

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

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Thurgood Marshall Federal
Judiciary Building
Federal Judicial Center
Classrooms A-C
Washington, D.C.

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1 P R O C E E D I N G S

2 CHAIRMAN MURPHY: I'd like to call the
3 hearing to order. In this very intimate room, I
4 think it's a little harder to give up on our
5 conversations.

6 We're very pleased to be holding this
7 public hearing today and to have the various
8 witnesses who are with us.

9 Past experience has shown that for the
10 Commission it's particularly valuable to have
11 enough time to have a give-and-take with the
12 witness. So we have received written statements in
13 advance. Not all of them have come in in quite the
14 time frame we had hoped, but the Commissioners have
15 had a chance to go over them. And just to keep us
16 on track so that we're sure that we don't take up
17 too much time with the oral presentations so that
18 there isn't time for questions, I've asked my right
19 arm, Frances Cook, to have a little bell ring at
20 seven minutes, because we have allocated eight
21 minutes for each person's direct statement. And
22 then after each person has had a chance to talk,

1 then we'll be able to ask questions.

2 So on the first panel, William Mercer, the
3 United States Attorney in the District of Montana
4 and the Chair of the Attorney General's Advisory
5 Council's Subcommittee on Sentencing Guidelines.
6 Mr. Mercer has testified--or, actually, talked with
7 the Commission before on issues of mutual concern
8 and is representing the Department of Justice here
9 today.

10 And then we're very pleased to have a
11 former member of the Sentencing Commission,
12 Professor Michael Goldsmith from Brigham Young
13 University, who has also published articles and
14 written on the guidelines and on a topic related to
15 what we're dealing with under the PROTECT Act.

16 So we will hear from each of these two
17 gentlemen, and then we'll have time for questions
18 of the first panel. Mr. Mercer?

19 MR. MERCER: Thank you, Judge Murphy, and
20 I thank the Sentencing Commission for the
21 opportunity to appear before you once again on
22 behalf of the Department of Justice. Before I

1 begin my comments on the PROTECT Act, I want to
2 first commend the Commission for holding this
3 hearing and for soliciting and considering our
4 views.

5 The department also would like to thank
6 the Commission and its staff for its hard work in
7 addressing the important issues before it. The
8 task now before this Commission includes some of
9 the most significant issues it has had to address
10 since the guideline system was first established.

11 The continued success of the reforms
12 sought to be achieved by the Sentencing Reform Act
13 of 1984 and the PROTECT Act will depend in large
14 measure on the actions this Commission takes in the
15 next ten weeks.

16 In our August 1, 2003, letter to the
17 Commission, we lay out a number of sentencing
18 policy issues beyond those already identified by
19 the Commission that we think need to be examined.
20 Let me first turn to downward departures.

21 It goes without saying at this point that
22 both the department and key Members of Congress

1 have been very concerned for some time about the
2 increasing number of non-substantial assistance
3 downward departures and the impact an increasing
4 rate of departures has on the basic principles
5 underlying Federal sentencing policy.

6 In passing the Sentencing Reform Act,
7 Congress rejected what it described in the
8 accompanying Senate report as the "almost absolute
9 discretion" traditionally exercised by Federal
10 judges in handing down criminal sentences, and
11 instead adopted a system of determinant sentences
12 calculated pursuant to the pre-established
13 guidelines. Congress intended this system,
14 considered a radical change at the time, to
15 "eliminate unwarranted disparities in Federal
16 sentenced," which is codified at Title 18 U.S.C.
17 3553(a)(6). Then, as now, the discretion of
18 sentencing judges was not to be eliminated but,
19 rather, to be limited, and in most circumstances
20 the exercise of that discretion resulting in
21 sentences outside the applicable guideline range
22 would be subject to appellate review.

1 Commission produced data that properly analyzed the
2 trends in downward departures by seeking to tease
3 out the effect of, one, uncontroversial but
4 atypical fast track programs on the Southwest
5 border that significantly boosted both case volumes
6 and departure rates; and, two, equally
7 uncontroversial but more typical substantial
8 assistance downward departures.

9 The data produced by the Commission showed
10 an unmistakable and steady increase in downward
11 departure rates. Setting aside the Southwest
12 border cases and substantial assistance cases, the
13 Commission found that 5.5 percent of the remaining
14 cases in fiscal year 1991 received a downward
15 departure. By fiscal year 1996, this figure had
16 risen to 8.9 percent, and in fiscal year 1999, it
17 was 12.4 percent.

18 We have extrapolated these statistics
19 using the more recent data sets now available, and
20 they show the relevant departure rate in 2001 has,
21 for the time being, leveled off at 13.2 percent.
22 Moreover, the rates of non-substantial assistance

1 downward departures differ widely and unjustifiably
2 from one district to another. In South Carolina,
3 it's 2 percent of all cases. In Connecticut, it's
4 nearly 34 percent.

5 Some of the public comments submitted to
6 the Commission criticize these statistical
7 measures, but we believe that this approach, which
8 the Commission itself used in analyzing the data
9 and which the American Bar Association has more
10 recently used in advocating against the PROTECT
11 Act, properly controls for the relevant variables
12 and is, statistically speaking, the most accurate
13 and informative measure that has been suggested.

14 It was, I note, one of the measures used
15 in the department's April 4, 2003, letter to the
16 House-Senate Conference Committee urging support
17 for the Feeney amendment. Likewise, the approach
18 used by Senator Hatch during the floor debate on
19 the PROTECT Act also excluded Southwest border
20 cases and substantial assistance cases.

21 Others have suggested that a general
22 downward departure rate as high as 13 percent is

1 within the range that Congress contemplated, which
2 they claim was 20 percent. This is wrong for two
3 reasons. First, as Commissioner Steer correctly
4 noted in connection with the 2000 Senate hearings,
5 the 20-percent figure which is mentioned in the
6 1983 Senate report was based on pre-guidelines
7 Parole Commission data that included a 12-percent
8 upward departure rate from parole guidelines and an
9 8-percent total downward departure rate that
10 included what we would now call substantial
11 assistance departures. As Commissioner Steer
12 stated, this suggests that current downward
13 departure rates are substantially greater than
14 Congress expected.

15 Second, whatever Congress' expectation in
16 1983, it is now clear beyond all doubt that
17 Congress deems the current downward departure rates
18 to be too high. Congress spoke clearly in
19 exercising its prerogative as architect of
20 sentencing policy.

21 As Chief Justice Rehnquist recently
22 remarked, such a decision is for Congress, just as

1 the enactment of the Sentencing Guidelines nearly
2 20 years ago was. The Chief Justice's remarks also
3 emphasized an obvious point that seemingly has been
4 lost on some of those who have submitted written
5 comments. Congress has directed that this
6 Commission take measures within 180 days to
7 "substantially reduce" the rate of downward
8 departures. That directive was added to the
9 legislation in conference as a substitute for much
10 broader, more sweeping proposed reforms at the
11 behest of this Commission, representatives of the
12 Federal judiciary, and other advocacy groups, which
13 requested time to study data, obtain additional
14 information from the public, and consider
15 amendments in a more deliberative manner. Although
16 several commentators now in essence encourage this
17 Commission to defy that directive, we are confident
18 that you will not accept that unhelpful invitation.

19 The department supports Congress' judgment
20 that the consistent and unchecked increase in the
21 number of cases where the specified guidelines
22 penalties are not applied will inevitably undermine

1 the most basic principles of consistency,
2 transparency, and predictability that Congress
3 sought to achieve in the Sentencing Reform Act of
4 1984.

5 Unless the Commission adopts more specific
6 measures to regulate the ability to depart, this
7 steady increase, coupled with an unjustifiably wide
8 geographic and subject area of variability in
9 departure rates, will likely continue.

10 Before I discuss the changes we think the
11 Commission should take to implement the relevant
12 sections of the PROTECT Act, I want to touch on the
13 recent changes already taking place that we think
14 will have a positive impact on Federal sentencing
15 policy generally and on departure policy in
16 particular.

17 We have made substantial changes through a
18 memo at the Department of Justice that was issued
19 by the Attorney General on the 28th of July.
20 Prosecutors' discretion must be exercised in a
21 manner that does not undercut the consistency and
22 equality in enforcement of the law that must be

1 maintained in a national system of justice. This
2 Attorney General takes those principles very
3 seriously and insists that the prosecutorial power
4 entrusted to department prosecutors must be
5 exercised fairly, consistently, and in a manner
6 that ensures accountability.

7 Consistent with Section 401(1) of the
8 PROTECT Act, the Attorney General last month issued
9 a new internal policy directive to all Federal
10 prosecutors concerning sentencing recommendations,
11 litigation, and appeals. In his memorandum to all
12 Federal prosecutors, the Attorney General prohibits
13 prosecutors from engaging in any type of fact
14 bargaining. Agreements about the applicability of
15 the Sentencing Guidelines must be fully consistent
16 with the readily provable facts.

17 Accordingly, if readily provable facts are
18 relevant to calculations under the Sentencing
19 Guidelines, the prosecutor must disclose them to
20 the court, including the probation office. This
21 directive specifically addresses a concern that has
22 been raised in the past by this Commission as well

1 as a number of Federal judges, and there are a
2 couple of case citations noted in the written
3 testimony.

4 The memorandum also establishes that
5 prosecutors have an affirmative obligation to
6 oppose any sentencing adjustments, including
7 downward departures, that are not supported by the
8 facts and the law. This memorandum makes clear
9 that prosecutors cannot evade this responsibility
10 by agreeing to stand silent with respect to an
11 improper departure. The policy also requires that
12 in specific circumstances prosecutors promptly
13 report adverse appealable decisions to the
14 appropriate appellate section and that each of
15 those cases be reviewed for appealability. This
16 policy treats the adverse Sentencing Guidelines
17 decisions just like any other adverse decision.

18 For years, the department has required
19 reporting of adverse decisions on the civil side
20 and accepting Sentencing Guidelines cases on the
21 criminal side as well. The PROTECT Act effectively
22 required the department to extend this well-established

1 mandatory reporting process to a subset
2 of guideline cases. We have done so. This
3 extension of the ordinary appellate review process
4 to guideline cases is entirely appropriate in light
5 of the additional and significant appellate
6 remedies afforded by the PROTECT Act.

7 Contrary to much recent media coverage and
8 editorial comment, this department policy regarding
9 litigation and appeal of downward adjustments and
10 departures is not intended to create a black list
11 of judges who depart from the guidelines. The new
12 charging plea, appeal, and fast-track policies are,
13 first, a required response to the PROTECT Act and,
14 second, an important reaffirmation of the Justice
15 Department's commitment to the principles of
16 consistency and effective deterrence embodied in
17 the Sentencing Reform Act and the guidelines.
18 Every aspect of this policy advances principles of
19 the Sentencing Guidelines and the Sentencing Reform
20 Act.

21 The department has long contended that the
22 deferential standard of review--I'm going to skip

1 over that given time. I'll skip the standard
2 review section.

3 I want to turn to the section dealing with
4 disfavored factors.

5 First, the Commission should
6 comprehensively review all non-substantial
7 assistance departure factors now mentioned in the
8 Guidelines Manual. We think the Commission should
9 make it a goal to catalogue all such factors in
10 Chapter 5 within the next two amendment years to
11 the extent and in a manner consistent with
12 limitations of 401(j)(2) of the PROTECT Act.
13 Wherever possible, the Commission should replace
14 departures authorized in Chapter 2 with appropriate
15 amendments to the underlying guideline. We would
16 be pleased to work with the Commission staff in
17 developing specific proposals to accomplish this
18 goal.

19 The Commission should also carefully
20 review and reform the existing ground of departure
21 authorized in Chapter 5. Consistent with concerns
22 we have previously voiced to the Commission and the

1 Congress during debate over implementation of the
2 Sarbanes-Oxley act, we believe the Commission
3 should convert certain disfavored departure
4 factors, factors often associated with white-collar
5 and fraud defendants to prohibit factors or, at the
6 very least, severely limit the availability of
7 these factors as a basis for departure as well as
8 the extent of the permissible departure. These
9 factors include community service, age, employment
10 record, civic or charitable service or prior good
11 works, rehabilitation, physical condition, and
12 gambling and abuse dependence. Health and/or
13 mental and emotional conditions should be
14 prohibited factors unless the Bureau of Prisons
15 indicates it does not have the capacity to
16 accommodate the specific medical problems of the
17 defendant. We also believe a defendant's
18 willingness to be deported should be a prohibited
19 departure factor.

