future cases. Second, when a court of appeals gives its imprimatur to a departure, it encourages other judges within the circuit to depart in similar circumstances. Finally, the adverse precedent of the order of the court of appeals' affirmance will preclude us from appealing future departures that rest upon the same ground. In short, there is a "ripple effect" to every loss that cannot be ignored.

Districts courts have been given broad discretion to depart—downward and upward—from the guideline range as long as they do not rely on a factor that is prohibited by the guidelines. The Department of Justice has in the past and will continue to appeal downward departures that, in our view, rest on an impermissible ground. If, however, the ground is a permissible one, our options are limited. In that instance, we will usually appeal only where the degree of the departure is excessive or where there is no factual support for the departure.

Question 4. Mr. Kirkpatrick, I understand that internal Justice policies require U.S. Attorneys to file a written report concerning any adverse decision in district court. It appears that to better enable the Department to monitor cases and determine those that should be appealed, these reports should include adverse sentencing decisions, such as downward departures that the prosecutor did not support. Do you agree?

Answer 4. At this time, we see no advantage to a reporting requirement for downward departures that the United States Attorney does not wish to appeal. The policy of not reporting these sentencing decisions was first instituted in 1987 by the Solicitor General serving during the final years of the Reagan Administration. It was endorsed by then Assistant Attorney General William Weld of the Criminal Division in a guidance pamphlet that was provided all United States Attorneys. Until now, the policy, which has remained in force during the Bush and Clinton Administrations, has generated no controversy and no disagreement. Moreover, the administrative burden and costs of reporting all "no appeal" recommendations from the United States Attorneys would, in our view, not be justified.

Question 5. Mr. Kirkpatrick, it seems that the question of what constitutes substantial assistance to warrant a defendant getting a reduced sentence for cooperating with the government is defined differently from one district to another. Do you know how all U.S. Attorneys define what constitutes substantial assistance?

Answer 5. What constitutes "substantial assistance" depends very much on the facts and circumstances of each case. There is no uniform definition of the term that can apply to all types of cases. For example, in some prosecutions, it is necessary for a defendant to testify against another charged person in order to provide substantial assistance to the government. The prosecution simply could not be successful without such testimony. However, in other cases, the defendant will have provided such crucial information (e.g., supplying the location of drugs or other contraband, wearing of a body wire, etc.) that the defendant's testimony at trial is not necessary for a conviction. While the term substantial assistance does not lend itself to a rigid definition, the federal prosecutor in charge of an investigation is in the best position to determine whether a defendant's assistance in a given case has truly been "substantial." Consistency within each district is encouraged by the requirement of the U.S. Attorney's Manual that a supervising attorney must make the final decision on whether to allow a substantial assistance motion. Many larger offices have established a committee to review substantial assistance motions and resolve them by applying consistent standards.

Question 6. Mr. Kirkpatrick, you noted at the hearing that the Department had been working to provide more uniformity in how U.S. Attorneys define and apply substantial assistance. Do you have a time line for developing policies for U.S. Attorneys as to what constitutes substantial assistance, and do you intend to consult with the Commission regarding this policy?

Answer 6. Within the Department of Justice, we have considered internal guidelines to encourage greater consistency in the use of substantial assistance departures. We continue to discuss the matter among the Criminal Division, the AGAC, and others within the Department of Justice and would be happy to hear from the Commission on the issue.

Question 7. Mr. Kirkpatrick, do you think it would be beneficial for the Sentencing Commission to establish a Crime Victims Advisory Group similar to the Practitioners Advisory Group?

Answer 7. It is highly beneficial to the Commission to receive views from a wide range of groups. The Commission already receives input from victims' groups through its public hearings and public comment process, but the establishment of a more formal Crime Victims Advisory Group could also be helpful to the Commission.

Question 8. Mr. Kirkpatrick, what is the legal basis pursuant to 18 U.S.C. § 3553(b) and the Sentencing Guidelines for the Department to adopt the fast track policies that it has instituted for immigration deportation cases?

Answer 8. The legal basis pursuant to 18 U.S.C. § 3553(b) for the fast track policies providing for departure from the applicable sentencing guideline range is that the statutory provision in question permits departures where the court finds that there is an aggravating or mitigating circumstance not adequately taken into account by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. The circumstances that may justify downward departure in the fast track context for immigration deportation cases are the pressures placed on available resources in the districts that rely on these departures, the defendant's willingness to expedite the criminal proceeding by indicating an early intent to plead guilty and by waiving other rights which if exercised could delay the proceeding, and the defendant's willingness to stipulate to deportation. The defendant's concessions contribute to the smooth and expeditious implementation of both the criminal prosecution and the deportation proceeding and thereby save much-needed prosecutorial and judicial resources.

The justification for such fast track proceedings under the sentencing guidelines is based on several sections. First, section 5K2.0 is a general provision on departure and specifies that departure decisions rest with the court on a case-specific basis. This section also provides that circumstances that warrant departure cannot be comprehensively listed and analyzed by the Sentencing Commission in advance. Thus, the absence of a provision in the sentencing guidelines specifically applicable to fast track programs is not an impediment to departure. Of course, the sentencing guidelines provide a reduction for acceptance of responsibility, § 3E1.1, which specifically recognizes early notification of an intent to plead guilty. However, this provision does not take into account the combination of circumstance described above. Downward departures for fast track defendants are premised not only on early notification of an intent to plead guilty but also on a stipulation to deportation and, depending upon the district, the waiver of indictment or other rights, such as the right to appeal the sentence. These actions have permitted the United States Attorneys' offices expeditiously to process a significant number of alien-related prosecutions over the past few years. It is noteworthy that the sentencing guidelines do not prohibit fast track departure—a fact that results in significant leeway to the courts under *Koon* v. *United States,* 518 U.S. 81 (1996).

Question 9. Mr. Kirkpatrick, as you know, the fast track policies in the Southwest Border districts have significantly impacted compliance with the Guidelines in immigration deportation cases. Did the Department consult with and get input from the Sentencing Commission before establishing these fast track policies?

Answer 9. The fast track policies employee by certain districts grew out of the burdens of a significantly increased caseload in recent years involving alien defendants. Largely as a result of increased enforcement along the Southwest Border, the total number of federal drug prosecutions in the five border districts nearly doubled between 1994 and 1998 (from 4,070 to 7,841), and felony immigration prosecutions increased by a factor of six (from 1,044 to 6,422). The increase in Border Patrol agents without a concomitant increase in prosecutors, defense attorneys, court interpreters, judges, deputy marshals, pretrial and probation officers, and pretrial detention space has caused a crisis for the federal criminal justice system that requires innovative and aggressive solutions. Fast tract programs, which expedite prosecutions through the use of concessions that encourage guilty pleas at the earliest possible stage and thereby minimize the burdens on prosecutors, the courts, and the United States Marshals, have enabled the border districts to cope with the flood of alien prosecutions. The development of fast track programs was a response to this flood of cases. The alternatives were not consistent with the public interest. One alternative, to prosecute fewer immigration cases, would have resulted in failure to prosecute many previously deported aliens with prior aggravated felony convictions who were in the United States unlawfully. This would increase, not decrease, the disparity of treatment of criminal aliens apprehended after their illegal entry into the U.S. These immigration violations are uniquely federal offenses and cannot be

turned over to the State for prosecution. Another alternative was to shift resources away from drugs, money laundering, violent crimes, fraud, and other high-priority cases. This, too, would have had a negative impact on the affected districts.

The Department did not consult with or get input from the Sentencing Commission before these programs were put into practice, but we do not ordinarily consult with the Commission or seek its input before implementing new prosecutorial practices. We have, however, had discussions with the Commission staff since fast track programs came into existence, including consultation regarding amendment of the sentencing guidelines with the aim of reducing sentencing disparity in alien cases. While we recognize the different circumstances out of which fast track programs have arisen, we have, nevertheless, been concerned about their effect on sentencing disparity and would like to explore ways to reduce unwarranted disparity while maintaining the necessary caseload over time.

Question 10. Mr. Kirkpatrick, as you know, border districts take widely different approaches to the increasing caseloads there. Some do not even have fast track policies, while the ones that do are not consistent. Has the Department undertaken any efforts to measure which approach is more effective in stopping the tide of illegal immigration?

Answer 10. The Department has looked at the various fast track programs in place, as well as the absence of them in certain districts that also prosecute alien defendants, to understand the approaches being taken and the reasons underlying them. There are many factors affecting the use of these programs, including factors outside of the Department's control, such as judicial resources. To determine the effect of fast track programs, or their absence, on the tide of illegal immigration would be an extremely difficult, if not impossible, task because of the variety of factors that may influence an individual's decision to enter the United States unlawfully. We have not undertaken such a study.

Question 11. Mr. Kirkpatrick, it seems that similarly-situated aliens in border districts can see their cases being disposed of very differently according to the district in which they are apprehended. Is the Department taking any specific action to develop consistency among the border districts in how they apply fast track policies for immigration deportation cases?

Answer 11. The Department has considered ways of developing consistency among the border districts with respect to their use of fast track programs but has been unable to arrive at a solution. The practices in each district are subject not only to the actions of prosecutors but also to those of the defense bar and the courts. Each district has particular needs, partly as a result of the practices that have developed over time involving all components of the criminal justice system in that district. These needs also reflect the law enforcement challenges and priorities which differ substantially from district to district depending on the size, the population density of each district, existence of Indian reservations and military installations within a district, crime patterns existing within the district, state and local law enforcement activity, and a host of other factors. However, we believe that greater consistency among the border districts is a very desirable goal and one toward which we would like to renew our efforts.

Question 12. Mr. Kirkpatrick, in some districts, fast track policies permit defendants to receive sentences that are not even close to the sentence they should receive under the current Guidelines. As you know, some of the penalties were increased in response to orders from the Congress as part of the Immigration Reform Act of 1996. Assuming there is a need for some type of fast track policies, is the extent of the reduction sentence that many aliens are receiving necessary based on the caseloads, or could the districts probably get similar cooperation if the departures from the Guidelines were less severe?

Answer 12. Whether the districts could obtain cooperation similar to what they have received if the extent of downward departures from the applicable sentencing guideline range were less than presently granted is unknown. The Department has considered whether such an approach may be workable, but certain districts fear that defense efforts aimed at thwarting the imposition of increased sentences may significantly impair their ability to prosecute alien cases at current rates.

Question 13. Mr. Kirkpatrick, are there other ways to handle immigration deportation cases in the border states today other than through downward departures?

Answer 13. To deal effectively with the flood of alien cases in the border states, additional resources are needed for many components of the criminal justice system. At present, there seems to be a disequilibrium in the allocation of resources, with a great deal directed toward apprehending offenders along the border but not enough directed toward the later stages of criminal prosecution. Additional resources are necessary to prosecute offenders, to house them pending trial, to try

them, and to incarcerate them following conviction. Sufficient resources to address these needs would decrease the pressure currently on prosecutors to enter into plea agreements aimed at expediting prosecutorial and judicial efforts and would allow the sentencing guidelines to operate as intended. In addition, revision of the guidelines, for example, to encourage defendants to indicate an early intent to plead guilty, may be another way to reduce the number of downward departures.

Question 14. Mr. Kirkpatrick, is the Department concerned about the recent decision of the Supreme Court in *Apprendi* v. *New Jersey,* and do you think it will have a significant impact on the Guidelines?

Answer 14. The Department of Justice is indeed concerned about the impact of the Supreme Court's decision in *Apprendi* v. *New Jersey.* The biggest impact of *Apprendi* to date has been the deluge of litigation that has resulted from the decision. While we anticipate that only hundreds of defendants will actually have their sentences directly affected by *Apprendi*, many thousands of defendants will likely file meritless claims. As to the impact on the guidelines, in courts around the country, the Justice Department is defending the sentencing guidelines against *Apprendi* attacks. We do not believe that the guidelines are impacted by *Apprendi,* because the guidelines do not affect the maximum penalty for any offense.

Question 15. Mr. Kirkpatrick, does the Congress need to consider statutory changes in response to the *Apprendi* decision, such as possibly increasing the maximum sentence for certain serious crimes?

Answer 15. At this time, we do not believe that Congress ought to consider statutory changes in response to the *Apprendi* decision. Prosecutors have adjusted charging and trial practices in light of *Apprendi* and now charge, for example, drug type and threshold drug quantities in appropriate cases. To date—and we should emphasize that our assessment is very preliminary—these changes have caused few disruptions in our ability to prosecute successfully drug or other crimes. We will not hesitate to ask Congress to make changes to federal criminal statutes if the need arises. However, at the present time—and again bear in mind that our assessment is preliminary—we do not see an immediate need to change federal law in response to *Apprendi*. The federal courts of appeal—and in all likelihood the U.S. Supreme Court—will render decisions interpreting *Apprendi* for some time in response to the deluge of litigation facing the courts. We will, of course, monitor these decisions and bring information to Congress, including legislative proposals—as appropriate.

RESPONSES OF LAIRD KIRKPATRICK TO QUESTIONS FROM SENATOR PATRICK J. LEAHY

Question 1. According to Commissioner Steer's testimony, deportation of aliens is the reason most often given by judges for downward departures. His testimony shows that the districts that lead the nation in rate of downward departures are Arizona and San Diego. The caseloads of those districts and others that border Mexico have dramatically increased over the past eight years due to the Clinton Administration's resoundingly successful efforts to patrol our borders more effectively and bring more border-related prosecutions in federal court to deter illegal immigration and drug smuggling at the border. This extraordinary increase in caseload has not been matched by an equal increase in prosecutorial and judicial resources. Thus, border districts have implemented so-called "fast-track" programs by which departures are granted as an incentive for defendants who commit border-related crimes to resolve their cases quickly and with a minimum of resource-consuming litigation.

Question a. Contrary to patently partisan accusations that there is a nationwide trend among our federal judges and the Justice Department to ignore or defeat the guidelines, do these facts suggest that the spike in the rate of increase of departures is due to districts trying to develop strategies to address increased emphasis on border-related law enforcement?

Answer 1a. The Sentencing Commission's data show that the increase in downward departures over the last several years has been due primarily to border district strategies addressing increased emphasis on border-related crime. These districts have experienced exploding caseloads without commensurate increases in the number of judges, probation officers, defense attorneys, and prosecutors.

Question 1b. Commissioner Steer's statistics show that the Eastern and Western Districts of Washington, districts which border Canada, are among the districts that lead the nation in rate of downward departures. Is the high rate of downward departures in those districts attributable to border-related issues as it is in the southwestern districts?

Answer 1b. According to data provided by the Sentencing Commission, the high rate of departures in the Eastern and Western districts of Washington appear to be

attributable to border-related issues. Downward departures for immigration offenses account for about 70 percent of all downward departures in Eastern District of Washington and for 44 percent of all departures in the Western District of Washington. Excluding these departures, the departure rate for these two district would be between 17 and 19 percent.

Question 1c. What would the rate of sentencings within the applicable guideline range be since 1990 if border districts were eliminated from the calculation?

Answer 1c. According to data provided by the Sentencing Commission, if border districts were eliminated from consideration, the rate of sentencing within the guideline range would have been the following: 1991—92.9%; 1992—92.5%; 1993—91.9%; 1994—90.6%; 1995—90.4%; 1996—89.9%; 1997—88.3%; 1998—87.3%; 1999—86.8%.

Question 2. As United States Attorney Denise O'Donnell testified at the hearing, the nation is divided inton93 geographic federal districts each headed by its own United States Attorney. The districts are not identical. The types of crimes that predominate in one district may be very different from another district. Each district has its own law enforcement priorities and a unique relationship with state and local law enforcement. While the Sentencing Guidelines serve the goal of sentence uniformity, the provision for downward and upward departures in Guideline Section 5K2.0 recognizes that some flexibility is necessary so that the sentencing judge in an appropriate case can account for compelling and otherwise unaccounted-for circumstances. Is some degree of disparity inevitable and acceptable in a nation as disparate as ours, and does Section 5K2.0 reflect the wisdom that room for some flexibility is an essential ingredient in a fair sentencing scheme in which the American people can have confidence?

Answer 2. To the best of our knowledge, it was never contemplated that the Sentencing Reform Act would eliminate all disparity from federal sentencing. We believe Congress, the Sentencing Commission, and the Department of Justice have all long recognized the need for flexibility in the way the sentencing guidelines direct the exercise of sentencing authority. We believe the departure is an essential element of the federal guideline system, made so by the fact that no centralized rulemaking authority—Congress, the Sentencing Commission, or otherwise—can adequately consider all of the case-specific factors that properly are a part of the sentencing process.

Question 3. The claim has been made by some that the number of appeals taken by the Justice Department has not increased commensurately with the increase in the rate of downward departures. That claim ignores that the increase in downward departures is largely due to policies and practices in border states to deal with caseloads resulting from increased emphasis on border-related crime. That claim also ignores *United States* v. *Koon,* 519 U.S. 81 (1996), in which the United States Supreme Court made it more difficult to appeal a downward departure by holding that appellate courts should only overturn a departure where the sentencing judge makes a mistake of law or abuses discretion. Mr. Kirkpatrick testified at the hearing that there are ways of assuring compliance with the Sentencing Guidelines other than taking appeals in particular cases, such as working with the Commission to resolve conflicts among the circuit courts of appeal about interpretation of the guidelines.

Question 3a. If border-related issues and *Koon* are considered, has there in fact been any significant change in the rate with which the Justice Department takes appeals from downward departures?

Answer 3a. If border-related issues and the decision in *Koon* are considered, we do not believe there has been any significant change in the rate with which the Justice Department takes appeals from downward departures.

Question 3b. What are the ways in which the Justice Department endeavors to assure the effectiveness of the Guidelines other than taking appeals from downward departures?

Answer 3b. The Justice Department endeavors to assure the effectiveness of the guidelines in many ways other than taking appeals from downward departures. Let me name just three. First, in federal district and appellate courts from coast to coast, Department of Justice prosecutors defend against meritless claims—claims that are advanced by the tens of thousands—by convicted defendants for downward departures and for inappropriate application of the sentencing guidelines generally. According to the Sentencing Commission, in the appellate courts alone, defendants appealed approximately 4,000 cases, claiming that there sentences were inappropriately severe. In about 80 percent of those cases, the decision of the lower court was affirmed with the support of the Department of Justice. Second, as we indicated in an answer to one of Senator Thurmond's questions, the Department of Justice is ac-

tively defending the sentencing guidelines against *Apprendi* attacks. Just as we initially defended the guidelines from constitutional and other attacks, so we are today doing in relation to the *Apprendi* decision. Third, we actively participate as an ex-officio member of the Sentencing Commission. Our work with the Commission includes seeking limits on departure grounds from time-to-time, seeking adjustments to penalty levels as appropriate, and reviewing research developed by the Commission staff. Our guiding principle in this work is—as we stated in our testimony—that structured sentencing is far superior to unstructured sentencing and that through the work of the Commission, we strive to develop fair and effective sentencing policy.

Question 3c. Should the Justice Department's policy be to pursue an appeal of every downward departure no matter the circumstances? What factors does the Justice Department consider in determining whether or not to pursue an appeal from a downward departure?

Answer 3c. The Justice Department's policy has never been—and ought not be—to pursue an appeal of every downward departure no matter the circumstances. In deciding whether to appeal, we consider, among other factors:

1. Did the departure rest on a ground prohibited by the guidelines?

2. If the factor was not specifically prohibited, should it nevertheless be prohibited for some other policy reason, i.e., it applies to so many people that it is not outside the heartland, or decreasing a sentence on this basis would be contrary to public policy?

