United States General Accounting Office

GAO

Report to Congressional Requesters

October 2003

FEDERAL DRUG OFFENSES

Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2001

GAO

Accountability * Integrity * Reliability

GAO-04-105

October 2003

FEDERAL DRUG OFFENSES

Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2001

GAO Accountability • Integrity • Reliability

Highlights

Highlights of GAO-04-105, a report to congressional requesters

Why GAO Did This Study

Created in 1984, the United States Sentencing Commission (USSC) was charged with developing the federal sentencing guidelines to limit disparities in sentencing among offenders with similar criminal backgrounds found guilty of similar crimes. Judges determine a specific sentence based on an applicable sentencing guideline range, such as 57 to 71 months, provided in the guidelines. Judges may impose sentences that fall anywhere within the range, above it (upward departures), or below it (downward departures). For some offenses, Congress established mandatory minimum sentences. Judges may also sentence below the minimum in certain circumstances.

We examined the differences in drug offense departures from sentencing guidelines and mandatory minimum sentences among federal courts and the documents the USSC used to record and analyze sentences.

What GAO Recommends

We recommend that USSC and the Administrative Office of the U.S. Courts (AOUSC) continue to collaborate on education programs to encourage judges and other court officials to use AOUSC's standard statement of reasons form (SOR), to complete the SOR more effectively; and to revise the standard SOR to better meet the data collection needs of the USSC.

www.gao.gov/cgi-bin/getrpt?GAO-04-105.

To view the full product, including the scope and methodology, click on the link above. For more information, contact William O. Jenkins at (202) 512-8757 or jenkinswo@gao.gov.

What GAO Found

Generally, downward departures are defined as (1) substantial assistance departures, made at the prosecutor's request because the offender provided substantial assistance to the government; and (2) other downward departures made for other reasons, such as a plea agreement, a judge's consideration of mitigating factors, or early disposition, i.e., "fast track" programs initiated by prosecutors for low-level drug trafficking offenses.

Of federal sentences for drug-related offenses in fiscal years 1999-2001, the majority (56 percent) was within applicable guideline ranges. Downward sentencing departures were more frequently due to prosecutors' substantial assistance motions (28 percent) than for any other reasons (16 percent).

For federal drug sentences that carried a mandatory minimum term of imprisonment, more than half of the drug sentences imposed fell below a mandatory minimum. Of these, half fell below a minimum due to prosecutors' substantial assistance motions and half due to other reasons.

After adjusting for differences in offense and offender characteristics among judicial circuits and districts, our analysis showed variations among certain circuits and districts in the likelihood an offender received a substantial assistance departure, other downward departure, or a sentence falling below a mandatory minimum. However, these variations did not necessarily indicate unwarranted sentencing departures or misapplication of the guidelines because data were not available to fully compare the offenders and offenses for which they were convicted.

For drug sentences nationally, USSC receives 96 percent or more of the three key documents, including the statement of reasons (SOR), used to record sentence length and departures. For a small percentage of drug cases in USSC's database, information is missing, incomplete, or too difficult for USSC to interpret, principally affecting sentencing analyses in districts where the missing or incomplete data are most prevalent.

Downward Departures for Federal Drug Sentences Imposed in FY 1999-2001

	All criminal sentences		All drug sentences	
	Number	Percent	Number	Percent
Sentences imposed	175,245		72,283	
Sentences with complete sentencing information	162,090	100%	69,279	100%
Sentences within guidelines	104,389	64%	39,138	56%
Downward departures				
Substantial assistance	29,247	18%	19,107	28%
Other reasons	27,474	17%	10,891	16%

Source: GAO analysis of USSC data.

Contents

Letter 1

Results in Brief 3
Background 5
Federal Drug Sentences Departed Downward More Often Due to Substantial Assistance than for Other Reasons 11
More Than Half of Drug Sentences Fell below an Otherwise Applicable Mandatory Minimum Sentence 14
Likelihood of Sentences Departing Downward or Falling below a Mandatory Minimum Varied by Judicial Circuits and Districts 19
Opportunities Exist to Improve Sentencing Data Collection and Reporting 21
Conclusions 24
Recommendations 24
Agency Comments 25

Appendix I **Objectives, Scope, and Methodology** 28

Objectives 28
Scope 28
Methodology 29

Appendix II **Percentage of Sentences Falling below an Applicable Guideline Range or An Otherwise Applicable Mandatory Minimum** 38

Appendix III **Likelihood of Sentences Falling below a Guideline Range or an Otherwise Applicable Mandatory Minimum** 49

Appendix IV **Data for Analyzing Departures and Mandatory Minimum Sentences at Circuit and District Court Levels Limited** 61

Documents USSC Requests from District Courts 61
How USSC Uses Documents to Create Its Database 61
USSC Receives Most of Requested Sentencing Documents 62
USSC Takes Steps to Reduce Missing Document Rate 63

Missing or Difficult to Interpret Information Can Affect Analysis of Departures 64
USSC Actions to Improve Coding 65
Multiple Reasons Cited for Missing Documentation and Information 65
Other Downward Departures Do Not Solely Reflect Judicial Discretion 67

Appendix V **Comments from U.S. Sentencing Commission** 75

Appendix VI **Comments from the Judicial Conference Committee on Criminal Law** 77

Appendix VI **GAO Contacts and Staff Acknowledgments** 81

GAO Contacts 81
Staff Acknowledgments 81

Tables

Table 1: Comparing Downward Departures Due to Substantial Assistance and Other Reasons for All Federal Sentences with Federal Drug Sentences, Fiscal Years 1999-2001 12
Table 2: Numbers and Percents of Drug Cases Involving Different Types of Offenses or Offenders, and Percentages of Each Type Receiving Sentences Departing Downward from the Guidelines 29
Table 3: Numbers and Percents of Drug Cases Involving Different Types of Offenses or Offenders, and Percentages of Each Type Receiving Sentences Departing Downward from the Guidelines 32
Table 4: Hypothetical Example Showing Effect of Two Different Methods of Computing Percentages for “Other Downward Departures” 34
Table 5: Percentages of Drug Cases between 1999 and 2001 Resulting in Upward Departures, Within Range Sentences, and Downward Departures, by Circuit 39

Table 6: Percentages of Drug Cases between 1999 and 2001 Resulting in Upward Departures, Within Range Sentences, and Downward Departures, by District 40
Table 7: Percentages of Mandatory Minimum Drug Cases between 1999 and 2001 Resulting in Sentences at or above a Minimum, and below An Otherwise Applicable Minimum Due to Substantial Assistance or for Other Reasons, by Circuit 44
Table 8: Percentages of Mandatory Minimum Drug Cases between 1999 and 2001 Resulting in Sentences at or above the Minimum, and below An Otherwise Applicable Minimum Due to Substantial Assistance or For Other Reasons, by District 45
Table 9: Odds on Substantial Assistance Departures and Other Downward Departures, and Odds Ratios Indicating the Differences between Circuits, before and after Adjusting for Offense and Offender Characteristics 50
Table 10: Odds on Substantial Assistance Departures and Other Downward Departures, and Odds Ratios Indicating the Differences between Districts, before and after Adjusting for Offense and Offender Characteristics 51
Table 11: Odds on Mandatory Minimum Sentences Falling below an Otherwise Applicable Mandatory Minimum for Substantial Assistance and for Other Reasons, and Odds Ratios Indicating the Differences between Circuits, before and after Adjusting for Offense and Offender Characteristics 56
Table 12: Odds on Mandatory Minimum Sentences Falling below an Otherwise Applicable Mandatory Minimum for Substantial Assistance and for Other Reasons, and Odds Ratios Indicating the Differences between Districts, before and after Adjusting for Offense and Offender Characteristics 57
Table 13: Percent of Missing Drug Sentencing Documents, by Circuit, as Shown in USSC's Database for Fiscal Years 1999-2001 63
Table 14: Percent of Missing Drug Sentencing Information on Documents USSC Received, by Circuit, Fiscal Years 1999-2001 64
Table 15: First Reason Provided by Judges for Other Downward Departure in Drug Sentences Nationwide, Fiscal Years 1999-2001 68

Table 16: Second Reason Provided by Judges for Other Downward Departure in Drug Sentences Nationwide, Fiscal Years 1999-2001 72
Table 17: Third Reason Provided by Judges for Other Downward Departure in Drug Sentences Nationwide, Fiscal Years 1999-2001 74

Figures

Figure 1: Sentences Departing from Guideline Ranges and Sentences Falling below a Mandatory Minimum 2
Figure 2: Geographical Boundaries of the 12 Regional Circuit Courts of Appeals and 94 District Courts 6
Figure 3: Illustration of a Sentencing Guideline for an Offense of Conviction Carrying a Mandatory Minimum 8
Figure 4: Percent of Substantial Assistance and Other Downward Departures for Drug Sentences, by Circuit, Fiscal Years 1999-2001 13
Figure 5: Number of Districts by Percent of Drug Sentences Departing Downward Due to Substantial Assistance or for Other Reasons, Fiscal Years 1999-2001 14
Figure 6: Percent of Drug Sentences Meeting or below an Otherwise Applicable Mandatory Minimum, Fiscal Years 1999-2001 15
Figure 7: Summary of Mandatory Minimum Drug Sentences below an Otherwise Applicable Mandatory Minimum and Departing Downward Compared with Sentences that Did Not Carry a Mandatory Minimum, Fiscal Years 1999-2001 17
Figure 8: Percent of Drug Sentences Falling below an Otherwise Applicable Mandatory Minimum due to Substantial Assistance or for Other Reasons, Fiscal Years 1999-2001 18
Figure 9: Number of Districts by Percent of Sentences Falling below an Otherwise Applicable Mandatory Minimum Due to Substantial Assistance or Other Reasons, Fiscal Years 1999-2001 19

Abbreviations

AOUSC	Administrative Office of the U.S. Courts
J&C	Judgment and Commitment Order
PSR	Presentence Report
SOR	Statement of Reasons
USSC	U.S. Sentencing Commission

This is a work of the U.S. government and is not subject to copyright protection in the United States. It may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.

