

## CONTRIBUTIONS TO THE INCREASING RATE OF CASES SENTENCED BELOW THE GUIDELINE RANGE

The preceding chapter demonstrates that the downward departure rate has increased measurably from fiscal year 1991 to fiscal year 2001. During Congress's consideration of the PROTECT Act, several reasons were cited as causes for the increased departure rate. This chapter discusses some of those reasons cited as contributing to the increased use of downward departures.

### A. APPELLATE REVIEW OF SENTENCES

One of the concerns expressed by Congress in enacting the PROTECT Act is that sentencing courts are exercising their authority to depart inappropriately, thereby contributing to the increasing departure rate.<sup>105</sup> Some members of Congress suggested that the increased departure rate reflected excessive leniency and less rigorous adherence to the guidelines on the part of sentencing courts.<sup>106</sup>

By statute, sentencing courts can depart from the guideline sentencing range only in cases in which the “court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”<sup>107</sup> Evaluating whether sentencing courts adhere to this statutory standard is a very complicated inquiry.

The Commission's data collection is designed to reveal national trends and statistics, but is not well suited to assess the appropriateness of departures in particular cases. As described in Chapter 2, the Commission relies solely on the Statement of Reasons to collect departure information, and the Statement of Reasons often does not permit a meaningful analysis of the appropriateness of the court's substantive reason for departure. Lack of specificity on a Statement of Reasons could reflect a less rigorous analysis than envisioned by the Sentencing Reform Act, or the sentencing court's full analysis could be set forth elsewhere in the record (*e.g.*, in the transcript of the sentencing proceeding). For the Commission to delve further into the sentencing record to measure the appropriateness of departures would require substantially greater resources and information than the Commission has available.

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<sup>105</sup> See *infra* Appendix B, at pp. B-28 to B-33.

<sup>106</sup> *Id.*

<sup>107</sup> 18 U.S.C. § 3553(b) (2003).

As contemplated by the Sentencing Reform Act and reaffirmed in the PROTECT Act, however, the courts of appeals are best situated to judge the appropriateness of departures in particular cases. In enacting the sentencing appeal provisions of the Sentencing Reform Act, codified at 18 U.S.C. § 3742, Congress envisioned that parties would object to and appeal departure decisions by sentencing courts not supported by the law or facts of the case.<sup>108</sup> Through this appellate process, Congress gave initial responsibility to the appellate courts for ensuring that the lower courts adhere to the guideline system and deviate from the sentencing guideline ranges only when appropriate to meet the goals of sentencing.

### **1. Impact of *Koon v. United States***

During its consideration of the PROTECT Act, Congress received testimony that the increase in the departure rate was due in part to lack of oversight by the courts of appeals. According to the Department of Justice, this lack of oversight was directly traceable to the Supreme Court's decision in *Koon v. United States*.<sup>109</sup> In *Koon*, the Supreme Court held that appellate courts are to apply an abuse of discretion standard when reviewing a district court's decision to depart from the guidelines, relying in part on the lower courts' "institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts."<sup>110</sup>

The impact of *Koon* on the departure rate is unclear. Although the rate of increase in the departure rate generally is higher post-*Koon* than pre-*Koon*, the rate of increase actually began to accelerate in 1994, almost two years prior to *Koon*, and has been relatively consistent thereafter.<sup>111</sup> See Figure 14.

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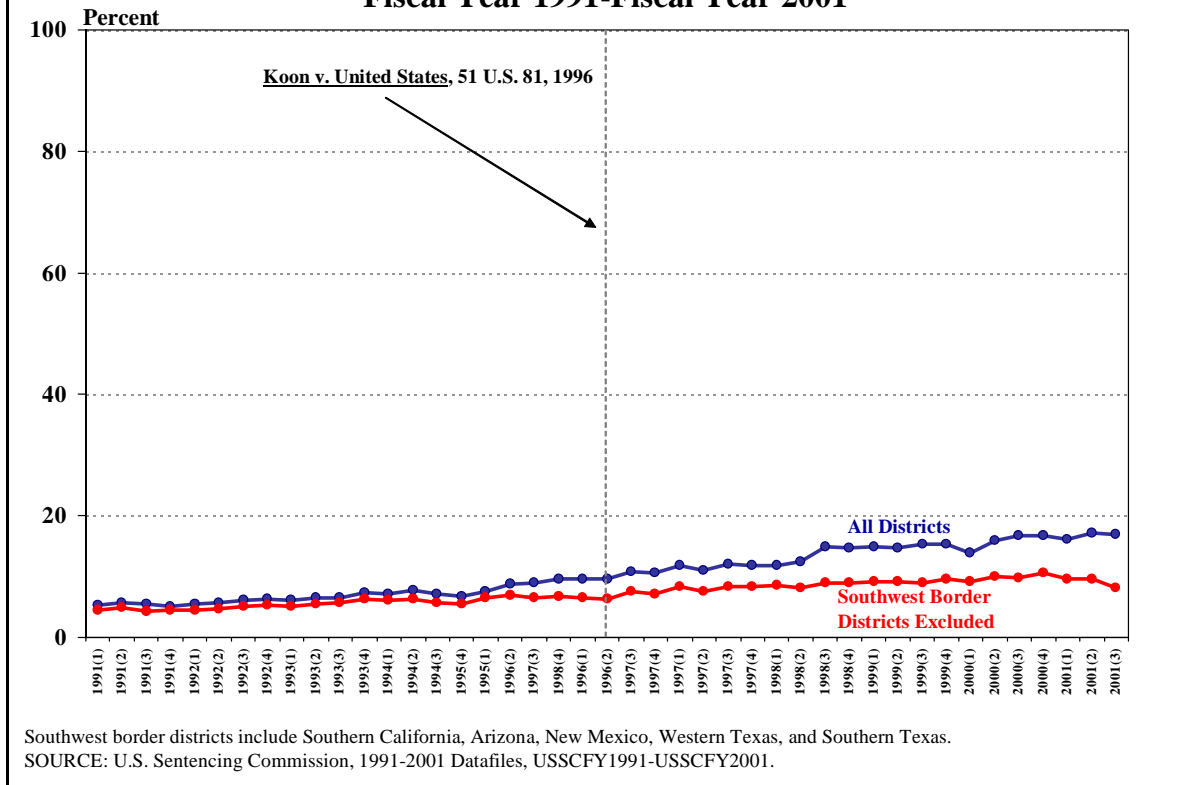
<sup>108</sup> See *infra* Appendix B, at pp. B-12 to B-13.

