

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
JOHN JOSEPH MOAKLEY UNITED STATES COURTHOUSE
1 COURTHOUSE WAY
BOSTON, MASSACHUSETTS 02210**

Chambers of Judge Nancy Gertner

TO: Michael Courlander at pubaffairs@ussc.gov - U.S. Sentencing Commission
cc: Honorable Sim Lake

FROM: Judge Nancy Gertner

RE: U.S.S.C. PROTECT Act - Comments

DATE: August 5, 2003

The Commission has solicited comments with respect to how it might best implement the directive in section 401(M) of the PROTECT Act. That directive instructs the Commission to reform the existing permissible grounds of downward departures.

Before we respond to the directive, it is important to understand what the PROTECT Act changed and what is not changed. The premises of the Guidelines, as found in 18 U.S.C. § 3553(b), have not been amended by the Act. Those premises are:

- Departures play an important role in the Guidelines regime.
- "It is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision."¹
- "[C]ircumstances that may warrant departure from the guideline range cannot, by their very nature, be comprehensively listed and analyzed in advance."²
- As a result, the Commission refused to "limit the kind of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case."³
- Judicial departures play a significant role in evolving the Guidelines.⁴

¹ U.S.S.G. ch. I, pt. A, intro. comment 4(b).

² U.S.S.G. § 5K2.0.

³ U.S.S.G. ch. I, pt. A, intro. comment 4(b).

⁴ The Senate report asserts, for example, that the articulation and review of decisions to depart from the Guidelines will "provide case law development of the appropriate reasons for sentencing outside the guidelines [which], in turn, will assist the Sentencing Commission in refining the sentencing guidelines." S. Rep. No. 98-225, at 151 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3334.

But while the PROTECT Act did not amend essential portions of the statute, notably § 3553(b), provides an important opportunity to look afresh at the role that departures play in the system.

1. Departure Study

Plainly, the message of the PROTECT Act is that there are "too many" departures. However, the essential question is -- "Too many" relative to what? From the comments of the drafters, it is apparent that they believe there are "too many" departures relative to the Guidelines' goal of sentencing uniformity. But uniformity was but one statutory goal of the Sentencing Reform Act, along with rehabilitation, deterrence, and proportionality.

I think the Commission should update their studies of departures to determine (1) when they are given, i.e. the kinds of cases in some detail, (2) why, i.e. the rationale for the departure, and (3) how much, i.e. the size of the departure. We have done a preliminary report of this nature for the District of Massachusetts. We have concluded that the largest single category of departures is departures on account of problems with the criminal history, departures under § 4A1.3. As I understand Commission data, that conforms to the national average. Moreover, it makes sense as a departure. The Commonwealth of Massachusetts, for example, does not have sentencing guidelines. It is not always easy to meaningfully and fairly translate a Massachusetts criminal record into the federal categories. See United States v. Leviner, 31 F. Supp. 2d 23 (D. Mass. 1998); United States v. Shepard, 181 F. Supp. 2d 14 (D. Mass. 2002).

In addition, the Massachusetts study -- at least in our preliminary review -- suggests that the majority of departures are under two years, hardly the kind of major adjustment that the debate on the PROTECT Act suggested. (To be sure, our statistics were not able to identify the relationship between the departure and the Guideline sentence, i.e. whether this was a two year departure on a ten year sentence or a two year departure on a three year sentence.)

In a sense, a study of this sort will enable the Commission to do what the Sentencing Reform Act suggested -- use judicial departures as a way of determining whether the substantive provisions of the Guidelines should be amended. Do the aberrant conduct departures suggest that the Commission ought to revisit changes in category I of the Criminal History score? Should we revisit the issues raised in the Commission's excellent Working Paper on this subject from several years ago? Do departures on the grounds of post offense drug rehabilitation suggest that the Commission should revisit that issue in Chapter 5? Are there any judicial departures based on role in the offense issues? Should role adjustments be more substantial, and along a greater range, so that courts can titrate culpability with greater precision?

I understand that I am merely restating several of the questions that the Commission has asked, but I believe they cannot -- and should not -- be answered in the abstract.

2. Crime Control

While it is somewhat unfashionable to speak of this, I also believe that the Commission study should attempt to link departures, and the sentences that resulted from them, to crime control issues. When the Sentencing Reform Act was passed, scholars despaired of all efforts to study the relationship between sentencing and crime rates. There was little data; the categories under which the data was recorded differed from jurisdiction to jurisdiction.