G A O
Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

October 24, 2003

The Honorable F. James Sensenbrenner
Chairman
Committee on the Judiciary
House of Representatives

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism,
and Homeland Security
Committee on the Judiciary
House of Representatives

The Sentencing Reform Act of 1984[1] established the independent U.S. Sentencing Commission (USSC) and charged it with developing the Federal Sentencing Guidelines. The guidelines were intended to avoid unwarranted disparities in sentences among defendants with similar criminal records who were found guilty of similar criminal conduct without eliminating the thoughtful imposition of individualized sentences.[2] To foster this goal, the guidelines specify sentencing guideline ranges—a range of time (in months)—that offenders should serve given the nature of their offense and other factors but also permit sentences to depart upward or downward from guideline ranges due to aggravating or mitigating circumstances. For certain types of offenses, including certain drug and weapons offenses, Congress has statutorily specified mandatory minimum sentences that supplant the otherwise applicable guidelines range (see fig. 1). Judges may impose sentences that depart downward from established guidelines or fall below a mandatory minimum at the request of the prosecution because the defendant has provided substantial assistance to the government. USSC designates sentences departing downward for this reason as substantial assistance departures. [3] A judge may also depart downward as a result of accepting a plea agreement or after considering characteristics of the offender or the offense not fully covered in the

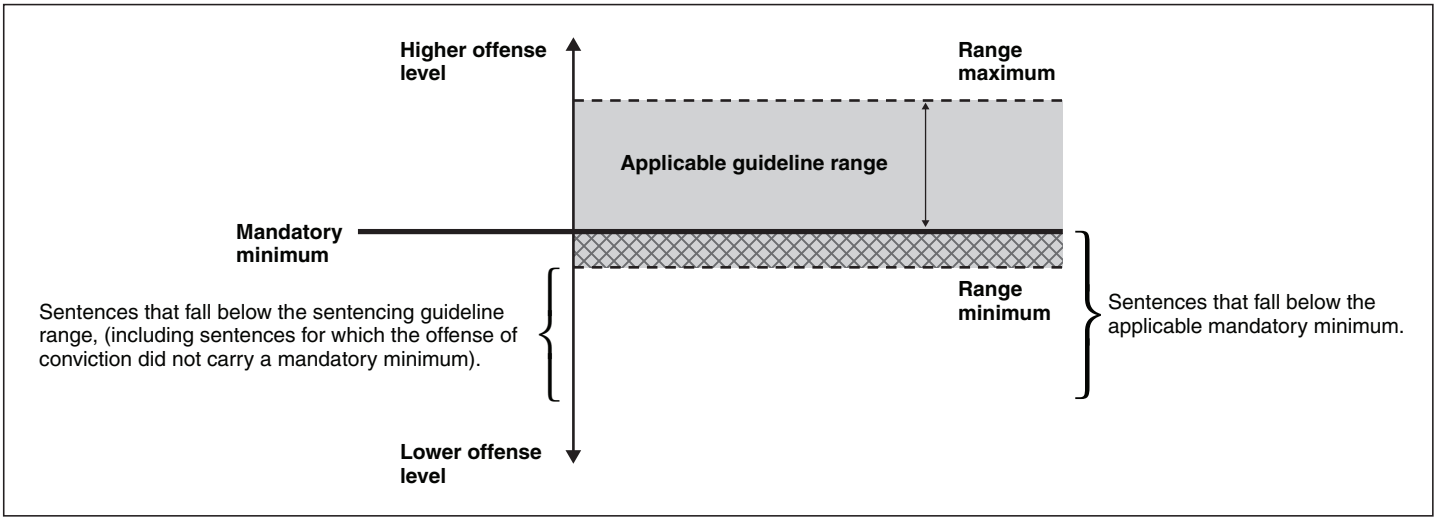
[1]18 U.S.C. 3551 *et seq.*, 28 U.S.C. 991-998.

[2]28 U.S.C. 991(b)(1)(B); *see also* S. Rep. No. 98-225, p. 52 (1983).

[3]See 18 U.S.C. 3553(e).

guidelines, such as extraordinary rehabilitation efforts after the offense but prior to sentencing. To distinguish such sentences from substantial assistance sentences, USSC designates them as "other downward departures" as part of its data gathering efforts.

Figure 1: Sentences Departing from Guideline Ranges and Sentences Falling below a Mandatory Minimum



Sources: USSC 2002 guidelines and GAO analysis.

As you requested, this report discusses downward departures for federal drug offenses. We identified the extent to which federal drug sentences departed downward from a guideline range determined by the court or fell below an applicable mandatory minimum in fiscal years 1999-2001. Our objectives were to (1) identify the percentage of federal sentences, and, specifically, those for drug-related offenses, departing downward due to substantial assistance motions or other reasons; (2) identify the percentage of federal drug sentences that fell below an applicable mandatory minimum due to substantial assistance motions or other reasons; (3) compare the likelihood across judicial circuits and districts that offenders received downward departing sentences or sentences below a mandatory minimum; and (4) identify limitations, if any, of USSC's sentencing data for drug offenses.

To meet these objectives, we obtained USSC's sentencing database for fiscal years 1999 through 2001 and used its coding scheme to identify (1) sentences departing downward due to a prosecutor's substantial assistance motion (substantial assistance departures); (2) sentences that

departed downward for other reasons (other downward departures); and (3) sentences that fell below an applicable mandatory minimum. We used the offender and offense characteristics in USSC's database to statistically control for major differences among circuits and districts in the types of offenders sentenced and the offenses for which they were sentenced. However, it is important to note that a variety of other variables, such as an offender's extraordinary rehabilitation efforts after the offense but prior to sentencing, could affect departure decisions, but data for these variables are not readily available.

We also reviewed the types of documents USSC staff used to identify departures, the reasons for those departures, and the number of missing documents by circuit and district. We interviewed officials at USSC and the Administrative Office of the U.S. Courts (AOUSC), the administrative arm of the federal judiciary, and the Chair, Committee on Criminal Law of the Judicial Conference of the United States, the judiciary's principal policymaking body. We conducted our work between March and August 2003 in Washington, D.C., in accordance with generally accepted government auditing standards. Appendix I includes a more detailed description of our scope and methodology. Appendixes II and III provide more detailed descriptions of how we applied our methodology.

Results in Brief

Federal judges imposed 175,245 sentences subject to the federal sentencing guidelines in fiscal years 1999-2001. Of the 162,090 sentences for which complete departure information was available, the majority of all federal criminal sentences (64 percent) as well as drug sentences (56 percent) were within applicable guideline ranges. Of the federal sentences that departed downward, 18 percent departed downward due to prosecutors' substantial assistance motions and 17 percent departed downward due to other reasons. Federal drug sentences imposed during the same period departed downward more frequently due to prosecutors' substantial assistance motions (28 percent) than for other reasons (16 percent).[4]

[4]Other reasons that sentences departed downward included early disposition, that is, "fast track," programs initiated by prosecutors; plea agreements; and judges' consideration of mitigating circumstances. See appendix IV for more information on the frequency of reasons cited for other downward departures.

Of 68,670 federal drug sentences imposed during fiscal years 1999-2001 with complete departure and sentence length information, 41,861 carried a mandatory minimum term of imprisonment. Of these, more than half (52 percent) fell below an otherwise applicable mandatory minimum sentence. An equal proportion of sentences fell below an otherwise applicable mandatory minimum due to substantial assistance (26 percent) as for other reasons, such as the safety valve (26 percent).

After taking into account differences in offender and offense characteristics across the 12 judicial circuits and 94 districts, our statistical analysis showed major variation among certain judicial circuits and districts in the likelihood of an offender receiving a substantial assistance departure, other downward departure, or a sentence falling below a mandatory minimum. For example, offenders sentenced in the Third Circuit during fiscal years 1999-2001 were over 3 times more likely to receive a substantial assistance departure at a prosecutor's initiative than offenders sentenced in the First Circuit. Further, the odds that an offender would be granted an "other downward departure" also varied substantially across circuits. For example, offenders sentenced in the Ninth Circuit were over 18 times more likely to have received an other downward departure than offenders sentenced in the Fourth Circuit. We analyzed the extent to which sentences departed below applicable guidelines on average nationally; however, we did not compare the degree to which the length of the departures varied across circuits and districts. Finally, it is important to note the departure differences among circuits and districts that we found may not, in and of themselves, indicate unwarranted sentencing departures or misapplication of the guidelines. Empirical data on all factors that could influence sentencing were not available, and so an analysis that could fully explain why sentences varied was not possible.