<sup>109</sup> See *infra* Appendix B, at p. B-30 (discussing Department of Justice position on *Koon*).

<sup>110</sup> *Koon*, *supra* note 17, at 98.

<sup>111</sup> See also Paul Hofer *et al.*, *Departure Rates and Reasons After Koon v. U.S.*, 9 FSR 284–91 (1997).

**Figure 14**  
**Quarterly Trends in Downward Departure Rates**  
**Fiscal Year 1991-Fiscal Year 2001**



Previous testimony before Congress on the impact of *Koon* did not discuss in detail the impact of significantly increasing immigration caseloads in southwest border districts on the national departure rate.<sup>112</sup> If southwest border districts are eliminated from consideration, the national rate of increase in the departure rate is substantially the same during the pre-*Koon* and post-*Koon* eras, and actually declines during the most recent year for which such data is available.

Appellate courts can exercise their oversight authority regarding downward departure decisions only to the extent that the government appeals unjustified departures. Congress received testimony from the Department of Justice that the standards of review set by *Koon* hindered the government's ability to appeal downward departures.<sup>113</sup> The government appealed

<sup>112</sup> See, e.g., *Oversight of the U.S. Sentencing Commission: Are the Guidelines Being Followed?: Hearing Before the Subcommittee on Criminal Justice Oversight of the Senate Judiciary Committee, 106th Cong., 2d Sess. (Oct. 13, 2000)* (statement of John R. Steer, Vice Chair, United States Sentencing Commission).

<sup>113</sup> See *infra* Appendix B, at p. B-30 (discussing testimony from Department of Justice representatives).

downward departure decisions in only 25 cases in fiscal year 2001,<sup>114</sup> which is 0.25 percent of the 9,985 cases in which a downward departure was granted that year.<sup>115</sup> In the few cases that the government has appealed a downward departure decision, it usually has been successful, having received favorable decisions in 19 of the 25 cases appealed in fiscal year 2001.<sup>116</sup>

Commission sentencing data suggest that *Koon* also may not have had a substantial impact on government appeals practices. According to Commission data, even prior to *Koon*, the government rarely appealed downward departure decisions, averaging less than 50 appeals per year from fiscal year 1993 to fiscal year 1996.<sup>117</sup>

## 2. PROTECT Act Remedies

The PROTECT Act included a number of provisions aimed at reinvigorating the role of the appellate process in sentencing and enhancing appellate oversight of the use of departures by lower courts. First, as discussed above,<sup>118</sup> in order to facilitate meaningful appellate review, Congress amended 18 U.S.C. § 3553(c) (Statement of reasons for imposing a sentence) by requiring the sentencing court, if imposing a sentence outside the prescribed guideline range, to state “the specific reason” for departing from the guidelines “with specificity in the written order of judgment and commitment . . . .”<sup>119</sup>

Second, the PROTECT Act amended 18 U.S.C. § 3742 (Review of a sentence) to require appellate courts to review *de novo* a district court’s departure decision in cases in which:

(A) the district court failed to provide the written statement of reasons required under section 3553(c); [or]

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

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<sup>114</sup> USSC, *supra* note 67, tbl 58.

<sup>115</sup> *Id.* at tbl 26. This 0.25 percent figure is not a true appeals rate because the 25 cases that were appealed in fiscal year 2001 did not necessarily involve cases sentenced that same fiscal year. However, it is a reasonable approximation.

<sup>116</sup> *Id.*

<sup>117</sup> The Department of Justice appealed 33, 40, 43, and 36 downward departure decisions in fiscal years 1993, 1994, 1995, and 1996, respectively, according to Commission data.

<sup>118</sup> *See supra* ch. 1, at pp. 9–10.

<sup>119</sup> Pub L. No. 108-21, § 401(c)(1), 117 Stat. 650 (2003).

- (ii) is not authorized under section 3553(b); or
- (iii) is not justified by the facts of the case.<sup>120</sup>

The appellate court shall set aside the sentence and remand the case with specific instructions if it finds that the district court failed to provide the required statement of reasons in the judgment and commitment order, the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.<sup>121</sup>

Third, the PROTECT Act adds restrictions to limit the district courts' discretion when sentencing cases upon remand. This change requires the sentencing court on remand to adhere to the guideline provisions in effect at the time of the original sentencing and to consider only grounds for departure included in the original statement of reasons and deemed permissible by the appellate court.<sup>122</sup> The Department of Justice subsequently has conformed its policies and procedures to the PROTECT Act's statutory restrictions by requiring prosecutors to report to Main Justice all sentences imposed on remand that do not comply with the requirements of new 18 U.S.C. § 3742(g) for consideration of possible appeal.<sup>123</sup>

Fourth, and perhaps the provision that will have the greatest impact on departure practices, the PROTECT Act contains a directive to the Department of Justice aimed in part at furthering the role of appellate review as originally envisioned by Congress. Section 401(l) of the PROTECT Act directed the Department of Justice to adopt detailed policies and procedures "to ensure the vigorous pursuit of appropriate and meritorious appeals of . . . adverse decisions" regarding downward departures that are not supported by the facts and the law, among other things.<sup>124</sup>

### **3. Greater Emphasis on Appeals by the Department of Justice**

In response to the congressional directive, on July 28, 2003, Attorney General John Ashcroft issued a memorandum to all federal prosecutors underscoring the importance Congress attaches to effectively opposing and appealing unjustified downward departures. "The Department of Justice has a responsibility to litigate vigorously in the district courts, and to

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<sup>120</sup> Pub. L. No. 108-21, § 401(d), 117 Stat. 650 (2003), codified at 18 U.S.C. § 3742(e)(3). In reviewing the reasonableness of the extent of departure, however, the appellate court is to give due deference to the district court's determination. *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *See supra* ch. 1, at pp. 9–10 for further discussion of this issue.