20 Despite the fact that existing policy
21 statements generally discourage such grounds for
22 departure, prosecutors report an ever increasing

1 number of cases where these departures are granted.
2 This phenomenon further erodes the relatively less
3 onerous guideline ranges in white-collar cases and
4 feeds the public perception that business people
5 and other fraudsters who steal get unduly lenient
6 sentences.

7 Criminal history departures. In 2001,
8 district courts departed 1,315 times on the basis
9 that the defendant's criminal history overrepresented his
10 involvement in the criminal justice
11 system. In some of those cases, the departure was
12 substantial. Senate bill 151, as passed by the
13 House and supported by the department, would have
14 effectively banned such downward departures
15 entirely. We continue to favor that position. To
16 the extent that the Commission believes that this
17 would result in unduly severe sentences for certain
18 offenders, it should attempt, in light of the 15
19 years of experience under the guidelines, to
20 articulate such circumstances by making appropriate
21 adjustments to the underlying rules that govern the
22 calculation of criminal history categories.

1 At a minimum, we believe the Commission
2 should make significant reforms concerning the use
3 of this departure. Instead of allowing an
4 unlimited reduction in the offense level or the
5 overall sentence, the guidelines should explicitly
6 cap such departures to a specified reduction in the
7 criminal history category. We further think such a
8 reduction should in no event exceed one criminal
9 history category.

10 Use of unmentioned factors. The version
11 of the PROTECT Act initially passed by the House
12 and supported by the department would have
13 effectively banned all unmentioned factors as
14 grounds for downward departure in all cases. That
15 across-the-board reform, however, was not included
16 in the final legislation, which preserved in many
17 cases the authority to depart if the statutory
18 standards in 18 U.S.C. 3553 are met. Instead, the
19 Congress directed the Commission to take measures
20 to ensure that the rates of downward departure
21 would be "substantially reduced." We believe that
22 the centerpiece of that effort must be the adoption

1 of additional measures to ensure that the use of
2 unmentioned factors is very sharply reduced.

3 The Commission's initial rationale for
4 allowing unmentioned departure factors was "for two
5 reasons."

6 First, the Commission noted that it could
7 not prescribe a single set of provisions governing
8 all relevant human conduct, and it did not need to
9 do so at the outset because "over time" it would be
10 able to refine the guidelines to specify more
11 precisely when departures should and should not be
12 permitted.

13 Second, the Commission stated its belief
14 that, "Despite the court's legal freedom to depart
15 from the guidelines, they will not do so very
16 often."

17 Both rationales have been undercut by the
18 passage of time. The Commission now has 15 years
19 of experience under the guidelines, and greater
20 specificity is both possible and warranted. We
21 think the Commission should, given its exhaustive
22 and comprehensive work now spanning 15 years,

1 promulgate a policy statement that establishes a
2 strong and effective presumption that in
3 establishing the applicable guideline and specific
4 offense characteristics and in cataloguing
5 permissible and impermissible grounds for
6 departure, the Commission has indeed considered
7 virtually all factors that might be relevant to
8 setting the guideline range of sentencing, leaving
9 other factors to be considered as appropriate only
10 in determining the sentence within the range.

11 The exact formulation of such a policy
12 statement must be carefully considered, especially
13 in light of the fact that the existing policy
14 statement stating that such departures should be
15 highly infrequent has proved to be ineffective. In
16 conjunction with issuing such a new policy
17 statement, the Commission may wish to consider
18 whether there are any unmentioned factors that
19 should be specifically mentioned. We also believe
20 that thereafter the Commission should annually
21 review departures based on unmentioned factors and
22 consider whether to address them in the Guidelines

1 Manual.

2 Finally, combination of factors. The
3 commentary to 5K2.0 currently provides that in an
4 extraordinary case in which a combination of
5 offender characteristics or not ordinarily relevant
6 circumstances takes the case out of the heartland,
7 even though none of the characteristics or
8 circumstances individually distinguishes the case,
9 a departure may be warranted. Since this provision
10 was enacted, despite the commentary that such cases
11 will be extremely rare, this amorphous, catch-all
12 provision has been used in sentencing courts all
13 too frequently--has been urged on sentencing courts
14 all too frequently by defendants and has been
15 relied upon by the courts to grant downward
16 departures.

17 I thank you again for the invitation to
18 appear before you and for taking up these important
19 issues. I'd be happy to address any questions.

20 CHAIRMAN MURPHY: Okay. We'll move then
21 to Professor Goldsmith.

22 MR. GOLDSMITH: Thank you, Judge. I

1 appreciate the invitation to testify before you
2 folks today, and it's good to see some old friends
3 and also some new members on the Commission. I
4 commend you for your fine work and thank you for
5 holding this hearing. And I might add that it
6 would have been helpful had Congress conducted
7 similar hearings prior to enactment of the PROTECT
8 Act so that it could have examined to what degree
9 departures are, in fact, a problem.

10 I think, however, that had Congress
11 conducted such hearings, in honesty it would have
12 said that departures are a problem. The departure
13 rate, as reported in fiscal 2001, was 18.3 percent.
14 And if you take out substantial assistance
15 departures, in effect that meant that in more than
16 20 percent of the cases courts were departing for
17 reasons other than having substantial assistance
18 situations. And that is more than the Sentencing
19 Reform Act contemplated.

20 Now, the PROTECT Act has caused all kinds
21 of alarm within the criminal justice community. It
22 has been criticized by a wide array of individuals;

1 not just defense attorneys but even some
2 prosecutors and judges have felt very strongly that
3 it is the wrong way to go. I think for the
4 Commission, however, what you folks might want to
5 do is view this as an opportunity to provide
6 guidance for judges. And, indeed, in a survey
7 conducted by the Federal Judicial Center in 1994,
8 judges rated very highly the need for increased
9 guidance from the Sentencing Commission on when to
10 depart. And so time passed. The Commission didn't
11 do much by way of providing guidance, and I accept
12 some responsibility for that as well. Now,
13 essentially, the PROTECT Act says you guys have to
14 do it in 180 days.

15 I recall at some point when I was on the
16 Commission, someone said that the Commission acts
17 with glacial speed. And I took issue with that
18 because I thought it gave a misleading impression
19 of undue haste and speed. We tend to act very
20 slowly, and now you have a 180-day time limit.

21 The truth is that I don't think this job
22 can be done effectively in 180 days. What is

1 required at this point is a comprehensive
2 evaluation of departure trends based upon departure
3 rates for each guideline and judicial explanations
4 in connection with those departures. The
5 Commission could then determine which guidelines
6 are most problematic, which produce the highest
7 rates and why. I think that outside professional
8 commentary and staff studies are required,
9 consultation with the Department of Justice, the
10 Criminal Law Committee of the Judicial Conference,
11 the Practitioners Advisory Group, FAMM, and other
12 members of the criminal justice community--all that
13 is required.

14 The Commission, of course, has begun this
15 process, but six months just isn't enough time to
16 get the job done properly. Even so, I think that
17 ways do exist for the Commission to respond to the
18 PROTECT Act in a manner that addresses congressional
19 concerns. I'd like to outline for you
20 essentially a five-step approach to responding to
21 Congress.

22 First, I would suggest a targeted response

1 which reduces departures in the area of kidnapping.
2 After all, kidnapping involves the underlying crime
3 that gave rise to the PROTECT Act, so if you
4 respond to the kidnapping guideline, that might be
5 one way to go, and I'll go into more detail in a
6 moment.

7 Second, correct the policy statement in
8 Section 1A.4.b which implicitly modified the
9 statutory standard for judicial departure
10 determinations. The standard is not the heartland
11 concept but the statutory standard based upon what
12 the Commission considered in formulating the
13 guidelines. I'll go into more detail on that
14 shortly as well.

15 Third, I would add the Commission's
16 statement of reasons, which accompany your
17 amendments annually, to the guidelines' official
18 commentary. This will reduce departures by
19 expanding and clarifying the range of factors that
20 the Commission considered in formulating
21 guidelines.

22 Next, I would propose an amendment to the

1 Sentencing Reform Act to broaden the range of
2 materials that courts may examine in determining
3 what the Commission considered in formulating
4 guidelines.

5 And, finally, when all that is said and
6 done, then conduct a comprehensive review of
7 departure rates which is required before you can
8 intelligently respond to this problem.

9 Step by step in more detail now. Amending
10 the kidnapping guideline. Such an amendment would
11 directly respond to the crime that initially led
12 Congress to enact the PROTECT Act. I would reduce
13 kidnapping departures by removing selected Section
14 5K2 factors as departure factors or designating
15 them as not ordinarily relevant in these cases.
16 That would, as I said, directly respond to the
17 concern that led Congress to enact the PROTECT Act.

18 More importantly, however, I think it's up
19 to the Commission to begin to correct the standard
20 that judges employ in departing. Judges typically
21 think in terms of the heartland concept. That
22 reflects language in the Guidelines Manual that

1 essentially equates heartland or uses heartland as
2 a proxy for when departures may occur, heartland,
3 in effect, as a proxy for what the Commission
4 considered, and presumably anything that's outside
5 the heartland is something that the Commission did
6 not consider when it formulated the guideline.

7 There are problems, however, with this
8 heartland concept. First of all, it really isn't a
9 functional concept. What is one person's heartland
10 is somebody else's non-heartland, and there's
11 really no necessarily reasonable way to reach
12 agreement on those factors.

13 Secondly, the guidelines themselves
14 oftentimes reflect non-heartland factors that the
15 Commission considered, and, indeed, your annual
16 source book refers to certain guidelines which are
17 applied--rather, certain specific offense
18 characteristics that are applied in less than 1
19 percent of the cases. So the guidelines themselves
20 I'm saying oftentimes include non-heartland
21 factors.

22 The difficulty with the heartland concept

1 is that it's ambiguous and it promotes confusion
2 and circuit conflicts, and I think it's why judges
3 want more guidance.

4 I would revise the policy statement in
5 Section 1A.4.b. to emphasize the correct statutory
6 standard for departures. This can be done
7 immediately to alleviate congressional concerns.
8 I'll go into more detail on that shortly.

9 I would also reduce departures under the
10 existing statutory standard. Let me back up for a
11 moment.

12 The problem is that judges are asking
13 themselves whether something is within the
14 heartland or non-heartland. What they should be
15 asking themselves is what did the Commission
16 consider in formulating the guideline. That's
17 really the question, and that's not what judges are
18 doing, and they're not doing that because there's
19 language in the original Guidelines Manual which
20 has not been amended that essentially says
21 departures occur when something falls outside the
22 heartland.

1 If you correct that language and you do so
2 immediately, you will substantially reduce
3 departure rates because you will point judges to
4 what they should be looking to, which in turn is
5 what did the Commission consider. And the next
6 step would then be to broaden the range of
7 materials available for courts to look to in
8 deciding what the Commission considered.

9 For example, if you take the statement of
10 reasons that accompanies amendments and you include
11 them as part of the commentary to the guidelines,
12 that in turn, under the Sentencing Reform Act,
13 would allow judges to consider those reasons in
14 evaluating whether departure is warranted. And
15 those statements of reasons oftentimes give policy
16 reasons and justifications for your decision that
17 are different from the types of comments contained
18 in your official commentary.

19 More detailed statement of reasons by the
20 Commission will in turn broaden the range of
21 evidence available for what you considered and
22 narrow the scope of departures. I think if you

1 take that action, you can respond to Congress in a
2 good-faith fashion and say we have taken steps to
3 significantly reduce departures.

4 I also suggest that you amend the
5 Sentencing Reform Act to broaden the range of
6 materials courts may review in deciding whether
7 there exists a mitigating factor not adequately
8 taken into consideration by the Commission.

9 For example, Commission hearings are often
10 tape-recorded by not transcribed. If you have a
11 transcript of the actual Commission meeting and
12 hearings, that transcript could serve as the basis
13 for helping judges determine what the Commission
14 considered, and that in turn, by expanding the
15 range of materials available for courts to
16 consider, would in turn narrow the scope of
17 departures and give appellate judges also room to
18 consider what the Commission used as the basis for
19 formulating any particular guideline.

