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April 2, 2003

The Honorable Orrin Hatch
Chairman
Senate Committee on the Judiciary
104 Hart Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Senate Committee on the Judiciary
SD-224 Dirksen Office Building
Washington, DC 20510

SUBJECT: S. 151/H.R. 1104, the "Child Abduction Prevention Act"

Dear Senators Hatch and Leahy:

We, the voting members of the United States Sentencing Commission, join in expressing our concerns over the amendment entitled "Sentencing Reform" recently attached to the Child Abduction Prevention Act of 2003, H.R. 1104, 108th Cong. (2003) (hereinafter "H.R. 1104"). In the past, with an issue of such magnitude, Congress has directed that the Commission conduct a review and analysis which would be incorporated in a report back to Congress. The Commission is uniquely qualified to serve Congress by conducting such studies due to its ability to analyze its vast database, obtain the views and comments of the various segments of the federal criminal justice community, review the academic literature, and report back to Congress in a timely manner. Indeed, such a process is contemplated by the original legislation which established the Commission over 15 years ago. *See* 28 U.S.C. § 994(o).

It is the Commission's understanding that the impetus for this proposed amendment to H.R. 1104 was congressional concern over the increasing rate of departures from guideline sentences for reasons other than substantial assistance. We share this concern. In fact, the Commission is undertaking an expansive review and analysis of all non-substantial assistance departures. That work has already yielded important preliminary data.

Based on this preliminary data, it appears that there are a number of factors that need to be examined and understood before drawing conclusions on the non-substantial assistance departure rate. One such factor is the impact on the non-substantial assistance departure rate resulting from policies implemented in a number of districts in an effort to deal with high volume immigration caseloads. For example, in 2001, the overall non-substantial assistance departure rate was 18.3 percent. If those districts with departure policies crafted to address these high volume immigration caseloads are filtered out, the non-substantial assistance departure rate is reduced to 10.2 percent.

In addition to the impact of the problems unique to districts with high volume immigration caseloads, other factors deserve analysis:

- 1) the impact, if any, of departures for reasons other than substantial assistance that are the subject of plea agreements and the extent of judicial oversight of such plea agreements;
- 2) the extent to which courts depart for reasons identified by the Sentencing Commission and specified in the guidelines as compared to factors unmentioned in the guidelines;
- 3) the extent, if at all, of disparity in departures within circuits and districts and whether such disparities may be unwarranted;
- 4) the advisability of creating different grounds for upward and downward departures;
- 5) the extent of appeals of departures; and
- 6) whether there are particular offense types that reflect unwarranted rates of departure.

When Congress created the Sentencing Commission as part of the Sentencing Reform Act of 1984, it did so with the idea that the Sentencing Commission would establish policies that would provide certainty and fairness in sentencing and would avoid unwarranted sentencing disparities among defendants. See 28 U.S.C. § 991(b)(1). Congress also recognized, however, that guideline sentences would not fit all cases and instructed the Commission to maintain sufficient flexibility in the drafting of guidelines to permit individualized sentences when warranted by mitigating or aggravating factors not otherwise taken into account. See 28 U.S.C. § 991(b)(1)(B). Based on this congressional policy, the Commission developed the concept of permitting courts to depart either upwards or downwards in unusual or atypical cases that fell outside the "heartland" of a particular guideline. The Commission adopted the departure policy not only to carry out congressional intent but also in recognition of the limits of adopting a perfect guideline system that would address all human conduct that might be relevant to a sentencing decision. Such a policy also was important in order to give feedback to the Commission as to whether a particular guideline should be reexamined because of an unusually high upward or downward departure rate. These departures have developed over time and have been adjusted throughout the history of the guidelines with the benefit of input from Congress, the federal criminal justice community, and considerable sentencing data.

We would note that there are numerous non-substantial assistance departures, both upward and downward, that appear in other than Chapter Five of the *Guidelines Manual*. The proposed amendment to H.R. 1104 deletes many of these departure provisions. For example, Chapter Four provides for a departure if the court finds that a defendant's criminal history category significantly either under- or over-represents the seriousness of a defendant's criminal history. See USSG §4A1.3. Similarly, USSG §2B1.1 in Chapter Two provides for a departure either up or down if the court determines that the offense level, which is primarily determined by the amount of the loss, either substantially under- or over-states the seriousness of the offense.

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Were the proposed amendment to be adopted, it would bar a court from downwardly departing in an appropriate case in each of the above examples.

The amendments being proposed in this legislation change not only departure guideline policy, but also alter the traditional way in which guideline revisions are implemented. The Commission would respectfully suggest that in order for the Commission to fulfill its statutory purposes as well as be of assistance to Congress in addressing its concern with respect to increased departure rates—a concern which the Commission shares—Congress might instead direct the Commission to review departures, recommend changes where appropriate, and then report back to Congress within 180 days. Such an approach would be in accordance with the procedure set forth by Congress when it established the Commission as well as with historical precedent. See 28 U.S.C. § 994(o).

Thank you for your consideration of our concerns.

Sincerely,



Diana E. Murphy
Chair



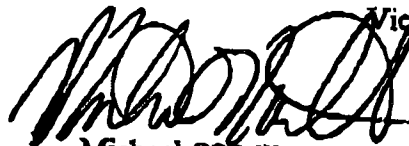
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Vice Chair



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Commissioner

cc: All Senate Judiciary Committee Members