<sup>123</sup> Ashcroft Appeals Memo, *supra* note 37, at A-2.

<sup>124</sup> *See supra* ch. 1, at pp. 10–11 (presenting the directive in its entirety).

pursue appeals in appropriate cases, so as to ensure that the policies of the Sentencing Reform Act and the PROTECT Act are faithfully implemented.”<sup>125</sup>

With respect to objections to and appeals of downward departures, the memorandum states in further detail that:

Department attorneys have an affirmative obligation to *oppose* any sentencing adjustments, including downward departures, that are not supported by the facts and the law. . . . Department attorneys must take all steps necessary to ensure that the district court record is sufficient to permit the possibility of an appeal with respect to the improper adjustment . . . .<sup>126</sup>

The memorandum also sets in place four procedural mechanisms to facilitate appeals of unjustified downward departures and delineates a detailed list of categories of adverse decisions that prosecutors must promptly report to the appropriate officials at Main Justice.<sup>127</sup> If the appeal is approved by the Solicitor General, the memorandum requires prosecutors to “vigorous and professionally” pursue the appeal.<sup>128</sup>

New statutory requirements and other changes directed by the PROTECT Act reaffirmed Congress’s belief in the importance of a robust appellate process to a properly functioning guideline system. The new statutory requirements for review of departure decisions enacted by Congress, coupled with rigorous adherence to the strict new policies and procedures established by the Attorney General, should reinvigorate the role of the appellate process in monitoring compliance with the guidelines as originally intended under the Sentencing Reform Act. The Department of Justice reports that these changes already are having a favorable impact, citing several recent holdings employing the new *de novo* standard of review.<sup>129</sup>

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<sup>125</sup> Ashcroft Appeals Memo, *supra* note 37, at 5.

<sup>126</sup> *Id.* at 3.

<sup>127</sup> *See supra* ch. 1, at pp. 11–12 (discussing new requirements for appeals of departures).

<sup>128</sup> Ashcroft Appeals Memo, *supra* note 37, at 4.

<sup>129</sup> Statement of William W. Mercer, United States Attorney, District of Montana, to the United States Sentencing Commission, regarding Implementation of the PROTECT Act of 2003 (August 19, 2003) at 11–12 (citing *United States v. Thurson*, \_\_ F.3d \_\_, 2003 U.S. App. Lexis 15516, 2003 WL 21782339 (1<sup>st</sup> Cir. 2003) (reversing downward departure decision); *United States v. Swick*, 334 F.3d 784 (8<sup>th</sup> Cir. 2003) (same); *United States v. Smith*, 331 F.3d 292 (2<sup>nd</sup> Cir. 2003) (same); *United States v. Jones*, 332 F.3d 1294 (10<sup>th</sup> Cir. 2003) (upholding upward departure decision); *United States v. Tarantola*, 332 F.3d 498 (8<sup>th</sup> Cir. 2003) (same); *United States v. Flores*, \_\_ F.3d \_\_, 2003 U.S. App. Lexis 14438, 2003 WL 21673619 (8<sup>th</sup> Cir. 2003) (same); *United States v. Semsak*, \_\_ F.3d \_\_, 2003 U.S. App. Lexis 14923, 2003 WL 21730615 (9<sup>th</sup> Cir. 2003) (same)); *see also* *United States v. Mallon*, \_\_ F.3d \_\_, 2003 WL 22285302 (7<sup>th</sup> Cir. 2003) (reversing downward departure decision).

## **B. ROLE OF THE GOVERNMENT AT SENTENCING**

Commission sentencing data indicate that the government also plays a significant direct role in sentencing court departure decisions. In particular, the extent to which sentencing courts depart *sua sponte* or without the agreement of the government may not be as great as perceived.