20 This would require an amendment to the
21 Sentencing Reform Act, but it then allows you as
22 Commissioners to go back to Congress and say:

1 We're taking your mandate seriously. We need your
2 help. We ought to amend the Sentencing Reform Act
3 to allow reviewing judges to have a better
4 understanding of what the Commission considered in
5 formulating a guideline. And I would suggest that
6 you amend the act to include the right for judges
7 to consider Commission transcripts, hearings
8 conducted by the Sentencing Commission, public
9 comment received by the Commission, and possibly
10 even your briefing books, which really provide, in
11 effect, a legislative history so that any reviewing
12 court could better understand exactly what the
13 Commission considered in formulating a guideline.

14 If you open the pool of information
15 available, it will allow judges to determine what
16 you considered, and the benefit of this approach is
17 that it will avoid a divisive, confrontational
18 battle over individual guidelines which will pit
19 liberals against conservatives. You'll essentially
20 have a blood bath over individual guidelines.
21 Instead, this is a policy-neutral approach that
22 really returns to the intent of the Sentencing

1 Reform Act and allows judges to make departure
2 determinations based upon what the Commission
3 considered or failed to consider in formulating a
4 particular guideline.

5 Thank you for your time.

6 CHAIRMAN MURPHY: Now is the opportunity
7 to ask questions.

8 COMMISSIONER CASTILLO: Mr. Mercer, do you
9 agree with former Commissioner Goldsmith that this
10 job just cannot be effectively done within the 60
11 days left?

12 MR. MERCER: You've got a congressional
13 mandate, and I'm not sure that it's appropriate for
14 me to make a determination as to whether the
15 Commission--I think you've got to make--

16 MR. GOLDSMITH: It helps to be a tenured
17 professor.

18 [Laughter.]

19 MR. MERCER: I don't advise any
20 prosecutors or any of our client agencies to ignore
21 what the statutes say. So I think the Commission
22 has an obligation and needs to meet it.

1 COMMISSIONER CASTILLO: To try and meet
2 it. But you do say in your written materials that
3 it would take a two-year period to re-evaluate all
4 these downward departure--

5 MR. MERCER: No, I think that's specific
6 to the notion of cataloguing the various departure
7 factors. I don't believe we--it's not our position
8 that you need to evaluate.

9 As you know, during Sarbanes-Oxley the
10 position of the department that I advanced on
11 behalf of the department was that this Commission
12 should make a number of factors prohibited factors.
13 I think the Commission has heard those views
14 before, and we believe that the Commission is in a
15 position to act based upon its evaluation over time
16 of those issues.

17 CHAIRMAN MURPHY: I'd like to ask you
18 about the fast-track provisions in the PROTECT Act
19 because the Commission, of course, is given the
20 task of considering adjustments, considering
21 provisions related to fast-track programs, and we
22 have been trying to get information from the

1 Department of Justice about what early disposition
2 programs or fast-track programs there are. And,
3 apparently, the department is having a hard time
4 identifying all the different programs that exist
5 and what actually is part of those programs.

6 I wonder if you would comment on that,
7 whether it's possible for us to--I know in your
8 written materials you say that you think probably
9 the best thing for us is just to track statutory
10 language. But why is this so difficult? I know
11 the department has been working on gathering
12 information, but we're left holding the bag, so to
13 speak.

14 MR. MERCER: Well, the answer, as you
15 note--although I didn't say anything about it in my
16 oral statement, the written statement indicates
17 that we believe that the Commission should take the
18 language in the statute and convert that into
19 5K2.23, which will set forth the fact that a court
20 may depart in a program in which both the Attorney
21 General and the U.S. Attorney have authorized a
22 departure--an early disposition program.

1 That provision allows up to a four-level
2 departure, and we believe if that language is
3 inserted into the manual, based upon the oversight
4 of the department and the request of a U.S.
5 Attorney, that will be an appropriate mechanism to
6 establish that program.

7 In response to the question about the
8 data, I believe that the department has provided
9 the Commission with an analysis of where we stand
10 in terms of fast-track programs, and hopefully
11 that's responsive. And I'm sure if it's not
12 responsive that we would--

13 CHAIRMAN MURPHY: Well, I think it's
14 responsive, but it doesn't have--it's pretty
15 skimpy. I think it's responsive, but it isn't as
16 much information as we might like.

17 MR. MERCER: Well, we would be happy to
18 get a sense from the Commission of where the
19 Commission believes there are shortcomings in the
20 analysis. It was my view that it was a fairly
21 complete analysis, but I know that we'd be happy to
22 respond to questions from the Commission on that.

1 I think, you know, it's clear that a
2 significant number of cases have been managed
3 through fast-track programs over time. Congress
4 responded to that as part of this act in order to
5 codify it. And we believe with inclusion of that
6 language in the manual, coupled with the fact that
7 it's got to be authorized by both the U.S. Attorney
8 and the Attorney General, there will be proper use
9 of that particular departure language.

10 COMMISSIONER SESSIONS: I kind of thought
11 with the related question, because you talked
12 about--well, you talked about a number of things.
13 First you started with an argument that prosecutors
14 were going to be consistently applying the
15 guidelines. We then look at the fast-track system
16 that you're proposing, and essentially if the U.S.
17 Attorney and the Attorney General agrees to a
18 particular fast-track program, then there will be a
19 significant reduction in the guidelines in that
20 particular area, which, needless to say, suggests
21 that if one crosses the border in that particular
22 jurisdiction, one receives a substantially reduced

1 sentence. But if by chance one enters the United
2 States in an adjoining area which does not have a
3 fast-track program, then the sentence is very
4 different.

5 My question is: Is that inconsistent in
6 some way with the purpose of the guideline,
7 especially in light of the fact that a second part
8 of your argument is that there should be no
9 departures for any other grounds related to
10 immigration other than pursuant to a fast-track
11 situation? And then the secondary question, as I'm
12 speaking, is: Is this really wise? Because I
13 wonder if sophisticated alien-smuggling rings on
14 the border would, therefore, identify which
15 jurisdictions have the fast-track system and which
16 jurisdictions don't have the fast-track system and,
17 in light of the huge swing in possible sentences,
18 focus their efforts in one particular jurisdiction,
19 i.e., that jurisdiction that has a fast-track
20 system?

21 MR. MERCER: It's the department's
22 position that the Congress through the PROTECT Act

1 has said, in reviewing disposition of cases
2 particularly on the Southwest border, that in order
3 to have effective administration of justice, there
4 needs to be the authority for the Attorney General
5 of the United States to say when we're trying to
6 process X thousands of cases in Arizona, the only
7 way to accomplish the end is to have some
8 opportunity to have early disposition programs.

9 So my answer to the Chair really is that
10 the Commission doesn't have, as I read the statute,
11 a whole lot of discretion. The Congress has said
12 early disposition programs are authorized by this
13 language in the PROTECT Act and the Commission
14 needs to adopt something that would facilitate
15 this, as long as it's been authorized by the
16 Attorney General and the U.S. Attorney.

17 And in terms of your second question, I
18 think the answer is that if you--there are going to
19 be certain cases that may not be covered by a fast-track
20 program. That's going to be up to a
21 recommendation from the U.S. Attorney and, if it's
22 adopted, by the Attorney General. And whether

1 alien smuggling is going to be captured by that
2 early disposition program, I don't know. And I
3 imagine that there would be some variability from
4 district to district. It will be based upon the
5 particular crime problem in that state.

6 Now, in my district--I'm the U.S. Attorney
7 in a border district--we don't have an early
8 disposition program. We won't have an early
9 disposition program. If we have an alien-smuggling
10 case in Montana, that person will be prosecuted,
11 and there won't be any sort of a fast track. I
12 don't have the crush of cases that my colleague,
13 Mr. Charlton, has in the District of Arizona.

14 COMMISSIONER SESSIONS: The question was
15 less actually the fast-track system, because
16 obviously Congress has directed us to implement a
17 fast-track system. There's no question about that,
18 and we would follow that. But the second part of
19 your argument is that for those jurisdictions that
20 don't have a fast-track system, there should be no
21 grounds for departure. So that as a result, the
22 disparities between the fast-track jurisdictions

1 and the non-fast-track jurisdictions are
2 necessarily heightened by your position.

3 MR. MERCER: Right, and the Congress
4 clearly contemplated that. Congress clearly
5 contemplates as part of the PROTECT Act that some
6 districts may have a fast-track program and other
7 districts may not, and that there may be disparity
8 in a defendant in the District of Arizona when
9 compared to a defendant in the District of Montana.
10 But that's been clearly authorized by the PROTECT
11 Act and the notion that there are pressure points
12 in the Federal criminal justice system in which it
13 would just simply break down if we didn't have some
14 sort of flexibility.

15 And, again, there's going to be considered
16 judgment on this issue by both the U.S. Attorney
17 and the Attorney General as to whether it's
18 appropriate. But I think Congress has made a
19 policy determination that if those two thresholds
20 are met--the U.S. Attorney says we should have an
21 early disposition program based upon these factors,
22 and the Attorney General ratifies that--then there

1 is a judgment of the Congress that that's
2 appropriate.

3 CHAIRMAN MURPHY: I think the two Michaels
4 down here have questions.

5 COMMISSIONER HOROWITZ: I want to focus
6 still on the fast-track issue. One of the concerns
7 I have is this disparity among districts and how
8 they implement a program. Some do it through the
9 guidelines. Some engage in charge bargaining and
10 do it that way.

11 Is there any process at Main Justice to
12 try and regularize what the various districts are
13 doing? I'm concerned also, having been a
14 prosecutor in a district that had a significant
15 number of illegal immigration cases but did not
16 engage in any bargaining on these issues, that
17 given where the guidelines are now, you're talking
18 about potentially 50 percent or more difference in
19 sentences between them. And I would hope that the
20 department would try and regularize that process in
21 some way.

22 MR. MERCER: I think that's an important

1 observation and one that we're taking a look at
2 seriously.

3 COMMISSIONER O'NEILL: What about
4 circumstances--I mean, is it appropriate for--I
5 mean, clearly, I recognize that Congress has made
6 this call. But if, in fact, what we're looking for
7 is the consistent enforcement of Federal law, and
8 if it's appropriate for the Department of Justice
9 to be able to pick and choose--because there are
10 resource questions, obviously. As you point out,
11 the crush of cases dictates in the border districts
12 that we've simply got to have provisions that are
13 slightly different than cases we might have in
14 Montana or a district that perhaps doesn't face
15 that same crush of cases.

16 Is it then appropriate for the Sentencing
17 Commission to do much the same thing the Department
18 of Justice has done and allow for certain sorts of
19 departures in districts or in circuits that are
20 different, recognizing the same sort of resource
21 scarcity issues that they have and recognizing that
22 there are different sorts of pressure points that

1 different districts and different jurisdictions
2 will face?

3 MR. MERCER: Is there any way you can be--well,
4 let me answer it, and if there can be any
5 more specificity, then I'd be happy to take a
6 particular departure.

7 I notice in some of the work that the
8 Commission staff has done that the family ties
9 departure is invoked as a basis for a departure in
10 19 percent of the cases in the Second Circuit, of
11 the cases that involve departures.

12 Now, I think the premise of your question
13 is: Shouldn't we assume, based upon the fact that
14 we have this observation from the Second Circuit,
15 that maybe there are particular circumstances in
16 places like Vermont that would maybe make a family
17 ties departure more relevant? I don't think that's
18 right. I don't see how the rate in the Second
19 Circuit would be different on family ties departure
20 than it would be in the Sixth Circuit.

21 COMMISSIONER O'NEILL: What if we find
22 out, for example, that the Second Circuit

1 prosecutes a high number of white-collar fraud
2 cases given the fact that New York is a financial
3 center? And given those particular circumstances
4 where New York does far and away more than any
5 other district, say perhaps Chicago, in terms of
6 financial prosecutions, that there needs to be some
7 sort of--something taken into account for that
8 district?

9 MR. MERCER: It's the government's view
10 that you should be very troubled if that's a
11 finding that you observe in that the whole purpose
12 of trying to minimize unwarranted disparity of
13 similarly situated offenders is going to be
14 undercut to the extent that in the Second Circuit
15 you've got a bunch of people who are committing
16 fraud crimes that are somehow getting lower
17 sentences based upon family ties departures than
18 would occur in Chicago or on the West Coast.