3. Is the departure de minimus? For example, if a defendant should have been sentenced to 20 years, and the district court instead imposed a sentence of 19 years, we are not likely to ask the court of appeals to review the sentence. On the other hand, if the reduction is significant, or, if the judge replaces a prison term with home confinement, we will often challenge the departure.

4. Has the district court justified the degree of the departure? In some circuits, the district court must explain how it selected the sentence. If the record is devoid of any analytical framework for the sentence, we will often appeal.

5. Is there support in the record for the factual findings of the district court? If there is evidence in the record to support the findings, we cannot challenge them even if we disagree with those findings. Factual findings are reviewed for clear error, and credibility choices are left to the court. Thus, no matter how strongly we disagree with the court's assessment of the facts, we have no recourse as long as there is some evidence in the record to support the court's findings.

What is the likelihood that we will win? There are substantial costs to an unsuccessful appeal. Each affirmance of a downward departure opens the door to future downward departures. An affirmance will embolden the judge who departed and encourage him to continue to depart in the future. An affirmance will also signal other judges within the circuit that downward departures are countenanced. Moreover, the precedent created by the affirmance will preclude us from appealing future departures that are "controlled" by the precedent. Because we carry the heavy burden on appeal of establishing an abuse of discretion or clear error, we must select our cases carefully. In this regard, if we expand the number of cases that we appeal by lowering our standards, i.e., by appealing weaker cases, our winning percentage will decrease. There is not rational basis for predicting that our win-loss percentage will remain fixed if we begin to challenge factual findings, etc.

Question 4. Ms. Hernandez expressed concern about relentless attempts by some to ratchet up the Guidelines and create unduly harsh sentences with an unintended racially disparate impact. Mr. Kirkpatrick in his written testimony expressed concern that our federal prison population continues to grow even as the crime rate decreases. Indeed, the population in our federal prisons has almost doubled in the last five years, and there are now about two million people in our nation's federal, state and local jails.

Question 4a. Is there reason for concern that our sentencing laws have become too harsh and retributive?

Question 4b. Is the Sentencing Commission as sensitive to unduly harsh sentences as it is to inappropriately lenient ones?

Answer 4a and b. The Sentencing Reform Act mandates that the Sentencing Commission develop sentencing policy that meets the goals of sentencing and that courts shall impose a sentence "sufficient, but not greater than necessary" to achieve those goals. We believe the Sentencing Commission has a statutory responsibility to be equally concerned with sentencing policy that is excessively harsh as it is with sentencing policy that is excessively lenient. It is also the Commission's responsibility, in promulgating its guidelines, to "take into account the nature and capacity of the penal, correctional, and other facilities and services available." We believe there is

reason for concern that some of our sentencing laws are unnecessarily harsh and that others are unnecessarily lenient, and we believe the Commission ought to be equally sensitive to both. We have and will continue to bring such matters to the attention of the Commission, when appropriate.

Question 4c. If application of the Guidelines creates an unintended racially disparate impact, what steps should Congress take to address that impact?

Answer 4c. We believe that when the guidelines have a racially disparate impact, the Sentencing Commission ought to thoroughly—and using the most rigorous research protocols—examine the impact to determine its cause. The Commission may find that the disparate impact is unintended and the result of appropriate and reasonable law enforcement and sentencing policies—taking into consideration all alternative policies. On the other hand, the Commission may find that the impact is unwarranted for one reason or another. In either case, we think the Commission ought to report its finding—after consultation with appropriate interested parties and after rigorous scholarly review—providing Congress, the Executive Branch, and others with recommendations, if appropriate. If, however, the Commission fails to undertake this type of rigorous review in the face of available data, we think it is appropriate for the Congress to direct the Commission to do so, and then if necessary, to seek reviews elsewhere.

Question 5. The Supreme Court in *Koon* held that the sentencing judge is in the best position to evaluate whether a departure is warranted, and any departure should be reversed on appeal only under very limited circumstances where, for example, the judge abused discretion or made a mistake of law. Some say that *Koon* is good for the system because it supports the authority of judges to fashion on appropriate sentence where there are unforeseen or compelling circumstances. Others have suggested that the Congress should pass legislation that would effectively overrule *Koon*. What factors should the Congress consider in evaluating the wisdom of a legislative effort to statutorily overrule *Koon*, including, for example, the increase in federal appellate litigation?

Answer 5. As we indicated in an answer to a question from Senator Thurmond, we think it is premature for Congress to consider legislation overruling the Supreme Court's decision in *Koon* on the standard of review federal appellate courts must use in reviewing most departure decisions by district courts. We believe the Sentencing Commission and the Department of Justice should continue to monitor the extent of departures—as well as specifically how the district and appellate courts are applying current departure law—to determine whether the purposes of sentencing reform are being substantially achieved by current law. We think a variety of factors ought to be considered, including the number of departures, the reasons for the departures, law enforcement priorities, and available resources. In addition, we believe that if significant concerns are identified, the first remedy for such concerns ought to be with the Commission and with its authority to adjust the guidelines. Only if such efforts fail do we believe that legislation ought to be considered.

RESPONSES OF CARMEN HERNANDEZ TO QUESTIONS FROM SENATOR PATRICK J. LEAHY

Question 1. According to Commissioner Steer's testimony, deportation of aliens is the reason most often given by judges for downward departures. His testimony shows that the districts that lead the nation in rate of downward departures are Arizona and San Diego. The caseloads of those districts and others that border Mexico have dramatically increased over the past eight years due to the Clinton Administration's resoundingly successful efforts to patrol our borders more effectively and bring more border-related prosecutions in federal court to deter illegal immigration and drug smuggling at the border. This extraordinary increase in caseload has not been matched by an equal increase in prosecutorial and judicial resources. Thus, border districts have implemented so-called "fast-track" programs by which departures are granted as an incentive for defendants who commit border-related crimes to resolve their cases quickly and with a minimum of resource-consuming litigation.

a. Contrary to patently partisan accusations that there is a nationwide trend among our federal judges and the Justice Department to ignore or defeat the guidelines, do these facts suggest that the spike in the rate of increases of departures is due to districts trying to develop strategies to address increased emphasis on border-related law enforcement?

Answer 1a. The most significant fact to note about downward departure rates is that overall federal judges continue to grant downward departures at a rate below that contemplated by Congress when it enacted the Sentencing Reform Act. The national downward departure rate is a mere 15.8 percent, below the 20 percent rate

expressly noted in the Senate report filed contemporaneously with the passage of the Sentencing Reform Act in 1984. The majority of federal defendants—85 percent—are sentenced within the guideline range.

Included in the 15 percent of cases that do receive downward departures are the departures granted in those handful of districts like Arizona and San Diego whose rates have dramatically increased in recent years as the courts and the prosecution have tried to deal with the dramatically increased number of border-related prosecutions. While there has been a slight incremental increase in the overall downward departure rate over the last six years, that is a reflection, as the Senator has noted, of the successful prosecution of immigration offense by the Clinton administration.

Vigorous border-related law enforcement has swelled federal criminal dockets in border states. In fact, there was a record number of apprehensions on the southwest border in FY 2000, <http://www.ins.gov/graphics/aboutins/statistics/msrsep00/SWBORD.HTM>, and immigrants are the fastest growing segment of the country's prison population.

To ease case backlogs caused by the overwhelming increase in immigration cases, some districts have implemented a "fast track" program whereby criminal alien defendants are allowed to plead guilty to offenses carrying reduced statutory maximums or are granted downward departures as an incentive to plead guilty within a week or two after apprehension. NACDL believes that unless Congress is prepared to fund adequately the courts and the defense function,this caseload management tool is essential to handle the potentially paralyzing volume of immigration cases in some border states. As it is, persons convicted of these immigration offenses are being processed in a fashion that we reserve for minor traffic offense in other courts across America—when in fact they stand convicted of felonies which carry serious prison terms and other consequences.

Aside from the caseload management benefits, there are equitable reasons for downward departures in immigration cases. Federal prisoners with INS holds are automatically designated to higher security facilities, where living conditions are more oppressive, and are ineligible for many prison programming benefits. The prisoners serve their entire sentences at the prison facilities, as they are disqualified from the transitional 6-month placement in halfway house, and then continue their confinement at INS detention facilities. These INS facilities have come under the scrutiny of public interest groups and the Department of Justice for their abusive and overcrowded conditions. Chris Hodges, Policy to Protect Jailed Immigrants is Adopted by U.S., N.Y. Times, Jan. 2, 2001.

Question 1b. Commissioner Steer's statistics show that the Eastern and Western Districts of Washington, districts which border Canada, are among the districts that lead the nation in rate of downward departures. Is the high rate of downward departures in those districts attributable to border-related issues as it is in the southwestern districts?

Answer 1b. In the Eastern District of Washington, immigration offenses outnumber all other categories of offenses. United States Sentencing Commission, 1999 Sourcebook of Federal Sentencing Statistics, App. B. In the Western District of Washington, immigration cases do not predominate but still exceed the national average; thus, in cases involving prison, immigration offenses are second only to drug offenses. Id. We refer the Committee to the Sentencing Commission's response for more detailed data concerning the impact of border-related issues on the downward departure rates in these districts.

Question 1c. What would the rate of sentencings within the applicable guidelines range be since 1990 if border districts were eliminated from the calculation?

Answer 1c. It appears that the rate of downward departures is just around 10 percent when the handful of border districts are excluded from the calculations, but we refer the Committee to the Sentencing Commission's response for a more detailed analysis of these statistics.

Question 2. As United States Attorney Denise O'Donnell testified at the hearing, the nation is divided into 93 geographic federal districts each headed by its own United States Attorney. The districts are not identical. The types of crimes that predominate in one district may be very different from another district. Each district has it own law enforcement priorities and a unique relationship with state and local law enforcement. While the Sentencing Guidelines serve the goal of sentence uniformity, the provision for downward and upward departures in Guideline Section 5K2.0 recognizes that some flexibility is necessary so that the sentencing judge in an appropriate case can account for compelling and otherwise unaccounted-for circumstances. Is some degree of disparity inevitable and acceptable in a nation as disparate as ours, and does Section 5K2.0 reflect the wisdom that room for some flexi-

bility is an essential ingredient in a fair sentencing scheme in which the American people can have confidence?

Answer 2. Downward and upward departures do not create unwarranted disparity—they are the hallmark of a just system of punishment. Departures account for offense and offender differences that if disregarded, would create disparity. The departure authority that Congress built into the Sentencing Reform Act, 18 U.S.C. § 3553(b), requires district courts to smooth out the disparities that otherwise would be generated by application of the guidelines.

As Congress and the Sentencing Guidelines' drafters understood, a guidelines system that encompasses every relevant sentencing factor is neither possible nor desirable:

> The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce departures should and should not be permitted.

USSG Ch. 1, Pt. A, intro. comment. Although the Sentencing Guidelines include what are arguably the most prominent offense and offender characteristics, they are by necessity a relatively blunt instrument; without Section 5K2.0, they would frequently fail to take account of ethically relevant differences between offenders. In our view, the problem of excessive uniformity, particularly in the area of drug sentencing, warrants greater attention by the Commission and this Committee than certain justifiable pockets of regional disparity. See Kyle O'Dowd, The Need to Reassess Quantity-based Drug Sentences, 12 Fed. Sent. R. 116 (1999); Stephen J. Schulhofer, Excessive Uniformity—and How to Fix It, Fed. Sent. R. 169 (1992).

Question 3. The claim has been made by some that the number of appeals taken by the Justice Department has not increased commensurately with the increase in the rate of downward departures. That claim ignores that the increase in downward departures is largely due to policies and practices in border states to deal with caseloads resulting from increased emphasis on border-related crime. That claim also ignores *United States* v. *Koon,* 518 U.S. 81 (1996), in which the United States Supreme Court made it more difficult to appeal a downward departure by holding that appellate courts should only overturn a departure where the sentencing judge makes a mistake of law or abuses discretion. Mr. Kirkpatrick testified at the hearing that there are ways of assuring compliance with the Sentencing Guidelines other than taking appeals in particular cases, such as working with the Commission to resolve conflicts among circuit courts of appeal about interpretation of the guidelines.

Question a. If border-related issues and *Koon* are considered, has there in fact been any significant change in the rate with which the Justice Department takes appeals from downward departures?

Answer 3a. NACDL has no knowledge whether the Justice Department's rate of appeals has or has not significantly changed. More significant than the rate of appeals is the nation's rate of imprisonment, which is the highest of any industrialized nation, and the overly harsh federal penalties for nonviolent drug offenses.

Almost 90 percent of drug offenders serving prison terms are non-violent offenders. More than half are first-time offenders or persons with very minor prior wrongful conduct. Persons convicted for crack cocaine offenses are sentenced on average to more than ten years in prison, longer than the average sentence for a violent offense. If the rate of appeals taken by the Department of Justice has decreased, it may reflect the fact that the sentences being imposed, even after downward departures, satisfy the statutory purposes of sentencing and the requirements of the law.

Question 3b. What are the ways in which the Justice Department endeavors to assure the effectiveness of the Guidelines other than taking appeals from downward departures?

Answer 3b. The Department of Justice is in the best position to provide a full answer to this question. We merely note that the government's interest in the Guide-

lines' effectiveness does not support its use of sentencing issue waivers and appeal waivers. Prosecutors frequently require, as an express plea agreement condition, that defendants waive their right to request a downward departure or other sentencing adjustment as well as their right to appeal the sentence imposed. Indeed, the government's increased requirement that defendants waive all manner of claims of error including wrongful conduct—such as ineffective assistance of counsel claims and failure to disclose exculpatory evidence by the government—contributes to the problem of innocent persons being convicted which has become so commonplace. NACDL believes these waivers contravene congressional intent that guideline sentences be appealable and disrupt the Sentencing Commission's mandate to continually refine and improve the guidelines in light of developing case law.

Question 3c. Should the Justice Department's policy be to pursue an appeal of every downward departure no matter the circumstances? What factors does the Justice Department consider in determining whether or not to pursue an appeal from a downward departure?

Answer 3c. Downward departures, which are an integral part of the sentencing reform which Congress enacted in 1984, are legal and should not be appealed in every instance. Even when the Department of Justice believes that a departure arguably exceeds the sentencing discretion that the Guidelines repose in federal judges, the Justice Department must responsibly allocate its resources like any other agency and should not reflexively appeal downward departures that do not jeopardize public safety or the integrity of the guidelines.

Question 4. Ms. Hernandez expressed concern about relentless attempts by some to ratchet up the Guidelines and create unduly harsh sentences with an unintended racially disparate impact. Mr. Kirkpatrick in his written testimony expressed concern that our federal prison population continues to grow even as the crime rate decreases. Indeed, the population in our federal prisons has almost doubled in the last five years, and there are now about two million people in our nation's federal, state and local jails.

Question 4a. Is there reason for concern that our sentencing laws have become too harsh and retributive?

Answer 4a. Mandatory minimums and sentencing guidelines for drug offenses account for a major share of the individual injustices that plague federal sentencing. The average crack cocaine sentence, 120 months, is greater than: the 103-month average sentence for robbery; the 76-month average sentence for arson; the 64-month average sentence for sexual abuse; and the 31-month average sentence for manslaughter. The excessive severity of drug sentences is also reflected in the composition of the prison population. Drug offenders account for 57 percent of the federal prison population (compared to 42 percent of all federal sentencings). The drug offender population, which exceeds 63,000, has more than doubled in the last ten years.

A growing number of conservatives and firm law-and-order advocates have questioned current sentencing policies:

—"And I think a lot of people are coming to the realization that maybe long minimum sentences for the first-time users may not be the best way to occupy jail space and/or heal people from their disease. And I'm willing to look at that. * * * [The crack-powder disparity] ought to be addressed by making sure the powder-cocaine and the crack-cocaine penalties are the same. I don't believe we ought to be discriminatory." Statement of President George W. Bush, CNN Inside Politics (CNN television broadcast, Jan. 18, 2001) (transcript on file with NACDL).

—"There is a conservative crime-control case to be made for repealing mandatory-minimum drug laws now. That's a conservative crime-control case, as in a case for promoting public safety, respecting community mores, and reinstating the traditional sentencing prerogatives of criminal-court judges." John J. DiIulio, Jr., Against Mandatory Minimums, National Review, May 17, 1999, at 46.

—"I believe it is time for us to look at the drug guidelines and the penalties we are imposing. * * * Judges think this minimum mandatory [for crack cocaine] which has the effect of driving up all of the sentencing guidelines is too tough." Cong. Rec. S14452 (Nov. 10, 1999) (statement of Senator Sessions).

—"[T]he narcotics sentences generated by the Guidelines and the various minimum mandatory statutory sentencing provisions are often, if not always, too high. I say this as a former prosecutor of some fourteen years experience, seven of them as an Assistant U.S. Attorney in Miami, who helped send a fair number of folks to prison for narcotics offenses." Frank O. Bowman, III, Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines, 44 St. Louis U. L.J. 299, 337 (2000).

—"Far from saving the inner cities, our barbaric crack penalties are only adding to the decimation of inner-city youth." Stuart Taylor Jr., Courage, Cowardice on Drug Sentencing, Legal Times, April 24, 1995, at 27.

—"I think mandatory minimum sentences for drug offenders ought to be reviewed. We have to see who has been incarcerated and what has come from it." Statement of Edwin Meese III, in Timothy Egan, Less Crime, More Criminals, N.Y., Times, Mar. 7, 1999.

—"Too many lives are unfairly ruined by Draconian sentences that do not achieve the law-enforcement objectives—primarily deterrance—supposedly promoted by them. * * * The way to mitigate the unfairness of the crack-cocaine standards is not to toughen the powder-cocaine sentencing rules; it is to take the more courageous step of ameliorating the crack-sentencing scheme." Michael Bromwich (former inspector general of the Justice Department), Put A Stop to Savage Sentencing, Wash. Post, Nov. 22, 1999, at A23.

—"Too often, our drug laws result in the long-term imprisonment of minor dealers or persons only marginally involved in the drug trade." John R. Dunne (former assistant attorney general under President George Bush), Paying For Failed Drug Laws, Wash. Post, Aug. 12, 1999.

Consistent with the above statements, Congress should refrain from increasing penalties and from directing the Sentencing Commission to increase penalties for drug offenses based on anecdotal media reports without sufficient verifiable scientific and empirical evidence. In addition, the Sentencing Guidelines, whatever its flaws, are an integrated system. In recent year, Congress directed the Sentencing Commission to increase penalities for particularized factors, and these directives have often duplicated guideline provisions that already punish such factors. This micro-management of the guidelines by Congress also contributes to the ratcheting up of sentences and undermines the uniformity and fairness that Congress sought to bring into federal sentencing.

Question 4b. Is the Sentencing Commission as sensitive to unduly harsh sentences as it is to inappropriately lenient ones?

Answer 4b. The Sentencing Commission does not seem to be as sensitive to unduly harsh sentences as it is to lenient ones. The fact is that of the more than 600 amendments promulgated by the Sentencing Commission less than a handful have served to reduce sentences. Thus, as with statutory sentences, sentences prescribed by the guidelines continue to escalate. A civilized society must find alternatives to imprisonment to deal with conduct which it wishes to prevent, particularly in the case of nonviolent offenses.