### **1. Government Initiated Downward Departures**

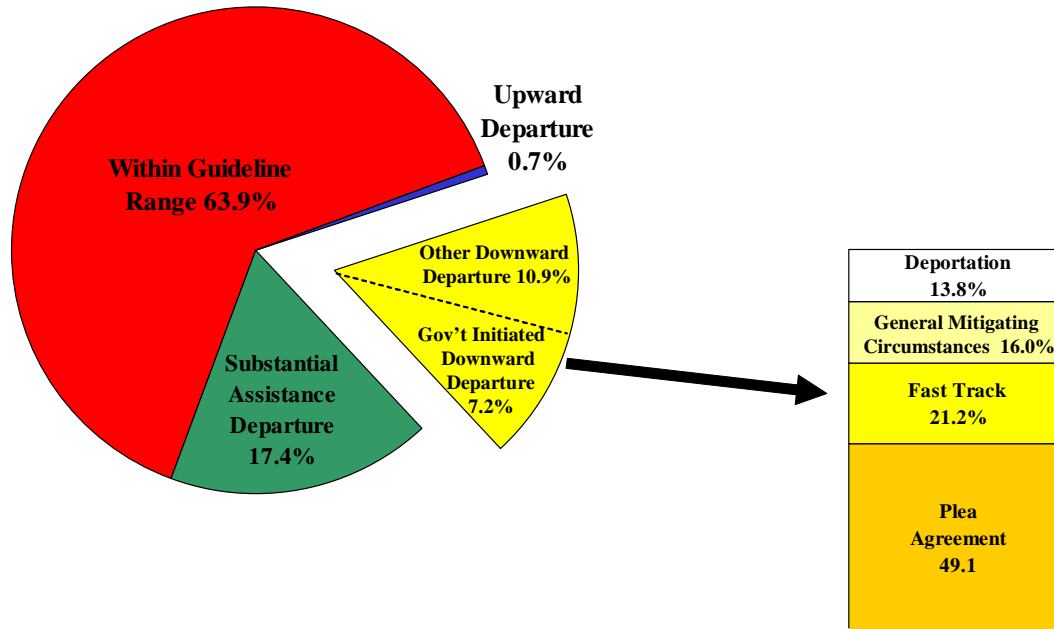
Based on review of the Commission's Monitoring database and the results of the coding project conducted for this report, Commission sentencing data suggest that the government initiated approximately 40 percent of the nonsubstantial assistance downward departures granted in fiscal year 2001. *See* Figure 15. This "government initiated downward departure rate" consists of cases for which one of four departure reasons are cited in the Statement of Reasons: all cases citing "Fast Track" (842 cases), "Deportation" (553 cases), and "Plea Agreement" (1,960 cases), and one-quarter of the cases citing "General Mitigating Circumstances" (641 cases).<sup>130</sup>

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<sup>130</sup> The number of cases attributed to "Fast Track," "Deportation," and "Plea Agreement," reflect the total number of cases reported in the Commission's 2001 Monitoring database as citing those specific reasons. The number of cases attributed to "General Mitigating Circumstances," however, is an extrapolation based on the results of the Commission's coding project undertaken for this report. The Commission examined 223 cases sentenced in fiscal year 2001 that cited "General Mitigating Circumstances" in the Statement of Reasons as a basis for downward departure. Of the 114 cases for which the case file conclusively indicated the underlying mitigating circumstance with specificity, 24.6 percent relied upon an "early plea," "savings to government," "waiver of indictment," "stipulation to deportation order," "fast track," or other similar reasons indicating that the government initiated the departure as a result of receiving some type of benefit from the defendant. These 55 cases comprise 24.6% of the overall sample. The Commission applied the same 24.6 percent figure to the total number of cases in the 2001 Monitoring Database citing "General Mitigating Circumstances" to estimate the total number of "General Mitigating Circumstances" departures initiated by the government.

The Commission's coding project revealed that cases citing other reasons for departure, such as aberrant behavior and family ties and responsibilities, sometimes also may represent departures initiated by the government through fast track programs. Departures based on aberrant behavior and family ties, for example, occur disproportionately in a few districts along the southwest border. Because the Commission could not conclusively determine that these departures in those districts were the result of fast track programs, these cases were excluded from this calculation of government initiated departures in order to be conservative in the estimation of such departures.

**Figure 15**  
**Departure Status and Classification**  
**Fiscal Year 2001 Downward Departure Sample**



The percentage of government initiated general mitigating circumstances departures was estimated based on the finding from the case review that 24.6% of general mitigating circumstances departures in the sample were government initiated.  
 SOURCE: U.S. Sentencing Commission 2001 Departure Sample.

If the 3,996 government initiated downward departures are subtracted and considered separately from the 9,985 downward departures granted by sentencing courts in fiscal year 2001, the remaining downward departure rate is 10.9 percent. Obviously, this 10.9 percent figure is substantially lower than the 18.1 percent overall downward departure rate derived from the Commission’s Monitoring database. *See* Figure 1.

The number of government initiated downward departures may not reflect fully the extent to which the government acquiesces to downward departures granted by sentencing courts. The Commission was able to determine the government’s position regarding a downward departure in only one-half of the 658 cases it reviewed in preparation of this report. Of the cases in which the government’s position was documented, the government expressly supported all or some of the grounds for departure in 77.5 percent of the cases. The extremely high rate of guilty pleas – 96.6 percent in fiscal year 2001 – coupled with the low number of government appeals also suggests that the 40 percent figure is a conservative estimate of the extent to which the government initiates or acquiesces to downward departures.

The government also affects sentencing court decisions regarding the extent of departures in many cases. Over 90 percent of the cases reviewed for this report citing “Plea Agreement” as



the reason for departure involved plea agreements pursuant to Fed. R. Crim. P. 11(e)(1)(C).<sup>131</sup> Based on this figure the Commission estimates that sentencing courts cited binding plea agreements as the reason for departure in 1,788 cases in fiscal year 2001. Such plea agreements typically include agreements between the government and the defendant regarding sentencing ranges, maximum sentences, guideline calculations, and even precise sentence lengths, which, if the court accepts the plea agreement, are binding on the court.<sup>132</sup> The sentencing court granted a departure of the exact magnitude specified in 84.8 percent of the Rule 11(e)(1)(C) agreements reviewed for this analysis.

## **2. PROTECT Act Remedy**

The impact of plea agreements on the departure rate may decrease with enactment of the PROTECT Act. Pursuant to the directive to the Department of Justice contained in section 401(l) of the PROTECT Act, the Attorney General has told prosecutors that a recommendation for a particular sentence under Rule 11(c)(1)(B), or an agreement to a specific sentence under Rule 11(c)(1)(C) “must not vitiate relevant portions of the Sentencing Guidelines.”<sup>133</sup>

Furthermore, subsequent to enactment of the PROTECT Act, the Attorney General issued a memorandum setting forth revised charging and plea bargaining policies requiring that any sentencing recommendation contained in a plea agreement, including departure recommendations, “be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant’s history and conduct.”<sup>134</sup> Adherence to these new Department of Justice policies could affect a reduction in the incidence of downward departures.