The Guideline movement -- both federal and state-- has changed all of that. There is substantial information, much of it recorded in similar categories.

I understand that the Commission has begun this effort with respect to recidivism studies as part of their Fifteen Year review. I would like to see the effort broadened. What is the science of drug rehabilitation and propensity to commit crimes? What can we learn from the drug court efforts? Are there categories of offenders and offenses that we can target for drug treatment?

I cannot underestimate the importance of this effort. The departure categories of Chapter 5 would be easier to understand -- for the general public, for our legislators -- if they were linked to concrete crime control issues, rather than to unspoken premises about social policy and judicial behavior.

3. District Reports

I also believe that a study of departures within each District would be efficacious in and of itself. First, it serves a purpose internal to the court. Each judge reviews the study and uses it to correct or not correct his or her own practices. Second, it serves an external purpose. The debate on departures should not be about gross numbers, i.e. the rate of departures, but should be about substance, i.e. when judges depart and why.

4. Guideline Commentary

Departures from the Guidelines would be more limited -- and in my judgment, more rational -- if the following occurred:

- a) Courts spell out the grounds for their departures more explicitly than they have done before. The PROTECT Act emphasizes this as did the Sentencing Reform Act, but the importance of this goes beyond the statutory mandate. The public needs to understand why courts depart, that departures are not taking place willy nilly, that there are sound reasons for judicial departures. (I am reminded of the study that the Commission did several years ago, in which it concluded that public opinion on what sentences were appropriate for given crimes depended to a considerable extent on the information the public was given about the offense and the

offender. If the public had the information that judges had about offenders and their crimes, they would better understand sentencing outcomes.)

- b) District court opinions as well as the opinions of appellate courts should be circulated. I say this not simply because I am a zealot on the subject of writing sentencing opinions. (I write in virtually every case in which I depart.) I believe that it would be enormously helpful to other district court judges in defining when it is appropriate to depart to understand what other judges have done in comparable circumstances. Appellate court decisions, while helpful, are not adequate to the task, because they review only a fraction of the cases the district court sees. The more district court judges know about the practices of their colleagues, the more likely they will conform their behavior to those norms.

To be sure, similar efforts were less than successful in the pre-Guidelines era. Sentencing councils and institutes were not sufficient to create standards prior to the enactment of the SRA. I believe that the current atmosphere is quite different, and the exchange of this type of information is more likely to have a meaningful impact on judicial behavior.

- c) District sentencing reports or a Sentencing Information System (described below) -- describing the sentencing practices in the area-- should be widely circulated, for the same reasons as outlined in (b) above.
- d) The Commission should provide commentary to each Guideline and in particular, the policy statements in Chapter 5, more akin to legislative history. Legislative history could include summaries of hearings, Commission reports, etc. Alternatively, it could include commentary like the commentary to § 1B1.3, "Illustrations of Conduct for which the Defendant is Accountable." In that section, the Commission has provided courts with examples of relevant conduct to illustrate the Guidelines. It is essentially a series of narratives -- not unlike a body of case law -- which I, for one, find enormously helpful in elucidating the boundaries of the Guidelines.

5. Sentencing Information System

Our District has been working on creating a Sentencing Information System for the judges with a single searchable data base of a) opinions, b) sentencing transcripts, c) statements of reasons, d) presentence reports. If a given statement of reasons form is perfunctory, the judge reviewing it can go to the sentencing transcript or the presentence report to flesh out the details.

6. Conclusion

I understand that this letter is not directly responsive to each of the questions that the Commission asked. Moreover, I understand that it is not directly responsive to the "reduce departures" message of the PROTECT Act. In my judgment, however, the unique mission of the Commission will be undermined if it responded to the Act simply by closing this departure window, or that one, without further study and thought. Even in a Guideline regime ostensibly based on a "limited retribution" model, there is room for this kind of analysis. The Commission should use its considerable staff to determine what departures make sense in limiting recidivism or what offenders can be identified for example, for whom drug treatment is both meaningful and acceptable, to the public?

Moreover, providing judges with more of the data on which Commission guidelines are based, or legislative history, or narratives, will rationalize departures, create a more coherent body of law. That approach may also reduce departures, but as important, it will make the departures that result more understandable to the public we serve.