

ANALYSIS BY NACDL'S FEDERAL SENTENCING GUIDELINES COMMITTEE

In response to a Congressional directive in the highly-controversial Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21 (the "PROTECT Act") to amend the Federal Sentencing Guidelines "to ensure that the incidence of downward departures are substantially reduced," the United States Sentencing Commission (the "Commission") published its proposed amendments on October 8, 2003. The proposed amendments leave intact the basic structure for granting downward departures while making the changes required by the PROTECT Act, and eliminate or significantly curtail the ability of federal judges to depart below the guidelines in particular instances.

It is important to note at the outset that the impetus for the proposed amendments regarding departures came not from the usual, deliberate rule-making process employed by the Commission, but at the direction of Congress through legislation that practitioners and the federal judiciary have found extremely troubling. The Judicial Conference of the United States has voted in support of legislation that would repeal some of the sentencing provisions of the PROTECT Act. The U.S. Court of Appeals for the Ninth Circuit recently decided to create a task force to study the impact of the PROTECT Act on judicial discretion at sentencing.

Even the most conservative judges, such as Chief Justice Rehnquist and Circuit Judge William W. Wilkins, Jr., Chief Judge for the Fourth Circuit Court of Appeals and former Chair of the Commission, expressly wrote in opposition to those provisions of the PROTECT Act that would further limit the discretion of judges to depart below the guidelines. Reiterating the view of the Judicial Conference, Chief Justice Rehnquist wrote that the legislation "would do serious harm to the basic structure of the sentencing guidelines system and would seriously impair the ability of courts to impose just and responsible sentences."

Although the PROTECT Act was pared down from the worst aspects opposed by the Chief Justice, the NACDL, the ABA and the Judicial Conference of United States, the changes to downward departures that will go into effect on October 27 nevertheless result from a process driven by the Ashcroft Justice Department that involved distortions of the facts, particularly the principal fact that the overwhelming majority of all downward departures are granted at the express request of government prosecutors rather than in the exercise of independent judicial discretion.

These government-driven departures include departures for substantial assistance, where often the more culpable defendants receive reductions while those they supervised and recruited, who have less information about the enterprise, serve the entire sentence without any reductions. They also include fast-track departures that have less to do with just punishment or the will of Congress and more to do with the desire of federal prosecutors to process federal criminal prosecutions in high-volume districts as if they were traffic violations.

Based on statistics and arguments provided by the Department of Justice, Congress was concerned that too many downward departures have taken place under the guidelines. An increase in downward departures from 5.8% in 1991 to 18.3% in 2001 was cited as evidence of an inclination on the part of federal judges, the majority of whom were once federal prosecutors,

to go soft on crime. But a closer look at the relevant data, which was released by the Commission on October 8, 2003, reveals the real explanation: increased prosecution of immigration cases and so-called "fast track" departures.

Fast-track programs were established by United States Attorneys offices to expedite the prosecution of immigration cases; if an immigration offender pleads guilty in a timely fashion, the prosecutor is authorized to pursue an additional downward departure. Importantly, until the PROTECT Act, these departures were not authorized by the Federal Sentencing Guidelines. The fast-track programs are no longer limited to immigration cases, prosecutors now have extended them to drug cases and do not limit their use to Southwestern border districts, but use them also in other high-volume or port-of-entry districts.

If these departures, which occur primarily in southwest border districts, are excluded, the actual departure rate decreases by almost half, down to approximately 10.4% in 2001, a substantially lower rate than the 20% of all cases Congress intended when it included departures in the structure of the Guidelines at the outset. See S. Rep. No. 225, 98th Cong., 1st Sess. 52 n.193 (1983). In contrast, in those districts that have implemented fast-track programs, the departure rates have increased from 10.2% in 1991 to 38.2% in 2001.

What these statistics reveal is that the increase in downward departures primarily is due to programs implemented by the government itself. The belief undergirding the PROTECT Act that the increase in departures is indicative of soft-on-crime judges simply is not empirically supported.

To its credit, the Commission has reaffirmed the basic principles that Congress established in the legislation that created the sentencing guidelines that "[d]epartures ... perform an integral function in the sentencing guidelines system. Departures permit courts to impose an appropriate sentencing in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing."

The Commission, unfortunately, bowed to pressures from the Ashcroft Justice Department and eliminated nine separate grounds for departure without sufficient empirical evidence to support that action. It remains to be seen how these changes will affect the way prosecutors advocate for harsher prison sentences. And whether defense counsel will continue to be able to present those mitigating facts that will allow courts to impose punishment that fits the crime or, in the words of the statute, sentences that are "sufficient, but not greater than necessary."

Most importantly, it remains to be seen how many fewer "just and responsible sentences" will be imposed on persons brought before federal courts.

The Committee will continue to study the proposed amendments and will publish a more detailed analysis in the near future.