## **C. EARLY DISPOSITION OR FAST TRACK PROGRAMS**

Early disposition or fast track programs apparently account for a substantial portion of the government initiated downward departures discussed above. During its consideration of the PROTECT Act, Congress received correspondence attributing a substantial proportion of the

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<sup>131</sup> Fed. R. Crim. P. 11(e)(1)(C) was redesignated as Fed. R. Crim. P. 11(c)(1)(C) in 2002.

<sup>132</sup> USSG §6B1.2 (Standards for Acceptance of Plea Agreements) provides that the court may accept a plea agreement that includes a specific sentence if the court is satisfied either that (1) the agreed sentence is within the applicable guideline range, or (2) the agreed sentence departs from the applicable guideline range for justifiable reasons.

<sup>133</sup> Ashcroft Appeals Memo, *supra* note 37, at 3.

<sup>134</sup> Ashcroft Charging Memo, *supra* note 40, at 5; *see supra* ch. 1, at pp. 10–16 (discussing Attorney General’s memoranda).

downward departure rate to fast track programs established in judicial districts along the southwest border of the United States.<sup>135</sup>

## 1. Impact of Increasing Immigration Offense Caseload

According to these submissions, fast track programs were established in judicial districts along the southwest border to accommodate burgeoning immigration offense and immigration related caseloads.<sup>136</sup> Commission sentencing data confirm that the number of federal immigration offenses increased dramatically from 2,300 in fiscal year 1991 to 10,458 in fiscal year 2001. *See* Figure 7. The increase in the number of immigration offenses has put enormous caseload pressures on the districts along the southwest border. The Southern District of California alone, for example, sentences more defendants under the guidelines (4,213) than do all of the district courts in each of the First Circuit (1,645), Second Circuit (4,147), Third Circuit (2,636), Seventh Circuit (2,450), Eighth Circuit (3,568), Tenth Circuit (3,415), and District of Columbia Circuit (276).<sup>137</sup>

The Commission is unable to estimate from its sentencing data the full impact of fast track programs with sufficient reliability for several reasons. Most important, sentencing courts do not report this information in a uniform manner. Courts in only one judicial district, the Southern District of California, typically cite “Fast Track” as a reason for downward departure on the Statement of Reasons.<sup>138</sup>

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<sup>135</sup> *See e.g.*, Letter from Alfred P. Carlton, Jr., American Bar Association, to Sen. Orrin G. Hatch, Chairman, Committee on the Judiciary, United States Senate (Apr. 1, 2003), stating that the increased rate of nonsubstantial assistance departures is attributable to tripling of the number of departures in five fast track border districts from 1996 to 2001, *reprinted at* 149 CONG. REC. (daily ed. Apr. 10, 2003); Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States, to Sen. Orrin G. Hatch, Chairman, Committee on the Judiciary, United States Senate (Apr. 3, 2003), attributing 70 percent of nonsubstantial departure increase to five southwest border districts, *reprinted at* 149 CONG. REC. S5121 (daily ed. Apr. 10, 2003); 149 CONG. REC. S5133–34 (daily ed. Apr. 10, 2003) (statement of Sen. Edward Kennedy, discussing letter from eight former United States Attorneys attributing increase in nonsubstantial assistance departure rate to southwest border districts).

<sup>136</sup> *Id.*

<sup>137</sup> Letter from Marilyn L. Huff, Chief Judge, United States District Court for the Southern District of California, to Judge Diana E. Murphy, Chair, United States Sentencing Commission 1 (Aug. 1, 2003) citing “recent published statistics” from the Commission indicating the Southern District of California sentenced more defendants under the guidelines than seven other circuits in their entirety.

<sup>138</sup> The Southern District of California accounted for 92.4 percent of departure cases citing fast track in fiscal year 2001.

The Commission's review of its sentencing data suggests that departures in other judicial districts that routinely cite "Pursuant to Plea Agreement" or "General Mitigating Circumstances" on Statement of Reasons may be fast track departures. For example, more than half (59.3%) of the downward departure cases citing general mitigating circumstances were sentenced in three districts on the southwest border: the Southern District of California (24.9%), the Western District of Texas (24.6%), and the District of Arizona (9.8%). In those three districts combined, 92.4 percent of the offenders receiving downward departures based on general mitigating circumstances were convicted of drug trafficking offenses (53.6%) or immigration offenses (38.8%), and 63.2 percent were non-U.S. citizens. These factors suggest that in those three districts general mitigating circumstances may be cited as a reason for departure in cases that in fact involve fast track dispositions.

Similarly, two districts on the southwest border, Arizona (54.3%) and New Mexico (21.9%), accounted for more than three-quarters of the downward departure cases citing "Pursuant to Plea Agreement." In those two districts combined, 94.7 percent of offenders receiving a downward departure pursuant to a plea agreement were convicted of an immigration offense (60.4%) or drug trafficking offense (34.3%), and 82.5 percent were non-U.S. citizens. These factors suggest that in those two districts plea agreements may be cited as a reason for departure in cases that in fact involve fast track dispositions.