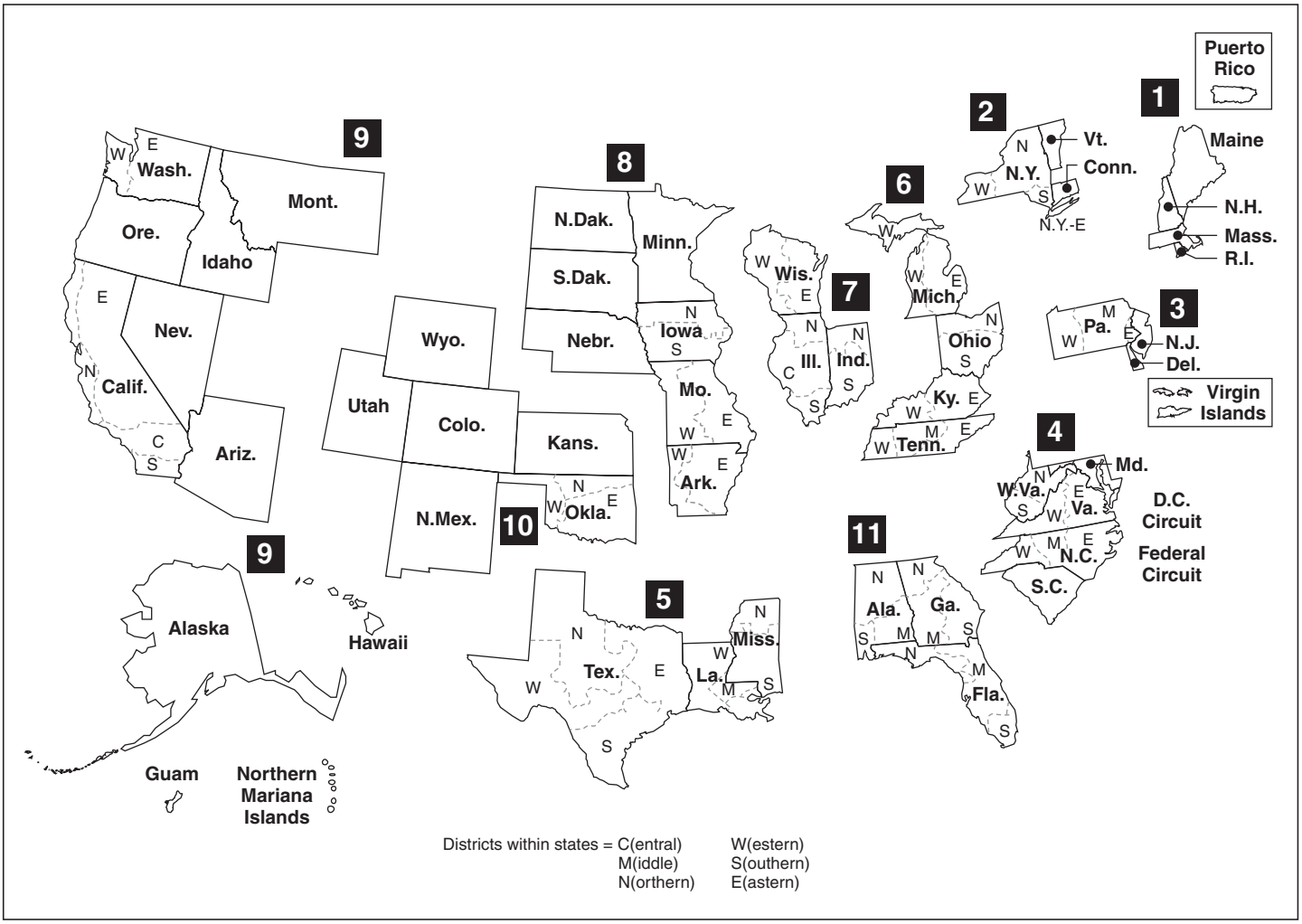
USSC data were generally sufficient for our analyses of downward departures and mandatory minimum sentences across circuits and for the great majority of districts. USSC's sentencing data are based on information from five documents usually produced for each case during the sentencing process, but it principally relies on three of them—the Judgment and Commitment Order (J&C), Statement of Reasons (SOR), and Presentence Report (PSR)—to identify the length of sentences imposed, departures, and the reasons for departures. For drug sentences nationally, USSC receives 96 percent or more of these three key documents. For a small percentage of drug cases nationally, information regarding departures or the reasons for departures is lacking in USSC's database because documents are missing, incomplete, or too difficult for USSC to interpret. Opportunities for improving USSC data exist.

In order to improve USSC's data on federal drug sentences, we are making recommendations that USSC and AOUSC collaborate to improve the collection and recording of sentencing information through education programs, further revision of the standard SOR, and notification of Chief Judges of unclear, incomplete or difficult to interpret information received from their districts. On October 10, 2003, we received official written comments on a draft of our report from USSC and the Chair of the Judicial Conference Committee on Criminal Law that generally agreed with our recommendations (see app. V). However, the Chair of the Criminal Law Committee noted that our report did not sufficiently distinguish downward departures that are due to judicial discretion from those that are due to prosecutorial discretion. As a result, according to the Committee, the category "other downward departures" invites confusion, and some may mistakenly attribute all such departures to judges. We state in our report that all other downward departures are not attributable to judicial discretion and that data were not available to fully distinguish sentences that are attributable to judicial discretion from those due to prosecutorial discretion. USSC, AOUSC, and Department of Justice also provided technical comments that we incorporated as appropriate.

Background

The United States is divided into 94 federal judicial districts, each containing the federal trial courts, where criminal and civil cases are tried. Congress placed each of the 94 districts in 1 of 12 regional circuits, each containing a court of appeals, to which district court decisions may be appealed. Figure 2 is a map of the United States showing the geographical boundaries of the 94 district courts and the 12 regional circuit courts of appeals (including 11 numbered circuits and the District of Columbia Circuit.). There is also a Court of Appeals for the Federal Circuit with nationwide jurisdiction for specific types of cases, such as patent appeals. This court does not hear cases involving the federal sentencing guidelines.

Figure 2: Geographical Boundaries of the 12 Regional Circuit Courts of Appeals and 94 District Courts



Sources: Administrative Office of the U.S. Courts and GAO (data); copyright © Corel Corp. All rights reserved (map).

In 1984, to help ensure that similar crimes committed by similar criminals were punished with similar sentences, Congress, under the Sentencing Reform Act, established the U.S. Sentencing Commission (USSC) and directed that it develop a comprehensive sentencing scheme for federal crimes.[5] USSC established guideline ranges for the length of federal prison

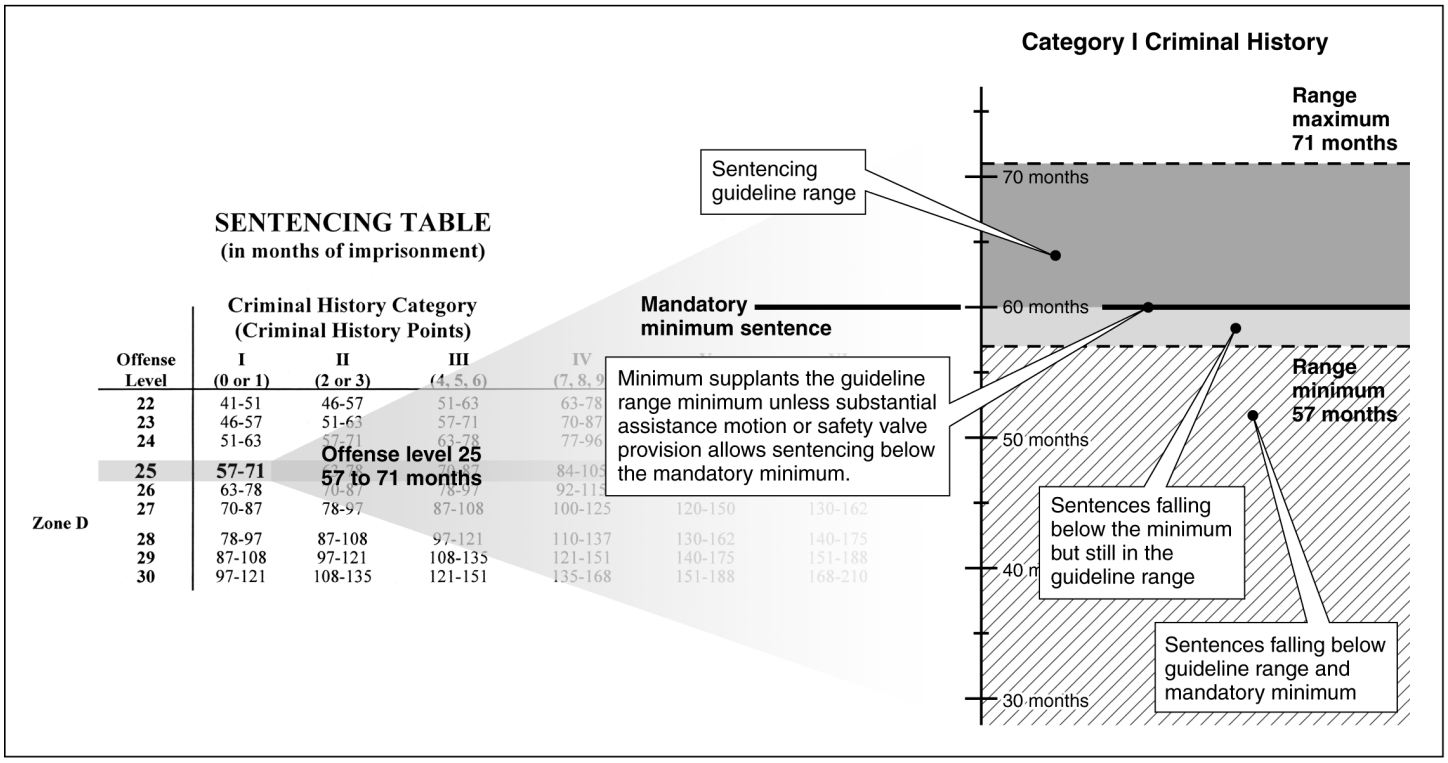
[5]28 U.S.C. 994.

sentences taking into account offender and offense characteristics to establish appropriate sentence terms. The sentencing guidelines cover more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. The sentencing guidelines do not apply to Class B or C misdemeanors or infractions, offenses with a maximum prison exposure of 6 months or less.[6]

Applying USSC's guidance, federal district judges in the 94 federal district courts determine the appropriate sentencing guideline range for an offender based on various factors related to (1) the offense and (2) the offender. The offense is assigned an offense level, which for drug offenses is based on several factors such as the quantity and type of drug involved and whether the offense involved violence. The offender is also assigned a criminal history category based on the number of criminal history points. Criminal history points reflect the severity of an offender's prior criminal record. Taken in combination, the offense level and criminal history category correlate with a sentencing guideline range, which is expressed in months. In addition, for some drug offenses where a mandatory minimum sentence applies, the applicable mandatory minimum sentence supplants the lower end of the applicable guidelines sentencing range. For example, as shown in figure 3, a convicted offender whose offense of conviction is assigned an offense level of 25 and who has a "criminal history category I" should be sentenced between a maximum of 71 months and a minimum of 57 months under the sentencing guidelines unless a mandatory minimum greater than 57 months (e.g., 60 months) is required. A sentence less than 60 months falls below the applicable mandatory minimum.

[6]See USSC 2002 Guidelines, 1B1.9 and ch. 1, pt. A, intro. comment. 5.

Figure 3: Illustration of a Sentencing Guideline for an Offense of Conviction Carrying a Mandatory Minimum



Sources: USSC 2002 guidelines and GAO analysis.

The guidelines also permit sentences that fall above or below an applicable guidelines range, often called upward or downward departures, respectively, in certain circumstances. As illustrated in figure 3, a sentence of more than 71 months would depart upward from the applicable guideline range while a sentence of less than 57 months would depart downward, falling below the lower end of the guideline range.