Nevertheless, one must acknowledge that, despite what the Sentencing Commission might want to do, it is constrained by mandatory minimums and congressional reaction to attempts to lower the drug guidelines. According to many observers, the phrase "once bitten and twice shy" aptly describes the Commission's fear of Congress and resulting failure to review the Guidelines with an eye towards fairness. The Commission's 1995 attempt to equalize the crack cocaine and cocaine powder penalties drew not only sharp criticism from members of Congress and the Attorney General but an unprecedented congressional rejection. Since that humbling episode, the Commission has been relatively silent with respect to the severity of the drug guidelines—ignoring the din of outside criticism. Although drug cases account for the largest percentage of the sentencing caseload and are responsible for much of the criticism lodged at the regime, guidelines that are perceived as being too lenient—the fraud guideline, for example—have received considerably more attention from the Commission.

Question 4c. If application of the Guidelines creates an unintended racially disparate impact, what steps should Congress take to address that impact?

Answer 4c. Congress must eradicate laws and guidelines which disparately impact on racial and ethnic minorities. Congress should also satisfy itself, after public hearings, that racial disparity is not the result of disparate application of neutral laws. As then Congressman George Bush said in introducing legislation to repeal federal mandatory minimums for drug offenses, "Philosophical differences aside, practicality requires a sentence structure which is generally acceptable to the courts, to prosecutors, and to the public." 116 Cong. Rec. H33314, Sept. 23, 1970. Sentencing policies and law enforcement practices which operate in a racially disparate manner erode public confidence in our criminal justice system, particularly in minority communities.

The Sentencing Commission first reported increasing racial disparities in August 1991:

> The difference found across race appears to have increased since 1984. This difference develops between 1986 and 1988, after implementation of mandatory minimum drug provisions, and remains constant thereafter.

United States Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 82 (1991).

Racial and ethnic disparities continue into today and are seen at all stages of the criminal justice process. For example, currently Latinos comprise approximately 40 percent of the federal prison population although they only account for approximately 11.7 percent of the general population.

Requiring special mention are the disparities caused by the disproportionately severe penalties that apply to crack cocaine offenses. While a majority of crack users in the United States are white, 94 percent of those sentenced under the incomparably severe penalties for crack cocaine are black or Hispanic. United States Sentencing Commission, 1999 Sourcebook of Federal Sentencing Statistics 69. The average sentence for crack cocaine (ten years) is thirty-five percent longer than the average methamphetamine sentence and fifty-two percent longer than the average powder cocaine sentence. Id. at 81. Amid widespread criticism directed at the severity and disparate impact of the crack sentencing regime, the Sentencing Commission has twice called for reduced crack penalties, noting "[t]he current penalty structure results in a perception of unfairness and inconsistency." United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 8 (April 1997).

Indeed, the ball is in Congress' court—Congress has yet to act on the recommendations in the congressionally ordered report issued by the Commission in 1997. It seems clear that the Commission is waiting for Congress to act in this area and that congressional action is necessary to initiate reform. NACDL supports repeal of all mandatory minimums and greater latitude for the Commission to set drug penalties. As a intermediate step, we believe Congress should increase the quantity thresholds necessary to trigger the mandatory minimums for crack cocaine and direct the Commission to amend the guidelines accordingly.

Question 5. The Supreme Court in *Koon* held that the sentencing judge is in the best position to evaluate whether a departure is warranted, and any departure should be reversed on appeal only under very limited circumstances where, for example, the judge abused discretion or made a mistake of law. Some say that *Koon* is good for the system because it supports the authority of judges to fashion an appropriate sentence where there are unforseen or compelling circumstances. Others have suggested that the Congress should pass legislation that would effectively overrule *Koon.* What factors should the Congress consider in evaluating the wisdom of a legislative effort to statutorily overrule *Koon*, including, for example, the increase in federal appellate litigation?

Answer 5. Departures are an integral part of the Sentencing Reform Act which Congress enacted in 1984. As Congress and the drafters of the first guidelines understood, departures make the guidelines possible. As explained in our answer to Question 2, the guidelines could not achieve their purpose of disparity reduction without departures.

Concern regarding departure rates in certain districts does not warrant congressional abrogation of the *Koon* standard. The judicial branch—through both the Sentencing Commission and the courts—has repeatedly demonstrated its willingness to police the departure power. See, e.g., USSG §5K2.19 (added Nov. 1, 2000, to prohibit downward departures for post-sentencing rehabilitative efforts); *United States* v. *Banuelos-Rodriquez,* 215 F.3d 969 (9th Cir. 2000) (en banc) (holding that "sentencing disparities arising from the charging and plea bargaining decisions of different United States Attorneys is not a proper ground for departing from an otherwise applicable Guidelines range."); *In re Sealed Case,* 181 F.3d 128 (D.C. Cir. 1999) (en banc) (holding that *Koon* did not open the door to a downward departure, without a government motion, based on substantial assistance).

To the extent that judges, prosecutors, and defense attorneys are relying upon downward departures in response to overwhelming caseloads or unduly blunt guidelines, abrogating *Koon* will only drive guideline evasion underground and camouflage the root problems. Indeed, there are many other mechanisms for evading the guidelines, including charge bargaining and fact bargaining, which escape detection and resist policing. The consequence of turning to these other mechanisms to do the work of what under the guidelines would be a departure, justified in writing, may be widespread disparity. See Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 14–SPG Crim. Just. 28 (1999).

Finally, downward departures serve an important function in the guideline writing process. As Justice Breyer has explained, the original guidelines

> were intended as a starting point. Sentencing judges would remain free to depart from the guidelines' categorical sentences. They would write down the reasons for their departures. The Commission would learn from what the judges said and did. and future commissions would adjust the guidelines accordingly.

Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 14–SPG Crim. Just. 28 (1999). See also USSG Ch.1, Pt. A, intro. comment. (stating intent that the Commission would refine the guidelines based on its review of departures). Thus, departure rates sometimes reflect the fact that particular guidelines do not capture the ethically relevant sentencing factors. Overruling *Koon* would hamper evolution of the guidelines by denying the Commission an important source of information regarding potentially important offense and offender characteristics.

RESPONSES OF WILLIAM G. OTIS TO QUESTIONS FROM SENATOR STROM THURMOND

Question 1. Mr. Otis, as the number of cases in which defendants receive downward departure[s] increase, would you expect that the number of government appeals in departure cases to increase?

Answer 1. Yes. The most effective way—indeed, perhaps, the only effective way—for the government to rein in departures is to appeal. A failure to appeal does more than allow what may be an injustice to go uncorrected. It sends a signal to the district judge that the government is unwilling or unable to stand up for the purposes of the Sentencing Reform Act and the rules that limit departures to truly exceptional cases.

Of course no sensible person believes that the government should appeal in every case. But plainly the need to appeal is greater, not less, when the number of departures accelerates. As things stand now, the number of downward departures, both in absolute terms and as a percentage of all sentences, is higher than it has ever been. At the same time, the number of government appeals is lower than it has ever been. In the most recent year for which statistics are available, district courts granted slightly more than 8300 downward departures without a prosecution request, but the government appealed only 19 times. That is an appeal rate of less than one-quarter of one percent.

In my view, this makes no sense. At best, it suggests a curious degree of lassitude in the Department of Justice. At worst, it suggests indifference, if not antagonism, to the system of serious and determinate sentencing that, at least into the early 1990's, had done so much to advance the rule of law in this vital area.

Question 2. Mr. Otis, based on your experience in the Eastern District of Virginia, do you think the Government could significantly promote compliance with the Guidelines if it had an aggressive policy on appeals?

Answer 2. Yes. As you may know, the Eastern District of Virginia has now, and for many years has had, one of the best records of Guidelines compliance in the country. Specifically, according to the Sentencing Commission's statistics, district judges in Eastern Virginia impose sentences within the Guidelines at or above 90% of the time, as opposed to the sluggish national rate of 65%. In considerable part, this is because the judges in Eastern Virginia know that the United States Attorney stands behind the Guidelines, and that less than fully justified departures will be prime candidates for review by the Fourth Circuit.

I should emphasize that the Eastern District's long record of Guidelines compliance is not a result of happenstance or luck. It is a result of the commitment of United States Attorneys of both parties, Henry Hudson and Richard Cullen during the Reagan and Bush years, and Helen F. Fahey under President Clinton. Each of these outstanding prosecutors has shown a steadfast commitment to the rule of law and to the public safety that Guidelines compliance promotes. Their crucial insight, the key component of their willingness to take an aggressive stand in the Court of Appeals, is their knowledge that fairness—for both the defendant and the public—is served not by accommodating special breaks for a minority of criminals, but by insisting on the same rules for everyone.

Question 3. Mr. Otis, as you know, downward departures in immigration cases have increased greatly in recent years. Do you think there are other ways to handle increased caseloads of immigration deportation cases rather than through downward departures from the Guidelines?

Answer 3. Yes. The increased caseload created by border-related law enforcement falls far short of providing an adequate explanation for the present, nationwide departure rate—a rate which has grown over the last eight years from slightly less than a fifth to more than a third.

First, the "fast-track" programs some United States Attorneys have adopted do not need to involve wholesale departures, and indeed not all of them do. The Central District of California (Los Angeles), for example, has a considerable problem with illegal immigration to say the least, but has an overall departure rate no greater than the national average. Moreover, its rate of departures not based on a defendant's substantial assistance in other prosecutions is only roughly one-half the national rate. And its rate of such departures is less than one-fifth the rate in the adjoining Southern District of California.

The Central District of California has simply settled on a different approach to the problem, one which in my view intelligently addresses illegal immigration and related issues, and does so in a way that avoids blasting an enormous hole in the Guidelines. Specifically, that District obtains expeditious plans in more than 95% of its cases by offering nothing more than credit for acceptance of responsibility and a recommendation for a sentence at the lower end of the Guidelines range. Defendants, and the defense bar, soon come to understand that accepting that arrangement is their best option in cases where proof of guilt is typically incontrovertible.

It is not clear why a similar approach could not be tried in other districts with border- and immigration-related problems. But for however that may be, a second approach is available if the Southern District's plan is tried but turns out to be impractical. If a true emergency were to exist after having made the effort, federal resources could be re-focused on prosecuting only the most egregious offenders (for example, alien smugglers, narcotics traffickers and persons previously deported for illegal reentry after conviction for an aggravated felony) and giving those defendants the full Guidelines sentences they deserve. This approach would in my judgment better serve the public interest than an undifferentiated program of half-measure "justice" spread thinly around the board.

The "fast-track" explanation for the growth in departures is deficient for a second, more categorical reason. Practical difficulties in border enforcement, even the most intractable difficulties, simply cannot be an excuse for the Justice Department to squeeze around the law. Article II. Sec. 3 of the Constitution requires that the Executive "shall take Care that the Laws be faithfully executed." It does not provide that they shall be executed when it is easy or convenient, but shuffled to the sidelines when it is not. Some of our country's landmark statutes, including statutes protecting civil rights, have been difficult, and sometimes even dangerous, to enforce. We enforced them nonetheless, and we are better for it.

The Sentencing Reform Act is a landmark effort in providing more nearly equal treatment of defendants. It is not, and should not be treated as, an unwanted stepchild. Enforcing it in full measure may well be a daunting task, particularly in border districts. But it is unacceptable to make the law the victim because the job is hard.

Question 4. Mr. Otis, are you concerned about the increase in the use of substantial assistance departures in the last decade, and in the great disparity in how substantial assistance is applied within districts today?

Answer 4. I am concerned about both developments.

A. In fiscal 1992, there were substantial assistance departures in slightly over 15% of the cases. Over the next two years, this increased to 20%—a jump of one-third. The rate has remained at or about 20% since then, although with a slight decrease in fiscal 1999.

Congress was wise to grant to the government the power to reward a defendant's substantial assistance by making these motions. I am unaware, however, of any reason to believe that defendants have become one-third more willing to cooperate—or, indeed, any more willing to cooperate—over the last eight years than they were in the five years before that. Nor is it clear why the government should need to sponsor below-guidelines sentences in 20% of its cases in order to obtain the cooperation it needs. In the Eastern District of Virginia, for example, the government makes these motions in only 7% of the cases, yet does not suffer from a lack of cooperation. Indeed, over the 18 years I was in the United States Attorney's Office there, it was my experience that defendants were more eager to cooperate, and to do so in a timely fashion, knowing that substantial assistance motions were hard to get. In sentencing as elsewhere in life, it is the disciplined use of incentives that reaps the greatest rewards.

It is natural, although unfortunate, for Assistant United States Attorneys to be tempted to accommodate the pressure that may be placed on them by judges antagonistic to the Guidelines, and of course by the criminal defense bar, by stretching the standards for what will count as "substantial assistance." It is perhaps because of the build-up of these pressures that we have seen the increase from 15% to roughly 20% of cases in which the government makes substantial assistance motions. The precise reason for the increase warrants further inquiry, perhaps from the Sen-

tencing Commission and Congress and certainly from the Department of Justice. This much is clear, however: Having a supportive and resolute United States Attorney will combat these pressures and help insure that a reduction in sentence brought about by a government motion truly reflects "substantial assistance."

B. The disparity in the rate of substantial assistance motions is troubling. It is all but impossible to believe that in five districts in the country, defendants cooperate 40% of the time or more, while in five others they cooperate less than 7% of the time (see Commissioner Steer's Exhibits 10 and 11). It simply cannot be the case that, based on no obviously relevant difference in geography or crime patterns, defendants in one district provide substantial assistance more than five times as often as defendants in some other district.

Of course, some variation in rates is to be expected. A substantial assistance departure is, after all, a departure, and departures by definition will not exhibit the same degree of rough uniformity we can expect when the Guidelines as followed.

Nonetheless, the enormous disparity in substantial assistance rates from district to district should be addressed, because it disserves the central goal of the Sentencing Reform Act. In order to encourage more nearly equal treatment of cooperating defendants, the Department of Justice, after consulting with the United States Attorneys, should attempt to develop more uniform standards for what assistance will count as "substantial." This may be a difficult undertaking, because the needs and circumstances of each case will vary, but it is worth the candle. In my view, it should begin with the understanding that, at a minimum, substantial assistance means results—that is, specific, detailed information, typically resulting either in testimony or the entry of a guilty plea by another party. Merely having a cooperative attitude, or providing information that turns out to have little or no use would be insufficient. A defendant who does no more than that may well deserve leniency at sentencing, but that leniency can be given within the Guidelines—for example, by a government recommendation for full credit for acceptance of responsibility and for a prison term or fine at the lower end of the sentencing range.

By adopting a more clearly defined and pointedly results-oriented standard, the Department will still be able to obtain cooperation, but at lower cost and with higher regard for uniform treatment.

Question 5. Mr. Otis, when the Guidelines are applied as the Congress intended, do you consider the resulting punishment to be an important reason for the decline in crime in recent years?

Answer 5. Yes. I am not a criminologist and do not pretend to be. There are doubtless a number of factors that have contributed to the decrease in crime, but common sense tells us that the more serious and uniform sentencing we have seen under the Guidelines regime has helped promote this encouraging development. After all, every day a drug dealer spends in jail, courtesy of a Guidelines-mandated sentence, is a day he is not standing outside your child's school.

It is true that the Guidelines cover only federal offenses, and that those offenses account for only a fraction of all crimes. Still, I believe that the Guidelines have contributed to the decrease in crime both directly and indirectly.

Directly, they have created increased prison sentences for some of the most powerful criminals, such as the leaders of national (and occasionally international) drug cartels. With such criminals off the street for a longer time, the effects ripple down, causing disruption in the drug networks they used to command.

Indirectly, the Guidelines have been a model for the states. In the 13 years since the Guidelines became effective, more and more states have adopted some form of determinate sentencing system modeled on them, and have abolished or significantly curtailed parole. As the visibility and truthfulness of sentencing have increased, the crime rate has decreased. It would seem odd to believe that this trend, now consistent for about a decade, is mere coincidence.

The Guidelines have indirectly promoted the decrease in crime in another way, one which is difficult to quantify but, in my judgment, not less for its statistical evanescence. The Guidelines signal that our country is going to take sentencing seriously. We are no longer content to hear that a criminal has been sentenced to, say, 15 years, only to read in the papers two or three years later that, because of bulging "good time" credits and easy parole, he is out on the street and has done it again. The Guidelines are a model of being serious with the criminal and honest with the public. A country that displaces unbridled sentencing discretion—which in practice often meant nothing more than disposition by lottery—with the rule of law, is a country that tells its criminals, not to mention the rest of us, that the chances of effectively "beating the rap" with an impassioned plea to a soft judge are over. Sooner or later this message finds its way to the street, and some who might have thought that getting a light sentence was a good enough gamble to make crime worth the risk will think again.

As noted, I am not a criminologist. But the coincidence of Guidelines sentencing and less crime is there for all to see. At the very least, it would be irresponsible to weaken the Guidelines without studying whether their effect on the crime rate is what it certainly seems to be.

Question 6. Mr. Otis, some have criticized the Guidelines for not providing judges enough discretion in how to sentence offenders. What are some of the ways that the system permits judges flexibility other than [in] the Guidelines range?

Answer 6. Under the Guidelines, judges retain considerable flexibility, much more than seems ordinarily to be assumed by the critics.

First off, the Guidelines do not specify a particular sentence, but a sentencing range—for example, 100 to 125 months. For each offense, the top of the range is 25% higher than the bottom. Within the range, the judge can fix the sentence at any point he chooses, no questions asked. Beyond that, the judge can grant another two levels (or roughly 25%) off the sentence if he decides that the defendant has accepted responsibility for his crime; for more serious crimes, the additional amount off exceeds 35%.

In other words, taking into account nothing more than the court's determination of acceptance of responsibility and its freedom to choose where within the resulting range the actual sentence should fall, the system allows for individual variations of at least 50%, and often close to two-thirds.

But there is more. In many cases, particularly those involving drugs or fraud (two of the most frequently charged federal offenses), the Guidelines reserve to the judges the authority to make a number of largely factual, and therefore effectively unreviewable, determinations that can affect dramatically the sentencing range. For example, the judge determines the amount of drugs that should be attributed to a particular defendant in a narcotics ring; whether the dealer was a major or a minor player; whether he attempted to obstruct justice by "encouraging" witnesses to lie, and so on. All these determinations affect the sentence; in particular, the determination of the amount of drugs involved, or the amount of money illegally obtained, can influence the sentence as much or more than any other factor. Again, the Guidelines leave all these determinations to the judge, and it was my experience that, in cases where the evidence was anything less than quite clear, the benefit of the doubt went to the defendant.*

Finally, of course, there is the power to depart. The original Sentencing Commission, under the leadership of Judge Wilkins, correctly recognized that the power to depart in a truly exceptional case is an important component of justice.

Departures are not inherently wrong or destructive. The problem lies not in the idea of departures, but in what certainly appears to be their increasing use for the improper purpose of circumventing a Guidelines sentence that a particular judge may personally believe is "too long." As written, the Guidelines asked of the judge only that he give a persuasive reason not already taken into account as to why the case is sufficiently unusual to justify a departure. If he can do so, the departure will stand, as the Supreme Court noted in United States v. Koon, 518 U.S. 81 (1996). If we cannot, the departure shouldn't stand. At the end of the day, the present system allows for a full measure of flexibility, asking in return only that good reasons be given if the normal rules are to be by-passed.

Question 7. Mr. Otis, it has been argued since the Guidelines were created that they are far too complex. However, the intent of the Guidelines is to expressly apply a wide variety of factors that judges should consider for each person they sentence. What is your view about the complexity of the Guidelines.