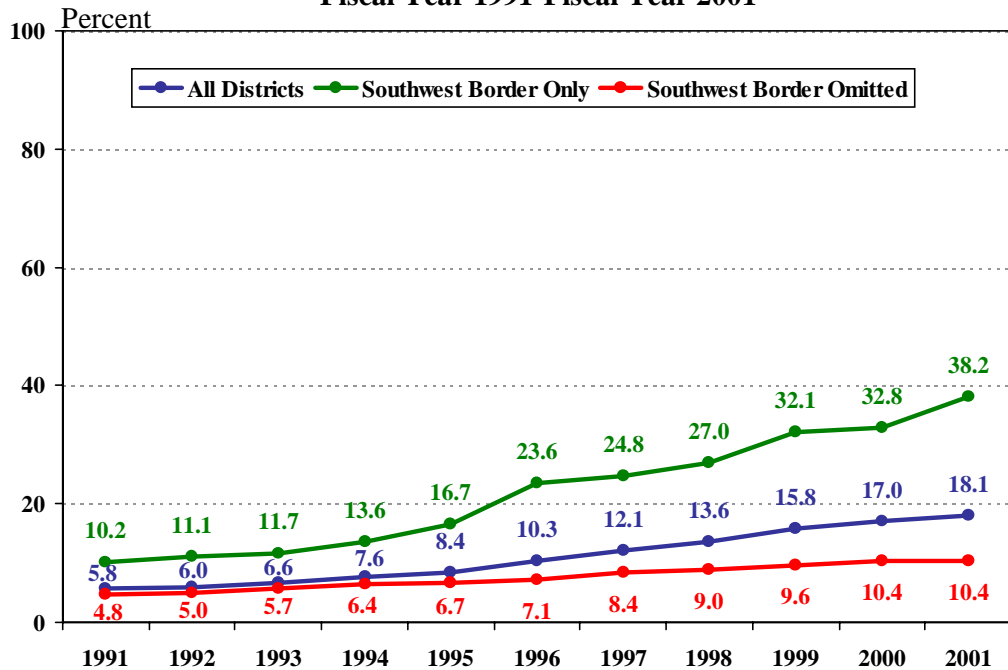
Because of the difficulties in determining from Statements of Reasons the existence of a fast track departure, the Commission requested and the Department of Justice provided information regarding fast track programs so that the Commission could better interpret its data.<sup>139</sup> Included in the information provided were details regarding such programs in five judicial districts along the southwest border: the District of Arizona, the Southern District of California, the District of New Mexico, the Southern District of Texas, and the Western District of Texas.<sup>140</sup> Each of these southwest border districts reported that its fast track program was established in response to overwhelming caseloads, and such programs generally covered illegal reentry, alien smuggling, and certain drug trafficking offenses. The specific criteria and benefits to the defendants in each district, however, vary significantly.

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<sup>139</sup> See Letter from Judge Diana E. Murphy, Chair, United States Sentencing Commission, to Larry D. Thompson, Deputy Attorney General, United States Department of Justice (May 13, 2003) requesting information on early disposition programs.

<sup>140</sup> See Letter from Eric Jaso, Counselor to the Assistant Attorney General, United States Department of Justice, to Judge Diana E. Murphy, Chair, United States Sentencing Commission (Aug. 1, 2003) [hereinafter Jaso Fast Track Letter] setting forth information on fast track programs. The Department of Justice also provided information regarding two additional districts, the District of Idaho and the Eastern District of Washington, that had established fast track programs for illegal reentry cases. The program was discontinued in the Eastern District of Washington in May 2002.

**Figure 16**  
**Trends in Downward Departure Rates**  
**Fiscal Year 1991-Fiscal Year 2001**



Southwest border districts include Southern California, Arizona, New Mexico, Western Texas, and Southern Texas.  
 SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

Southwest border districts combined have experienced a significant increase in the departure rate from 10.2 percent in fiscal year 1991 to 38.2 percent in fiscal year 2001, an almost four-fold increase. *See* Figure 16. Furthermore, southwest border districts account for a disproportionate number of departures. The national departure rate was 18.1 percent in fiscal year 2001. If southwest border districts are excluded, however, the national departure rate has increased more modestly from 4.8 percent in fiscal year 1991 to 10.4 percent in fiscal year 2001. Therefore, fast track programs in districts along the southwest border appear to drive the national departure rate significantly higher than it otherwise would be.

## 2. Extent of Fast Track Programs

Fast track programs apparently are not limited to the districts along the southwest border. The Department of Justice indicated that fast track programs exist in some form in up to one-half of the 94 judicial districts.<sup>141</sup> The widespread nature of fast track programs would suggest that

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<sup>141</sup> *See* Letter from Judge Diana E. Murphy, Chair, United States Sentencing Commission, to Eric Jaso, Counselor to the Assistant Attorney General, United States Department of Justice (Aug. 25, 2003) requesting further clarification of fast track and early disposition programs.

factors in addition to the burgeoning number of immigration related offenses are the impetus for some of these programs.

Further complicating the analysis is the fact that the majority of fast track programs “do not employ agreed-upon or Government-requested downward departures, but instead rely upon accepting pleas to lesser charges.”<sup>142</sup> As discussed in Chapter 2, the Commission generally compiles sentencing information regarding only the statutes of conviction and the sentencing guidelines applicable to those statutes, and, as a result, the Commission cannot estimate the impact of this type of fast track program.

In sum, data constraints and the apparent widespread use of a variety of early disposition programs across the nation prevent the Commission from isolating fast track departures from downward departures generally. Accordingly, the Commission cannot fully estimate the contribution of such programs to the increasing downward departure rate.

### **3. Early Disposition Programs Pursuant to the PROTECT Act**

Congress has recognized the importance of fast track or early disposition programs by sanctioning their use in section 401(m) of the PROTECT Act. Section 401(m) directs the Commission to promulgate “a policy statement authorizing a downward departure of not more than four levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney.”<sup>143</sup> The underlying premise of fast track programs, as articulated by the Attorney General, is that defendants who promptly agree to participate in such a program save the government significant scarce resources that can be used in prosecuting other defendants and demonstrate acceptance of responsibility above and beyond what is taken into account under §3E1.1 (Acceptance of Responsibility).<sup>144</sup>

The Commission also received testimony underscoring the importance of fast track programs in certain judicial districts. The Chief Judge of the Southern District of California testified that, because of the overwhelming caseload in that district, in great part comprised of immigration related offenses, fast track programs are essential to the efficient and effective administration of the courts in that district.<sup>145</sup> Furthermore, the Commission received testimony from the United States Attorney from the District of Arizona that the fast track program in that

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<sup>142</sup> See Jaso Fast Track Letter, *supra* note 140.