At the request of the prosecution, the judge may depart downward because the defendant has provided substantial assistance to the government—what USSC designates as substantial assistance departures. But the guidelines also provide that a judge may depart downward if the court finds certain mitigating circumstances exist that were not adequately taken into consideration by USSC in formulating the guidelines that should

result in a sentence below the guideline range.[7] To assist sentencing courts, the guidelines list both encouraged departure factors (such as coercion or duress, diminished capacity, or aberrant behavior of non-violent offenders) and discouraged though permissible departure factors (such as age, physical condition, family responsibilities, or prior good works).[8] Judges may also consider other, unmentioned factors that were not adequately considered by the guidelines (such as extraordinary rehabilitation after the offense but prior to sentencing). USSC designates consideration of encouraged, discouraged, and unmentioned factors as "other departures." Judges are required to explain the reasons for departing from the guidelines. The recently enacted PROTECT Act of 2003 makes clear that the reasons must be specific, written, and provided to USSC.[9]

USSC maintains a database that records a variety of data on the offenders and offenses for which sentences are imposed. Judges must comply with USSC's data collection needs by furnishing a written report of the sentence, and the PROTECT Act makes clear that specific sentencing documents must accompany that report.[10] Included in these data is information on whether the sentences imposed fell within or outside the applicable sentencing guidelines range as determined by the sentencing judge. Information on the incidence of sentencing outside of the guideline ranges is used by USSC to identify areas where the sentencing guidelines may need adjustment. Congress, under the PROTECT Act, directed USSC to review the grounds of downward departures that are authorized by its sentencing guidelines, policy statements, and official commentary, and to promulgate amendments to ensure that the incidence of downward departures is substantially reduced. The required amendments to the sentencing guidelines are due October 27, 2003.[11]

As previously noted, various drug offenses carry a mandatory minimum.[12] For such offenses, the mandatory minimum precludes judges from

[7]See 18 U.S.C. 3553(b); USSC 2002 Guidelines, ch. 5, pt. K, sec. 2.

[8]See USSC 2002 Guidelines., 5K2.0 and ch. 5, pt. H, intro. comment.

[9]See P.L. 108-21 (April 30, 2003), sec. 401(c), *amending* 18 U.S.C. 3553(c).

[10]See *id.*, sec. 401(h), *amending* 28 U.S.C. 994(w).

[11]See *id.*, sec. 401(m)(1), (2)(A).

[12]See 21 U.S.C. 841, 844, 846, 960, 963.

sentencing at a lower guideline range minimum or from granting a downward departure that might otherwise be available, unless one of two statutory provisions applies. First, a judge may impose a sentence below the applicable mandatory minimum if the government (the federal prosecutor) files a motion with the court for such sentencing relief because of the defendant's "substantial assistance" in the investigation or prosecution of another person.[13] The discretion to make such a motion rests solely with the prosecutor. Second, in the absence of a substantial assistance motion, the "safety valve" provision affords relief from any otherwise applicable mandatory minimum sentence for drug offenders who have minimal criminal history (i.e., no more than 1 criminal history point); were not violent, armed, or high-level participants; and provided the government with truthful information regarding the offense. In these cases, the court is directed by statute to impose a sentence pursuant to the sentencing guidelines without regard to a mandatory minimum.[14]

As incorporated in USSC's sentencing guidelines, both the substantial assistance and the safety valve provision may affect sentencing for offenders whose offense of conviction does not carry a mandatory minimum sentence—that is, whose sentences are solely governed by the application of the sentencing guidelines. For such offenders, a substantial assistance motion permits the judge to depart downward from the applicable guidelines range.[15] With respect to the safety valve, the sentencing guidelines provide offenders who are convicted of certain drug offenses and who meet the legislative safety valve requirements a 2-level decrease to their base offense level, for example, from level 25 to level 23.[16]

[13]See 18 U.S.C. 3553(e).

[14]See *id.* 3553(f).

[15]See USSC 2002 Guidelines, sec. 5K1.1.

[16]See *id.*, secs. 2D1.1(b)(6); 2D2.1(b)(1).

Federal Drug Sentences Departed Downward More Often Due to Substantial Assistance than for Other Reasons

The majority of federal sentences fell within an applicable guideline range, but when sentences departed downward, or fell below a guideline range, they did so about as often due to substantial assistance as to other reasons. Of the 162,090 federal sentences from fiscal years 1999-2001 for which complete sentencing information was available, most were within the guideline ranges determined by the court (64 percent), and about an equal proportion of sentences departed downward due to substantial assistance (18 percent) as for other reasons (17 percent).[17]

Similar to federal sentences overall, of the 69,279 drug sentences for which complete departure information was available, we found that most sentences were within guideline ranges (56 percent). Unlike federal sentences overall, from fiscal years 1999 to 2001, federal drug sentences departed downward more frequently due to substantial assistance (28 percent) than other reasons (16 percent), as shown in table 1. Other reasons that drug sentences departed downward included early disposition, that is, fast track, programs initiated by prosecutors; plea agreements; and judges' consideration of mitigating circumstances. See appendix IV for more information on the frequency of reasons cited for other downward departures.

[17]Since circuits and districts may vary widely in the number of offenders and type of offenses for which they are convicted, analyses that identify the percent of cases that fell below an applicable guideline range or a mandatory minimum do not provide a fair basis for comparing sentencing practices across circuits and districts. For example, a greater proportion of offenders appearing before a district court who possessed and shared information of a crime that assisted the government in the investigation or prosecution of others or whose offenses were less serious may influence the frequency of sentences that fell below an applicable guideline range. Taking various offender and offense characteristics into account to identify the likelihood of a sentence falling below a guideline range or a mandatory minimum provides a more accurate picture of variation in sentencing across circuits and districts. We provide this statistical analysis later in the report. See appendix I for more information on the limitations of percentages as a basis for comparison.

Table 1: Comparing Downward Departures Due to Substantial Assistance and Other Reasons for All Federal Sentences with Federal Drug Sentences, Fiscal Years 1999-2001

	All criminal sentences[a]		All drug sentences	
	Number	Percent	Number	Percent
Sentences imposed	175,245		72,283	
Sentences with complete sentencing information	162,090[b]	100	69,279[b]	100
Sentences within guidelines	104,389	64	39,138	56
Upward departures	980	[c]	143	[c]
Downward departures				
Substantial assistance	29,247	18	19,107	28
Other reasons	27,474	17	10,891	16

Source: GAO analysis of USSC Data.

[a]Includes only offenders who were sentenced under the Federal Sentencing Guidelines.

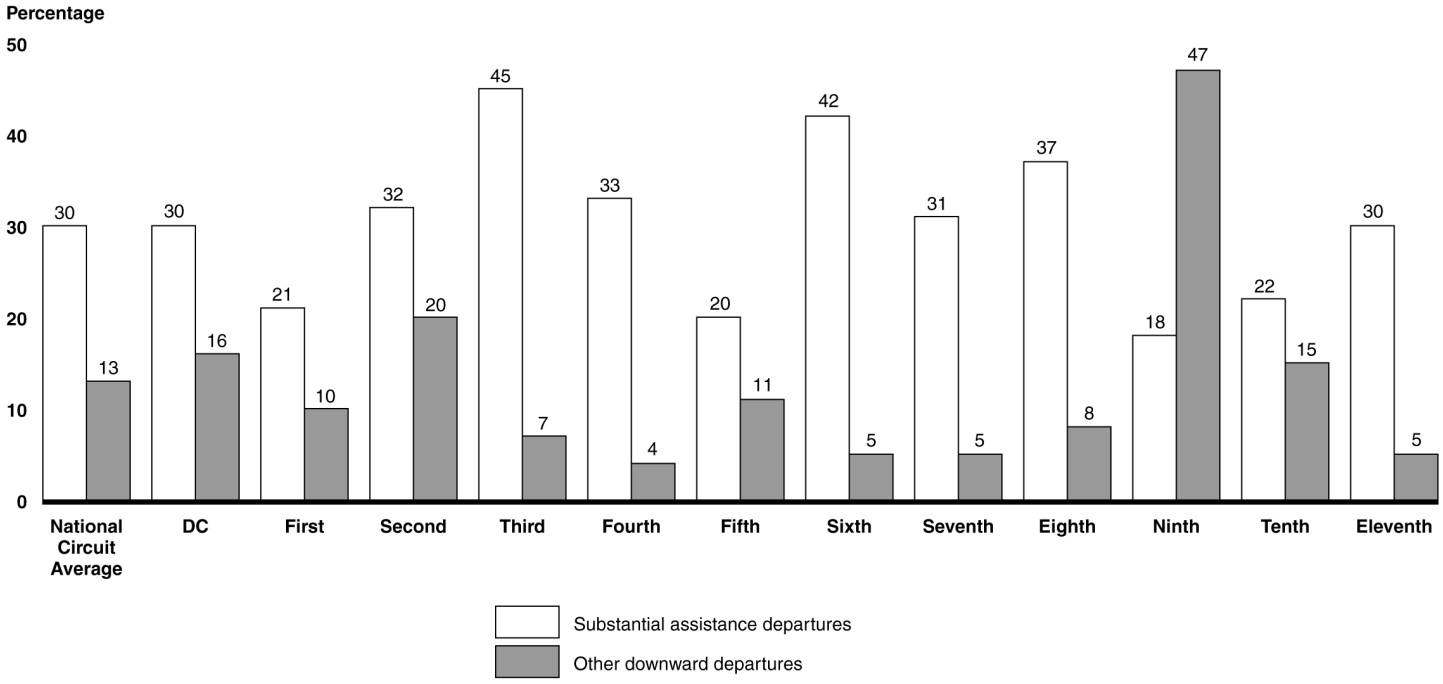
[b]The USSC database lacked departure information on a total of 12,630 (7 percent) of all federal sentences; of these, the USSC database lacked departure information on 3,004 (4 percent) federal drug sentences. An additional 525 sentences were missing offense type information.

[c]Less than 1 percent.

Prosecutors' substantial assistance motions resulted in downward departing sentences that were on average 49 percent of the average lowest sentence drug offenders otherwise would have received under the guidelines. Other downward departures resulted in sentences that were on average 57 percent of the average lowest sentence drug offenders otherwise would have received under the guidelines. See appendix I for more detailed information on sentence reductions.

The percentage of drug sentences that departed downward due to prosecutors' substantial assistance motions or for other reasons varied across judicial circuits in fiscal years 1999–2001, as shown in figure 4.