Answer 7. One man's complexity is another man's refinement.

Once Congress made the decision to place sentencing under the rule of law, and to incorporate the sort of established, written-down rules through which the rule of law expresses itself, a certain degree of complexity became inevitable. Given the stakes at sentencing, for both the defendant and society, complexity—or as I view it, refinement—is a positive good.

At the outset, it should be borne in mind that the Guidelines' "complexity" is easy to overstate. Guidelines sentencing at the end of the day rests on the same two basic factors that have always been considered: how serious the crime was (the offense level) and whether we are dealing with a first offender or a repeat customer

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*The Supreme Court's ruling last term in *Apprendi* may significantly curtail the judge's authority to determine, for example, the amount of drugs involved and to use that determination in fixing the sentence, but not in any way that will redound to a defendant's disadvantage. Before *Apprendi* the general rule was that a "sentencing factor" had to be proved by a preponderance of the evidence. In at least some cases after *Apprendi*, a "sentencing factor" that could increase the defendant's exposure will have to be submitted to a jury for its determination under the more exacting reasonable doubt standard.

(the criminal history score). One major difference between Guidelines sentencing and past practice is that now the defendant, and the public, know exactly how much each of these factors contributes toward the sentence, because each has a value assigned to it. Thus what is criticized as complexity is often nothing more than visibility.

In order to be fair, the Guidelines have no choice but to account for the wide variations in how any given crime can be committed. Not every rape, for example, is perpetrated in the same way. The Guidelines account for this by listing, in addition to the base offense level for rape, specific offense characteristics and adjustments to the sentence to be made in light of them. To illustrate, if the rapist rendered his victim helpless by force or drugs, of if the victim was a young child, the sentence increases by about 50%. Smaller but still significant increases are required if the victim was in the rapist's care (such as a student raped by a teacher on a field trip or an inmate raped by a guard), or if the victim was injured or abducted. All this undeniably adds to the Guidelines' "complexity." The question is which of these factors should be ignored. If as I believe none should be, and if more broadly no relevant feature of a crime should be ignored at sentencing, isn't it better to deal with them explicitly and in concrete terms—even if this makes the Guidelines tedious and "complex"?

As long as crimes vary in important details, any sensible sentencing system is going to be complex (or refined, depending on how one cares to put it). The very refinement of the Guidelines—that they require the judge to consider and assign a weight to every relevant fact about the offense conduct—belies the competing attack on the Guidelines, namely, that they blot out individual consideration. To the contrary, they guarantee individualized consideration in a way that the old, discretion-based system never did. In the past, if the judge overlooked an important fact or made a mistake about it, or inexplicably counted it for much less or much more than it was worth, the parties would be lucky to find out, much less be able to seek correction. The judge could sit on the sentencing bench sphinx-like. He was not required to say what facts he considered, how much weight he gave them, or why.

The Guidelines have changed all this. Sentencing is now more specific, detailed and visible. This means, as the critics point out, that it is also more determinate, demanding and litigious. But in exchange for these costs we have dramatically reduced the opportunities for unwarranted disparity, hidden bias and arbitrary decision making. We have increased to opportunities to find and correct error. And we have opened up the workings of the system, generally and in individual cases, to the public that pays for it and has to live with its results.

Permit me one final observation. It turns out that much of the antagonism toward the Guidelines and their "complexity" takes root among those who prefer the old way, which was literally a system of sentencing without law—a system, not coincidentally, in which the emotional plea by an adroit or well-paid lawyer might turn the tide at sentencing, there being no settled rules to promote equality for defendants not so fortunate.

One may debate the wisdom of particular aspects of the Guidelines, but it seems bizarre to condemn the idea of a rules-based system at all, and to demand a return to the days when the length of the sentence turned on the draw of the judge. No serious person doubts that whether a defendant properly may be convicted should be decided under the rule of law, no matter how complex and problem-laden it may be, and not as an exercise of will by individual judges. It is difficult to understand, then, why any serious person would want to nudge the system back toward the time when, at sentencing, all bets, and all rules, were off.

Question 8. Mr. Otis, as you have noted, there is only a little over 60 percent compliance rate with the Guidelines today. If the downward departure trends continue, does there reach a point where the Guidelines system breaks down?

Answer 8. Yes. It is difficult to know precisely where the point is, but my sense of it is that we are perilously close to it now, if indeed we have not already passed it.

The Guidelines were modeled on he sentencing practices that had been established in the years before they were adopted. The Guidelines-prescribed sentencing range for any particular offense was taken largely from the "heartland" range of sentences imposed for that offense in pre-Guidelines practice. Of course there were sentences that fell outside that range—sentences that amounted to what one might call pre-Guidelines "departures."

Because I was not involved in crafting the Guidelines, I do not know the percentage of cases in which such "departures" were allowed. I would be surprised, however, if it were as high as the present rate of slightly over 35%. Obviously, if the pre-Guideline "departure" rate were less than that, or even just close to it, then there is strong reason to believe that we have already returned to the point it was

the whole purpose of the Guidelines to leave—namely, the point of unpredictable sentencing based on idiosyncratic and subjective factors.

As I have noted, allowing reasonable latitude for departures is not per se either wrong or destructive. But a fundamental choice has to be made. Either we are going to have the rules-based system Congress intended by adopting the Sentencing Reform Act, or we aren't. When the rules are by-passed in more than a third of the cases, and when the rate of by-pass has increased steadily for years, we have in my view come to a crossroads. Continuing down the present path means that the system will break down. What will emerge from its quiet (and, as its opponents intend, mostly hidden) dismantling will be worse than what we had before. In pre-Guidelines practice, we had unwarranted disparity and luck-of-the-draw sentencing—but at least we did not pretend to the public that we had anything better. If the Guidelines system is eaten away from the inside by departures, sentencing will be every bit as random and unpredictable it was before, but less honest. We will continue to display to the taxpayers the superstructure of the Guidelines, but, I strongly suspect, never tell them how little of the rule of law is really left inside.

Question 1. According to Commissioner Steer's testimony, deportation of aliens is the reason most often given by judges for downward departures. His testimony shows that the districts that lead the nation in rate of downward departures are Arizona and San Diego. The caseloads of those districts and others that border Mexico have dramatically increased over the past eight years due to the Clinton Administration's resoundingly successful efforts to patrol our borders more effectively and bring more border-related prosecutions in federal court to deter illegal immigration and drug smuggling at the border. This extraordinary increase in case load has not been matched by an equal increase in prosecutorial and judicial resources. Thus, border districts have implemented so-called "fast-track" programs by which departures are granted as an incentive for defendants who commit border-related crimes to resolve their cases quickly and with a minimum of resource-consuming litigation.

Question a. Contrary to patently partisan accusations that there is a nationwide trend among our federal judges and the Justice Department to ignore or defeat the guidelines, do these facts suggest that the spike in the rate of increase of departures is due to districts trying to develop strategies to address increased emphasis on border-related law enforcement?

Answer 1a. I believe Commissioner Steer's testimony showed that there has been not so much a "spike" in the rate of departures as a moderate, although certainly discernable, acceleration in the rate of increase. Thus what I conclude is that the border-related issues have simply exacerbated a problem of indiscipline that was already there.

Even assuming that there has been a "spike" in departures driven by border-related law enforcement, however, that would fall far short of providing an adequate explanation for the present, nationwide departure rate—a rate which, as Mr. Kirkpatrick acknowledged, has grown over the last eight years from slightly less than a fifth to more than a third.

The explanation is inadequate for two reasons. First, fast-track programs do not need to involve wholesale departures, and indeed not all of them do. The Central District of California (Los Angeles), for example, has what is to say the least a considerable problem with illegal immigration, but has an overall departure rate no greater than the national average. Moreover, its rate of departures not based on a defendant's substantial assistance in other prosecutions is only roughly one-half the national rate. And its rate of such departures is less than one-fifth the rate in the adjoining Southern District of California.

The Central District of California has simply settled on a different approach to the problem, one which in my view addresses illegal immigration and related issues, but does so in a way that avoids blasting an enormous hole in the Guidelines. Specifically, that District obtains expeditious pleas in more than 95% of its cases by offering nothing more than credit for acceptance of responsibility and a recommendation for a sentence at the lower end of the Guidelines range. Defendants, and the defense bar, some come to understand that accepting that arrangement is their best option in cases where proof of guilt is typically readily at hand and incontrovertible.

It is not clear why a similar approach could not be tried in other districts with border- and immigration-related problems. Nor is it clear why, if a true emergency were to exist after having made the effort, federal resources could not be re-focused on prosecuting only the most egregious offenders (for example, alien smugglers, narcotics traffickers and persons previously deported for illegal reentry after conviction for an aggravated felony) and giving those defendants the full Guidelines sentences they deserve. This approach would in my judgment better serve the public interest

than an undifferentiated program of half-measure "justice" spread thinly around the board.

The "fast-track" explanation for the growth in departures is inadequate for a second, more categorical reason. Practical difficulties in border enforcement, even the most intractable difficulties, simply cannot be an excuse for the Justice Department to squeeze around the law. Article II, Sec. 3 of the Constitution requires that the Executive "shall take Care that the Laws be faithfully executed." It does not provide that they shall be executed when it is easy or convenient, but shuffled to the sidelines when it is not. Some of our country's landmark statutes, including statutes protecting civil rights, have been difficult, and sometimes even dangerous, to enforce. We enforce them nonetheless, and we are better for it.

The Sentencing Reform Act is a landmark effort in providing more nearly equal treatment of defendants. It is not, and should not be treated as, an unwanted stepchild. Enforcing it in full measure may well be a daunting task, particularly in border districts. But it is unacceptable to make the law the victim because the job is hard.

Having said this, I do not wish to be misunderstood. Career Assistants in United States Attorneys Offices, at the border and across the country, are doing a remarkably good job under the weight of a tremendous burden. I could scarcely agree more with your implicit suggestion that Congress provide additional resources for them. Likewise I agree with you that more judges are needed in these districts. My point is simply that border-related issues should not be allowed to become, and as a practical matter they are not, the "explanation" for the broad, steady, and now alarming nationwide growth in departures.

Question 1b. Commissioner Steer's statistics show that the Eastern and Western Districts of Washington, districts which border Canada, are among the districts that lead the nation in [the] rate of downward departures. Is the high rate of downward departures in those districts attributable to border-related issues as it is in the southwestern districts?

Answer 1b. Although I am at least acquainted with the practices in Los Angeles because I have had the good fortune to know people working in the United States Attorney's Office there, I do not know prosecutors in the Washington districts. I thus confess that I do not know the answer to your question. I am sure the United States attorneys in those districts would be able to furnish the information you seek.

I have noticed one curious aspect of Commissioner Steer's statistics, however. It is true that the Eastern and Western Districts of Washington have among the highest non-assistance based downward departure rates in the country, 40.85 and 26.3%, respectively. But the next three districts to the east which also border Canada—Idaho, Montana and North Dakota—have downward departure rates of, respectively, 12.5%, 13.0% and 9.3%—each of which is lower than, not merely the rates in Washington, but the national average of 15.8%. Without knowing anything more, it would thus seem unlikely that the high departure rates in Washington should be imputed to border-related issues, since the three closed border states (having a combined border more than twice as long as Washington's) have an average departure rate only one-third of the Washington districts' combined average.

Question c. What would the rate of sentencings within the applicable guideline range be since 1990 if border districts were eliminated from the calculation?

Answer c. Again, my present resources do not enable me to answer this question. This would be the case even if I were sure whether you intended to include as "border districts" only those districts on the southern border, or to include as well the districts that border Canada, or to include only districts which have initiated "fast-track" programs of the form employed by San Diego but not by Los Angeles; or whether you would also include, for example, Florida, which has its own significant and unique mix of immigration-related problems but nonetheless maintains an extremely low rate of non-assistance based downward departures. The Sentencing Commission may be able to provide the data you seek.

Question 2. As United States Attorney Denise O'Donnell testified at the hearing, the nation is divided into 93 geographic federal districts each headed by its own United States Attorney. The districts are not identical. The types of crimes that predominate in one district may be very different from another district. Each district has its own law enforcement priorities and a unique relationship with state and local law enforcement. While the Sentencing Guidelines serve the goal of sentence uniformity, the provision for downward and upward departures in Guidelines Section 5K2.0 recognizes that some flexibility is necessary so that the sentencing judge in an appropriate case can account for compelling and otherwise unaccounted-for circumstances. Is some degree of disparity inevitable and acceptable in a nation as

disparate as ours, and does Section 5K2.0 reflects the wisdom that room for some flexibility is an essential ingredient in a fair sentencing scheme in which the American people can have confidence?

Answer 2. There is not doubt that "some flexibility" is both needed in sentencing and contemplated by the Guidelines. But the situation we face today calls into question what is meant by "some," and, if a point be made of it, also what is meant by "flexibility."

"Flexibility" in sentencing means the ability to adjust a sentence either up or down, depending on the nature of the unusual and "compelling" circumstances of a case. What departures accomplish now, however, is not an adjustment up or down but a one-way ratchet down. Downward departures outnumber upward departures by a ratio of 57 to 1. Even excluding substantial assistance departures, downward departures outnumber upward departures 26 to 1. Upward departures for practical purposes do not exist.

What the sprawling growth in departures reveals, then, is not a need for "flexibility"—a need that would not on the face of it cut in one direction more than the other—but a wholesale shrinking of sentences. It is, in other words, a one-way street favoring criminals that has understandably appropriated the more appealing, if not particularly forthright, banner of "flexibility."

Even if departures were evenly balanced, however, the current rare at which they are allowed shows something more than merely "some" flexibility. Downward departures are now given in more than one-third of the cases nationwide. In my view, preservation of an ample degree of flexibility easily could be accomplished with a departure rate of less that half that. Indeed, in the Eastern District of Virginia, where I was a prosecutor for many years, departures are given, not in a third of the cases, but in less than a tenth. Downward departures for reasons other than a defendant's substantial assistance are given in fewer than 2% of the cases—a rate less than one-eighth the national average.

The high compliance rate in the Eastern District of Virginia has not come about because the district judges there are any less in need of "some flexibility" than district judges anywhere else. It has not come about because the Eastern District has some peculiar or singular pattern of crime; to the contrary, we have a fairly typical mix. We also have an enormously disparate district, with a long seacoast, urban areas in Richmond and Norfolk, populous suburbs in northern Virginia, and rural areas stretching out to the Blue Ridge Mountains. No—the high rate of Guidelines compliance has come about because our district judges understand that the Guidelines already permit considerable flexibility for dealing with the unusual case (please see my response to Senator Thurmond's Question 6), and understand as well the importance, to both defendants and the public, of providing the assurance of equal justice. It has also come about because the judges have been encouraged to maintain this view by the commitment to the Guidelines, and to seeking the Fourth Circuit's enforcement of them when necessary, shown by United States Attorneys of both parties—Henry Hudson and Richard Cullen during the Reagan and Bush years, and more recently President Clinton's outstanding appointee, Helen F. Fahey.

Finally, the call for "some flexibility" can too easily become the anthem of chaos. In seven districts in the country, only two of which border on Mexico, the overall departure rate is already above 50%. This means that, in each of those districts, a defendant's chances of getting a departure are greater than his chances of getting a Guidelines sentence. It is regrettably no exaggeration to say that, in those districts, there has been a de facto repeal of the Sentencing Reform Act. With all respect to the judges and the United States Attorneys in those jurisdictions, a departure rate that high is a burlesque of "flexibility." In my judgment, what is needed in these and in many other districts with excessive departure rates is not more flexibility but more discipline.

Question 3. The claim has been made by some that the number of appeals taken by the Justice Department has not increased commensurately with the increase in the rate of downward departures. That claim ignores that the increase in downward departures is largely due to policies and practices in border states to deal with caseloads resulting from increased emphasis on border-related crime. That claim also ignores *United States* v. *Koon*, 518 U.S. 81 (1996), in which the United States Supreme Court made it more difficult to appeal a downward departure by holding that appellate courts should only overturn a departure where the sentencing judge makes a mistake of law or abuses discretion. Mr. Kirkpatrick testified at the hearing that there are ways of assuring compliance with the Sentencing Guidelines other than taking appeals in particular cases, such as working with the Commission to resolve conflicts among the circuit courts of appeal about interpretation of the guidelines.

Question a. If border-related issues and *Koon* are considered, has there in fact been any significant change in the rate with which the Justice Department takes appeals from downward departures?

Answer 3a. I take Mr. Kirkpatrick at his word that *Koon* has made government appeals potentially more difficult than they had been before, but I have no way to quantify how much more difficult the Department estimates appeals have become, still less to gauge how much its estimate has affected the actual number of appeals it has initiated.

There are some observations I can make, however. First, the rate of unappealed downward departures has shown a remarkably steady increase since the early 1990's. The increase began before *Koon* and has continued at only a modestly accelerated pace afterward. It began before border-state "fast track" programs and has continued at much the same pace after them as well. This does not prove, but it would seem to suggest, that *Koon* and the border-related issues have simply added to a pre-existing problem.

Second, departures arising from border-related issues are at least in part a self-inflicted wound, for reasons explained in the second, third and fourth paragraphs of my answer to Question 1(a).

Third, the impact of *Koon* is not as one-sided as it might appear. At the same time *Koon* may have made successful government appeals potentially more difficult, it has also made a willingness to take such appeals more important. That is because some district courts have erroneously taken *Koon* as a "green light" to depart in cases where, before, no departure would have been allowed. In fact, of course, and as your question correctly states, *Koon* did not so much focus on the standards district courts should employ for granting departures as on the standards the courts of appeals should employ for reviewing them. Nonetheless, the "green light" effect of *Koon* in district court has been apparent. Thus, since *Koon* , we have seen some departures, and some bases for departing, more adventuresome than in the past. A Department determined to preserve the Guidelines as the rules-based system Congress intended must resist this tendency to, in effect, take *Koon* and run with it.

At the same time, the difficulties posed by *Koon* are easy to overstate. Indeed, in a sense, appellate testing is more useful now than ever to gauge how broadly—or narrowly—the courts of appeals will interpret *Koon*. In one case I litigated, for example, *Koon* proved to be no barrier to a successful government appeal even where the district court had employed no fewer than six bases for departing. See *United States* v. *Rybicki,* 96 F.3d 754 (4th Cir. 1996), on remand from the Supreme Court in light of *Koon* , 116 S.Ct. 2543 (1996). The Fourth Circuit there established that even after *Koon*, departures based on factors not mentioned in the Guidelines should be "highly infrequent," and will be permissible only where the "'structure and theory of both the relevant individual guideline and the Guidelines taken as a whole' indicate that they take a case out of the appellate guidelines' heartland * * * The interpretation of whether the Guidelines' structure and theory allow for a departure is * * * a legal question subject to de novo review * * *," 96 F.3d at 758 (internal citations omitted). This interpretation of *Koon*, which makes clear the courts' duty to remain faithful to the rules-based "structure and theory" of the Guidelines, makes that case less of an obstacle to government appeals of departures than some apparently take it to be.

Finally, even though it is not possible to state the precise change in the number or rate of government appeals in light of *Koon* and the border-related issues, this much is clear. Of the more than eight thousand downward departures given in fiscal 1999, the government appealed 19 times. With all respect to the Department, that is not careful case selection in light of difficult legal terrain. That is surrender. Because the Sentencing Reform Act is worth fighting to preserve, surrender is not in my view an acceptable option.