19 COMMISSIONER O'NEILL: But in response to
20 Judge Sessions' question, isn't that precisely what
21 Congress has told us to do, at least with respect
22 to fast track, that we're required to make those

1 same sorts of considerations largely based upon
2 resource scarcity, nearly as I can figure out?

3 MR. MERCER: Well, I think Congress has
4 asked the Commission to do two things--well,
5 multiple things, but two of the key points are:

6 You need to be able to stretch your fast-track
7 program under 5K2.23 that allows, with U.S.
8 Attorney approval and Attorney General approval, to
9 have early disposition programs.

10 At the same time, they're saying to you
11 that you need to substantially reduce the incidence
12 of downward departures, and those things seem to--you know,
13 they're not mutually exclusive. They've
14 asked you to do both at the same time, and the
15 Congress has not expressed a concern that the early
16 disposition programs are going to create
17 unwarranted disparity that cannot be tolerated. In
18 fact, they seem to be saying we, based upon the
19 overall concerns of the criminal justice system,
20 are willing to introduce a certain amount of
21 inequity because it's the only way that the system
22 can function. But at the same time, they're saying

1 it is intolerable, or at least you should make a
2 significant attempt to try to substantially reduce
3 the incidence of departure because it is
4 contributing to unwarranted disparity in other case
5 categories.

6 COMMISSIONER O'NEILL: Does the department
7 have a target--

8 CHAIRMAN MURPHY: Commissioner Steer has a
9 question.

10 COMMISSIONER STEER: I wanted to ask a
11 question of Professor Goldsmith, which is, first,
12 this will sound more like a comment. I agree with
13 your analysis of the inadequacy or the erroneous
14 nature of the heartland standard. In fact, I would
15 go further. I think it has been problematic from
16 the outset because the Commission did not initially
17 write the guidelines purely from a statistical
18 analysis of prior cases but, rather, took into
19 account factors that were directed by the
20 Sentencing Reform Act itself. And as you well
21 know, over the years many other enactments of
22 Congress have directed that this or that factor be

1 added, which may not correspond to the presence of
2 that particular factor in the actual caseload that
3 is being prosecuted and sentenced to any--you know,
4 closely at all.

5 I guess my question--if you want to
6 comment on my observation, you may, but my question
7 really goes to your recommendation about amending
8 the statute to add these other things that the
9 court could look at. And it's really a two-part
10 question.

11 One, is it really necessary? Because
12 aren't the courts really doing that kind of
13 sentencing, courts, aren't they really going beyond
14 the four corners of the manual and looking at other
15 things now?

16 And, two, if the statute was so amended,
17 isn't there a danger, a risk that the focus would
18 shift from looking at those materials to ascertain
19 the factors that were taken into account to
20 actually a focus on the Commission's processes and
21 the adequacy of our processes? Did we have enough
22 hearings? Did we debate and consider enough a

1 particular issue? Which is not what I think the
2 framers of the original act had in mind at all.

3 MR. GOLDSMITH: Let me respond as follows:
4 First, if I could, I wanted to clarify a point
5 possibly raised by Judge Castillo's question of my
6 colleague.

7 I want to emphasize that the Commission
8 does need to respond to Congress. Obviously,
9 you've got the directive and you must do so.
10 That's just the nature of democracy, and there's no
11 getting around that. But the gist of my remarks
12 was that the type of comprehensive review that's
13 required to take care of departures comprehensively
14 and systematically simply can't be done in six
15 months' time. And I think that Feeney instead
16 poses a challenge to the Commission to better
17 articulate what it considered in formulating
18 guidelines. And if you do that--and my suggestion
19 is that you do that by broadening the scope of
20 materials available for courts to look to. That
21 will, in fact, produce a significant decrease and
22 bring it more within the parameters contemplated by

1 the Sentencing Reform Act initially.

2 To respond to Commissioner Steer's
3 questions directly, if a court is going beyond the
4 materials set forth in 3553(b), it's acting
5 improperly, and I think it makes itself vulnerable
6 to reversal. To the degree that a court looks to
7 materials that are not specified as within the
8 scope of what judges may consider in deciding what
9 the Commission used as the basis for formulating a
10 guideline, that is going to be a plain error and,
11 especially given the change in standard under
12 Feeney, I think will more readily produce reversals
13 of erroneous departure decisions.

14 With respect to your other concern, I
15 don't think that my suggestion goes to the quality--or has
16 any basis for a court to criticize the
17 quality of a Commission enactment. It doesn't give
18 rise to a qualitative review. It just broadens the
19 scope of materials that judges may look to in
20 deciding whether, in fact, the Commission
21 considered something, yes or no.

22 I know that on a few occasions I've gone

1 back to take a look at minutes of Commission
2 hearings, and they, in fact, allowed me to reach a
3 determination that the Commission did consider
4 something and obviously chose to reject it by not
5 including it in the guideline itself. And,
6 therefore, it really shouldn't have been a basis
7 for a departure. But unless you looked at the
8 minutes and could in turn use them in deciding
9 whether departure was appropriate, you're acting
10 outside the bounds of law.

11 So I think you're safe, and especially
12 since the Commission is not governed by the
13 administrative Procedure Act, I just don't see any
14 type of a concern that a court might say, well,
15 qualitatively the level of consideration wasn't
16 enough. The question really is whether the
17 Commission considered it adequately within the
18 meaning of 3553(b).

19 CHAIRMAN MURPHY: The Eighth Circuit just
20 ruled that it is governed by--I wasn't on the
21 panel, but that it is governed by the APA.

22 MR. GOLDSMITH: You know, that's another

1 example of what happens when the only people that
2 read my law review articles are my mother and my
3 sister.

4 [Laughter.]

5 MR. GOLDSMITH: They're just wrong.

6 CHAIRMAN MURPHY: Well, Judge Castillo has
7 his hand up. You've got just a minute or two more.

8 COMMISSIONER CASTILLO: Okay. I just want
9 to say this: One, a lot of statistics have been
10 bandied about. I have to say, just as one
11 Commissioner, the more I dig into this data, the
12 more questions I have about the reliability even of
13 the reported data. So the one good thing that can
14 come out of this PROTECT Act is probably more
15 reliable data in the future.

16 But as we've talked about--and this
17 question is going to be addressed to either of our
18 panelists--reducing and especially substantially
19 reducing the non-cooperation departure rate, does
20 the Department of Justice or, former Commissioner
21 Goldsmith, do you have in mind what that rate is?
22 Commissioner Goldsmith, you said "as originally

1 contemplated." Do you know what rate that is?
2 Does the Department of Justice have a rate in mind
3 as to what the non-cooperation downward departure
4 rate should be nationally?

5 MR. GOLDSMITH: I think it ought to be
6 less than what it presently is.

7 [Laughter.]

8 MR. GOLDSMITH: You're all laughing and
9 that's fair enough. But--

10 COMMISSIONER CASTILLO: I'm not laughing.

11 MR. GOLDSMITH: I was surprised, frankly,
12 when I saw that the rates were as high as they were
13 because I think clearly the Reform Act and the
14 Commission originally contemplated that departures
15 would be reserved for unusual circumstances, and no
16 one really defined what was unusual. But I would
17 imagine it would be somewhere in the range of 10
18 percent--10 percent, 5 percent. I mean, the
19 article which you referred to--

20 COMMISSIONER O'NEILL: That's the
21 appropriate range, 10 percent, 5 percent?

22 MR. GOLDSMITH: Five to 10 percent

1 departure range I think would be acceptable. When
2 your departure rate is higher than that, then
3 you're basically saying every case is above
4 average, every case is unusual. And that strikes
5 me as inappropriate.

6 MR. MERCER: I want to talk a little bit--without
7 giving a specific answer on the rate, I
8 want to talk about a couple things I think the
9 Commission has really got to worry about in doing
10 this. I'm not sure that it's going to be feasible
11 for the Commission to look at the national average.
12 When I look at the data, when I look at the spread
13 sheet, the thing that jumps out at me is the
14 outliers. You've got a number of districts--and
15 this cannot be an aberration because it's year
16 after year after year--that have rates that exceed
17 20 percent. There are ten districts, or
18 thereabouts, that fit into that box for 2000 and
19 2001. So the first answer to the question is what
20 do we do to substantially reduce. You're going to
21 have to cut those in half in the short term.

22 The other problem you're going to have, I

1 think, from a data perspective--I know there is
2 some suggestion in some of the public comment that
3 the Commission should try to take that national
4 number and figure out what it is today and reduce
5 it by some percentage. Again, that doesn't address
6 this district-by-district problem. But what it
7 also doesn't do is, in my view, it doesn't take
8 into account Footnote 1, I think it's Table 26,
9 that says we're missing information on well over
10 4,000 cases where the PSR and the judgment do not
11 line up. And we can't figure out what happened in
12 those cases.

13 So you're reporting an 18.3-percent rate
14 for 2001, but you're missing departure data
15 potentially on 8 percent of the overall number
16 sentenced.

17 COMMISSIONER CASTILLO: You agree that
18 there is a data collection problem that might be
19 ameliorated by the PROTECT Act?

20 MR. MERCER: Oh, the PROTECT Act is going
21 to advance--it should advance this in a substantial
22 way, not only in terms of what the district court

1 will need to say about the basis for departure in
2 the judgment, but then the directive to the chief
3 judge to ensure that that information is
4 transmitted to the Commission, because you're
5 missing a huge subset of the cases.

6 COMMISSIONER CASTILLO: We're going to
7 have to close, and Judge Hinojosa hasn't had a
8 chance to ask a question. I know he has one.

9 COMMISSIONER HINOJOSA: I had two quick
10 questions for Mr. Mercer.

11 I guess the first one is: It's not the
12 Justice Department's position--or is it?--that fast
13 track in the PROTECT Act is limited to districts in
14 the Southwest border.

15 MR. MERCER: It is not.

16 COMMISSIONER HINOJOSA: Okay. The second
17 question is: Would it be the department's position
18 that if we adopted the specific language in fast-track
19 departure that's in the PROTECT Act, the
20 Commission would be prohibited from expressing some
21 viewpoint as to some of the factors that might be
22 considered by the U.S. Attorney and the Attorney

1 General as these positions change--they won't
2 always be the same individuals--that these are some
3 of the factors that should be considered in
4 deciding whether to approve and adopt a fast-track
5 program in a particular district or particular
6 area?

7 It's not addressed in the PROTECT Act, and
8 I just wondered if the department felt that the way
9 it's worded the Commission should not specifically
10 offer some opinion as to commentary about these are
11 some of the factors that should be considered by a
12 district in adopting a fast-track program, try to
13 keep them uniform.

14 MR. MERCER: Well, the uniformity in the
15 department's view will be achieved by virtue of the
16 fact that no program will be authorized without the
17 authority--without the authorization of the
18 Attorney General of the United States. And we
19 believe that that internal policy will result in
20 effective programs and programs that have a
21 significant amount of deliberation in terms of what
22 goes into them before they're authorized.

1 COMMISSIONER HINOJOSA: But that would
2 depend on the individual who holds that position as
3 opposed to a general set of principles, I take it?

4 MR. MERCER: Well, certainly whoever
5 serves as Attorney General will be in a position to
6 authorize or refuse to authorize. But I think it's
7 our view that that authority within the PROTECT Act
8 not only will authorize this program, but it will
9 delegate back to the Attorney General to make a
10 determination about what's appropriate and whether
11 it should be done.

12 But I agree with your assessment. There
13 isn't anything in the legislative language,
14 legislative history that limits the scope of that
15 to just the Southwest border.

16 COMMISSIONER HINOJOSA: But you still
17 don't--

18 CHAIRMAN MURPHY: Before you--

19 COMMISSIONER HINOJOSA: You won't express
20 an opinion as to whether we would have the
21 authority to--

22 MR. MERCER: I think I'd like to take a

1 look at that before I--I think that we should get
2 back to you on that request.

3 CHAIRMAN MURPHY: I realize that you think
4 you're off the hot seat, but there's popular demand
5 from this end of the table to be able to ask a
6 question about the presentence report.