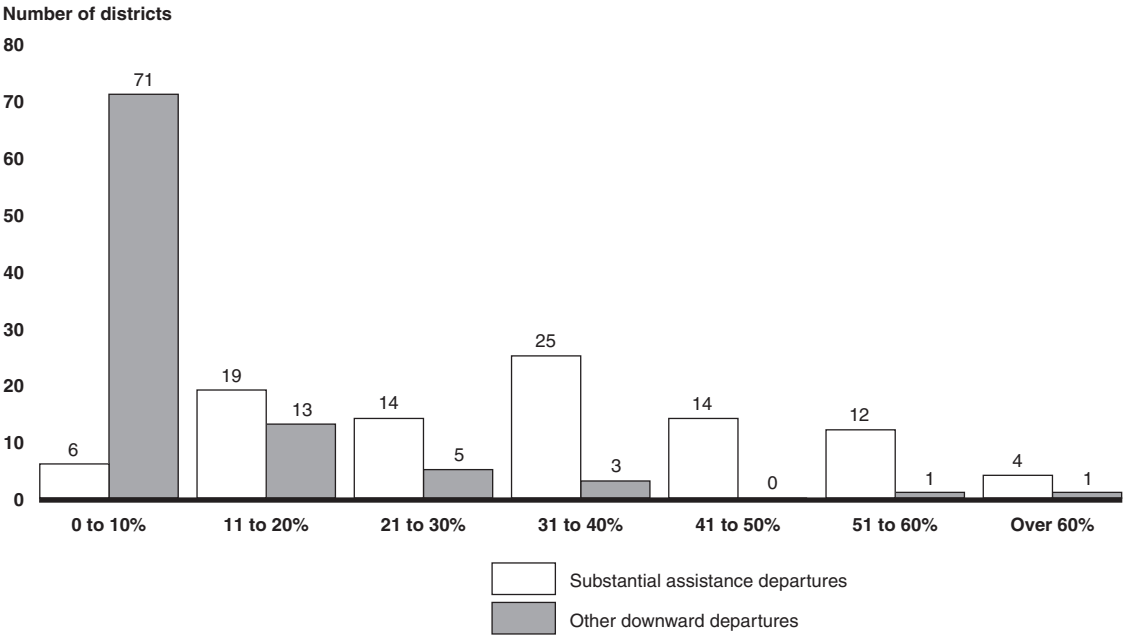
Figure 4: Percent of Substantial Assistance and Other Downward Departures for Drug Sentences, by Circuit, Fiscal Years 1999-2001



Source: GAO analysis of USSC data.

The percentages of drug sentences departing downward differed notably across the 94 districts, even in some cases among districts within the same circuit. Figure 5 shows the 94 judicial districts grouped according to the percent of sentences imposed in districts that departed downward due to substantial assistance and for other reasons. In 55 districts, more than 30 percent of sentences departed downward due to substantial assistance, while in only 5 districts more than 30 percent of the sentences departed downward due to other reasons. However, these percentage differences do not take into account differences in offender and offense characteristics that may contribute to differences among circuits and districts.

Figure 5: Number of Districts by Percent of Drug Sentences Departing Downward Due to Substantial Assistance or for Other Reasons, Fiscal Years 1999-2001



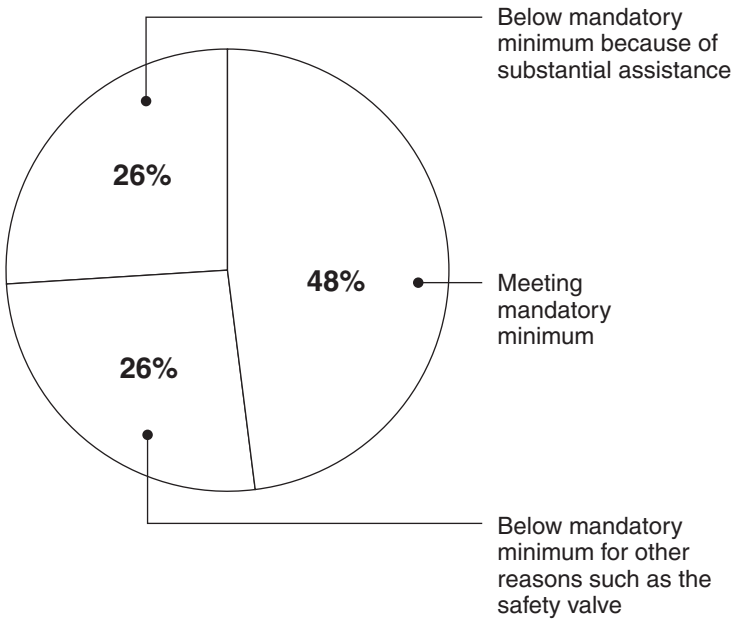
Source: GAO analysis of USSC data.

More Than Half of Drug Sentences Fell below an Otherwise Applicable Mandatory Minimum Sentence

Of 41,861 federal drug sentences included in our analysis that carried a mandatory minimum term of imprisonment, more than half (52 percent) fell below an otherwise applicable mandatory minimum sentence. These sentences were split equally among those that fell below an otherwise applicable mandatory minimum sentence due to substantial assistance (26 percent) and those that fell below for other reasons, such as the safety valve (26 percent).[18] (See fig. 6.)

[18]If a sentence fell below a mandatory minimum sentence and involved a substantial assistance motion, we described the sentence as a "substantial assistance sentence falling below." If a sentence otherwise fell below, we described that sentence as falling below because of "other reasons." The data indicated that most, but not all, of sentences falling below for other reasons involved the safety valve provision, which is the only mechanism by which a judge may disregard a mandatory minimum in the absence of a substantial assistance motion. Reasons for 681 drug sentences falling below a mandatory minimum were not clearly indicated on the sentencing documents, according to USSC officials. Our analysis included these sentences as falling below a mandatory minimum for other reasons.

Figure 6: Percent of Drug Sentences Meeting or below an Otherwise Applicable Mandatory Minimum, Fiscal Years 1999-2001



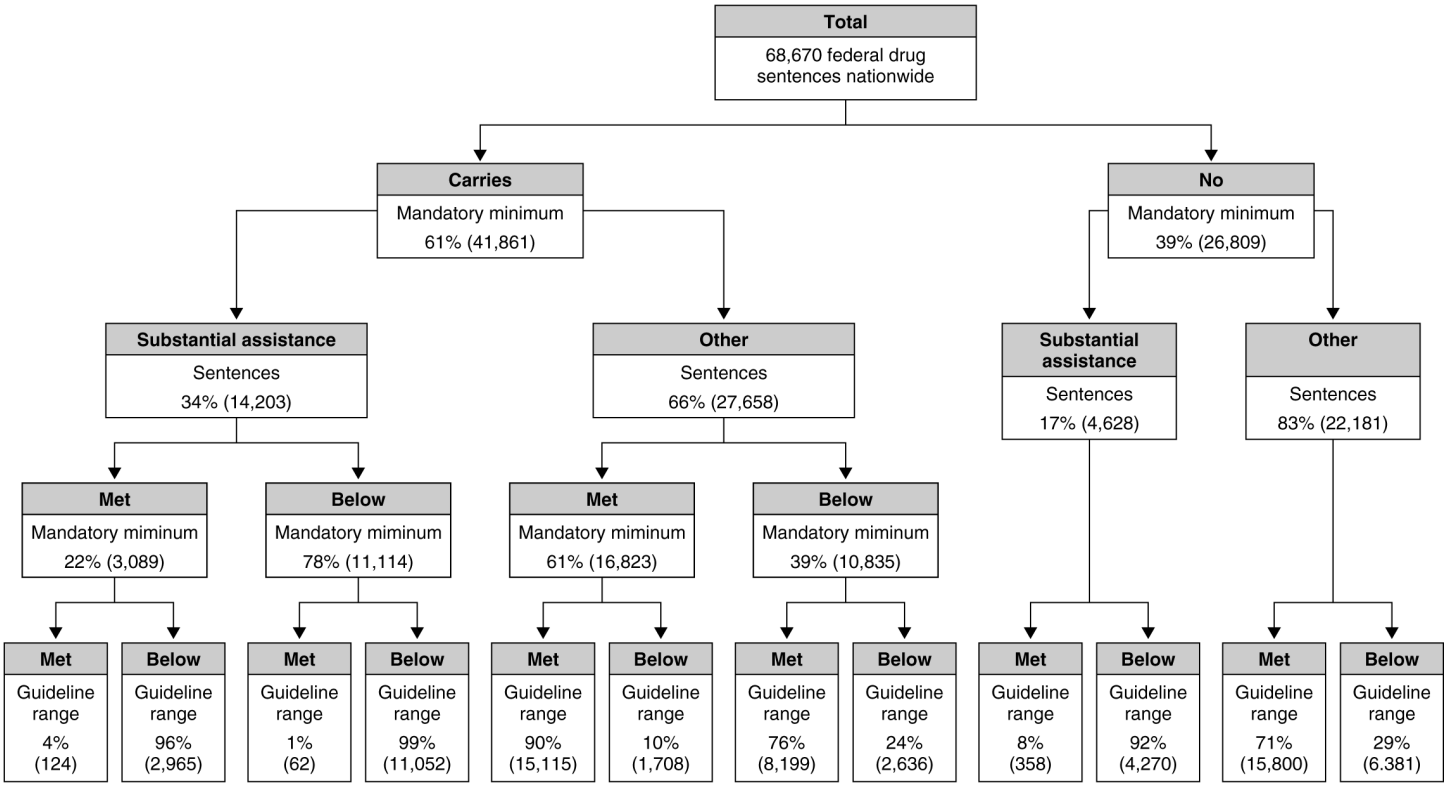
Source: GAO analysis of USSC data.

Nearly all of the mandatory minimum drug sentences carried either a 5-year (48 percent) mandatory minimum or a 10-year minimum (49 percent). On average, prosecutors' substantial assistance motions reduced drug offenders' 5-year mandatory minimum sentence by 33 months. Sentences lowered for other reasons, such as the safety valve, that would otherwise be subject to a 5-year mandatory minimum were reduced by an average of 26 months. On average, prosecutors' substantial assistance motions reduced drug offenders' 10-year mandatory minimum sentences by 63 months, and sentences lowered for other reasons that would otherwise be subject to a 10-year mandatory minimum were reduced by an average of 52 months. See appendix I for more detailed information on sentence reductions.