Question 3b. What are the ways in which the Justice Department endeavors to assure the effectiveness of the Guidelines other than taking appeals from downward departures?

Answer 3b. Based on my seven years in the Department and an even longer tenure in the United States Attorney's Office, I believe that appealing downward departures is by far the most effective means of enforcing the Guidelines.

You note that the Department can work with the Sentencing Commission to resolve conflicts among the circuit courts of appeals about the interpretation of particular guidelines. This is true of course, and Mr. Kirkpatrick deserves full credit for his efforts in doing so. But I do not believe working through circuit conflicts can substitute for a resolute appeals policy. No matter how successful the Department may be in persuading the Commission to resolve conflicts in a way favorable to public safety, its efforts will be wasted motion unless the resulting guideline is reliably implemented. With departure rates already at slightly more than 35% and headed

higher every year, we cannot tell the public that even the present guidelines are being reliably implemented.

At the end of the day, the Guidelines are not a statement of philosophy. They are legal rules that govern, or ought to govern, sentencing in criminal cases. They are "effective" to the extent, but only to the extent, they are followed in such cases. When the trial court goes outside the Guidelines, the only means of correction is recourse to the court of appeals.

Question 3c. Should the Justice Department's policy be to pursue an appeal of every downward departure no matter the circumstances? What factors does the Justice Department consider in determining whether or not to pursue an appeal from a downward departure?

Answer 3c. It would be foolish for the Justice Department to pursue an appeal in 100% of the cases in which a downward departure is granted, and no one to my knowledge has suggested doing so. But there is a considerable gap between an appeal rate of one hundred percent and an appeal rate of one-quarter of one percent, which is what we have now. Thus the question better suited to current realities is whether the Justice Department should never appeal a downward departure no matter the circumstances.

Attorneys in the Justice Department, like all attorneys, are advocates for their clients. They are also public servants and officers of the government, of course, so neither their behavior nor the standards governing their behavior can precisely parallel what would be the case for private counsel. Nonetheless, the duty to be a zealous advocate for the client's legitimate interests should be among the paramount guideposts for Department attorneys.

Accordingly, the first factor the Department should consider in deciding whether to appeal a downward departure is the extent to which public safety will be endangered by allowing the criminal back on the street before he would have been had the Guidelines been followed. In assessing that question, the Department should look to the nature and seriousness of the crime and the amount by which the sentence was cut. A departure of a few months for a relatively less serious offense obviously does not present the same need for appellate correction as a departure of a year (or as we increasingly see, several years) for crimes of violence, drug trafficking offenses or (in my view) offenses that attack the rule of law, such as witness intimidation and perjury.

Although I shall not attempt here to list every factor the Department employs in deciding whether to appeal a downward departure (a subject the Department is better situated to address in any event), there is one more I should mention: the judge's track record. If a judge consistently shows respect for the Sentencing Reform Act, then, all other things being equal, it is less necessary to appeal the rare departure he or she will allow (and less likely that an appeal would succeed, since such a judge will typically have the sound reasons the Act requires to support a departure). Conversely, if the judge has shown by a long record of departing that he or she has not put aside the luck-of-the-draw policies that once made sentencing little more than a lottery, there is an increased need for the Department to appeal, both to correct the injustice to its client and to make clear its intention to back the Sentencing Reform Act with more than lip service.

Question 4. Ms. Hernandez expressed concern about relentless attempts by some to ratchet up the Guidelines and create unduly harsh sentences with an unintended racially disparate impact. Mr. Kirkpatrick in his written testimony expressed concern that our federal prison population continues to grow even as the crime rate decreases. Indeed, the population in our federal prisons has almost doubled in the last five years, and there are now about two million people in our nation's federal, state and local jails.

Question a. Is there reason for concern that our sentencing laws have become too harsh and retributive?

Answer 4a. Not in my judgment. The main justification for sentencing law is to protect the first civil right of our citizens—the right to live in peace and safety. Although the sentencing structure we put in place in the late 1980's has started to pay dividends with the leveling off of the crime rate over the last few years, we still have a high rate by historical standards. And while some might find it troubling that so many criminals are in prison, it would be considerably more troubling to have them back on the street with no assurance that they won't do it again.

Persons convicted of crime deserve to be treated with dignity and fairness—not only because of what it does for them, but because of what it says about us. To understand this, however, is not to say that we should abjure the serious sentencing we need, not only to impose just punishment on the wrongdoer, but to protect ourselves and our children.

To its credit, Congress has seen this point. In the 13 years the Guidelines have been in effect, not once has Congress suggested that the Sentencing Commission review any of its work as "too harsh and retributive." Quite to the contrary, on several occasions Congress has asked the Commission to consider new and more stringent guidelines. And the most significant action Congress took with respect to the Commission's work was its legislation blocking an attempt by the Commission to lower the penalties for crack cocaine. President Clinton enthusiastically signed that legislation, noting in his signing statement that crack dealers should understand that the price of doing business was not going to be headed down.

In my view, the consistent and bi-partisan support for a resolute response to crime, combined with the continuing need to depress the crime rate and the encouraging signs that Guidelines sentencing has started to do exactly that, undercuts any notion that sentencing has become unjustifiably harsh.

Finally, the question before the Subcommittee concerned the operation specifically of the federal Sentencing Guidelines. I am not aware that any member of the Subcommittee has criticized a particular guideline as excessively harsh. If such a guideline were identified to me, I would do what I can to answer questions about its justification. Short of that, I do not know that a free-ranging discussion about the subject of sentencing laws in general would advance the Subcommittee's work.

Question 4b. Is the Sentencing Commission as sensitive to unduly harsh sentences as it is to inappropriately lenient ones?

Answer 4b. By law, three of the seven members of the Sentencing Commission must be federal judges; often the Commission has had a majority of judges. Five of the present Commissioners are judges, and four of those are district judges who must sentence defendants as a routine part of their work.

Except for the National Association of Criminal Defense Lawyers, which Ms. Hernandez so ably represented at the hearing, and organizations with allied interests favoring criminal defendants, no responsible group of which I am aware has criticized the Commission for insensitivity to "unduly harsh sentences." Given the Commission's strong complement of judges, not to mention its two other expert members, the reason for this is clear. Judges, certainly including those on the Commission, are acutely aware of the gravity of the sentencing decision. I have often heard it said that federal judges view sentencing as the most serious and difficult task they are called upon to perform. I am therefore confident that the Commissioners are fully sensitive to all proper considerations that should go into formulating the Sentencing Guidelines.

If further evidence of this were needed, however, one need not look far. For some time the Commission has invited and received input from the Practitioners Advisory Group. Even if otherwise there might have been doubt about whether the Commission is sensitive to "excessively harsh sentences," the work of this body of leading criminal defense attorneys should allay any fears on that score. Regrettably, the more realistic danger is that the Commission does not hear enough from crime victims, who inexplicably have no comparable group to speak to the Sentencing Commission in their behalf.

Question 4c. If application of the Guidelines creates an unintended racially disparate impact, what steps should Congress take to address that impact?

Answer 4c. There is a reason Lady Justice wears a blindfold.

A cornerstone of our freedom, and perhaps the crowning achievement of our system of justice, is that we treat each defendant as an individual citizen and not as the member of a subgroup of citizens. Each defendant facing criminal penalties is entitled to have his case and his sentence determined solely on the evidence about his conduct—not on stereotypes, either favorable or unfavorable. In no area of the law would it be less justifiable or more dangerous to arrange benefits or burdens based, not on the evidence in the case before the court, but on a politically determined and inevitably divisive recognition of group identity, whether by race, religion or any similar criterion.

Question 5. The Supreme Court in *Koon* held that the sentencing judge is in the best position to evaluate whether a departure is warranted, and any departure should be reversed on appeal only under very limited circumstances where, for example, the judge abused discretion or made a mistake of law. Some say that *Koon* is good for the system because it supports the authority of judges to fashion an appropriate sentence where there are unforseen or compelling circumstances. Others have suggested that the Congress should pass legislation that would effectively overrule *Koon.* What factors should the Congress consider in evaluating the wisdom of a legislative effort to statutorily overrule *Koon,* including, for example, the increase in federal appellate litigation?

Answer 5. Congress should consider whether it wants to preserve the determinate sentencing system it created, and the considerable benefits that system has brought both to public accountability and public safety, or whether it wants to risk a continuation of the present slow slide back to the failed policies of the past.

President Clinton's Justice Department argued, correctly in my view, that the Sentencing Reform Act accommodates the relatively stronger hand the courts of appeals had in pre-*Koon* law. That relatively stronger hand was important in assuring that district courts adhered to the system of rules-based sentencing the Act contemplates. This was particularly useful in the face of the opposition the Guidelines faced from the organized defense bar and some district judges.

As the Department recognized, the Sentencing Reform Act was written in the knowledge that the district judge alone sees the flesh-and-blood defendant. For that reason, the Act provided and continues to provide ample authority for the judge to fashion an appropriate sentence outside the Guidelines where there exist compelling circumstances of a kind or to a degree the Sentencing Commission did not take into account. But while it is true that the district court is better situated to know the individual defendant, the court of appeals is better situated to know sentencing patterns in the much broader surrounding area, and therefore to be able to discern whether there is unwarranted disparity in granting departures from one district to the next. Thus the appellate court is in a better position to safeguard the most important goal of the Act, namely, to promote more nearly equal treatment of defendants and more predictability in the law of sentencing. And in practice, that is what appellate courts were more clearly free to do, and did, before 1996.

By a legislative correction to *Koon*, Congress will simply restore the more substantive role of appellate review that existed for almost ten years before *Koon* was decided, and that the Justice Department believed to be the better interpretation of the Sentencing Reform Act. Although, as I have previously stated, *Koon*'s impact is difficult to quantify and may be overestimated by the Department, one could not describe *Koon* as helpful. Congress thus would do well to reinstate the relatively stronger hand of the circuit courts, which have shown themselves to be more vigilant in safeguarding the determinate sentencing system whose creation was the Congress's principal goal in adopting the Act.

ADDITIONAL SUBMISSIONS FOR THE RECORD

COMMITTEE ON CRIMINAL LAW OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES,
Greenville, SC, June 16, 2000.

Hon. DIANA E. MURPHY,
Chair, U.S. Sentencing Commission,
Washington, DC.

DEAR JUDGE MURPHY: On behalf of the Judicial Conference Committee on Criminal Law, I would like to take this opportunity to thank you and all the Commissioners and staff for joining us for our meeting and dinner in Boston on June 5, 2000. As promised, I am relaying to you the list of circuit conflicts that the Committee recommends that you resolve as soon as you can. We hope you will resolve as many of them as possible in the 2001 guideline amendment cycle.

The full Committee reviewed your staff's materials on 38 current circuit conflicts regarding guideline application. The Sentencing Subcommittee in particular studied them, and proposed a list of 17 to the full Committee. As you know, the full Committee approved that list, and added another conflict, bringing the total of our recommended conflicts to 18. Those 18 conflicts are listed below, generally in the priority of voting.

No. 1 Stipulations/1B1.2(a);
No. 2 Aggravated assault/use of dangerous weapon enhancement;
No. 5 Marijuana plants;
No. 6 Interest and Loss;
No. 7 Intended loss (reverse stings w/o actual loss);
No. 9 Prior felonies;
No. 14 Mitigating role/couriers;
No. 19 Grouping money laundering and fraud;
No. 35 Consecutive sentences/5G1.3;
No. 8 Fraudulent representations (2F1.1);
No. 23 4A1.3/Expunged convictions;

No. 38 Reasonableness of upward departure;
No. 21 Acceptance/Unrelated acts;
No. 30 Crime of Violence/burglary;
No. 17 Flight/obstruction;
No. 3 Brandishing;
No. 22 Acceptance/entrapment; and
No. 26 Criminal History VI departures.

I note that conflict number 6 (interest and loss), 7 (intended loss/0 actual loss), 19 (grouping money laundering and fraud), and 8 (fraudulent representations) relate to economic crimes, and would not only be relevant to issues raised in the upcoming Economic Crime Symposium, but also should be resolved as part of any economic crime package the Commission may adopt in 2001. In any event, even if the Commission is not able to complete the package, those conflicts are near the top of the list the Committee recommends the Commission resolve in 2001.

Regarding the discussion of circuit conflicts that I will moderate at the Sentencing Institute, I plan to begin preparing the top ten or so conflicts from the above list for that discussion, unless the Commission suggests that other conflicts be discussed. It would make sense to include the four involving economic crimes, to not only better inform the issues for the subsequent Economic Crime Symposium, but also to assist the Commission's consideration of the economic crime package.

As we indicated at our meeting, the Committee also specifically recommends that the Commission update its 1991 Report to Congress on Mandatory Minimum Penalties, prepared pursuant to P.L. 101–647, § 1703, which authorizes the Commission's updating of the report at any time. The year 2001 would be the Tenth Anniversary of the first, very fine report. This is a good time to remind Congress of the fundamental problems with mandatory minimum penalties that were explained in the original report, which can be even better informed and exemplified by the subsequent ten years' experience with even more mandatory minimum penalties. We urge and support the Commission's updating of its previous report, as imperative in shaping future federal sentencing legislation.

There can be nothing more important, in the larger perspective, than for the Commission to take up the banner of further informing Congress, and dissuading it from the passage of mandatory minimum penalties. At the same time, there is no more important guideline amendment than one that resolves a conflict among the circuits on the Commission's intended meaning of a term or procedure, because such an amendment avoids much unnecessary litigation and removes a significant source of unwarranted disparity in guideline application.

Accordingly, we thank you for your consideration of these matters in your 2001 amendment cycle. We also appreciate the opportunity to work with the Commission in preparing for the Sentencing Institute in September and Economic Crime Symposium in October.

With highest personal regards, I am

Sincerely,

WILLIAM W. WILKINS, Jr.,
Chair.

UNITED STATES SENTENCING COMMISSION

An Overview

of the

FEDERAL SENTENCING GUIDELINES

(**Disclaimer:** *The characterizations of the sentencing guidelines in this overview are presented in simplified form and are not to be used for guideline interpretation, application, or authority; the characterizations do not necessarily represent the official position of the Commission.*)

THE FEDERAL SENTENCING GUIDELINES

In 1984, Congress addressed the issue of fairness in sentencing by passing the Sentencing Reform Act. This Act created a new federal agency, the United States Sentencing Commission, and instructed it to develop uniform guidelines for sentencing in federal cases.

The guidelines were to be fair so that similar offenders convicted of similar crimes would receive similar sentences. The guidelines were also to be honest; the sentence received was to be the sentence served. Parole would be abolished. No longer would parole turn what appeared to be a long sentence into a short one. (Inmates could still earn credits for good behavior, but this was limited to 54 days a year.) And the guidelines were to be certain. A person convicted of an offense would have a clear idea of the range of sentences he or she could receive.

The guidelines became effective November 1, 1987, and apply to all federal felonies and most serious misdemeanors.

HOW THE SENTENCING GUIDELINES WORK

The sentencing guidelines take into account both the seriousness of the offense and the offender's criminal history.

Offense Seriousness

The sentencing guidelines provide 43 levels of offense seriousness – the more serious the crime, the higher the offense level.

Base Offense Level

Each type of crime is assigned a base offense level, which is the starting point for determining the seriousness of a particular offense. More serious types of crimes have higher base offense levels (for example, a trespass has a base offense level of 4, while kidnapping has a base offense level of 24).

Specific Offense Characteristics

In addition to base offense levels, each offense type typically carries with it a number of specific offense characteristics. These are factors that vary from offense to offense, but that can increase or decrease the base offense level and, ultimately, the sentence an offender receives. Some examples:

- One of the specific offense characteristics for fraud (which has a base offense level of 6) increases the offense level based on the amount of loss involved in the offense. If a fraud involved a $3,000 loss, there is to be a 1-level increase to the base offense level, bringing the level up to 7. If a fraud involved a $50,000 loss, there is to be a 5-level increase, bringing the total to 11.

- One of the specific offense characteristics for robbery (which has a base offense level of 20) involves the use of a firearm. If a firearm was displayed during the robbery, there is to be a 5-level increase, bringing the level to 25; if a firearm was actually discharged during the robbery, there is to be a 7-level increase, bringing the level to 27.

Adjustments

Adjustments are factors that can apply to any offense. Like specific offense characteristics, they increase or decrease the offense level. Categories of adjustments include: victim-related adjustments, the offender's role in the crime, and obstruction of justice. Examples of adjustments are as follows:

- If the offender was a minimal participant in the offense, the offense level is decreased by 4 levels.

- If the offender knew that the victim was unusually vulnerable due to age or physical or mental condition, the offense level is increased by 2 levels.

- If the offender obstructed justice, the offense level is increased by 2 levels.

Multiple Count Adjustments

When there are multiple counts of conviction, the sentencing guidelines provide instructions on how to achieve a "combined offense level." These rules provide incremental punishment for significant additional criminal conduct. The most serious offense is used as a starting point. The other counts determine whether to and how much to increase the offense level.

Acceptance of Responsibility Adjustments

The final step in determining an offender's offense level involves the offender's acceptance of responsibility. The judge may decrease the offense level by two levels if, in the judge's opinion, the offender accepted responsibility for his offense. In deciding whether to grant this deduction, judges can consider such factors as:

- whether the offender truthfully admitted his or her role in the crime,
- whether the offender made restitution before there was a guilty verdict, and
- whether the offender pled guilty.

Offenders who qualify for the two-level deduction and whose offense levels are greater than 15, may be granted an additional one-level deduction if: (1) they provide complete and timely information about their involvement in their offense, or (2) in a timely manner, they declare their intention to plead guilty.

Criminal History

The guidelines assign each offender to one of six criminal history categories based upon the extent of an offender's past misconduct and how recently these crimes took place. Criminal History Category I is assigned to the least serious criminal record and includes many first-time offenders. Criminal History Category VI is the most serious category and includes offenders with lengthy criminal records.

Determining the Guideline Range

The final offense level is determined by taking the base offense level and then adding or subtracting from it any specific offense characteristics and adjustments that apply. The point at which the final offense level and the criminal history category intersect on the Commission's sentencing table determines the defendant's sentencing guideline range.

In the following excerpt from the sentencing table, an offender with a Criminal History Category of I and a final offense level of 20 would have a guideline range of 33 to 41 months. (*See **table excerpt**.*)

SENTENCING TABLE *(excerpt)*
(in months of imprisonment)

Offense Level	Criminal History Category					
	I	II	III	IV	V	VI
	...	...	...	...	...	...
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
	...	...	...	...	...	...

Sentencing Options

In addition to providing a guideline range, there are a series of rules that determine the availability of non-imprisonment sentencing options for offenders. For example, if the applicable guideline range is 0-6 months, the judge has a number of options, including a guideline sentence of probation only, or a sentence of up to six months' imprisonment.

Departures

After the guideline range is determined, if the court determines that there is a factor that the guidelines did not adequately consider, it may "depart" from the guideline range. That is, the judge may sentence the offender above or below the range. When departing, the judge must state the reason for the departure. If the sentence is an upward departure, the offender may appeal the sentence; if it is a downward departure, the government may appeal. One special kind of departure is the "substantial assistance" departure. This downward departure may be granted if the offender has provided substantial assistance in the investigation or prosecution of another offender. A motion to depart for substantial assistance must be made by the prosecution, but it is the judge who decides whether to grant it and, if so, to what extent.■

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"BILL OTIS SENTENCING ESSAY"

The Post's series of October 6–10, 1996 entitled "Justice by the Numbers" on the Sentencing Guidelines would leave you with this picture: that it's a basically incomprehensible system of arbitrary numbers, larded with excessive detail but lacking the human element; that sentencing has become absurdly complicated, mistake-prone and over-litigated; that judges' discretion to reach a fair outcome has been all but ended in favor of deck-stacking prosecutors; and that racial discrimination infects the whole process.

