

April 28, 2003

The Honorable Diana E. Murphy  
Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

Re: Departure Study

Dear Judge Murphy:

We write in regard to the study of departures that the Sentencing Commission will shortly conduct in compliance with section 401(m) of the PROTECT Act. The manner in which you conduct this study will have a profound impact on federal sentencing for years to come.

Today, departures, the last vestige of judicial discretion in an age of determinate sentencing, face extinction. You have the opportunity -- and more important, the time we did not have as the Feeney amendment careened through Congress -- to educate Congress and the public with a comprehensive empirical analysis of the underlying causes of departures. Such a report and the conclusions you draw may yet salvage some judicial discretion in federal sentencing.

Departures are a healthy, necessary part of the sentencing guideline system. Without them, the guidelines will be no more than complex mandatory minimum sentencing laws, replete with the intolerable disparities and outcomes that characterize those laws. Eviscerating judicial departure authority will hand all remaining sentencing discretion to the prosecution, guaranteeing rampant injustice and racial disparity, as evidenced most dramatically today by the crack cocaine mandatory minimums. Unlike judicial discretion, unreviewable prosecutorial discretion is exercised behind closed doors, sometimes for reasons that do not comport with the ends of sentencing. Your study can restore the reputation of judicial departures.

To that end, we recommend a broad and deep review of judicial departures that reaches behind the statistics to articulate the underlying reasons for current departure rates. We encourage a comprehensive approach that includes:

- Exploring whether particular guidelines consistently result in unjust sentences that can only be cured by departures or by amending the guidelines themselves. Widespread departures from a guideline,

particularly where those departures are not regularly appealed by the government, may indicate that all participants in the sentencing system believe the guideline leads to unjust results;

- Determining whether some departures occur because cross references in the guidelines collapse very different offenders into one guideline. If a guideline fails to distinguish among defendants with varying levels of culpability, it may be appropriate to improve the guidelines in order to reduce departures;
- Examining inter-district differences carefully and controlling for those factors that might account for them (such as the high rate of departures in the border states that serve case management objectives of the government, or systematic departures for Native American defendants in certain districts). Having an understanding of the reason for district-specific departures may support the development of adjustments to replace departures as a way to manage such needs, abide by the congressional mandate, and preserve discretion;
- Thoroughly exploring not only the incidence of departure but their magnitude for clues about the causes underlying them;
- Exploring and describing the historical trend in departures, such as the growth in departures attributable to the government in substantial assistance and border state immigration cases. Then examining departure rates over the years in other cases, that, while not requested by the government or part of a government-sanctioned program, were nonetheless acquiesced in by prosecutors;
- Conducting a careful analysis of the kinds of departures the government appeals. This should provide some insights into the departures that have most troubled the government and lead to ways to address them that limit the impact on overall departure authority.

In conducting the study, the Commission should solicit input from front-line criminal justice practitioners. We recommend that you convene public hearings around the county at which judges, prosecutors, defense attorneys, probation officers and former defendants can describe how the departure authority is exercised in practice and can advise you how departures help or hinder the imposition of just punishment.

Finally, we respectfully request that the Commission make its data and preliminary conclusions available to us and other stakeholders at the earliest opportunity. Our review of the data will enable us to provide meaningful input as the Commission finalizes guideline amendments pursuant to section 401 (m) of the PROTECT Act.

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Thank you for considering our views. Our organizations stand ready to assist you in any way we can.

Sincerely,

Leadership Conference on Civil Rights

National Association for the Advancement of Colored People

National Council of La Raza

Families Against Mandatory Minimums

Human Rights Watch

National Association of Criminal Defense Lawyers

National Association of Federal Defenders

American Civil Liberties Union