Figure 7 provides a summary of the number and percent of federal drug sentences that fell below a mandatory minimum or guideline range compared with sentences that did not carry a mandatory minimum. Almost all of the sentences (99 percent) that fell below a mandatory minimum due to substantial assistance also departed downward from an applicable guideline range, whereas only a quarter of sentences that fell below an otherwise applicable mandatory minimum for other reasons also

departed downward from an applicable guideline range. These percentage differences do not take into account offender and offense characteristics that may contribute to differences among circuits and districts.

Figure 7: Summary of Mandatory Minimum Drug Sentences below an Otherwise Applicable Mandatory Minimum and Departing Downward Compared with Sentences that Did Not Carry a Mandatory Minimum, Fiscal Years 1999-2001

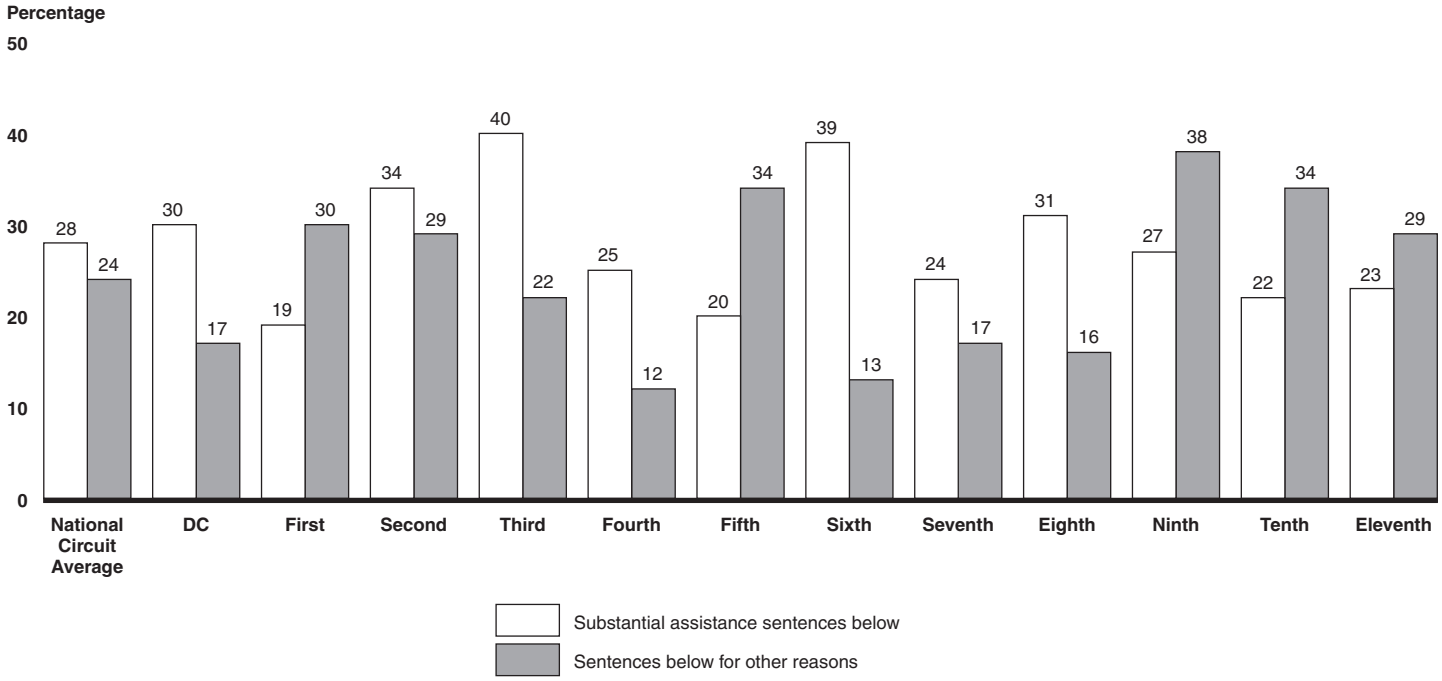


Sources: GAO analysis of USSC data.

Note: Of the 72,283 federal drug sentences imposed during fiscal years 1999-2001, 3,004 lacked complete information on departure status and 609 lacked sentence length information needed to identify sentences that fell below a mandatory minimum. These sentences were omitted from this analysis.

In 7 of the 12 Circuits, more sentences fell below a mandatory minimum due to substantial assistance motions than for other reasons, as figure 8 shows.

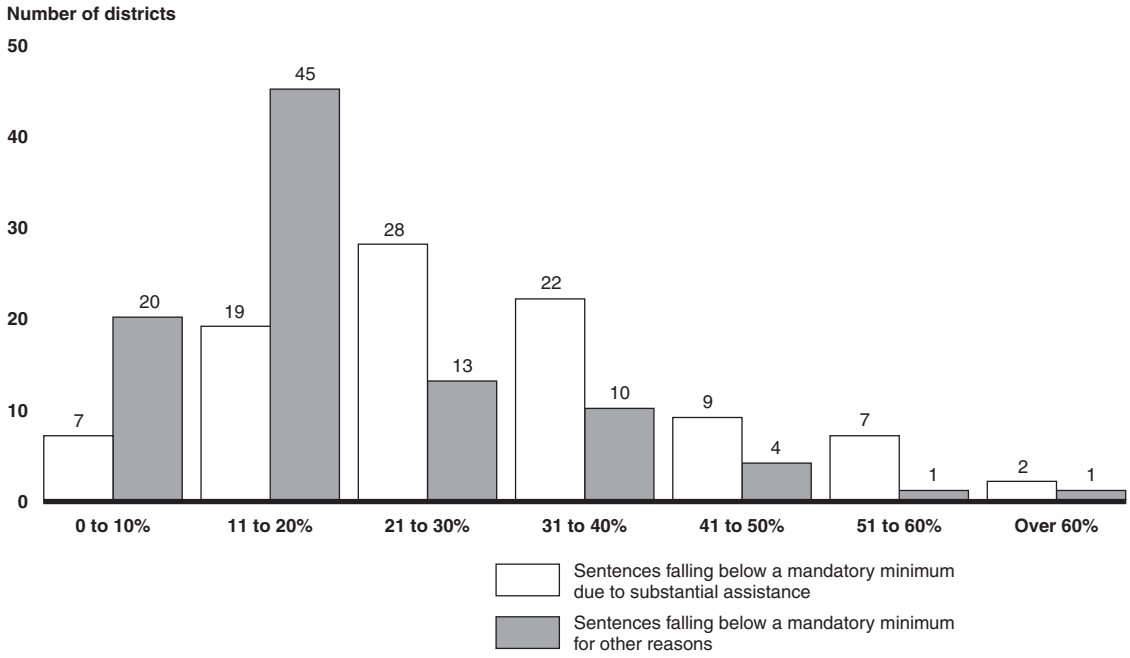
Figure 8: Percent of Drug Sentences Falling below an Otherwise Applicable Mandatory Minimum due to Substantial Assistance or for Other Reasons, Fiscal Years 1999-2001



Source: GAO analysis of USSC data.

In addition to these differences among the circuits, across the 94 districts the percentage of sentences meeting or below an otherwise applicable mandatory minimum substantially varied. Figure 9 shows the 94 judicial districts grouped according to the percent of sentences imposed that fell below an otherwise applicable mandatory minimum due to substantial assistance and for other reasons. In 40 districts, more than 30 percent of sentences fell below an otherwise applicable mandatory minimum due to substantial assistance whereas in 16 districts more than 30 percent fell below for other reasons. Appendix II has more details on our analysis of sentences for which the offense of conviction carried a mandatory minimum sentence.

Figure 9: Number of Districts by Percent of Sentences Falling below an Otherwise Applicable Mandatory Minimum Due to Substantial Assistance or Other Reasons, Fiscal Years 1999-2001



Source: GAO analysis of USSC data.

Likelihood of Sentences Departing Downward or Falling below a Mandatory Minimum Varied by Judicial Circuits and Districts

The percentage differences among circuits and districts suggest that variation existed in the way courts sentenced offenders; however, as discussed earlier, these percentages do not take into account factors such as the offender and offense characteristics that may affect sentencing within a circuit or district. For example, in addition to the number of deportable aliens potentially affecting the percent of other downward departures, some circuits and districts, when compared with others, could sentence a greater proportion of offenders who possessed and shared information of the crime that assisted the government in the investigation or prosecution of others. Therefore, a larger percent of offenders in those circuits and districts could have received a decrease in their sentence due to substantial assistance. Recognizing that judicial circuits and districts differed in the types of offenders sentenced and the offenses for which the offenders were sentenced, our analysis adjusted for differences such as race, gender, offense, criminal history, and offense severity (see appendix I for a complete list of variables included in our analysis). Although these

are the major factors that could affect the likelihood of an offender receiving a departure, they are not all-inclusive.

We used adjusted odds ratios to estimate how circuits and districts vary in sentencing practices. An adjusted odds ratio in this case indicates whether a departure is statistically less likely, as likely, or more likely to occur in one circuit as in another. We can describe how much more likely or less likely a substantial assistance departure was to occur in one jurisdiction versus another; for instance, we can estimate that a substantial assistance departure was 20 percent less likely to occur or 3.6 times more likely to occur in one circuit compared with another. Our analysis focused on adjusted odds ratios since they provide us with our best estimates of differences across circuits and districts after taking into account the differences in drug cases handled across jurisdictions.

Using adjusted odds ratios to estimate the likelihood of an offender receiving a substantial assistance departure, we can see that percentage differences can be misleading. In comparing percentages of substantial assistance sentences in the Eighth Circuit (37 percent) with other circuits, it appears that in 5 circuits –D.C. (30 percent), the Second (32 percent), Fourth (33 percent), Seventh (31 percent), and Eleventh Circuits (30 percent)— fewer offenders received substantial assistance departures. But taking into account differences of offenders and offense characteristics, adjusted odds ratios show that in D.C., the Fourth and Eleventh circuits, offenders were actually as likely to receive a substantial assistance motion as in the Eighth Circuit. Although the Second Circuit's percentage of substantial assistance departures was lower than the Eighth Circuit's, after adjusting for offender and offense characteristics, offenders in the Second Circuit were 1.4 times more likely to be granted a substantial assistance departure than offenders in the Eighth Circuit. In another example, the First Circuit appears to grant more other downward departures (10 percent) than the Eighth (8 percent), but the adjusted odds ratios imply that offenders in the First Circuit are actually 22 percent less likely to be granted an other downward departure than similar offenders in the Eighth Circuit.