I have worked with the Guidelines from their inception, and in my experience not a single facet of this criticism is true. There is no way to rebut in one op-ed the five gigantic articles the Post published on this subject, so I shall simply take the points in order and apologize in advance for my omissions.

1. The Post started its series with excerpts from a sentencing hearing that were presented to make it all seem like legal gibberish: alien-sounding talk about offense levels, criminal history points and adjustments pursuant to Guideline this and Chapter that. The truth is that, although the language of sentencing has changed, a judge working under the Guidelines bases the sentence on the same factors that have always been considered. These boil down to two things: how serious the crime was (the offense level) and whether we are dealing with a first-offender or a repeat customer (the criminal history score). One major difference between Guidelines sentencing and past practice is that now the defendant, and the public, know exactly how much each of these factors contributes toward the sentence, because each has a value assigned to it. This increase in the availability of specific information is a good thing, not a bad one.

A second major difference is that the Guidelines require each judge to treat any given sort of offense with the same level of seriousness. Recently we have seen episodes in which state judges opined that rape wasn't all that serious because the victim was "careless" or "was asking for it" or some such thing. The kind of sentence that results from that attitude is virtually impossible in the federal Guidelines system. The Sentencing Commission has assigned rape an offense level—a number—that the judge may not change and that does not vary depending on his attitude. It is of course possible to ridicule this, a la the Post series, as "justice by the numbers." It is also possible to say that an assigned number for the severity of rape "ties the judge's hands." And within limits so it does, thank goodness.

Of course, not every rape happens the same way or has the same consequences. The Guidelines account for this by listing, in addition to the base offense level, specific offense characteristics and adjustments to the sentence to be made in light of them. For example, if the rapist rendered his victim helpless by force or drugs, or if the victim was a young child, the sentence goes up by about 50 percent. Smaller increases are required if the victim was in the rapist's care (such as a student raped by a teacher on a field trip or an inmate raped by a guard); or if the victim was injured or abducted. All this undeniably adds to the Guidelines' "complexity." The question is: which of these factors should be ignored? If none should be, and if more broadly no relevant feature of a crime should be ignored at sentencing, isn't it better to deal with them explicitly and in concrete terms? Even if it makes the Guidelines tedious and complicated?

One person's complexity is another's refinement. As long as crimes vary in important details, any sensible sentencing system is going to be complex (or refined, depending on how you care to put it). The very refinement of the guidelines—that they require the judge to consider and assign a weight to every relevant fact about the offense conduct—belies the notion that they blot out individual variations. To the contrary, they guarantee individualized consideration in a way that the old, discretion-based system never did. In the past if the judge overlooked an important fact or made a mistake about it, or inexplicably counted it for much more or much less that it was worth, you would be lucky to find out, much less be able to seek correction. The judge was not required to say what facts he considered in sentencing, or how much weight he gave them, or why.

The Guidelines have changed all this. Sentencing is now more specific, detailed and visible. This means, as the critics point out, that it is also more determinate, demanding and litigious. But in exchange for these costs we have dramatically reduced the opportunities for hidden bias and arbitrary decisions. We have increased the opportunities to correct error. And we have opened up the workings of the system, generally and in individual cases, to the public that pays for it and that has to live with its results—a fact proven, ironically, by the Post's own series.

It turns out that much of the antagonism toward the guidelines and their complexity is among those who prefer the old way, which was literally a system of sentencing without law. One may debate the wisdom of particular aspects of the Guide-

lines, but it seems bizarre to condemn the idea of a rules-based system at all, and to demand a return to the days when the sentence turned on the luck of the draw. No serious person doubts that whether a defendant may properly be convicted should be decided under the rule of law, and not as an exercise of will by individual judges, who vary greatly in their ideology, instincts and temperament. Why then should any serious person suggest that at sentencing, all bets, and all rules, should be off?

2. While some criticize the Guidelines because they are supposedly too involved, others criticize them because they aren't involved enough. Specifically, these critics note that the Guidelines either discourage or prohibit outright consideration of a defendant's personal characteristics. This defect, so the argument has it, only exacerbates the Guidelines' already mechanical and inhuman features.

Let's see what happens when offender characteristics re-enter the sentencing system. How about considering the defendant's age?

Judge A: "Defendant Smith, you're 19 years old, just starting out in the adult world. Getting involved with selling these drugs was wrong, and you surely realize that, but you were in with a bad crowd and I know what peer pressure can be at your age. A jail term would seriously jeopardize your future employment prospects, and with them your chance for a productive life. I feel like someone your age deserves the chance to right himself. Two years' probation with counseling."

Judge B: "Defendant Smith, you're 19 years old and just starting out in the adult world. Getting involved with selling these drugs was wrong and you knew it. You chose to run with a gang, while most of your peers have the sense to avoid them. If I don't impose a significant jail term, I would undermine any lesson you might learn from this experience and would, to the contrary, send a message that young people can get caught but still beat the rap at sentencing. For your future if not your survival, you need to be off the streets, and you need a wake-up call. Five years in the penitentiary.

How about the defendant's social and economic status?

Judge C: "Defendant Jones, you came from a disadvantaged background—a broken home, inadequate schooling and few job skills. With that baggage, maybe it's no surprise that you pulled a gun when you robbed the convenience store. But you had other choices. It's tough to start at the bottom, but millions of people in this country have done it and succeeded. My father died when I was young and my mother had to go it alone. We kids still grew up knowing right from wrong. Besides that, with your background, and now with this conviction, your prospects for getting an honest job are low, and the prospect of repeat offenses therefore high. Five years in the penitentiary."

Judge D: "Defendant Jones, you came from a disadvantaged background. Maybe it's no surprise that you robbed the convenience store by sticking a gun in the cashier's face. But there's no denying that your broken home, inadequate schooling and poor job skills significantly narrowed your range of choices. I would have to be blind not to understand that society helped create the conditions that handicapped your life. Society thus shares some of the blame for your predicament. Besides that, with counseling and the educational opportunities your probation officer can help arrange, you will have a new chance. Two years' probation with counseling."

How about civic and work-life contributions?

Judge E: "Defendant Brown, your taking pornographic pictures of these girl scouts was terribly wrong, and it will hurt them tremendously. Still, I can't overlook the fact that you have contributed much time to being a scout leader, and there's no documented evidence that you did anything blameworthy until now. Moreover, you've given substantial amounts to the Habitat Project, you've been a successful businessman providing jobs to many people in our city, and you volunteered after your guilty plea to pay for the girls therapy. Besides that, the psychiatrist you hired wrote me that you were under stress, and that you're a good prospect for rehabilitation. Given your unblemished record and contributions to society, I agree. Two years' probation with counseling."

Judge F: "Defendant Brown, your taking pornographic pictures of these girls scouts was terribly wrong, and a man who has accomplished what you have must have known that. Dozens of parents will worry themselves sick about what you were doing over the years you were a scout leader. If I give you a break because of your contributions to charity or your success in business, I would in effect be allowing you to buy your way to a lower sentence. And maybe I'm being too harsh here, but I wonder whether your offer to pay for the girls' therapy, an offer made only after your conviction, isn't a form of trying to buy off the victims. I sentence a lot of people who didn't have much of a chance in life. You had plenty and blew it. Five years in the penitentiary."

Who's right about all this? Take your choice. There is no consensus about these things, not in society and not among judges. Prosecutors predictably push one line; defense attorneys predictably push the opposite. Judges can come down on one side or the other, or in any of a thousand places in between. It just depends on which judge has the case.

And there's the rub. One persons' discretion is another's subjectivity. if we return to the old system in which judges had "discretion" to consider offender characteristics like the ones discussed (or a host of others), it is certain that luck-of-the-draw disparity will return with it. Consideration of offender characteristics is discouraged by the Guidelines not because such characteristics have no significance, but because they have no agreed significance. In a system that strives for the rule of law and equality of treatment, there is simply no other choice.

3. The claim that judges' discretion has been all but drained from the system is, in any event, considerably exaggerated in the Post series. In fact, judges retain a good deal of leeway.

First off, the Guidelines do not specify a particular sentence, but a sentencing range—for example, 100 to 125 months. For every offense, the top of the range is at least 25 percent higher than the bottom. Within the range, the judge can fix the sentence at any point he chooses, no questions asked. Beyond that, the judge can grant another 25 percent off the sentence if he decides the defendant has accepted responsibility for his crime; for serious crimes, the additional amount off exceeds 35 percent. In other words, the system allows for variations of at least 50 percent. The sentencing judge is free to decide whether and how much of that to use, and except in the most unusual circumstances, his outcome will stand up even if there's an appeal.

But that's not all. In many cases, particularly those involving drugs or fraud, the judge has the power to make a number of largely factual (and therefore effectively unreviewable) determinations that can dramatically affect the sentencing range. For example, the judge determines the amount of drugs that should be attributed to a particular dealer in a narcotics ring; whether the dealer was a major player or just a flunky; whether he attempted to obstruct justice by "encouraging" witnesses to lie; and on and on. Justifiably, all these determinations affect the sentence, sometimes substantially, and all of them are left to the judge.

But that's not all either. On the inside pages of the Post's third article was a little box titled, "Some Leeway for Judges." The box introduces us to judges' power to depart from the Guidelines. The Post says that the authority to depart is a "special provision" of the Guidelines system that allows judges "to add extra time or trim time for defendants in extraordinary circumstances." But the numbers in the box tell a more interesting story.

First, they show that there is nothing unusual about departures. They occur in three of every ten cases according to the Post's chart. They are thus about as special" as Cal Ripken's getting a hit. Second, although it is theoretically true that departures can be used equally either to add to or trim sentences, they are not used equally. Downward departures outnumber upward departures 97 to 3.

There is an important message in that ratio, but before turning to that, it's useful to reemphasize the fact that there is an enormous amount of discretion left in the system. The demand for even more discretion largely ignores this fact, but ignoring it does not make it less true.

The capstone of discretion is the power to depart, essentially to opt out of the Guidelines. The judge need only give a persuasive reason that the Guidelines do not already take into account as to why the case is sufficiently unusual to justify a departure, and his outside-the-Guidelines sentence will stand up, as the Supreme Court noted recently in the *Koon* case. If he can't state a persuasive reason, the sentence shouldn't stand up. What is wrong with that? The present system allows for a full measure of discretion, asking in return only that good reasons be given. Is it wise to trade discretion based on reason for discretion based on—well, who knows what? Will? Ideology? On the fact that the judge is a political ally of the prosecutor, or a college chum of defense counsel? The past system of unlimited discretion might not have been infected with these things very often (although it's hard to tell because it was mostly invisible). But that is hardly a reason to tear down a new system that is better at eliminating them, smoking them out if they creep in, and providing a means of correction in the court of appeals.

4. When downward departures outnumber upward departures by more than 30 to 1, that tells you something about what the campaign for more "discretion" is all about. It's about getting lower sentences.

It is true, as the Post's figures show, that well more than half of all departures are given at the prosecutor's request, to reward the defendant's cooperation. But even disregarding those, downward departures still outnumber upward departures

10 to 1. At least for many of its advocates, then, the call for more discretion is fundamentally a call for lower sentences.

Lower sentences are not inevitably and in all circumstances a bad thing. Many conscientious people believe that prisons do as much harm as good, and point out that it costs a great deal of taxpayer money to keep building them. Others argue that there is an even greater cost in not incarcerating people who, out in the community, cause much expensive social damage. And certainly it is true that every day a drug dealer is in jail is a day he is not standing outside your kid's school.

The point is not that the Sentencing Commission should be automatically either for or against lower sentences. The point is that the public has a right to know that lower sentence are what more discretion will quite certainly produce. More broadly, the point is that the proponents on this issue should do more to explain the dramatic substantive effects of what they discuss as if it were merely a procedural change.

5. The question of lower sentences is also a submerged issue that should be brought to the surface in another hotly debated area covered in the Post series, the controversy over crack cocaine penalties. As the Post correctly reported, crack sentences are much higher than those for powder cocaine, and close to 90 percent of those convicted of federal crack offenses are black. Fewer than five percent are white. This disproportion has led to an uproar to say the least. The Sentencing Commission, by a one-vote majority, responded with a proposal to change crack sentences so that both crack and powder would be punished equally. Congress overwhelmingly rejected the proposal, and it did not become law.

I agree with those who thing the degree of difference in the punishment of these two drugs is wrong. But the Commission's majority was wrong as well, and Congress acted wisely in counteracting it.

First, while the disparity in treatment under current law is excessive and racially divisive, crack and powder should not be treated equally for the simple reason that they are not, in fact, equal. As the Justice department has pointed out, crack is more addictive, more readily available to children, more frequently associated with violence, and generally more of a menace than powder. And it is not just the Justice Department. The federal courts of appeals unanimously have rejected equal protection/racial disparity challenges, holding that the significant difference is social harms between crack and powder is an adequate basis to accept even the present, enormous difference in punishment. In my view, that difference should be narrowed, but not—as the Sentencing Commission would have done-eliminated entirely.

The problem with the Commission's proposal was not, however, merely that it went too far. The problem was that it went in only one direction—the same direction that lies silently beneath the argument for more "discretion."

It was obvious to the Sentencing Commission, and it remains obvious, that it is possible to reduce the difference in treatment between crack and powder by either (1) reducing crack sentences, (2) increasing powder sentences or (3) a combination of these. If one believes, as I do, that the disparity in punishments should be narrowed but not eliminated, a relatively modest increase in powder sentences it will do the job. Such an increase is justified independently by the fact that the (white-dominated) powder consumption market is actually more dangerous than it looks, because ultimately it feeds the distribution networks for both powder and crack. But an increase in powder sentences, although both obvious and justified as an answer to the disparity problem, was not the answer the commission chose. In the name of an equality that could have been achieved just as well by a more balanced solution, the Commission chose only to lower sentences. It chose to lower them by a huge amount, and to lower them for a drug as pernicious to life in our cities as any this country has seen.

Congress and the President have been criticized for blocking the Commission's proposal out of "political expediency." I respectfully disagree. The proposal deserved to be blocked because it was either insufficiently thought through, or —worse if this is what happened—a politically correct surrender to a one-sided view of sentencing. If en masse higher sentences are not an automatic answer to our problems, en masse lower sentences certainly aren't either.

6. A front page headline on the second day of the Post's series announced that "Prosecutors Can Stack the Deck;" the ensuing story suggested that that is exactly what they do. They get away with it, the inside page headline continues, because "U.S. Attorneys Have Usurped the Power of Judges" to determine the sentence.

What does "stacking the deck" mean? I think it means cheating to obtain a better result than you're entitled to under the rules. As applied to a prosecutor's role in sentencing, that would mean attributing to a defendant things he didn't do in hopes of obtaining a longer prison term that the law allows for the things he actually did.

Is that how prosecutors act according to the Post's story? Not a bit. The Post cites not one instance of a prosecutor's having charged a defendant with something he didn't do. To the contrary, by far the bulk of the story recounts prosecutors' not charging defendants with things they did do to permit a shorter prison term than the law allows. If this is how prosecutors "stack the deck," we would all do well to break out the cards at the Justice Department and insist that they deal.

The point here is not that prosecutor's variations in charging and plea bargaining decisions present no difficulties under the present sentencing regime. They do, and I shall turn to that momentarily. The point is that for whatever those problems may be, they do not partake of the self-serving, defendant-bashing sleaziness implied by the headlined references to "stacking the deck.

It is true, as the Post reports, that the prosecutor selects the charges. But that is neither new with the Sentencing Guidelines nor improper; it has always been part of the prosecutor's constitutionally assigned task, as the Supreme Court emphasized recently in *United States* v. *Armstrong*. Nor does the prosecutor select the charges as part of a game; the charges arise from the defendant's conduct. And if a prosecutor's ethical obligation to eschew unsubstantiated charges were not enough, courtroom dynamics would do the job. No prosecutor wants to look like an idiot by standing in the front of the jury with a blank face and a molehill for evidence.

The prosecutor's decision about exactly what to charge, like the judge's decision about where within the Guidelines range a sentence should fall, necessarily involves an exercise of judgment—discretion if you will. But two things should be borne in mind here. First, this is unavoidable. No prosecutor's office has the resources to pursue every crime, so a selection must be made. Second, the purpose of written rules, whether the Guidelines for sentencing or Justice Department regulations for charging—is to limit discretion, not end it. The survival of discretion, in sentencing and in charging, necessarily means the survival of a degree of disparate treatment, but this fact hardly counsels going back to a system of unlimited disparate treatment. If the prosecutor has too much discretion under the Guidelines system, the answer is not to shift excess back to the judge, but to develop more enforceable rules for both.

This really gets ahead of the game, however. It's not such much that discretion has shifted to the prosecutor (since that's where it's always been for charging decisions), as that the stakes in charging have been raised. Prescribed sentences have become higher. But little of that can be attributed to prosecutors or even the Sentencing Commission. It is mostly due to the proliferation of a long mandatory minimum terms imposed by Congress.

Again, there are those who believe that Congress acted out of political expediency, and again I disagree. Like the public, Congress is justifiably alarmed by the level of crime in this country and its increasingly violent, random and predatory nature. And it is difficult to explain the proliferation of mandatory minimums except as an expression of Congress' concern that even the Guidelines leave to much discretion to judges—not too little as the critics charge—and that a more nearly absolute barrier to unpredictable—sentencing is needed.

The claim that Guidelines give over to prosecutors the discretion that judges used to have is therefore overstated, and in some ways flatly wrong. But even if it were entirely true, it does not take the critics where they want to go. The unspoken and apparently unquestioned assumption behind all this is that, in matters of sentencing, judges must know best. It that true? Judges tend to have their roots in an upper class of big-firm or boutique-firm lawyers. Often, although certainly not always, their background is in business practice: taxation, utilities, antitrust and the like. There is nothing wrong with that, but it does not make anyone an expert in criminal sentencing. And certainly judges do not tend to live anywhere near the neighborhoods where a lightly-sentenced criminal is likely to return. In my experience, veteran prosecutors, and veteran defense attorneys for that matter, know more about how criminals actually behave than corporate lawyers, before or after they become judges.

Finally, if Congress did want to shift power somewhat more toward prosecutors, the shift would not be without reason. Did we do all that well with the old system? Did sentencing decisions controlled entirely by judges stem the rise in crime? Did the public feel increasingly secure with the old system's mantra of rehabilitation and quickie parole, or increasingly at risk? And there's this too: if you don't like how the prosecutor handles the job, you can fire him and the person who appointed him at the next election. If you don't like how the judges are doing, too bad. Federal judges sit for life.

7. The Post series had a good deal to say about almost all the actors in the system: the manipulating prosecutor, the clever defense lawyer egging him on, the pas-

sive (or was it despairing) judge watching them take over the system, the fractious Sentencing Commission, and a cynical Congress in the background ever mindful of the political tides if mostly oblivious to fairness. Indeed, there was only one actor for whom the Post had no criticism at all.

The criminal.

