

October 29, 2003

Chairman Orrin Hatch  
United States Senate  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Senator Patrick J. Leahy  
United States Senate  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Amendments to the Federal Sentencing Guidelines pursuant to the PROTECT Act

Dear Chairman Hatch and Senator Leahy:

The undersigned organizations represent diverse constituencies and perspectives, but we are united in our opposition to any additional erosion of federal judicial sentencing discretion. For this reason, we are deeply alarmed by signs that the Justice Department intends to submit to Congress legislation to further restrict the ability of judges to depart from the sentencing guidelines. We urge you to reject any such proposals.

On October 27, 2003, in compliance with the PROTECT Act, the United States Sentencing Commission amended the Federal Sentencing Guidelines to substantially reduce the incidence of downward departures. Among other significant changes, the Commission eliminated nine separate grounds for downward departures. Judges will no longer be permitted to depart pursuant to plea agreement or due to “general mitigating circumstances” – two factors that accounted for 37.5 percent of all downward departures in 2001. Furthermore, the Commission created a new early disposition program in the guidelines that will capture departures advocated by the government to address bulging caseloads – another frequently invoked ground for departure. The amendments, combined with other restrictions already imposed under the PROTECT Act, promise to radically transform federal sentencing.

During discussions that led to the language in the PROTECT Act to limit judicial discretion in federal sentencing, the Department of Justice argued that the increase in departure rates – from 5.8 percent in 1991 to 18.3 percent in 2001 – was due to judicial leniency. However, the facts tell a different story. The Sentencing Commission recently released statistics that demonstrate conclusively that increased prosecution of immigration cases and the government’s own resort to fast track departures to quickly dispose of those cases fueled the increase. Thus, much of the increase in the departure rate in the last decade is due, not to errant judges, but to the government’s own plea bargaining practices. Even more telling are data revealing that nearly 90 percent of federal sentences are either within the range specified by the guidelines or the result of

a government-initiated departure.

Given these facts, there is simply no basis for legislation to further restrict judicial sentencing discretion. Congress recognized in the original Sentencing Reform Act that no guideline system, no matter how finely tuned, can or should account for every factor relevant to sentencing. Discretion is essential to just outcomes, and departures are the essence of discretion in the federal sentencing system. Without it, the guidelines are no more than complex mandatory minimums, replete with the disproportionate sentences and disparities produced by those statutes. Justice Anthony Kennedy and other respected jurists have decried the excessive severity of the sentencing guidelines, and that is the real problem to which Congress should turn its attention.

The fairness and legitimacy of the federal sentencing guideline system depend on a sufficiently flexible departure authority. Notwithstanding Justice Department statements to the contrary, the amendments passed by the Sentencing Commission clearly restrict judicial departure authority beyond what was required by the PROTECT Act. We urge you to reject any proposals that would exacerbate this problem.

Thank you for considering our views. Please regard Kyle O'Dowd (202-872-8600, ext. 226) at the National Association of Criminal Defense Lawyers as the point of contact on this matter.

Julie Stewart  
President  
Families Against Mandatory Minimums

E.E. (Bo) Edwards  
President  
National Association of Criminal Defense Lawyers

Carol A. Brook  
President  
National Association of Federal Defenders

H. Scott Wallace  
Director, Defender Legal Services  
National Legal Aid and Defender Association

Steven B. Hellem  
Executive Director  
Corporate Environmental Enforcement Council

Daniel J. Popeo  
Chairman  
Business Civil Liberties, Inc.

Wade Henderson  
Executive Director  
Leadership Conference on Civil Rights

Thomas W. Hillier, II  
Jon M. Sands  
Federal Public and Community Defenders

Laura W. Murphy  
Director  
ACLU Washington Legislative Office

cc: Members of the Senate Judiciary Committee