7 COMMISSIONER HOROWITZ: I just want to ask
8 one question. We talked about data collection. Is
9 there a concern at the department about the data
10 collection with regard to presentence reports,
11 particularly with regard to cooperation,
12 information cooperators? And is there any effort
13 underway within the department on how to deal with
14 that in connection with the PROTECT Act?

15 MR. MERCER: In terms of...I think there
16 is a general concern about whether that--how that
17 information is going to be disseminated, and we
18 would like to work with the Commission and the
19 Congress in terms of making sure that there aren't
20 any sort of inappropriate disclosures in that
21 regard.

22 CHAIRMAN MURPHY: Okay. Thank you--

1 your question.

2 COMMISSIONER JASO: I guess the question
3 is: Is the rate--if there is an increase in the
4 rate of downward departures, or, frankly, of upward
5 departures, is that also a cause for concern? And
6 how should the Sentencing Commission react to it?

7 MR. GOLDSMITH: I think that the increased
8 rate is a concern, and it goes beyond what the
9 Sentencing Reform Act contemplated. My own view is
10 that the PROTECT Act, nevertheless, was an
11 overreactive response in a situation where Congress
12 really didn't carefully study this problem and has
13 put undue pressure on the Commission to respond in
14 a short time frame unrealistically. The true rate
15 is probably closer to about 23 percent, once you
16 take out substantial assistance departures, and
17 that I think is too high. But the answer is to
18 give judges more guidance, which is what the judges
19 have been asking for. I think there are ways of
20 doing that that simply require the Commission to
21 articulate the factors that it considered. And if
22 you do that, you will, again, broaden the range of

1 materials courts may look to, and in turn that will
2 serve to cut down the number of departures
3 substantially. It certainly will give appellate
4 judges more leeway and a better feel for knowing
5 when a departure was incorrect.

6 CHAIRMAN MURPHY: Thank you very much,
7 Professor Goldsmith, and thank you very much, Mr.
8 Mercer.

9 MR. GOLDSMITH: Thank you.

10 MR. MERCER: Thank you, Judge, and we look
11 forward to working with you, and we'll be at your
12 beck and call to provide any sort of further--

13 CHAIRMAN MURPHY: Well, we are going to
14 remember that quote.

15 MR. MERCER: Please do.

16 [Laughter.]

17 CHAIRMAN MURPHY: Okay. Then we'll move
18 on to the second panel: James Felman, who is the
19 Chair of our Practitioners Advisory Group, a very
20 active member of the criminal defense bar and very
21 helpful to the Commission; John Rhodes, who was on
22 detail to the Commission for a six-month period,

1 but he is gone now, but he is assistant public
2 defender in the District of Montana. We've got a
3 heavy representation from Montana here. And Jon
4 Sands, who is assistant Federal public defender in
5 the District of Arizona and chairs the Federal
6 Sentencing Guidelines Committee for the Federal
7 Public and Community Defenders, and is also a
8 member of our Native American Advisory Group, a
9 frequent contributor.

10 So we'll start in the order in which we've
11 just listed people. Mr. Felman?

12 MR. FELMAN: Thank you, Judge Murphy and
13 members of the Sentencing Commission. On behalf of
14 the Practitioners Advisory Group, of course, we
15 always appreciate the opportunity to express our
16 views and to be of whatever assistance we can.

17 I must say, however, that I am utterly
18 chilled by Professor Goldsmith and am tempted to
19 think that I should not open my mouth for fear that
20 anything that I say, given that it likely will not
21 be enacted, will then be evidence that the
22 Commission considered it and rejected it.

1 [Laughter.]

2 MR. FELMAN: So I'm going to specifically
3 ask that you do not now or ever take into
4 consideration anything I ever said.

5 [Laughter.]

6 COMMISSIONER JASO: Consider yourself
7 immunized.

8 COMMISSIONER O'NEILL: That testimony was
9 brief.

10 [Laughter.]

11 MR. FELMAN: Having given that proviso,
12 let me begin by agreeing with Mr. Mercer. I agree
13 with Mr. Mercer fully when he says that the tasks
14 now before the Commission--

15 CHAIRMAN MURPHY: Are you trying to ruin
16 his reputation?

17 [Laughter.]

18 MR. FELMAN: I agree with him when he
19 says, and I quote, that "the task now before the
20 Commission includes some of the most significant
21 issues it has had to address since the guidelines
22 system was first established." I think he's right

1 about that.

2 It compels me, however, to observe that
3 the process by which the Feeney amendment to the
4 PROTECT Act was enacted, calculated as it was to
5 avoid any significant debate or discussion of any
6 of its critically important provisions, was
7 antithetical to every principle for which our
8 nation stands. It was, in a word, un-American.

9 Having said that, it is the law, and the
10 Commission must comply with it, and the only useful
11 topic of today's hearing is how best to do so.

12 When I turn to the task at hand, the act
13 doesn't tell us what downward departures are to be
14 reduced. And in light of the process by which it
15 became law, I'm simply unaware of any study or data
16 that would give us any understanding of why
17 Congress sought to reduce the departures or what
18 types of departures it wants reduced, other than, I
19 assume, non-substantial assistance and non-fast-track.

20 So I must say that I feel like the task at
21 hand much resembles a solution in search of a

1 problem. I don't know where to look first for the
2 problem that we're supposed to be solving. I feel
3 compelled to respond first to the suggestion from
4 Mr. Mercer in his submission that we should simply
5 eliminate all unmentioned factors as grounds for
6 departure, and that we should take all of the ones
7 that are mentioned and make them highly
8 discouraged, and we should take all the ones that
9 are encouraged and put them all in one place, so
10 that presumably we can slowly get rid of them, too.

11 And it strikes me that I think we need to
12 remember how utterly integral departures have to be
13 to a just sentencing process. It just seems every
14 day, as I practice law, that human behavior is so
15 diverse as to be beyond our imagination. How
16 frequently those of us who are participants in the
17 criminal justice system do we say to ourselves,
18 "Truth is just stranger than fiction"?

19 The result of that is that justice suffers
20 greatly where it is driven exclusively by a set of
21 rules that are written down in advance. The
22 achievement of human justice in the sentencing of

1 criminal behavior calls into play a mix of
2 information so rich that there are times when it
3 must best be described as art and not science.
4 There are and there always will be cases in which
5 justice can only be achieved through a departure
6 from the guidelines.

7 So I say that not because it's somehow
8 optional to substantially reduce their incidence.
9 You have to do that. But I think as you do so, we
10 want to be very careful not to eliminate them.
11 They are important to the twin goals of uniformity,
12 and it's not just making sure that similar cases
13 are treated alike. That's pretty easy. The
14 difficult one has always been to make sure that
15 different cases are treated differently. What
16 makes it so hard is how to describe what makes a
17 case and an offender different from one another,
18 but it is an endeavor we must undertake.

19 So I simply could not support ever getting
20 rid of all the unmentioned grounds or converting
21 mentioned ones into adjustments. You'll never be
22 successful there. And so instead, I think we have

1 to look for something else, and the proposal that
2 seems easiest--and, you know, given the limited
3 period of time, my fear is that that is all we'll
4 ever do--is to just take out the source book and
5 list--you know, look at the list on page 52 of the
6 reasons for downward departure, figure out which
7 ones are used the most, and let's limit them, and
8 that will cut out a bunch of them and then our
9 numbers will look better.

10 You know, you can look at it quickly, and
11 you can see that general mitigating circumstances
12 is listed a lot. Pursuant to plea agreement,
13 whatever that is, is listed a lot. And criminal
14 history being overstated is listed a lot.

15 But before I get to what I call that
16 categorical approach, I agree--and I'm serious
17 about this--with Mr. Mercer about the geographic
18 disparity. And you'll never be able to do that in
19 the time that's allowed, and so I think what you
20 have to do is do whatever you need to do to satisfy
21 Congress in the short term, but maybe they'll live
22 with a little bit less in that regard if you tell

1 them the real issue here is in some sense
2 geographic disparity.

3 I practice law in the Middle District of
4 Florida where the incidence of other downward
5 departures is 6.6 percent, and there's not a whole
6 lot of playing around in the guidelines. There is
7 from time to time, but not typically. The judges
8 just simply don't depart downward, and they follow
9 the law and they apply the guidelines as they're
10 intended in most of the cases, I believe.

11 The overall departure rate in the Second
12 Circuit was 20 percent, triple the rate in my
13 district. And I'm not pointing fingers there, but,
14 I mean, I just look at the statistics in New York.
15 In the Eastern District, the rate is 28 percent.
16 And if you go across the river to the Southern
17 District, it's 12 percent. What's going on there?
18 In Connecticut, it's 33 percent.

19 Just, you know, travel on out to the
20 heartland and look in Iowa. In the Southern
21 District of Iowa, it's 17 percent, which is twice
22 that of Northern Iowa, which is 8 percent. A

1 defendant in the Middle District of Alabama is four
2 times more likely to receive a downward departure
3 as a defendant in the Northern District of Alabama.

4 There are things out there in the field
5 that are happening, and I think we all know that.

6 Is that my timer? Okay. Well, let me
7 just mention that it's complicated because it's not
8 just obviously the departure rates, because there
9 are other districts in which, quite candidly--and
10 I'm sure this is a dirty secret that nobody would
11 want me to say, but the judges have told the
12 probation officers: Don't look behind the plea
13 agreements. You can get a plea agreement, write up
14 the PSI so that it followed the plea agreement, and
15 just put in the impact of the plea agreement
16 section of the PSI what you think the guidelines
17 really are. Then the judge just sentences
18 according to the PSI, and everybody goes along with
19 that, and it doesn't even show as a departure.

20 So there are districts out there where the
21 departure rates are very low, but they're the same
22 sentences that are being achieved in sentences

1 where the departure rates are very high. The only
2 way you're really going to solve the problem of
3 getting rid of unwarranted downward departures, you
4 know, if they're out there--I mean, they're not
5 happening in my district, but if they're out there--is to go
6 out and really try to undertake and find
7 out what the actual practices are in these various
8 districts.

9 If you get to the categorical approach--and I'll
10 be happy to respond to questions about
11 that--the top two listed on there aren't even valid
12 grounds. General mitigating circumstances and
13 pursuant to a plea agreement are just simply not
14 valid grounds for a plea agreement. And so it just
15 seems to me that if you just nail that down, you're
16 going to get rid of a huge number of these. And it
17 may be that that alone would satisfy the Feeney
18 act, particularly in conjunction with the things
19 that the Department of Justice is doing.

20 The only other point that I would make is
21 that in Mr. Mercer's written materials, he has the
22 suggestion that this long list of grounds for

1 downward departure are fodder in virtually every
2 sentencing in a white-collar case. If you add up
3 every ground for downward departure he listed
4 there, it's like 3 percent of cases. They may be
5 fodder, but that's about all they are. It isn't
6 happening. And the best he can cite in support of
7 that is prosecutors report an ever increasing
8 number of cases where these departures are granted.
9 Well, who are these prosecutors? And what are the
10 cases they're reporting?

11 I could easily sit here in front of you
12 and say, well, defense attorneys are reporting an
13 ever decreasing amount of downward departures. It
14 sure feels that way.

15 And so, you know, these things are
16 meaningless. This is really at bottom all about a
17 power shift. Obviously, if a defendant can't get a
18 break from the judge, the only way they can get it
19 is from Mr. Mercer, and, you know, that is deeply
20 unfortunate. But it is truly what is at stake
21 here, I believe. And so I think the Commission
22 must follow the law. It must substantially reduce

1 the incidence of downward departure. I think in
2 the short term, it can make clear that the top two
3 leaders in those categories are not appropriate,
4 and there may be some things that eventually once
5 the recidivism study is done and criminal history
6 that could be done there. It sure would be a shame
7 to start tinkering with criminal history before all
8 that work is done. But that appears to be an area
9 in which there are a lot of departures, although
10 maybe there should be. Just because there's a lot
11 of them, that may be an indication that they should
12 be departures in that area.

13 These judges and prosecutors and defense
14 attorneys were not bad people trying to do bad
15 things. We're out there really trying to achieve
16 justice, and if departures are occurring, there's
17 probably a reason.