In a huge series about criminal sentencing, the Post had almost nothing to say about crime or the people who commit it. To the extent crime or criminals got mentioned, it was short and antiseptic. In the third article, for example, we heard about Johnny Patillo, who "was 27 and * * * had never been involved with drugs." But one day Mr. Patillo tried to send about half a kilo of cocaine from Los Angeles to Dallas, although "he didn't know what kind [of drugs were in the package] or how much. And he needed the $500 he would get as a courier." So the judge had to sentence Mr. Patillo to a mandatory minimum prison term, a sentence that was likened to "amputation of the offending hand * * * for stealing a loaf of bread."

The message: Mr. Patillo is not the bad guy. We are the bad guys. Cocaine and the cocaine pipeline don't cause any social damage, at least none worth mentioning, not in Dallas and certainly not in Los Angeles, Mr. Patillo had gone to college but "had fallen on hard times financially." he is Jean Valjean. We are Javert.

And there was David Ives. Mr. Ives, who appeared as the lead-off example in the second article, was part of an amphetamine ring that apparently didn't do anything, since nothing about its operation appears in the story. What does appear is the fact that Mr. Ives got a sentence of over eight years imprisonment, while his brother and cohort in the ring got one year. The reason for this was that the brother agreed to cooperate with the government and was allowed to plead to a less serious charge. David Ives chose not to. The Post quotes him as saying that cooperation "never even crossed my mind. I think anyone who will rat on his friends to get his own self out of trouble should be hung." And that's the last we hear of Mr. Ives.

The message: Mr. Ives is not only not a bad guy, he's heroic. He stands up for his friends. We are the bad guys. We like people who squeal. Was any social damage done by Mr. Ives, and the buddies whose activities he continues to hide? None worth mentioning in the Post.

That is one message we can send to the criminals who were just barely visible in the series—and to the other, more violent and sadistic ones whom the Post was apparently unable to find. But I believe we should send a message with a different emphasis: the criminal is not our victim; we are his victims. Of course the system could use improvements. But to understand that and take it seriously should not mislead anyone, the Post or its readers, about the more important source of our problems. What primarily needs changing is not the system. What primarily needs changing is the criminal and his me-first-at-any-cost way of thinking about the world.

8. Something more needs to be said about the Post's selection of the cases it highlighted in order to paint its dour picture of the Guidelines. The Post notes that it spent a year studying 79,000 sentencings from across the country. But the examples displayed for us are all along the lines of the Patillo and Ives episodes. The implication is that these are representative of the system. They also supposedly illustrate what happens when we surrender discretion and fall for the Guidelines' "pseudo-science" and half-baked formulas.

Let me present some different examples. They also say something about the exercise of discretion. To find them, I didn't need to spend a year scouring the country. I needed to spend three minutes scouring my in-box. Case one: A jealous young fellow hired a hit-man to neutralize his girlfriend's husband. The neutralizing was to be accomplished by blowing the husband's head off. Unfortunately, for the boyfriend, the would-be hit man turned out to be an FBI agent, so the boyfriend got convicted of attempting to arrange a contract murder. The "pseudo-science" sentencing grid called for a sentence of from about seven to nine years, something that most people would find reasonable for this sort of crime. The judge thought differently, however, and sentenced the man to 21 months. In the judge's view, the case was unusual, and deserving of a light sentence, because romantic jealousy is unheard of in contract murder cases. And there was at least one other thing as well: the intended victim's misconduct. The husband was beating his wife. Only not exactly: the husband wasn't really beating his wife. Before sentencing, the defendant admitted that he was just pretending about that one, or imagining it. His recently-hired psychiatrist couldn't say. Whatever. Beating or no beating, real or imagined, it was good enough to help persuade the judge, as an exercise of "discretion," that the sentence should be sliced by three-quarters.

Case two: An inmate at Lorton Reformatory was dealing drugs in prison. he was caught with 25 tinfoil packets containing various amounts of 97% pure crack. Because he had five prior convictions for drug crimes, he faced a sentence of from 14

to 17 years under the Guidelines' provision for career criminals. The judge, acting from his "discretion," refused to impose that sentence and instead sentenced the man to 48 months. Although the judge knew that drug dealing in Lorton precipitates some of the most gruesome murders you ever heard of, he thought leniency was in order because, so he ruled, the Sentencing Commission did not understand that dealing drugs in prison might affect the prisoner's parole date. Why the judge thought this, and why parole should be considered at all for someone with six drug convictions, were matters the judge did not discuss.

Case three: A major, repeat drug felon faced 20 years in prison under the Guidelines a related mandatory minimum sentencing provision. Although the defendant's own lawyer made no argument that the 20 year sentence was wrong, the judge cut it to a little over 11 years. The judge did not claim that the defendant was gullible, or that he had been mistreated by the government, or that he had psychiatric difficulties. Instead, the judge gave two reasons for his exercise of "discretion": the defendant had delivered papers as a boy, and he was overweight.

This is not a misprint. The judge sliced the drug dealer's sentence about in half because the drug dealer was fat.

Unlike the Post, I do not wish to imply that these examples are representative of the system. I supply them as an antidote to the Post's tendentious selection of its own examples, hoping to illustrate two points. First, it's not just that the return of galloping discretion will produce lower sentences, although it will; it's that judges can make enormous, even absurd blunders, just like any other human beings. It is precisely that reason that the best systems are those that (1) most sharply reduce the running room for misjudgment and (2) most sharply increase the opportunities to spot misjudgment and correct it. On both counts, the Guidelines beat the old system hands down.

Second, argument by anecdote had too much potential to be misleading. Anyone with a point of view can round up several dozen cases out of 79,000 and paint the system to be a monstrosity. That the Post's reporters did so proves a good deal about their diligence but not much about anything else.

If anything, it's revealing that the Post could not come up with something more damning—a point illustrated by a story featured in the first article. The story was titled, in a headline bigger than the one that announced life on Mars, "Innocent Errors Add Years to Terms of Guilty Parties." It recounted the plight of John Behler, a methamphetamine dealer who was sentenced to 19 years because the judge mistakenly used the wrong Guidelines book. The sentence should have been 14 years. This fact eluded everyone until Behler himself caught it after months in the prison law library. The Post went on to recount the misfortune of William Davis, a Las Vegas crack dealer who got a bigger term than he should have because the probation officer made a mistake in recording the amount of drugs he distributed. It took the court of appeals to discover the miscue.

Evidently we are supposed to infer from this that the Guidelines' reliance on numbers invites blunderbuss errors—with potentially disastrous consequences. I agree that the mistakes were unfortunate and their consequences quite serious; what I doubt is that this can be attributed to the Guidelines. A judge, now or in the past, could pick up an outdated statute book just as easily as he can pick up an outdated Guidelines book. And a probation officer's error in recording the amount of drugs in a case could just as easily have been made before the Guidelines existed: for obvious reasons, sentencing courts in the past also were interested in knowing the details of the crime, and probation officers routinely relayed such information to the judge.

The Post's treatment of error thus turns out to prove something very different from what was apparently intended. Error has always been in the sentencing system because the system has always been run by human beings. What has changed is not the incidence of error but its visibility. Both Behler and Davis were able to vindicate their claims in the end because, under the Guidelines, the judge had to make a record of what he did in determining the sentence, what facts he counted and how much he counted them for, and how they affected the outcome. Sentencing in the past did not require any of that. The Post story thus proves not that the Guidelines invite and compound error, but precisely the opposite. The Guidelines help expose and correct it.

9. The Post's focus on fairness to the defendant was entirely appropriate but missed half the story. Sentencing is about fairness—fairness to the defendant but fairness to the public as well. On this latter subject the series had little to say. I wonder, though, whether it is wise to be so critical of the Guidelines system without even asking how well it does at protecting the public.

It is too early to answer that question (beyond the intuition that more certainty about the sentence might deter at least some would-be criminals), but there is some

interesting and possibly suggestive evidence. The crack epidemic appears to have leveled off. Murders in New York City are down dramatically. The national crime rate is also down over the last couple of years. Do the Guidelines get credit for any of this? It's debatable. On the one hand, the great majority of criminal cases are processed through state, not federal, court; in addition, as noted earlier, the Guidelines do not significantly increase sentences per se except to the extent they incorporate Congressionally-imposed mandatory minimum terms. On the other hand, many of the most serious drug crimes (and therefore many of the most serious criminals) are charged in federal court; and the Guidelines at least indirectly promote longer sentences in part because they require the sentencing judge to take account of all the defendant's relevant criminal conduct. In addition, an increasing number of states use a Guideline system or some variant of it, and, like the federal system, have abolished parole.

The point is not that the Guidelines have brought about the decrease in crime. The point is that we ought to find out. Before we do, it is premature to dilute or abolish a system that common sense and some statistical evidence suggest is doing its most important job—public protection.

10. The Post reported various proposals for improving the Guidelines. Here's my list.

—*Require sentencing impact statements for proposed changes in the Guidelines.* No more hidden agendas. At the end of the day, what people care most about with the Guidelines is whether the sentence is the right length for the crime. Any sort of proposed amendment to the Guidelines should be accompanied by a statement revealing, through case examples, its probable effect on actual sentences. For example, if there is a proposed amendment to limit or eliminate consideration of conduct relevant to the defendant's culpability, but not included in the count of conviction, the public should be told up front and in specifics what the effect of that amendment will be on jail time.

—*Establish a Crime Victims Advisory Group.* For several years, the Sentencing Commission has recognized and solicited the views of a Practitioners Advisory Group, which consists of many of the most energetic and persuasive defense lawyers in the country. Fair enough, at least in Washington's somewhat overgrown interest-group culture, but where are the crime victims? It seems self-evident to me that crime victims deserve at least the same independent voice at the table that criminal defendants have now through their lawyers.

—*Reduce but don't eliminate the difference in sentencing between crack and powder.* This issue should not become more political or divisive than it already is. Create a modest increase in powder sentences to bring the crack-powder sentencing ratio into a fairer balance. There is good reason to punish crack more harshly than powder, but no reason for allowing suburbanites, who ultimately finance crack markets, to walk away with the small fraction of a crack dealer's sentence they get now.

—*Eliminate retroactive guidelines.* Complexity in the Guidelines is worth the cost most of the time. When the Sentencing Commission makes a Guideline retroactive, however, it goes too far. Retroactivity is one of the most difficult and vexing areas of the law. Retroactive Guidelines therefore pave the way for some of the most involved and expensive litigation anywhere in the criminal justice system. In addition, retroactivity works to favor only one side—defendants. When a Guideline goes up, the Ex Post Facto Clause prevents the increase from being piled on a defendant's sentence. That's only fair, but it also means that retroactivity is a one-way street.

—*Lengthen the amendment cycle.* Under current procedures, the Commission can propose amendments every year. As U.S. Attorney Jay McCloskey and Fourth Circuit Chief Judge J. Harvie Wilkinson have pointed out, that is too often. The public would benefit from enhanced predictability, and it's hard to predict much if this year's amendment can change last year's amendment, which changed the amendment the year before. Changes are especially difficult for the defense bar to assimilate, because defense attorneys do not have the training resources available to Justice Department lawyers.

—*Once Congress regains confidence in the Sentencing Commission, reexamine mandatory minimum sentencing laws.* A properly functioning Guidelines system should make mandatory minimum statutes unnecessary. It is unlikely, however, that the wariness in Congress that underlies such statutes will abate until Congress is satisfied that the Sentencing Commission is getting the job done right. The Commission lost credibility with its proposal to drastically lower crack sentences. It will take time and a change in direction to restore that credibility. If and when that happens, Congress may come to view mandatory minimums in a different light.

In thinking about the kind of sentencing system we want, it's both natural and right to look beyond the world that lawyers, judges and defendants inhabit, and to consider the real world where the effects of the system will be felt by the rest of

us. That world has become a remarkable place: bullet-proof glass at the filling station, metal detectors at school, walled-in neighborhoods, shotguns under the convenience store counter, purses filled with mace, criminal checks on your kids' teachers and coaches, handgun sales at sky-high levels. Block after block of inner city housing, formerly mostly just blighted but now blighted and deadly. Home security systems for the few who can afford them, pit bulls or nothing for the many who can't. Security guards everywhere, reminding us less of the safety we have than of the safety we've lost.

We do not have to live this way. We didn't used to. We have the right to live in peace and safety. All of us have that right, not just those who can (or think they can) buy their way to security in a neighborhood of $400,000 houses. All of us, the wealthy but not just the wealthy, are entitled to assert our right to safety against those who would take it away, and to assert it without apologizing.

No sensible person believes that even the best criminal justice and sentencing systems are the answer. But they are part of the answer, so the kind of system we have makes a difference. The Guidelines have brought into the system a degree of objectivity, accountability and visibility that was not there before. They are a significant step forward for effective punishment and equality of treatment. And they are a revolutionary advance for the idea and the practice of the rule of law. From the Post's contrary conclusions, I respectfully dissent.

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Judges under scrutiny for ignoring federal sentencing guidelines

Thurmond leads charge against lenient sentences at subcommittee hearing

By JIM ABRAMS
The Associated Press

WASHINGTON -- Lawmakers on Friday questioned a growing trend of judges ignoring federal sentencing guidelines in favor of more lenient sentences. The Justice Department said the overload of illegal immigration cases in the Southwest is a major factor.

Of 55,000 criminal cases sentenced in federal courts last year, only 65 percent were within the guidelines of the U.S. Sentencing Commission, down from 82 percent in 1989, according to recently updated statistics from the commission. Judges went above the guidelines in 0.6 percent of cases. More than one-third of sentences were below the guidelines.

"Criminals are getting a break as fairness in sentencing is becoming more elusive every year," said Sen. Strom Thurmond, R-S.C., at a hearing of the Senate Judiciary criminal justice oversight subcommittee he heads. "The Sentencing Commission and the Department of Justice must address these problems."

Thurmond criticized the Justice Department for last year appealing only 19 of the 8,000 lower or "downward departure" sentences that did not involve a defendant getting a reduced sentence for cooperating with authorities.

Witnesses from the seven-member Sentencing Commission, created as part of a 1984 law to make sentencing more uniform, and the Justice Department said they were concerned with the trend. "But it should not set off any alarm bells," said John Steer, vice-chair of the commission. "The guideline system is still fundamentally sound."
Much of the growth in lower sentences, he said, can be attributed to the sharp rise in immigration cases in the Southwest. Deportations last year accounted for almost 20 percent of cases under the guidelines, compared to 0.2 percent in 1992. Arizona departed from guidelines in two-thirds of cases last year, followed by Southern California at 58 percent.

Laird Kirkpatrick of the Justice Department's criminal division added that while Congress and the White House have increased law enforcement efforts in Southwest border states in recent years, there has not been a parallel increase in judges and attorneys to handle the vastly expanded caseloads.

He said one reason for the low rate of appeals was a 1996 Supreme Court decision giving local judges more leeway in making exceptions to the guidelines. "We like to take cases up where we think we can win."

But Sen. Jeff Sessions, R-Ala., a former federal prosecutor, said that while immigration was a factor, downward departures for robbery cases went from 9.3 percent in 1992 to 13.7 percent last year, and for firearms violations from 6.4 percent in 1992 to 11 percent in 1999.

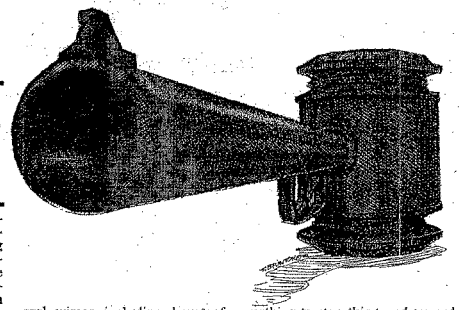
"It's a dangerous thing if judges and prosecutors get in cahoots and just sort of look the other way," Sessions said.

Sen. Patrick Leahy of Vermont, the ranking Democrat on the Judiciary Committee, said in a statement that the system was working. "These types of disparities are inevitable in as disparate a country as ours, and we should not put our sentencing laws in a vise and try to squeeze away every drop of disparity as if it were poison."

Washington Times 11/19/2000 page B-

Sentencing lapses

Punishment that is tough, swift and consistent is essential to controlling crime.



The attorney general, as the chief law enforcement officer in the United States, has a duty to enforce the laws. Under this administration, this duty has not always been met; the failure to fully enforce our gun laws is just one well-known example. Now, it is becoming clear that this Justice Department is failing to uphold our sentencing laws. As a result, more and more criminals are serving less time than they should under the law. In the 1980s, Congress created sentencing guidelines to bring some fairness and predictability to how criminals were sentenced in federal courts.

At the time, it was anyone's guess how much jail time federal criminals would receive or how long they would actually serve. The guidelines established a limited range within which the judge may sentence an offender after taking into account all the details about his case, such as his conduct and prior criminal record. Any legitimate need to sentence outside of these comprehensive rules should be rare. Treating similarly situated offenders in similar ways benefits victims and criminals alike, and it promotes public confidence in our criminal justice system. Punishment that is tough, swift and consistent is essential to controlling crime.

Today, the system we worked so hard to create is being threatened by the increasing trend of sentencing criminals below the range established in the guidelines. The year before President Clinton took office, 80 percent of criminals received sentences within the guidelines; last year, only about 65 percent were sentenced within the guidelines.

This disturbing trend is rising steadily each year with no end in sight. Although judges can sentence above the guidelines, they almost never do. More than one-third of offenders are getting a break from the guidelines. We are slowly returning to the uncertain system we thought we had replaced.

The problem is most acute on the Southwest border where judges and federal prosecutors are agreeing to sentences below the guidelines as a way to handle the increasing number of aliens who are being caught crossing the border illegally. Some accommodations at the border may be warranted. However, each U.S. attorney has his own way of responding to the problem without any firm policies from the Justice Department. In many cases, aliens who commit serious violent felonies in the United States, or who smuggle other aliens into our country, are getting the benefit of generously reduced sentences.

Moreover, the problem is much broader than immigration. The trend is evident for almost all federal crimes, including drug trafficking and fraud. Even those convicted of federal firearms offenses are increasingly receiving sentences lower than what the guidelines provide.

It was clear from a hearing I recently chaired on this matter before the Judiciary subcommittee on Criminal Justice Oversight that the Justice Department has done nothing to stop this trend toward more lenient sentences. In fact, the department is a large part of the problem.

As judges impose sentences below the guidelines for more creative reasons, it would seem that prosecutors would appeal more cases. But just the opposite is occurring; the department is appealing less. Of the more than 8,300 downward departure cases last year, the government appealed only 19.

The Justice Department also contributes to the problem in the way it handles the most frequent type of downward departure, called substantial assistance, which is given to defendants who cooperate with the government. Without any control from the Justice Department, U.S. attorneys vary drastically in how often they give this departure or even how they define what it means, thereby further contributing to disparity in the guidelines.

There are federal districts, such as the nearby Eastern District of Virginia, that are committed to the guidelines and have high compliance rates with them. However, they are the exception rather than the rule. After years of neglect, it is time for the attorney general to place a renewed focus on upholding the integrity of the guidelines.

Strom Thurmond, a Republican, is the senior senator from South Carolina.

INSIDE:

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NATION

U.S. sentencing debated

Some judges bend rules in immigration cases

By Judy Holland
Hearst Washington Bureau

WASHINGTON — The vice chairman of the U.S. Sentencing Commission told Congress on Friday that judges may view sentencing rules for immigration law violators as too strict.

John Steer told the Senate Judiciary Committee that this reluctance by judges and prosecutors to hand out tough sentences in immigration cases explains much of the trend by U.S. district court judges to impose more lenient sentences than those recommended by the commission.