After adjusting for differences in drug offenses and offender characteristics, the likelihood of an offender receiving a lower sentence due to either a prosecutor's substantial assistance motion or for other reasons varied substantially across the 12 U.S. circuits and the 94 U.S. district courts. For example, drug offenders sentenced in the Third Circuit from fiscal years 1999-2001 were over 3 times more likely to receive a substantial assistance departure at a prosecutor's initiative than drug

offenders sentenced in the First Circuit during that same time period. The likelihood a drug offender would be granted an other downward departure also varied substantially. Adjusting for differences in offender and offense characteristics, drug offenders sentenced in the Ninth Circuit from fiscal years 1999-2001 were over 18 times more likely to have received an other downward departure than similar drug offenders sentenced in the Fourth Circuit during that same time period.

The likelihood of courts to impose a sentence that fell below a mandatory minimum due to substantial assistance or other reasons also varied substantially across the 12 U.S. circuits and the 94 U.S. district courts, even after taking into account offense and offender characteristics for drug offenses. See appendix III for more details about the statistical likelihood of drug sentences departing downward or falling below a mandatory minimum and the variation in those likelihoods across all circuits and districts.

Our analysis shows variation—in some cases substantial differences—among circuits and districts in the likelihood that offenders convicted of drug offenses would receive substantial assistance or other downward departures in fiscal years 1999-2001. However, these differences, in and of themselves, may not indicate unwarranted sentencing departures or misapplication of the sentencing guidelines. Empirical data on all factors that could influence sentencing were not available, and so an analysis that could fully explain why sentences varied was not possible.

Opportunities Exist to Improve Sentencing Data Collection and Reporting

USSC data were generally sufficient for our analyses of downward departures and mandatory minimum sentences across circuits and for most districts. USSC's sentencing data are based on information from five documents usually produced for each case during the sentencing process. USSC requires that district courts send them these documents for each sentence imposed but principally relies on three of them—the Judgment and Commitment Order (J&C), Statement of Reasons (SOR), and Presentence Report (PSR)—to identify the length of sentences imposed, departures, and the reasons for departures. Nationally for drug cases, USSC received 96 percent or more of each of these documents from the district courts. The percentage of documents missing varied by circuit and districts within circuits. For example, among the circuits the percentage of missing SORs ranged from less than 1 percent to more than 7 percent. Among districts within the Ninth Circuit, the percentage of missing SORs ranged from less than 1 percent to more than 58 percent. Although USSC received most of the requested documents, some were missing key

information or contained unclear information that was difficult to interpret. For instance, among the 12 circuits, departure data were missing for 1 percent to 7 percent of all drug sentences imposed in fiscal years 1999-2001. See appendix IV for more detailed information.

In districts where the missing documents or information are concentrated analysis of departures could be affected. Missing or unclear data also limited our ability to determine when the safety valve was used as the basis for sentencing below a mandatory minimum. For example, in our preliminary analysis, we found that of the 11,256 federal drug sentences for which the offense of conviction carried a mandatory minimum and fell below that minimum, about 1,600 (14 percent) were coded by USSC as falling below the applicable mandatory minimum but not involving either the safety valve or substantial assistance. We discussed this issue with USSC. After reviewing the underlying documents used for coding these 1,600 sentences, USSC determined that over 900 sentences were miscoded. These miscoded sentences were recoded in a variety of ways, including some coded as involving the safety valve, some coded as involving substantial assistance, some coded as having a changed drug quantity that affected the applicable mandatory minimum, and some coded as missing safety valve information. USSC did not recode 681 sentences; these sentences remained coded as falling below a mandatory minimum but involving neither the safety valve nor substantial assistance. In addition, safety valve information was determined to be missing from 770 sentences for which the offense of conviction carried and fell below a mandatory minimum.

AOUSC and USSC officials offered several explanations for missing documents and information or unclear information on documents that was difficult to interpret and code consistently. AOUSC officials noted that judges may not submit documents due to security concerns in cases where the record has been sealed or the offender placed in the witness protection program. Processing a high volume of drug cases could potentially affect document submission, they also noted. Of the four circuits with the highest volume of drug cases, two—the Fourth and the Ninth—also had the highest percentage of missing SORs, 7.4 percent and 6.6 percent, respectively. Although AOUSC developed a standard SOR form for judges to use, USSC officials said that judges submit information to USSC using a variety of forms and formats. In USSC's view, this may contribute to missing information on documents (e.g., forms that do not prompt for an applicable mandatory minimum) or unclear information on the forms that is difficult to interpret.

In addition to these explanations, USSC and AOUSC officials said no information had been provided to judges and other court officials on how sentencing documents are used by USSC to create its database or how to clearly and completely prepare forms such as the SOR to meet USSC's data collection needs. USSC relies almost exclusively on the SOR to determine whether the sentence imposed departed from the guidelines range, met a mandatory minimum, or involved substantial assistance. Thus, missing, incomplete, or difficult to interpret information on that form can affect the completeness and accuracy of the data in USSC's database.

USSC has taken steps to reduce the number of missing documents and information, but opportunities for improvements exist. For instance, USSC sends an annual letter to the courts identifying those cases in which there appear to be missing documents. However, USSC officials said they do not inform courts of documents that, while received by USSC, contained missing or unclear information. In addition, USSC collaborates with the AOUSC and the Federal Judicial Center, the judiciary's research and education body, to educate judges and court officials on how to apply the sentencing guidelines, but they do not offer programs or workshops on how to complete forms such as the SOR and other documents used by USSC.

Although the AOUSC has also taken steps to improve the quality of sentencing data captured on the SOR, opportunities for improvements remain. At its September 2003 meeting, the Judicial Conference of the United States, the federal judiciary's principal policymaking body, approved a new standard SOR form. The Conference designated the new form as the mechanism by which courts comply with the requirements of the PROTECT Act to report reasons for sentences to USSC. The form was revised in part because AOUSC officials and the Chair of the Judicial Conference's Committee on Criminal Law stated that the previous SOR provided an imprecise measure of judicial discretion. It did not collect information on other downward departures that are initiated by the prosecution. The form was revised in consultation with USSC to better meet its data collection needs. However, a USSC official said that the new SOR does not specifically prompt for information on the application of the safety valve or whether the offense of conviction carried a mandatory minimum. In addition, judges will not be required to use this form although USSC believes that the most effective step to improving the completeness of the data the district courts report is for all courts to use a single, standard SOR. AOUSC officials said that while the Judicial Conference has endorsed the new form, they do not believe that the

Conference has the authority to require judges to use the new SOR. However, AOUSC officials stated that with additional education they believe judges will see the benefits of the new form and routinely use it.

Conclusions

The judiciary provided and USSC collected and interpreted sentencing information for the vast majority of the 72,283 drug sentences imposed during fiscal years 1999-2001. The small percentage of documents and sentencing information for drug cases that were lacking in USSC's database did not affect the validity of our analyses at the national or circuit level or for the vast majority of districts. However, the missing data could limit analyses of sentencing practices in the few districts where missing data are most prevalent. Reducing missing, incomplete, or difficult to interpret information would improve USSC's data on departures and reasons sentences fell below an applicable mandatory minimum. Unless the judiciary's standard SOR is revised, judges are made aware of how to effectively complete the SOR, and data submitted more consistently to USSC by the courts, these data problems are likely to persist. More could be done to help reduce the number of documents that are missing, incomplete, or too difficult for USSC to interpret. Evaluating how USSC interprets sentencing data was beyond the scope of this work. However, we believe that without changes to the way USSC reports other downward departures, that is, distinguishing, rather than combining other downward departures initiated by the government with those initiated by judges, the benefits of improved data collection of sentencing practices may not be fully realized.

Recommendations

As USSC and the AOUSC work together to collect and record information on federal sentences and provide additional education and information to judges, we recommend that both USSC and AOUSC continue to collaborate to

- develop educational programs and information for judges and other officers of the court to encourage the use of AOUSC's standard SOR and more effective ways to complete the SOR and
- revise the standard SOR to better meet the data collection needs of USSC.

We also recommend, resources permitting, that USSC, in addition to notifying courts of missing sentencing documents, notify the Chief Judge of each district of documents for drug cases that were received but

contained information that was unclear, incomplete, or difficult to interpret.

Agency Comments

We requested comments on a draft of this report from USSC, the AOUSC, the Judicial Conference Committee on Criminal Law, and the Department of Justice (DOJ). We received written comments on October 10, 2003, from USSC and the Judicial Conference Committee on Criminal Law. Both generally agreed with our report and our recommendations, although the Criminal Law Committee was concerned that the variation among districts we found in the likelihood of other downward departures could mistakenly be attributed to judicial discretion. Their official comments are reproduced in Appendix V. We received oral technical comments from USSC and written technical comments from DOJ and the AOUSC that we incorporated where appropriate. DOJ, the Committee on Criminal Law, and USSC all noted that "fast-track" sentences—prosecutor-initiated programs to encourage early case disposition and reduce the burden on the courts—could account for some of the variation we found among districts in other downward departures. We have added new tables in appendix IV that show the reasons reported to USSC for other downward departures and the frequency with which each reason was cited.

USSC

USSC generally agreed with our report and our recommendations. USSC stated that it is already working to develop more detailed sentencing documentation, submission procedures, and educational outreach to courts and court personnel. USSC noted that while our recommendations are helpful and consistent with their own thinking, implementation of such measures may exceed their current resources given the increasing volume of sentences to be processed and more detailed information for each sentence required by the PROTECT Act.

The Judicial Conference Committee on Criminal Law

The Judicial Conference Committee on Criminal Law generally agreed with our report and our recommendations. The Committee noted that it has taken significant steps to help USSC improve its data collection by revising the standard Statement of Reasons form and endorsing the standard form as the way to comply with PROTECT Act requirements.

