WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY
RANKING MEMBER OF THE SENATE JUDICIARY COMMITTEE
AT HEARING BEFORE
THE SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT
ON
"OVERSIGHT OF THE UNITED STATES SENTENCING COMMISSION:
ARE THE GUIDELINES BEING FOLLOWED?"
OCTOBER 13, 2000

QUESTIONS FOR MS. CARMEN HERNANDEZ:

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 Afast-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 increase of departures is due to districts trying to develop strategies to address increased emphasis on border-related law enforcement?

ANSWER:

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 C 85 percent C 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 offenses 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 Afast 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 offenses in other courts across America C 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. These 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.

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?

ANSWER:

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.

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

ANSWER:

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.

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:

Downward and upward departures do not create unwarranted disparity C 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.

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 Re-assess Quantity- based Drug Sentences*, 12 Fed. Sent. R. 116 (1999); Stephen J. Schulhofer, *Excessive Uniformity C and How to Fix It*, 5 Fed. Sent. R. 169 (1992).

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.

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:

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.

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?

ANSWER:

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 Guidelines= 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 C such as ineffective assistance of counsel claims and failure to disclose exculpatory evidence by the government C 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.

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:

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.

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.

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

ANSWER:

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 C primarily deterrence C 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 comments, 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 has directed the Sentencing Commission to increase penalties 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.

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

ANSWER:

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 Aonce 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 C 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 C the fraud guideline, for example C have received considerably more attention from the Commission.

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

ANSWER:

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, APhilosophical 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 A[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 C 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 an 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.

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:

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 C through both the Sentencing Commission and the courts C 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 Asentencing 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.