Steer was responding to complaints by Sens. Strom Thurmond, R-S.C., and Jeff Sessions, R-Ala., that federal judges increasingly are imposing lighter punishments than those recommended by U.S. sentencing guidelines.

Congress created the commission in 1984 to set ranges within which a defendant could be sentenced, based on the offense and criminal history.

The purpose was to make sentencing more uniform and equitable across the country among defendants guilty of similar crimes.

The guidelines, which went into effect Nov. 1, 1987, allow the judge to "depart" from the range if the court determines there is a factor the guidelines didn't consider.

The judge must cite a specific reason for any departure.

But Thurmond said the purpose of the sentencing guidelines "is being threatened by the increasing trend of sentencing criminals below the range established in the guidelines."

"Criminals are getting a break as fairness in sentencing is becoming more elusive every year," said Thurmond, chairman of the criminal justice and oversight subcommittee of the Senate Judiciary Committee.

In the past eight years, he said, the number of sentences lower than the guidelines, known as "downward departures," has increased steadily from 20 percent to about 35 percent of cases.

"If the trend continues much longer, we will see more criminals being sentenced below the guidelines, than within them," Thurmond said.

Sessions, a former federal prosecutor, said the trend toward below-guideline sentences is "troubling."

"The integrity of the guidelines can be undermined and we can be not much better off than (when) we started," Sessions said. "It's (a) dangerous thing if judges and prosecutors look the other way and don't proceed in a proper way."

Steer told the hearing that federal judges have dealt with a surge in immigration cases, such as illegal entry and alien smuggling, resulting from beefed up law enforcement along the U.S.-Mexico border.

Federal judges in Arizona, who ruled on 2,830 criminal cases in 1999, sentenced offenders below the guidelines 58 percent of the time. Federal judges in Southern California, who heard 4,012 cases that year, issued below-guidelines sentences in 49 percent of cases, according to Steer.

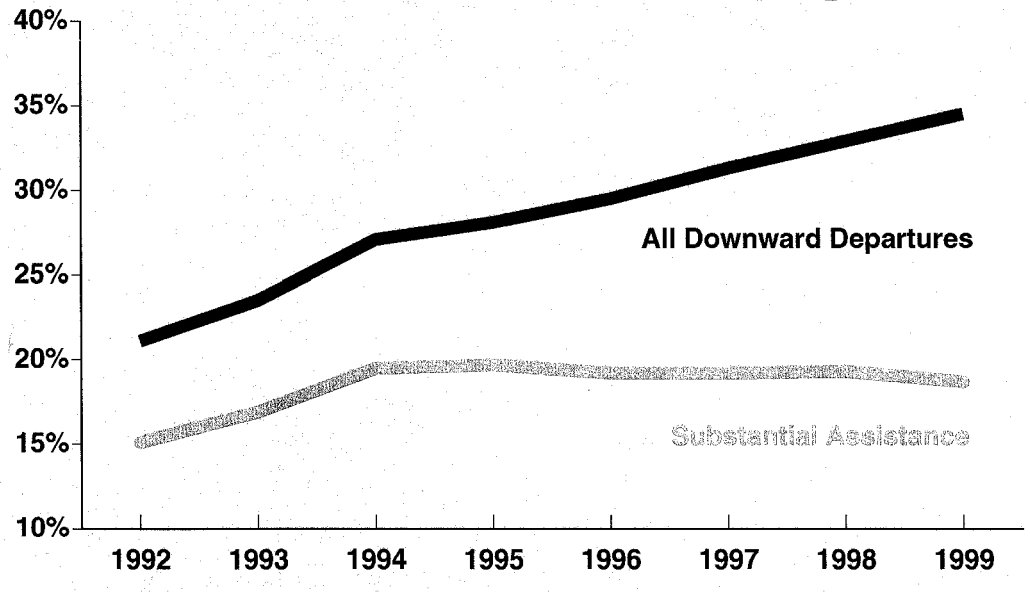
Steer suggested judges and prosecutors may believe the new and tougher sentencing guidelines for those offenses are too severe.

Cases of alien smuggling and harboring aliens nearly tripled from 580 in 1992 to 1,499 in 1999, with below-guideline sentences skyrocketing from 2 percent to 37 percent.

He said unlawful entry cases increased from 652 in 1992 to 5,249 in 1999, with below-guideline sentences rising from 5 percent to 36 percent.

Steer also pointed to data showing that U.S. district judges in the Ninth Circuit on the West Coast imposed below-guidelines sentences 36 percent of the time in 1999, more than any other circuit.

Criminals Sentenced Below Guidelines Range



Source: U.S. Sentencing Commission

5265063, sentences below range 01:58 PM 9/25/2000

Exhibit 1
DEPARTURE RATES EXCLUDING SOUTHWEST BORDER DISTRICTS[1]
FY1991 through FY1999

		Within Range		Downward		Upward	
	Total Cases	N	%	N	%	N	%
1991	22,588	20,987	92.9	1,241	5.5	360	1.6
1992	25,518	23,608	92.5	1,514	5.9	396	1.6
1993	28,284	26,000	91.9	1,941	6.9	343	1.2
1994	25,763	23,346	90.6	2,075	8.1	342	1.3
1995	24,466	22,127	90.4	2,063	8.4	276	1.1
1996	26,202	23,566	89.9	2,330	8.9	306	1.2
1997	28,107	24,826	88.3	2,989	10.6	292	1.0
1998	27,997	24,453	87.3	3,226	11.5	318	1.1
1999	29,840	25,902	86.8	3,687	12.4	251	0.8

[1]All numbers in this table exclude §5K1.1 substantial assistance downward departures.
Cases missing departure status are excluded from table statistics.

SOURCE: U.S. Sentencing Commission, FY1991 - FY1999 Datafiles, USSCFY91 - USSCFY99.

Exhibit 2

DEPARTURE RATES EXCLUDING SOUTHWEST BORDER DISTRICTS[1]

FY1991 through FY1999

		Within Range		Downward		Upward		5K1.1	
	Total Cases	N	%	N	%	N	%	N	%
1991	25,883	20,987	81.1	1,241	4.8	360	1.4	3,295	12.7
1992	30,254	23,608	78.0	1,514	5.0	396	1.3	4,736	15.7
1993	34,147	26,000	76.1	1,941	5.7	343	1.0	5,863	17.2
1994	32,176	23,346	72.6	2,075	6.4	342	1.1	6,413	19.9
1995	30,704	22,127	72.1	2,063	6.7	276	0.9	6,238	20.3
1996	32,942	23,566	71.5	2,330	7.1	306	0.9	6,740	20.5
1997	35,592	24,826	69.8	2,989	8.4	292	0.8	7,485	21.0
1998	35,722	24,453	68.5	3,226	9.0	318	0.9	7,725	21.6
1999	38,042	25,902	68.1	3,687	9.7	251	0.7	8,202	21.6

[1]Cases missing departure status are excluded from table statistics.

SOURCE: U.S. Sentencing Commission, 1991 - 1999 Datafiles, USSCFY91 - USSCFY99.

APPEALS ON DEPARTURE ISSUES

TABLE 1

APPEALS BY THE GOVERNMENT OVERALL AND ON DEPARTURE ISSUES
FY 1993 - 1999

YEAR	Appellate Cases						District Court Cases			
	TOTAL[1]		Government		Gov't on Departures		TOTAL[2]		Downward Departures	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
1999	4,068	100.0	32	0.8	19	0.5	52,425	100.0	8,304	15.8
1998	3,635	100.0	77	2.1	33	0.9	47,896	100.0	6,509	13.6
1997	3,692	100.0	78	2.1	24	0.6	46,017	100.0	5,574	12.1
1996	4,039	100.0	108	2.7	38	0.9	40,879	100.0	4,201	10.3
1995	4,327	100.0	91	2.1	42	1.0	36,975	100.0	3,110	8.4
1994	3,942	100.0	105	2.7	41	1.0	38,498	100.0	2,932	7.6
1993	3,380	100.0	97	2.9	35	1.0	40,442	100.0	2,676	6.6

[1] This total reflects the number of cases appealed for sentencing and conviction issues or sentencing issues alone. Cases appealed for conviction issues only are not included.

[2] Total number of cases in which all information was received on the case so that a proper assessment of the departure status of the case could be determined.

TABLE 2

ISSUE FOR APPEAL BY THE GOVERNMENT ON DEPARTURE ISSUES
Chapter 5 Part H
FY 1993-1999

	1999		1998		1997		1996		1995		1994		1993		TOTAL	
Issue for Appeal	**N**	**Rate[1]**	**N**	**Rate**	**N**	**Rate**	**N**	**Rate**	**N**	**Rate**	**N**	**Rate**	**N**	**Rate**	**N**	**Rate**
TOTAL	**2**	**50.0**	**5**	**60.0**	**1**	**100.0**	**4**	**25.0**	**3**	**0.0**	**13**	**23.1**	**18**	**44.4**	**46**	**32.6**
Challenge to downward departure based on age (§5H1.1)	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	3	0.0	3	33.3	**7**	**28.6**
Challenge to downward departure based on educational/vocational skills (§5H1.2)	0	0.0	1	0.0	0	0.0	0	0.0	0	0.0	2	0.0	1	0.0	**4**	**0.0**
Challenge to downward departure based on mental/emotional state (§5H1.3)	0	0.0	0	0.0	0	0.0	1	0.0	0	0.0	0	0.0	1	100.0	**2**	**50.0**
Challenge to departure based on physical appearance/condition (§5H1.4)	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2	50.0	2	100.0	**4**	**75.0**
Challenge to departure based on employment record (§5H1.5)	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	0.0	**1**	**0.0**
Challenge to family ties/responsibilities downward departure (§5H1.6)	1	100.0	2	100.0	1	100.0	3	33.3	1	0.0	2	50.0	7	42.9	**17**	**58.8**
Challenge to downward departure based on §5H1.10 factor	0	0.0	1	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	**1**	**0.0**
Challenge to departure based on any §5H1.11 factor	0	0.0	0	0.0	0	0.0	0	0.0	2	0.0	1	0.0	3	0.0	**6**	**0.0**
Challenge to downward departure based on lack of youthful guidance (§5H1.12)	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3	33.3	0	0.0	**3**	**33.3**
Challenge to the extent of the departure (§5H1.12)	1	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	**1**	**0.0**

[1] The "rate" represents the affirmance rate, which includes all appeals not reversed by the circuit court

TABLE 3

ISSUE FOR APPEAL BY THE GOVERNMENT ON DEPARTURE ISSUES
Chapter 5 Part K
FY 1993-1999

	1999		1998		1997		1996		1995		1994		1993		TOTAL	
Issue for Appeal	**N**	**Rate[1]**	**N**	**Rate**	**N**	**Rate**	**N**	**Rate**	**N**	**Rate**	**N**	**Rate**	**N**	**Rate**	**N**	**Rate**
TOTAL	**0**	**0.0**	**2**	**50.0**	**2**	**50.0**	**17**	**47.1**	**14**	**57.1**	**9**	**44.4**	**8**	**62.5**	**52**	**51.9**
Court believed it lacked authority to depart (§5K1.1)	0	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	**1**	**100.0**
Rule 35b, reduction of sentence (§5K1.1)	0	0.0	1	100.0	0	0.0	0	0.0	1	0.0	1	0.0	0	0.0	**3**	**33.3**
Challenge to granting downward departure for substantial assistance (§5K1.1)	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	0.0	**1**	**0.0**
Challenge to departure based on physical condition (§5K1.4)	0	0.0	0	0.0	1	100.0	3	33.3	3	67.7	0	0.0	0	0.0	**7**	**57.1**
Challenge to the extent of the departure (§5K2.1)	0	0.0	0	0.0	0	0.0	0	0.0	3	0.0	0	0.0	0	0.0	**3**	**0.0**
Challenge to court's refusal to depart upward based on extreme psychological injury (§5K2.3)	0	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	**1**	**100.0**
Challenge to court's refusal to make upward departure based on extreme conduct (§5K2.8)	0	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	**1**	**100.0**
Challenge to downward departure based on victim's conduct (§5K2.10)	0	0.0	0	0.0	0	0.0	3	0.0	0	0.0	0	0.0	0	0.0	**3**	**0.0**
Challenge to the extent of the departure (§5K2.10)	0	0.0	0	0.0	0	0.0	0	0.0	2	100.0	0	0.0	0	0.0	**2**	**100.0**
Challenge to downward departure based on lesser harms (§5K2.11)	0	0.0	0	0.0	0	0.0	2	100.0	0	0.0	1	100.0	0	0.0	**3**	**100.0**
Challenge to the extent of the departure (§5K2.11)	0	0.0	0	0.0	0	0.0	0	0.0	2	50.0	2	50.0	0	0.0	**4**	**50.0**
Challenge to downward departure based on coercion and duress (§5K2.12)	0	0.0	0	0.0	0	0.0	2	50.0	3	100.0	4	50.0	2	100.0	**11**	**72.7**
Challenge to departure based on diminished capacity (§5K2.13)	0	0.0	1	0.0	1	0.0	3	33.3	0	0.0	0	0.0	4	50.0	**9**	**33.3**
Challenge to the extent of departure (§5K2.13)	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	0.0	1	100.0	**2**	**50.0**
Voluntary disclosure of offense as basis of departure (§5K2.16)	0	0.0	0	0.0	0	0.0	1	0.0	0	0.0	0	0.0	0	0.0	**1**	**0.0**

[1] The "rate" represents the affirmance rate, which includes all appeals not reversed by the circuit court

TABLE 4

ISSUE FOR APPEAL BY THE GOVERNMENT ON DEPARTURE ISSUES
General Issues
FY 1993-1999

Issue for Appeal	1999		1998		1997		1996		1995		1994		1993		TOTAL	
	N	Rate[1]	N	Rate	N	Rate	N	Rate	N	Rate	N	Rate	N	Rate	N	Rate
TOTAL	**20**	**80.0**	**28**	**35.7**	**20**	**10.0**	**24**	**12.5**	**28**	**39.3**	**27**	**7.4**	**24**	**20.8**	**111**	**43.2**
Challenge to factors in used making a downward departure	7	57.1	15	33.3	5	20.0	9	0.0	0	0.0	0	0.0	0	0.0	**36**	**27.8**
Challenge to single act of aberrant behavior departure	7	85.7	6	0.0	2	0.0	3	66.7	1	100.0	4	0.0	1	0.0	**24**	**37.5**
Challenge to court's refusal to make an upward departure	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	**3**	**100.0**
Other mitigating circumstances as a reason for departure	3	100.0	1	0.0	5	0.0	10	10.0	16	43.8	16	0.0	9	11.1	**60**	**20.0**
Co-defendant disparity as a basis for departure	0	0.0	3	66.7	2	0.0	0	0.0	3	33.3	0	0.0	4	25.0	**12**	**33.3**
Challenge to the extent of the departure	0	0.0	2	100.0	0	0.0	0	0.0	3	0.0	1	0.0	0	0.0	**6**	**33.3**
District Court mistakenly believed it had no authority to depart	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	2	50.0	**3**	**66.7**
Challenge to downward departure - extraordinary acceptance of responsibility	0	0.0	0	0.0	0	0.0	0	0.0	1	0.0	2	50.0	1	0.0	**4**	**25.0**
Sentence imposed departs from guideline range in violation of law	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2	0.0	1	0.0	**3**	**0.0**
Other undefined departure reasons	0	0.0	0	0.0	6	16.7	2	0.0	4	50.0	2	50.0	6	33.3	**20**	**25.0**

[1] The "rate" represents the affirmance rate, which includes all appeals not reversed by the circuit court

TABLE 5

EXTENT OF DOWNWARD DEPARTURES:
GOVERNMENT INITIATED APPEALS ON DEPARTURE ISSUES
FY 1993-1998

Year	Appeals by the Government: Departure Issues	Cases that match with the District Court Files	Cases with complete District Court Information	Extent of Downward Departure	
				Avg Months	Avg Pct
TOTAL	**233**	**209**	**180**	**45.3**	**58.6**
1999	20	17	14	33.7	49.7
1998	33	32	28	34.4	54.4
1997	24	22	21	38.4	53.4
1996	38	30	24	30.7	52.3
1995	42	39	36	51.1	64.5
1994	41	35	31	58.1	67.9
1993	35	34	26	58.8	58.3

TABLE 6

CIRCUIT OF DOWNWARD DEPARTURES:
GOVERNMENT INITIATED APPEALS ON DEPARTURE ISSUES
FY 1993-1998

	TOTAL		YEAR													
			1999		1998		1997		1996		1995		1994		1993	
CIRCUIT	N	Percent	N	Percent	N	Percent	N	Percent	N	Percent	N	Percent	N	Percent	N	Percent
TOTAL	**233**	**100.0**	**20**	**8.6**	**33**	**14.2**	**24**	**10.3**	**38**	**16.3**	**42**	**18.0**	**41**	**17.6**	**35**	**15.0**
DC Circuit	**7**	**3.0**	1	5.0	1	3.0	0	0.0	2	5.3	0	0.0	2	4.9	1	2.9
1st Circuit	**16**	**6.9**	0	0.0	3	9.1	0	0.0	0	0.0	7	16.7	4	9.8	2	5.7
2nd Circuit	**21**	**9.0**	0	0.0	1	3.0	7	29.2	3	7.9	4	9.5	3	7.3	3	8.6
3rd Circuit	**11**	**4.7**	0	0.0	2	6.1	3	12.5	1	2.6	4	9.5	0	0.0	1	2.9
4th Circuit	**23**	**9.9**	0	0.0	1	3.0	5	20.8	7	18.4	4	9.5	3	7.3	3	9.7
5th Circuit	**13**	**5.6**	6	30.0	0	0.0	2	8.3	1	2.6	1	2.4	1	2.4	2	5.7
6th Circuit	**16**	**6.9**	1	5.0	0	0.0	1	4.2	4	10.5	3	7.1	4	9.8	3	9.7
7th Circuit	**7**	**3.0**	0	0.0	1	3.0	0	0.0	1	2.6	1	2.4	2	4.9	2	5.7
8th Circuit	**25**	**10.7**	1	5.0	11	33.3	2	8.3	1	2.6	2	4.8	4	9.8	4	11.4
9th Circuit	**51**	**21.9**	10	50.0	2	6.1	1	4.2	8	21.1	12	28.6	10	24.4	8	22.9
10th Circuit	**18**	**7.8**	1	5.0	4	12.1	3	12.5	3	7.9	2	4.8	2	4.9	3	8.6
11th Circuit	**25**	**10.7**	0	0.0	7	21.2	0	0.0	7	18.4	2	4.8	6	14.6	3	8.6

APPEALS BY THE GOVERNMENT OVERALL AND ON DEPARTURE ISSUES
FY 1993 - 1999

YEAR	TOTAL[1]	Government Appeals Overall		Government Appeals on Departures	
		Number	Percent Affirmed[2]	Number	Percent Affirmed
1999	4,068	32	76.1	20	80.0
1998	3,635	77	67.0	36	47.2
1997	3,692	78	63.1	26	77.0
1996	4,039	108	62.6	45	48.9
1995	4,327	91	60.6	52	57.7
1994	3,942	105	60.9	43	44.2
1993	3,380	97	58.2	36	52.8

[1] This total reflects the number of cases appealed for sentencing and conviction issues or sentencing issues alone. Cases appealed for conviction issues only are not included.

[2] The "Affirmance rate" includes all appeals not reversed by the appellate court.