18 So, anyway, I've more than used my time.
19 Thank you.

20 CHAIRMAN MURPHY: Mr. Rhodes?

21 MR. RHODES: Thank you, Judge Murphy, and
22 thank you, Commission, for this opportunity to

1 comment on a decision which will literally impact
2 tens of thousands of individuals in nearly every
3 community in America. I'm obligated to preface my
4 remarks with a disclaimer that what I say are my
5 personal opinions and do not reflect my employer,
6 the Federal Defenders of Montana, or my current
7 workstation, the Administrative Office of the
8 United States Courts.

9 The focus for the Commission, and rightly
10 so, is the PROTECT Act directives, what the PROTECT
11 Act is telling the Commission to do. But in
12 considering that, it's also important to consider
13 what the PROTECT Act didn't do. It didn't change
14 the fundamental or guiding principles of the
15 guideline. 3553(b) remains. Where there are
16 circumstances not adequately considered by the
17 Commission in formulating the guidelines, the
18 district court, now subject to the appellate
19 court's de novo review, can depart.

20 The PROTECT Act didn't say do away with
21 fairness in sentencing. It didn't say do away with
22 flexibility in individualizing sentences. And it

1 didn't say do away with uniformity.

2 That's important because when it's
3 suggested that there should be some sort of
4 mechanical or categorical ban on certain
5 departures, if that was to occur, it would do away
6 with uniformity because cases that were different
7 would be treated the same. It would also do away
8 with individualized sentencing, so in my opinion,
9 that's not the route for the Commission to go
10 because doing so would undermine the guidelines.
11 Instead, I agree with the comments of Professor
12 Goldsmith and of Mr. Felman that specificity is
13 what the Commission should focus on.

14 The PROTECT Act is encouraging the
15 Commission to reduce unwarranted or unlawful
16 departures, and I believe by expounding upon the
17 specificity requirement now at 3553(c), the
18 Commission can do that. Specificity will not only
19 be important, as Professor Goldsmith alluded to, in
20 guiding the judges, what I would call guided
21 discretion, not only for the district court judges
22 in making the initial departure decision, but also

1 for the appellate judges in reviewing that
2 decision; it's also going to benefit the Commission
3 because it's going to provide for reportable
4 departures that the Commission can utilize in
5 reviewing the departures, studying the departures,
6 and moving forward.

7 My specific recommendation to the
8 Commission is that it create a new guideline or
9 policy statement, as I said, expounding upon the
10 specificity requirement in the PROTECT Act. And I
11 would suggest that that either be as an amendment
12 to Section 5K2.0 or perhaps as a new guideline or
13 policy statement at 5L. And I believe that the
14 specificity requirement which is now in 3553(c) can
15 only be achieved if the courts articulate exactly
16 why the offender or offense characteristic is so
17 unusual that a departure is warranted, and in doing
18 so not only will the courts comply with 3553(c),
19 but they're also complying with 3553(b).

20 The courts should not only have to be
21 specifying the facts that warrant the departure,
22 but in categorizing the departure, if the district

1 court chooses to do so, be it at their oral
2 sentencing hearing or in the written judgment, it
3 should have to be specific and can no longer fall
4 back on the general mitigating circumstances or
5 pursuant to plea agreement catch-all provisions, as
6 alluded to by Mr. Felman. And I think the
7 Sentencing Commission can help guide the courts in
8 being specific by including language in Chapter 5,
9 be it in 5K2.0 or 5L, forcing the courts to do so
10 and making it clear that if the courts don't do so,
11 the departure is going to be reversed on appeal.

12 Outside-the-heartland departures are a
13 good example of this. The circuits--and they've
14 done so in different fashions, and perhaps that's
15 something the Commission needs to consider. But
16 the circuits have directed the district courts on
17 how to proceed in outside-the-heartland departure
18 analysis. My case *United States v. Parrish* is such
19 an example where the district court was affirmed
20 because the district court judge did exactly what
21 the Ninth Circuit had prescribed in previous case
22 law. And I think that something the Commission

1 should consider is looking at how the circuits have
2 prescribed outside-the-heartland analysis and
3 incorporating that into the guidelines.

4 I also think in this new guideline or
5 policy that I'm suggesting, the Commission should
6 ban vague departures, not only in the general
7 sense, which would, as I say, reflect the
8 specificity directive from Congress, but also in
9 the specific sense of banning departures such as
10 pursuant to plea agreement or general mitigating
11 circumstances.

12 A couple others on the list from the 2001
13 statistics that may not meet the specificity
14 requirement or this new departure--or new guideline
15 language that I'm suggesting would be time served
16 or sufficient punishment. To me, those are a
17 shorthand euphemism for outside the heartland.
18 Require the district court to engage in that
19 specific analysis. Doing so will force defense
20 attorneys, such as the three of us sitting here, to
21 provide the specific facts that show pursuant to
22 3553(b) that there are circumstances that haven't

1 been adequately considered by the Commission in
2 formulating the guideline, and it will also reflect
3 the new Ashcroft memorandum, which, as I see it, is
4 a directive to the AUSAs to be more vigilant. To
5 me, with this new, what I would generally call
6 guided discretion, the Commission can substantially
7 reduce the incidence of departures.

8 My sense is that the criminal history
9 departures are in the cross hairs, so I feel
10 compelled to comment on those.

11 First, they should not be banned
12 categorically. As the Commission has reflected in
13 its previous deliberations, the reason that such
14 departures are identified in the guideline as being
15 possible both upward and downward is because of the
16 disparate sentencing practices in the states. And
17 should the Commission ban categorically such
18 departures, it would not reflect the reality of
19 what every lawyer and certainly every defendant
20 knows how things operate in the state court
21 systems.

22 So, instead, I would suggest that the

1 Commission guide the calculation that district
2 courts undertake in reaching the extent of the
3 criminal history departure, and specifically, the
4 Commission should require the district courts to
5 specify exactly which conviction warrants reduced
6 criminal history points, why that reduction is
7 justified, and why the precise amount of that
8 reduction is justified.

9 A further step if the Commission wants to
10 be more strict in its guidance to the district
11 court is to say that reductions are only justified
12 to a certain degree. For instance, if it's a
13 three-point felony conviction, then it can be
14 reduced to no more than two points in calculating
15 the criminal history category. Or if it's a two-point
16 conviction, it can only be reduced to one
17 point. Or if it's a one-point conviction, it can
18 result in only a lowering of one criminal history
19 category. That's a specific example of the type of
20 guided discretion that I feel the Commission should
21 provide to the district court and appellate judges
22 in meeting Congress' directive.

1 I would just emphasize and encourage the
2 Commission to undertake general guided principles
3 to direct the courts because I fear that if the
4 Commission takes the more draconian step and does
5 what the Department of Justice is encouraging and
6 categorically bans departures that otherwise comply
7 with the law, then the very purpose of the
8 guidelines--rationality, certainty, fairness, and
9 uniformity--are going to be undermined.

10 Thank you.

11 CHAIRMAN MURPHY: Thank you, Mr. Rhodes.

12 Mr. Sands?

13 MR. SANDS: I have seven questions,
14 hopefully some answers, and a Lego set to address
15 the PROTECT Act. The seven questions are for the
16 seven Commissioners.

17 First, has the PROTECT Act changed the
18 Sentencing Reform Act? Short answer: No. The
19 PROTECT Act, they tweak it, might try to refine it,
20 but it doesn't change the underlying ground rules,
21 which is that we have a guideline system and the
22 departures allow the flexibility, guided

1 discretion, that judges exercise with the help of
2 Mr. Mercer and the Department of Justice and
3 defense counsel.

4 Second, why haven't they been changed?

5 Well, once again, the Congress in passing the
6 PROTECT Act emphasized that there had to be a
7 transparency. It seems that the PROTECT Act is
8 saying that they want an accounting. They want to
9 know why departures are done. They want to know
10 statistics. But they aren't saying category no for
11 this or no for that. They want reasons, and we're
12 here to help with that.

13 What has the PROTECT Act done? It has
14 addressed certain offenses--kidnapping, sexual
15 offenses--made changes there, and it questioned
16 departures by requiring reasons and specific
17 reasons for that, which has been a theme from the
18 previous panelists. What the PROTECT Act is doing
19 is saying judges can exercise a discretion, but we
20 want to know why and we want the Commission to
21 justify these reasons.

22 Four, what must the Commission do?

1 Obviously, act on the PROTECT Act. It has to study
2 it, but it has to study--it has to study the
3 departures, it has to act within the context of the
4 principles of the Sentencing Reform Act and what
5 the Commission has done in the past. It has a
6 database. It can examine the data. It can
7 understand why departures are being done, for what
8 reasons, what factors are inappropriate, what
9 factors are appropriate, but to categorically take
10 out sections does no one any good. So the
11 Commission must study them, and the Commission must
12 understand that there are certain what I call mushy
13 grounds that can be taken away. These grounds
14 particularly are pursuant to a plea agreement or
15 the unspecified reasons. The PROTECT Act is
16 requiring specific reasons, and I dare say most of
17 this are fast-track in nature. The District of
18 Arizona has approximately 2,500 to 3,000 cases a
19 year. The vast majority of those are immigration.

20 In Tucson, the reason for the fast track
21 is pursuant to a plea agreement. In Phoenix, an
22 hour and a half away, the reasons are 5K2.0, a

1 totality of circumstances. But both of those are
2 really dealing with the same thing, which is the
3 fast track, which the Department of Justice and the
4 PROTECT Act both bless. If we can deal with the
5 fast track and get to that, the departure rate will
6 drop dramatically.

7 Now, five, we have to be wary of just
8 numbers, and Mark Twain once said, "There are lies,
9 there are damn lies, and there are statistics."
10 And so I'm about to enter into that fray.

11 What I have in front of me, Legos, which I
12 borrowed from my child and which got me through the
13 metal detector at the airport, is the total number
14 of cases. The yellow are the sentencing within the
15 guideline range; the red is substantial assistance
16 controlled by the Department of Justice; and the
17 green are the other departures. And you can see in
18 this visual that the departures not authorized by
19 the Department of Justice is not dominating the
20 color landscape.

21 Now, in terms of category approach, if we
22 take--people have mentioned that criminal history

1 is one of the top three. But that is just looking
2 at criminal history as a percentage of the
3 departures itself. If you look at it as total
4 number of departure cases, because every case has a
5 criminal history--a person is either 1 through 6 or
6 above--you will see that it's that small green
7 block which represents 1,250 cases against that
8 whole block.

9 Turning it around, let's ask questions.
10 What would be, for example, aberrant behavior? It
11 would be the sixth prong block in--

12 COMMISSIONER SESSIONS: Is that before or
13 after the changes to the aberrant behavior
14 guideline?

15 MR. SANDS: It's 2001, so we're two years
16 in the past. Now it would go down because we have
17 narrowed it for those districts.

18 Green would be diminished capacity. This
19 is a slight two-prong Lego. You can see that. And
20 this little--

21 COMMISSIONER O'NEILL: Are these Legos for
22 sale?

1 MR. SANDS: --although unseeable, is age.
2 So you can see that departures, when you look at
3 the whole range, is not overwhelming.

4 And, for example, since fast track is
5 controlled by the government, as Mr. Mercer made
6 abundantly clear--DOJ has to approve it and the
7 U.S. Attorney--we should actually take half of
8 these, which would be the immigration, and move it
9 to the substantial assistance or the government-controlled
10 block. And you can see then that the
11 departures actually go to that magical, mystical,
12 wonderful 5 to 10 percent that was mentioned by the
13 previous panel.

14 This shows you that departures are not
15 overwhelming and that by taking the PROTECT Act's
16 mission of using specific reasons, the Commission
17 can get down to it.

18 The final two questions are:

19 What about the Department of Justice?
20 Interesting. What the Department of Justice is
21 trying to do is take all the discretion to itself.
22 It wants to control the 5K1s, which they do now,

1 substantial assistance. They want to control the
2 fast track, but no one else, principally judges,
3 can control that discretion.

4 Finally, can the Commission stay true to
5 its principles and deal with the PROTECT Act? Yes,
6 but only if it does the changes with the principles
7 that it came with set out in 3553: that sentences
8 not be higher than necessary, that they look at the
9 data, and that they understand that flexibility and
10 departures are an integral part of the guidelines.

11 Thank you.

12 CHAIRMAN MURPHY: You have a question
13 about the Legos?

14 [Laughter.]