<sup>143</sup> Pub. L. 108-21, § 401(m)(2)(B), 117 Stat. 650 (2003).

<sup>144</sup> See *supra* ch. 1, at pp. 14–16.

<sup>145</sup> Written statement by Hon. Marilyn L. Huff, Chief Judge, United States District Court for the Southern District of California, to the United States Sentencing Commission regarding necessity of fast track or early disposition programs within the Southern District of California (Sept. 23, 2003).

district advances the statutory goal of deterrence, particularly regarding immigration offenses. Even with its fast track program, the United States Attorney stated that the District of Arizona can prosecute only a small fraction of the hundreds of thousands of illegal entries committed in that judicial district. In the absence of a fast track program, he stated that prosecutions of immigration offenses would significantly decrease, thereby reducing the deterrent effect of current prosecutorial practices.<sup>146</sup>

On September 22, 2003, the Attorney General issued a memorandum outlining the criteria for authorization of such programs.<sup>147</sup> In order to receive authorization for a fast track program, a district must demonstrate, among other criteria, that (1) the district handles an exceptionally large number of a specific class of offenses within the district; (2) failure to handle such cases on an expedited basis would significantly strain prosecutorial and judicial resources in the district; and (3) state prosecution of such cases is either unavailable or unwarranted.<sup>148</sup> The memorandum, however, specifies no requirements regarding the type (*i.e.* downward departure or charge bargaining) or extent of the benefit to be received by a defendant pursuant to a fast track program, other than the statutory requirement that a benefit in the form of a departure not exceed four offense levels.<sup>149</sup>

The Department of Justice requested that the Commission implement the directive regarding the early disposition programs in section 401(m) of the PROTECT Act in a similar unfettered manner by merely restating the legislative language and “leav[ing] to the sentencing court the extent of the departure under these early disposition programs.”<sup>150</sup> The Commission notes that implementation of the directive in this manner has the potential to create unwarranted sentencing disparity.

The new statutory requirement that the Attorney General approve all early disposition programs hopefully will bring about greater uniformity and transparency among those districts that implement authorized programs. Defendants sentenced in districts without authorized early disposition programs, however, can be expected to receive longer sentences than similarly-

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<sup>146</sup> Written statement by Paul Charlton, United States Attorney, District of Arizona, to the United States Sentencing Commission regarding fast track programs in Arizona (Sept. 23, 2003).

<sup>147</sup> See Ashcroft Fast Track Memo, *supra* note 50.

<sup>148</sup> The criteria are discussed in more detail in ch. 1, at pp. 14–16.

<sup>149</sup> See Ashcroft Fast Track Memo, *supra* note 50.

<sup>150</sup> See Letter from Eric H. Jaso, Counselor to the Assistant Attorney General, U. S. Department of Justice, to Judge Diana E. Murphy, Chair, United States Sentencing Commission 19 (Aug. 1, 2003), submitting 18 U.S.C. §994(o) report commenting on the operation of the sentencing guidelines and requesting that the Commission “simply restate the legislative language” contained in the PROTECT Act regarding early disposition programs.

situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted sentencing disparity among similarly-situated offenders.

Furthermore, sentencing courts in districts without early disposition programs, particularly those in districts that adjoin districts with such programs, may feel pressured to employ other measures – downward departures in particular – to reach similar sentencing outcomes for similarly situated defendants. This potential response by sentencing courts could undermine the goal of the PROTECT Act to reduce the incidence of downward departures.

Finally, sentencing courts within districts that establish authorized early disposition programs may not have sufficient guidance to apply the departure provision in a uniform manner. Without greater specifications to the sentencing court regarding the circumstances warranting an early disposition departure, and the appropriate extent of departure, sentencing courts may vary in their application of the policy statement. Such variation could result in undesirable sentencing disparity.

Accordingly, the Commission agrees with the Department of Justice’s comment that “[i]t may be appropriate at some later date to review how these early disposition programs are actually being implemented and whether further guidance to the courts might be useful.”<sup>151</sup>

#### **D. ASSESSING DOWNWARD DEPARTURES IN A BROADER CONTEXT**

Less than two-thirds of cases sentenced in fiscal year 2001 – 63.9 percent – were sentenced within the guideline sentencing range. *See* Figure 1. This represents a significant decrease since fiscal year 1991, when 80.7 percent of cases were sentenced within the guideline sentencing range. This decreased percentage of within guideline range sentences, however, reflects an increase in both the number of substantial assistance departures pursuant to §5K1.1 (Substantial Assistance to Authorities),<sup>152</sup> which are granted only pursuant to a government motion, and nonsubstantial assistance departures.

The substantial assistance departure rate increased from 11.9 percent in fiscal year 1991 to 17.3 percent in fiscal year 2001, and accounted for almost one half (48.1%) of all departures below the guidelines in fiscal year 2001. *See* Figure 1. When substantial assistance departures

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<sup>151</sup> *Id.*

<sup>152</sup> Section 5K1.1 provides in pertinent part that “[u]pon motion of the government that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.” *See also* 18 U.S.C. § 3553(e) (West Supp. 2003) (Limited authority to impose a sentence below a statutory minimum) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

are combined with the other government initiated downward departures identified in the case review discussed above, the government accounts for over two-thirds (69.3%) of all departures below the guidelines. Substantial assistance departures and other government initiated downward departures considered together comprise a national 24.6 percent departure rate.