15 COMMISSIONER STEER: My son would have
16 been very pleased to--he'd probably offer up his
17 box.

18 A question along this specificity theme.
19 First, I commend each of you as a skilled advocate
20 for the defense, for being willing to step up to
21 the plate in the future and advocate with
22 specificity for reasons for departure. In that

1 area, what would you think of similar changes in
2 the criminal history area that would require the
3 court, in essence, in identifying a downward
4 departure for overstatement of criminal history to
5 state with greater specificity what aspects of the
6 criminal history score, in terms of prior
7 convictions or other aspects of the score, such as
8 recency or whatever, cause the criminal history to
9 be overstated? Do you think you could apply the
10 specificity principle in that area?

11 MR. SANDS: Not only apply it, we would
12 embrace it. It's one of those things that we do,
13 Judge--

14 COMMISSIONER STEER: I'm not a judge.

15 [Laughter.]

16 MR. SANDS: I'm so used to making the
17 argument and putting on evidence and spending hours
18 convincing a court that a prior conviction that was
19 for theft and was one point was really just two
20 points that the person shoplifted, bringing in
21 witnesses. This is something that defense counsel
22 and the government seeking upward departures can

1 and should do. It serves no one--the Commission,
2 society, the defendant, or the government--any good
3 to go in there and not make a specific finding and
4 a specific argument. We will be more than happy to
5 submit our proposed findings of fact and
6 conclusions of law.

7 COMMISSIONER STEER: Thank you.

8 CHAIRMAN MURPHY: Commissioner Sessions?

9 COMMISSIONER SESSIONS: First, I've got to
10 ask--I mean, I was a trial lawyer for a long time.
11 I never used Legos. Do you use Legos in Arizona
12 during your summations?

13 MR. SANDS: It's very good for DNA.

14 [Laughter.]

15 MR. SANDS: So if you want your expert to
16 be intelligible to the jury, you give each jury a
17 baggie with the colors of DNA, and the expert
18 builds it, and everyone understands and your client
19 goes home and doesn't have to face the guidelines.

20 [Laughter.]

21 MR. SANDS: It lightens the appellate
22 load, too.

1 COMMISSIONER SESSIONS: Well, let me ask
2 it to the whole panel, a broad-based question, and
3 maybe it requires your thinking in a little bit
4 different way. But what do you think about the
5 possibility of looking at, let's say, offender
6 characteristics in 5H or criminal history category
7 and looking at the criminal history, and rather
8 than leave open the issue of a court's ability to
9 depart, put those factors right within the
10 guidelines and then give the court the authority to
11 adjust an offense level or a criminal history level
12 within a small range, and then indicate that in all
13 other situations those factors should not or should
14 be severely discouraged?

15 MR. SANDS: That's an interesting--

16 COMMISSIONER SESSIONS: What do you think
17 about that?

18 MR. SANDS: I like it a lot. I like it a
19 lot because it goes to Mr. Mercer's concerns and
20 raised by Mr. Felman about the geographic
21 differences. You have adjustments. It will be
22 across the board from California to New York with

1 similarly situated defendants. The Commission can
2 also focus and graduate certain factors.

3 Let's just take immigration, for example.
4 If you wanted to do an adjustment for cultural
5 assimilation, the Commission can figure out the
6 factors that it feels are important or factors that
7 shouldn't be included, and that could be an
8 adjustment. A similar adjustment could be for
9 criminal history or for other aspects. But the
10 graduated approach, which this Commission has done
11 recently in aberrant behavior in immigration, seems
12 to work well and you get a more individualized
13 sentence.

14 COMMISSIONER SESSIONS: But you understand
15 the second part of that, perhaps the part that you
16 would not be particularly in favor of, would be a
17 severe restriction on departures. So that
18 basically if you are using, let's say, family
19 circumstances as an example or some other factor,
20 like a particular criminal history category, you
21 can adjust that within a limited range without
22 departing, but then the departures would be

1 extraordinarily discouraged from that point
2 forward.

3 In that world, do you think that's a
4 better world than today or a worse world?

5 MR. SANDS: As a policy matter, it would
6 be a better world because then Mr. Felman's clients
7 could probably take advantage of it, and my
8 clients, and Mr. Rhodes. If I had an individual
9 right here, then I would argue that he or she may
10 possess those extraordinarily difficult
11 circumstances. But an adjustment is transparent.
12 It gets the factors out. The Commission can
13 consider it, and courts of appeal can review it.
14 We would be in favor of adjustments, especially
15 large ones.

16 [Laughter.]

17 CHAIRMAN MURPHY: Judge Castillo, then
18 Commissioner O'Neill.

19 COMMISSIONER CASTILLO: One of the things
20 we're confronting is a quickly evolving world, as
21 we have data that is, at best, incomplete; now the
22 PROTECT Act which should lead to more complete

1 data; and just recently, in the last two weeks, the
2 Attorney General implementing the PROTECT Act.

3 Since all three of you are experienced
4 criminal defense attorneys, what's your view as to
5 what is going to be the effect now of the Attorney
6 General's policy as written on downward departures?

7 MR. FELMAN: I think the judges are going
8 to read the policy and they're going to know that
9 as long as they depart two levels and not three,
10 they're likely okay, as long as they keep putting
11 the person in prison for some period of time.
12 They're going to read the memo, and they're going
13 to say as long as I stay within the DOJ guidelines,
14 they're not going to have to report me.

15 And so it's yet another example of the
16 department basically aggregating authority. I
17 think that's what's going to happen, although in my
18 district it won't happen much, anyway. I mean,
19 I've seen three departures in my career in 15
20 years--not for lack of trying. And the idea that I
21 would go in there and argue an unspecified route
22 for departure, I can't even imagine it. You know,

1 go in there and say, "I want a downward departure
2 on general mitigating circumstances," I'd get
3 laughed out of court.

4 But, anyway, to answer your question, yes,
5 I think it will have directly that effect. It will
6 limit the instances in which departures--I think
7 the mood in the courthouse in my district right now
8 is departures are bad, Congress said so, so we're
9 going to get our 6.6 percent down to, you know, 2.2
10 percent, or whatever. But in the instances in
11 which they are willing to depart, they're going to
12 look at that memo, and that's going to guide what
13 they do.

14 MR. RHODES: Your Honor, I would add, I
15 think there's going to be decisions made in
16 individual U.S. Attorney's Offices, and even more
17 specifically with each AUSA, of how much they want
18 to play Main Justice's game. In other words, if
19 that AUSA is in a case--and I've had these cases
20 previously in Montana; no longer are they permitted
21 to do this--where they feel that a departure is
22 warranted and they feel the facts are so unusual

1 that the right, just thing to do is to tell the
2 district court that, they're going to have to make
3 a decision. Do they want to do that, perhaps
4 jeopardizing their future in their current
5 position? Or would they rather, as I say, play the
6 Main Justice game, oppose it, even though they
7 personally disagree with that position? And I
8 think those decisions are going to be made both in
9 the U.S. Attorney's Offices at a management level
10 and then specifically by each AUSA.

11 CHAIRMAN MURPHY: Commissioner O'Neill--oh, go
12 ahead.

13 MR. SANDS: Most of the time, Judge, the
14 departures are given with the consent of the
15 government. The government recognizes that there
16 are issues or problems with their case or justice
17 needs to be done. This is especially true in
18 border states, especially true in states that have
19 specialized jurisdiction, like Indian country.

20 CHAIRMAN MURPHY: Commissioner O'Neill?

21 COMMISSIONER O'NEILL: Mr. Felman's
22 testimony, at least initially, had me pretty well

1 convinced that the Department of Justice's position
2 was absolutely right. Isn't part of what we're
3 trying to seek here the uniform and consistent
4 enforcement of Federal law without regard for
5 individual jurisdiction? And I guess I'd like to
6 turn the question a little bit. How much in your--as has
7 been pointed out, you're all very
8 experienced criminal defense lawyers, and if the
9 sort of baseline notion is that we want to treat
10 like cases alike, we want to make sure that similar
11 offenses of conviction with similarly situated
12 defendants are basically given roughly equivalent
13 sentences, how much do things like acquitted and
14 relevant conduct that come in at sentencing that
15 are not subject to the conviction--not subject to
16 the charge of conviction, how much does that, do
17 you think, lead to inconsistency in terms of
18 results among defendants that you've had just in
19 your personal experience?

20 MR. FELMAN: First of all, you have to
21 remember the other half of the equation that I
22 always stress, which is not just making sure that

1 similar cases are treated alike but that different
2 cases are treated differently. And that's been my
3 consistent frustration, because I repeatedly find
4 factors that I find overwhelmingly relevant that
5 are simply not in the guidelines and that
6 dramatically impact on the culpability of the
7 offender, such as whether the defendant got any of
8 the money. And I've told you that before. You
9 know, to me that's relevant, not in the guidelines,
10 and, you know, I have to ask for a departure on
11 that if I can get it.

12 I don't know if that--what was the rest of
13 the question?

14 COMMISSIONER O'NEILL: Basically, does the
15 use of uncharged or acquitted conduct relevant in
16 terms of sentencing, does that enter in,
17 inconsistency ultimately--

18 MR. FELMAN: My clients can't go to trial,
19 so there's never any acquitted conduct because the
20 threat of what they would get if they went to trial
21 is usually overwhelming; although occasionally they
22 do, they're not acquitted of much.

1 In terms of relevant conduct, that's where
2 all the bargaining is. You know, if you play ball
3 and you do the deal, they'll say, well, we'll limit
4 your relevant conduct to this period of time, and
5 we'll assume that the loss amount is this amount.
6 But if you go to trial, the relevant conduct is
7 going to be this.

8 And so that's where the relevant conduct
9 comes into play. It's like a huge hole in the
10 bucket. I mean, procedurally, of course, it's--and
11 I've talked about this before, too. The relevant
12 conduct is sort of, to some extent, whatever they
13 want to tell me it is because I have no right to
14 discovery and I have no access to any facts other
15 than what they want to tell me, for the most part.
16 And so relevant conduct is very malleable and
17 pliable. It leads to tremendous disparity.

18 MR. SANDS: Relevant conduct is the
19 cornerstone that the guideline says, one author has
20 scholarly termed it. But what has happened is that
21 relevant conduct has been eroded through cross-references.
22 Be that as it may, courts have come

1 back, at least some circuits, by imposing a higher
2 standard of proof. When there's cross-references,
3 that leads to unjust or a disparate sentence.
4 Relevant conduct is something that is in play in
5 any plea negotiation and in any sentencing.

6 MR. RHODES: I deal with the same small
7 pool of AUSAs and probation officers in every case.
8 So my experience, relevant conduct, for instance,
9 is consistently applied in my cases, the problem
10 being you get a different small pool of AUSAs and
11 probation officers in some other part of the
12 country and relevant conduct may be approached from
13 a very different angle.

14 And so I'd say within my division, within
15 my district, it's consistently applied, but I
16 seriously doubt if you could extrapolate that to
17 the country as a whole.

18 COMMISSIONER SESSIONS: Do you think the
19 Attorney General's regulations now will impact
20 that? They're supposed to.

21 MR. SANDS: No, Judge. Each district is
22 different. Each situation is different. And from

1 what I understand, there has been a dissent in the
2 ranks, and Main Justice may have a facade, but out
3 in the field things are very different.

4 MR. FELMAN: I didn't read anything in the
5 memo that was going to change anything that
6 prosecutors did much. I think that what will
7 change is what the judges do, as I mentioned
8 earlier. The memo allows prosecutors to agree to
9 departures that are supported by the law and the
10 facts. I'm sure they would never do otherwise. So
11 if they want to agree to a departure, they can.

12 CHAIRMAN MURPHY: Any other questions?

13 [No response.]

14 CHAIRMAN MURPHY: Thank you very much for
15 an enlightening and enjoyable presentation.

16 MR. RHODES: Thank you.

17 MR. SANDS: Thank you.

18 MR. FELMAN: Thank you.

19 CHAIRMAN MURPHY: When we go for our
20 hearing in Congress, maybe we'll borrow your Legos.

21 [Laughter.]

22 CHAIRMAN MURPHY: Well, Judge Hamilton,

1 you are there on the hot seat all by yourself. We
2 really appreciate your coming. Judge David
3 Hamilton from the Southern District of Indiana and
4 a member of the Criminal Law Committee of the
5 Judicial Conference of the United States.

6 JUDGE HAMILTON: Judge Murphy and members
7 of the Sentencing Commission, I did not bring any
8 visual aids. However, on behalf of the Judicial
9 Conference Committee on Criminal Law, I appreciate
10 the opportunity to provide our views concerning the
11 Sentencing Commission's implementation of Section
12 401(m) of the Prosecutorial Remedies and Other
13 Tools to End the Exploitation of Children Today Act
14 of 2003, also known as the PROTECT Act. The act
15 directs the Commission within 180 days of its
16 enactment to review the Sentencing Guidelines
17 grounds for downward departure, to amend the
18 guidelines to substantially reduce the incidence of
19 downward departures, to promulgate a policy
20 statement authorizing a downward departure of not
21 more than four levels if the government files a
22 motion to pursuant to an early disposition program;

1 and to make other conforming amendments, including
2 a revision of Chapter 1, Part A, and Policy
3 Statement 5K2.0 of the guidelines.

4 While the Sentencing Reform Act
5 revolutionized criminal sentencing in the Federal
6 system, it did not replace all individualized
7 sentencing decisions by judges, nor did it
8 eliminate all judicial discretion. The Senate
9 report that constitutes the principal legislative
10 history of the Sentencing Reform Act stated that
11 the purpose of the Sentencing Guidelines is to
12 provide a structure for evaluating the fairness and
13 appropriateness of the sentence for an individual
14 offender, not to eliminate the thoughtful
15 imposition of individualized sentences.

16 The ability to depart was an important, if
17 not the major vehicle to preserve this traditional
18 judicial function. As the guidelines themselves
19 repeatedly acknowledge in the offense conduct
20 provisions and the criminal history provisions,
21 there simply are too many relevant variables to
22 capture them all in the guidelines themselves.

1 Departures provide the flexibility needed to assure
2 adequate consideration of circumstances that the
3 guidelines cannot adequately capture.

4 Given the critical role that departures
5 play in the guidelines regime, the committee urges
6 the Commission to preserve, to the fullest extent
7 possible, the ability of judges to exercise
8 individualized judgment and to do justice in each
9 case before them. Historically, the Commission has
10 amended the guidelines only after careful
11 deliberation and study. The Commission, an
12 independent body of experts appointed by the
13 President and confirmed by the Senate, is best
14 suited to develop and refine Sentencing Guidelines
15 based upon its research and after examining a wide
16 spectrum of views.

17 Therefore, we defer to the Commission's
18 expertise on determining where it should focus its
19 efforts on implementing the specifics of the
20 PROTECT Act. As always, the committee will review
21 and comment, if appropriate, on specific proposals
22 the Commission publishes for comment.

1 Since Congress did not comprehensively
2 review downward departures before issuing its
3 directives to the Commission under the PROTECT Act,
4 Congress surely anticipated that the Commission
5 would develop a thorough understanding of the
6 underlying reasons for current departure rates
7 before changes are promulgated. We do not envy the
8 task of the Commission to complete this review and
9 promulgate guidelines within those 180 days.

10 The committee understands that the
11 percentage of downward departures has reportedly
12 increased in recent years. Various presentations
13 of the data suggestion that the downward departure
14 rate has increased anywhere from 10 to 20 percent.
15 By using highly selective data on a low number of
16 emotionally charged cases, accompanied by anecdotes
17 containing selective recitations of the facts from
18 carefully selected cases, an argument has been made
19 that downward departures are overused. Those
20 advancing this argument suggest that judges are
21 abusing their departure authority. This is not
22 true.

1 As I believe the Commission understands,
2 at the present time the percentage of downward
3 departures that are attributable solely to the
4 courts is unknown. We believe the percentage of
5 downward departures made over the objection of the
6 government is very low.

7 The Commission's data showed that about
8 half of all downward departures are pursuant to
9 substantial assistance motions filed by the
10 government, pursuant to Section 5K1. We also
11 believe that many non-substantial assistance
12 downward departures also occur pursuant to some
13 type of agreement with the government. These
14 agreements arise in a variety of ways. They can be
15 part of a plea agreement, including a binding plea
16 agreement, that cites specific grounds for a
17 downward departure, or a plea agreement that
18 indicates the government will not object to a
19 downward departure motion made by the defense.

20 Many non-substantial assistance downward
21 departures are also based on motions made at
22 sentencing. These include government motions

1 pursuant to early disposition or fast-track
2 programs that we have heard about today; government
3 motions that cite specific grounds for downward
4 departures; and defense motions for downward
5 departures. Separate and apart from formal
6 motions, a number of non-substantial assistance
7 downward departures arise at sentencing when the
8 government attorney agrees with defense counsel,
9 the probation officer, or the court that a
10 departure is warranted or the government does not
11 oppose a downward departure.

12 The committee believes that most non-substantial
13 assistance downward departures are
14 concentrated in a handful of courts, particularly
15 in the border districts. These departures often
16 occur in immigration and drug, primarily marijuana,
17 cases and are either initiated, supported, or
18 unopposed by the government.

19 If one seeks a dramatic reduction in the
20 rate of downward departures, the simplest solutions
21 would be restrictions on the use of substantial
22 assistance departures under 5K1 or on the use of

1 so-called fast-track or early disposition programs.
2 Obviously, however, there are substantial practical
3 reasons for not interfering with current practices
4 regarding these departures, which together make up
5 a substantial majority of all departures and which
6 were probably not the target of Section 401(m) of
7 the PROTECT Act.

8 Assuming that the target of Section 401(m)
9 is the minority of downward departures that are
10 neither proposed nor agreed to by the Department of
11 Justice, the complexity of this issue and the
12 importance of departures under the Sentencing
13 Guidelines make it imperative that any significant
14 adjustment to that authority be based on a precise
15 understanding of how the court's departure
16 authority has been used. By studying when courts
17 depart from the guidelines and by analyzing their
18 stated reasons for doing so, the Commission should
19 be able to more precisely refine the guidelines.
20 We're confident that the Commission will take these
21 issues into consideration as it confronts this
22 difficult task.

1 The committee is aware that the current
2 data collection efforts have not always yielded the
3 specific information that would be useful in
4 analyzing departures. As you know, the committee
5 is working closely with the Sentencing Commission
6 to help improve the quality of information that the
7 Commission receives from the courts.

8 We appreciate your support in our efforts
9 to revise the statement of reasons to facilitate
10 better documentation of sentencing departure
11 actions taken by the courts. We also look forward
12 to working with you at the upcoming National
13 Sentencing Policy Institute and other judges
14 conferences to alert judges to the importance of
15 the statement of reasons and the Commission's heavy
16 reliance on its accuracy.

17 We understand that the Federal Judicial
18 Center will develop needed training to educate
19 court staff, courtroom deputies, law clerks, and
20 probation officers on the proper way to complete
21 the statement of reasons.

22 The Guideline Manual reflects the

1 Commission's belief that courts will not depart
2 very often. There may never be a consensus as to
3 the proper quantification of this term. In a
4 recent floor statement, one of the original
5 drafters of the Sentencing Reform Act stated that a
6 20-percent departure rate was anticipated. There
7 is every indication that the current rate, whatever
8 that may be, is well below that rate.

9 Others argue that only a far lower
10 percentage rate would meet the requirement of
11 relatively few. In any event, only better recordkeeping and
12 precise data collection will ensure
13 that the extent of downward departures is clearly
14 defined and the reasons for them are accurately
15 explained.

16 Thank you for the opportunity to present
17 the views of the Criminal Law Committee on the
18 implementation of the PROTECT Act, and I'd be
19 pleased to answer any questions you may have, or to
20 try to answer them.

21 CHAIRMAN MURPHY: Commissioner O'Neill?

22 COMMISSIONER O'NEILL: Judge, thank you so

1 much for coming here, and I neglected to say it to
2 the other two panels as well, but I am sure we all
3 appreciate all of you coming and taking the time to
4 testify.

5 Judge, one question I had is one of the
6 difficulties that we have--and this has been
7 pointed out by Judge Castillo and others as we've
8 gone through and started crunching a lot of the
9 numbers. There are a number of individuals
10 districts where we're just having a difficult time
11 getting data. Is there any way that we can work
12 with you all or do you have any suggestions to us
13 as to how we might be able to sort of better ensure
14 compliance to make sure that we're getting the
15 numbers that we need ultimately not only to report
16 to Congress but also just for our internal purposes
17 of keeping our statistics?

18 JUDGE HAMILTON: My impression,
19 Commissioner O'Neill, is that under the PROTECT
20 Act, some of those reporting provisions that are
21 going to be put into place are likely to do that,
22 along with the improvements that are being made to

1 the statement of reasons.

2 I guess I should say "improvements" in
3 quotation marks because I'm not sure all judges are
4 going to appreciate the additional detail as an
5 improvement. But I think for purposes of the
6 committee and the Commission, it will be a big
7 help. If there are problems in that, I'm sure we'd
8 be happy to work with you.

9 COMMISSIONER CASTILLO: I also want to
10 thank Judge Hamilton--I know, coming from my
11 circuit, you are very busy in Indianapolis--for
12 taking on the responsibilities on the Criminal Law
13 Committee. And I really appreciate you pointing
14 out to the general public a very important point,
15 which is, really, it is unknown how many downward
16 departures are being made by judges over the
17 objection of government prosecutors in the courts,
18 because right now the data is very uncertain. And
19 with your help, improving the judgment and
20 commitment order which you referred to, which we've
21 worked on over the past few months, and with the
22 PROTECT Act provisions, I think that will be

1 improved. I'm sure you would agree.

2 JUDGE HAMILTON: I do.

3 CHAIRMAN MURPHY: I wonder if--I know that
4 the subcommittee headed by Judge Moore has sent on
5 some letters from individual judges in response to
6 our request for comment. And I wonder if the
7 committee or members of the committee have heard
8 much from the judiciary about the PROTECT Act. Is
9 it mainly an anecdotal basis?

10 JUDGE HAMILTON: I can offer only
11 anecdotes as the singular data, I guess, or vice
12 versa. I will not try to speak for the committee
13 as a whole on that, Judge Murphy. I think that
14 goes beyond my brief. I think all of us recognize
15 that the act is significant and the issues that the
16 Commission faces are significant. And as I
17 indicated, in terms of specific proposals that you
18 all are considering, the committee as a whole and
19 the Sentencing Subcommittee will try to respond as
20 quickly as possible.

21 CHAIRMAN MURPHY: We'll appreciate your
22 help.

1 Judge Sessions?

2 COMMISSIONER SESSIONS: I'd like to ask
3 about the disclosure requirements of the PROTECT
4 Act. Is there concern on your committee about
5 disclosure of, let's say, pre-sentence reports,
6 confidentiality agreements, cooperation agreements,
7 those kinds of things? And, if so, is there
8 anything that the committee is doing about it or
9 the AO is doing about it?

10 JUDGE HAMILTON: Judge Sessions, there is
11 I think consistently in the Criminal Law Committee
12 a great deal of concern about issues of security
13 and confidentiality of information that may affect
14 matters of public safety, witness safety, and the
15 like. I can't provide specifics with respect to
16 the reporting mechanisms under the PROTECT Act at
17 this time, but I know in a number of related
18 contexts, including access to--electronic access,
19 for example, to criminal case files, there are
20 major concerns along those lines, and those are
21 subjects that we and other committees in the
22 Judicial Conference are continuing to work on.

1 But I think that with respect to, in
2 particular, anything touching on 5K1 departures,
3 we've taken action, for example, to make sure that
4 portions of the statement of reasons remain
5 confidential and not accessible, for example,
6 within prisons, which has become a major concern
7 for our committee in recent years.

8 CHAIRMAN MURPHY: Well, Judge Hamilton,
9 thank you so much for coming. We really appreciate
10 it.

11 We do have a daunting task because it's
12 hard to gather all the data we need and to
13 authenticate it. We have very limited time in
14 which to respond, and we recognize very much how
15 many lives and interests these issues touch. So we
16 are going to do our best to respond in the best way
17 we can to the PROTECT Act by October 27th, which is
18 the 180th day, if we have calculated it correctly.

19 So thank you very much.

20 [Whereupon, at 4:57 p.m., the public
21 hearing was adjourned.]