Substantial assistance departures have been subject to some of the same criticisms as other downward departures.<sup>153</sup> For example, substantial assistance departure rates vary widely by district. The Central District of Illinois (41.6%), the Eastern District of Pennsylvania (40.7%), the Western District of North Carolina (38.2%), the Western District of Missouri (37.2%) and the Middle District of Alabama (36.8%) had substantial assistance departure rates in fiscal year 2001 dramatically higher than the District of Utah (1.0%), the Eastern District of Oklahoma (2.2%), the District of South Dakota (6.0%), the Northern District of West Virginia (6.0%), and the District of New Mexico (6.6%).<sup>154</sup> The differences in substantial assistance rates are even more stark between some adjoining districts, such as the Western District of Virginia (30.2%) and the Eastern District of Virginia (7.0%), and the Central District of Illinois (41.6%) and the Southern District of Illinois (11.2%).

Additionally, the percent of offenders who receive a sentence reduction for substantial assistance is not fully reflected by the 17.4 percent substantial assistance rate reported by the Commission. In addition to section 5K1.1, subsequent to sentencing the government can invoke Rule 35(b) of the Federal Criminal Rules of Procedure to move the court to reduce a sentence below the guidelines to reward substantial assistance.<sup>155</sup>

The Commission understands that some districts rely heavily on Rule 35 (b) motions instead of substantial assistance motions under section 5K1.1 to reward cooperation,<sup>156</sup> but cannot report reliable empirical data on the use of such motions. Despite a longstanding

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<sup>153</sup> See, e.g., Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 564 (1999) (“Cooperation is unevenly distributed and subject to wide variations in local practices and policies. . . . The system is rife with individual and district-to-district disparities . . . .”); Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* (January 1998); Ilene Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992).

<sup>154</sup> USSC, *supra* note 67, at tbl 26; see also NEWUSSCFY2001 (discussed *infra* Appendix C).

<sup>155</sup> Fed. R. Crim. P. 35(b) (Correcting or reducing a sentence).

<sup>156</sup> See, e.g., Daniel C. Richman, *The Challenges of Investigating Section 5K1.1 in Practice*, 11 FED. SENT. R. 75 (1998) (“The relatively low section 5K1.1 departure rate in the Eastern District of Virginia reflects the fact that prosecutors in that district dispense with substantial assistance motions by filing Rule 35(b) motions in order to comply with time limitations set by local court practice.”).



request,<sup>157</sup> the Commission does not receive sentencing documentation for Rule 35(b) sentencing reductions with sufficient regularity to permit an assessment of the impact of Rule 35(b) resentencings. The Commission expects that the most recent joint memoranda sent to the courts pursuant to the PROTECT Act will improve document submission in this area.<sup>158</sup>

Other districts may use charge bargaining to achieve sentencing outcomes below the otherwise applicable guideline sentencing range. Several commentators refer to this practice as “hidden departures.”<sup>159</sup> As discussed above in the context of fast track programs, the Department of Justice confirms that some districts use charge bargaining, at least in some circumstances, to reduce the otherwise applicable guideline sentencing range.<sup>160</sup> The Commission’s sentencing data generally is collected solely based on the statute of conviction, which does not permit an analysis of the impact of such charge bargaining for this report. The impact, if any, of charge bargaining on achieving the statutory purposes of sentencing may be mitigated by the Attorney General’s recent memorandum regarding such practices.<sup>161</sup>

This report does not attempt to examine the reasons for, or the appropriateness of, the increasing substantial assistance departure rate, the use of Rule 35(b) motions, or charge bargaining practices. These issues are mentioned merely to underscore the difficulties in drawing conclusions regarding the impact of downward departures on achieving the goals of

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<sup>157</sup> See AO Memo of Understanding, Mecham-Wilkins Letter, Mecham-Conaboy Letter, *supra* note 65 (letters between AO and USSC regarding documents to be submitted by courts).

<sup>158</sup> See Murphy-Lake Letter, *supra* note 76 (discussing new document submission requirements under PROTECT Act.)

<sup>159</sup> See, e.g., Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 63 (November 2000), citing Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1312 (1997) (“[H]idden departures’ are highly problematic, because ‘circumvention, unlike overt downward departure, is hidden and unsystematic. . . . By comparison to explicit departures, circumvention is far more likely to involve unwarranted disparity, and it occurs in a context that precludes oversight and obscures accountability.’”); Paul J. Hofer *et. al.*, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Disparity*, 90 J. CRIM L. & CRIMINOLOGY 239, 258 (1999), citing Hon. Joseph F. Weis *et. al.*, *Report of the Federal Courts Study Committee* (1990) (“Some district judges report feeling enormous pressure to accept pleas even though they clearly do not comport with the guidelines.”); Statement of Hon. Mark Wolf and Hon. Vincent L. Broderick before the United States Sentencing Commission, 3 FED. SENT. R. 287 (March 1991/April 1991) (“[W]e would like to see the guidelines encourage candor, discourage hidden departures through improper plea bargains . . . .”); Paul Hofer *et. al.*, *supra* note 8.

<sup>160</sup> Jaso Fast Track Letter, *supra* note 140; Murphy, *supra* note 141.

<sup>161</sup> See *supra* ch. 1, at pp. 13–14.

sentencing reform. There are many different ways in which similar sentencing outcomes below those prescribed by a strict application of the sentencing guidelines can be achieved.

Assessing the degree to which the increasing use of one mechanism – nonsubstantial assistance downward departures – evidences unwarranted disparity or excessive leniency ideally would include measuring the extent to which the remaining mechanisms are used by various districts to reach similar sentencing outcomes for similarly situated defendants.<sup>162</sup> Given the limitations of sentencing data available to the Commission and the time frame established by the directive in the PROTECT Act, the Commission cannot fully disentangle the overlapping effects of these several means of reducing sentences below the otherwise applicable guideline range.

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<sup>162</sup> See Lisa Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV 569 (1998).