The Committee commented that our report did not address the extent to which judges themselves, absent a prosecutor's request, have imposed sentences that fall below the sentencing guideline range. Further, the Committee noted that our report did not sufficiently distinguish downward

departures that are due to judicial discretion from those that are due to prosecutorial discretion. As a result, according to the Committee, the category "other downward departures" invites confusion, and some may mistakenly attribute all such departures to judges. We state in our report on page 11 that other downward departures are attributable to prosecutors as well as judges. Additionally, data are not recorded, coded, or reported in ways that clearly delineate other downward departures due to judicial discretion from those due to prosecutorial discretion.

Impact of Fast Track Sentences on Analysis of Other Downward Departures

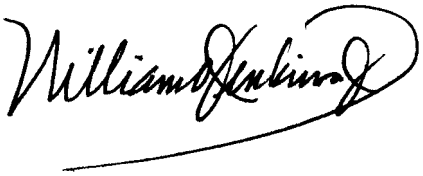
In addition, DOJ, USSC, and the Committee on Criminal Law stated that our report did not sufficiently discuss the impact of early disposition or "fast track" programs on rates of other downward departures in those circuits and districts where such programs were in place. Fast-track programs in the southwest border districts provide lower sentences initiated by prosecutors for low-level drug trafficking offenses. DOJ noted that these programs were developed in response to a dramatic rise in immigration cases handled by federal prosecutors in districts along the southwestern border and were designed to enhance public safety and minimize the burden on the court system by processing these cases as quickly as possible. All of the agencies took the position that some circuits and districts departed downward more than others due to the greater prevalence in some circuits and districts of cases involving fast track programs.

It may ultimately be useful to distinguish fast track departures from other downward departures, in the same way that we have distinguished substantial assistance departures from other downward departures. However, as currently coded in USSC database, fast track cases can be identified only when a judge explicitly lists fast track as a reason for a downward departure. Sentences citing fast track as a reason for departing downward occurred almost entirely in one district--the Southern District of California in which 2,171 sentences (58 percent of other downward departures imposed in this district) were recorded by USSC as departing due to the government's fast track program. In all of the remaining 93 districts combined, only 9 sentences were recorded as departing downward due to fast track programs. Moreover, when we eliminate from our analyses those other downward departures that list "fast track" as a reason for departing, we obtain very similar results to those published in our report; that is, a greater likelihood of other downward departures occurring in the Southern District of California than in most other districts. We do not include these results in detail in our report because of our concern that fast track cases are not always reported by judges as

such or coded by USSC in their database. If fast track departures are to be distinguished from other departures, then changes will need to be made in how such cases are currently reported to USSC. USSC is completing a report on departures, pursuant to a Congressional directive in the PROTECT Act, and will address the impact of fast track programs on departures in greater detail.

As agreed with your offices, unless you publicly announce its contents earlier, we plan no further distribution of this report until 2 days from the date of this report. At that time, we will send copies of this report to the AOUSC and Judicial Conference; DOJ; USSC; and the Federal Judicial Center. We will also make copies available to others upon request. In addition, the report will be available at no charge on GAO's Web site at http://www.gao.gov.

If you or your staffs have any questions about this report, please contact David Alexander at (202) 512-8777 or at Alexanderd@gao.gov or me at (202) 512-8777 or at jenkinswo@gao.gov. Major contributors to this report are listed in appendix V.



William O. Jenkins, Jr.
Director, Homeland Security and Justice Issues

Appendix I: Objectives, Scope, and Methodology

Objectives

Our objectives were to review and categorize all sentences imposed under the federal sentencing guidelines by federal district judges in fiscal years 1999 through 2001. Specifically, our objectives were to

- identify the percentage of federal sentences, and specifically, those for drug-related offenses, departing downward from the applicable guidelines range as determined by the court due to substantial assistance motions or other reasons;
- identify the percentage of federal drug sentences that fell below an applicable mandatory minimum due to substantial assistance motions or other reasons;
- compare the likelihood across judicial circuits and districts that offenders received downward departing sentences or sentences below a mandatory minimum;
- identify limitations, if any, of the U.S. Sentencing Commission's (USSC) sentencing data for drug offenses.

Scope

To meet these objectives, we obtained USSC sentencing data for fiscal years 1999 through 2001. During fiscal years 1999 through 2001, federal judges imposed sentences on 175,245 criminal offenders. Of this total, 11,584 sentences (6.6 percent) lacked information on whether there was a departure from the guidelines range, and for 1,046 sentences (0.6 percent) the guidelines were not applicable. An additional 167 sentences (0.1 percent) lacked information on the type of offender sentenced (drug versus non-drug), and 358 sentences (0.2 percent) lacked information on both departure status and type of offender. For the remaining 162,090 sentences (92.5 percent), table 2 shows the numbers and percents of departure and non-departure sentences for drug and non-drug sentences.

Table 2: Numbers and Percents of Drug Cases Involving Different Types of Offenses or Offenders, and Percentages of Each Type Receiving Sentences Departing Downward from the Guidelines

	Departure status				
Type of sentence	Upward departure	No departure	Substantial assistance departure	Other downward departure	Total
Non-Drug	837	65,251	10,140	16,583	**92,811**
	0.9%	70.3%	10.9%	17.9%	
Drug	143	39,138	19,107	10,891	**69,279**
	0.2%	56.5%	27.6%	15.7%	
Total	**980**	**104,389**	**29,247**	**27,474**	**162,090**
	0.6%	64.4%	18.0%	16.9%	

Source: GAO analysis of USSC data.

Of the total of 175,245 offenders sentenced, 72,283 offenders (41 percent) were convicted of drug offenses, and of those, 69,279 offenders had complete information on departure status. Roughly 11 percent of the non-drug offenders and 28 percent of the drug offenders received sentences below the guidelines range due to substantial assistance, while 18 percent of the non-drug offenders and 16 percent of the drug offenders received sentences that departed downward for other reasons. Of the 69,279 drug sentences that had valid information for USSC's departure variable, 42,145 sentences (61 percent) carried a mandatory minimum. Our analyses of mandatory minimum sentences excluded 284 of these sentences (0.6 percent of all mandatory minimum sentences) that lacked the valid sentence length information necessary to determine whether the sentence fell below the minimum.

Methodology

We had extensive discussions with knowledgeable USSC staff about the definitions and use of the data elements in our analysis. USSC takes many steps to ensure the reliability and completeness of the data it receives from districts. We did not independently validate the data in USSC's database; however, we did assess the quality of USSC data in our analysis by testing and crosschecking selected data elements for internal consistency. We discussed any anomalies we found from these tests with knowledgeable USSC staff. On the basis of our tests and discussions with USSC officials, we determined that the data were sufficiently accurate for our reporting objectives.

We defined sentences that fell above or below an applicable guideline range in accordance with USSC's definition of "departures"—sentences imposed that fall outside the sentencing guidelines range established by the court. In USSC's database sentences are coded into five categories: no departure, upward departure, downward departure, substantial assistance, and inapplicable. We distinguished sentences coded as "substantial assistance" as those that fell below sentencing guidelines due to "substantial assistance" or prosecutorial discretion. For sentences that fell below the guideline ranges for reasons other than substantial assistance, generally attributed to judicial discretion, we used those sentences coded as "downward departures." See appendix IV for a description of other reasons, which include the government's early disposition or "fast track" programs, cited by judges for downward departures. Sentences for which departure information was not available or coded "inapplicable" were deleted from our analysis.

We defined sentences that fell below an applicable mandatory minimum using USSC's recorded information for sentence length. For convictions where a mandatory minimum was recorded, those sentences with recorded lengths that fell below the length of time stipulated by the mandatory minimum were defined as "falling below the mandatory minimum." We identified 41,861 drug sentences that carried a mandatory minimum and had valid sentence length data. Of those sentences we designated as falling below an applicable mandatory minimum, we identified those sentences that involved a substantial assistance motion and those that fell below the mandatory minimum for other reasons, such as the safety valve. If a sentence fell below and involved a substantial assistance motion, we interpreted that sentence as a "substantial assistance sentence" that fell below a mandatory minimum due to prosecutorial discretion. If a sentence otherwise fell below, we interpreted it as falling below for "other reasons." Most of these sentences (9,384 or 87 percent of them) involved offenders that qualified for the safety valve provision allowing judges to grant sentences below the mandatory minimum. The data do not indicate that all of these sentences involve the safety valve, which may be the result of coding errors or insufficient available data.

We also reviewed the types of documents USSC staff used to identify departures, the reasons for those departures, and the potential effect of missing or unclear documentation on the interpretation of the departure data in USSC's database by district. We also interviewed officials at USSC and the Administrative Office of the U.S. Courts (AOUSC), and the Chair of the Judicial Conference Committee on Criminal Law.

Analyzing Numbers and Percents

We analyzed sentencing data using both descriptive statistics and multivariate analytic methods. For fiscal years 1999-2001, we used USSC's data to identify for each circuit and district the total number and percent of sentences that fell above or within an applicable guideline range and below a guideline range for substantial assistance or for other reasons. We also identified all sentences that fell below an applicable mandatory minimum due to substantial assistance or for other reasons for each circuit and district. We provide these numbers and percentages in appendix II.

The simple differences in the percentage of drug sentences that fall below the guidelines range or below the mandatory minimum may not, without some adjustment, provide an appropriate basis for making comparisons across circuits and districts. Characteristics of the offenses and offenders sentenced can vary from one circuit or district to the next, and these differences may affect the number or percent of sentences that fall below applicable guideline ranges or a mandatory minimum. Judges in some circuits or districts, for example, may sentence a greater proportion of offenders who possessed and shared information of the crime that assisted the government in the investigation or prosecution of others or whose offenses were less serious. Differences in these characteristics might produce differences in sentences that have little to do with the exercise of discretion. Therefore, the unadjusted differences in the percent of sentences below the guidelines range or mandatory minimum might result from judges sentencing different offenders, rather than from judges sentencing offenders differently. Table 3 shows the offense and offender characteristics we considered in the multivariate analyses we conducted to adjust for such differences and re-estimate differences across circuits and districts after taking them into account. It also provides the numbers and percentages of all drug offenders or drug offenses that possessed each of these characteristics.

Table 3: Numbers and Percents of Drug Cases Involving Different Types of Offenses or Offenders, and Percentages of Each Type Receiving Sentences Departing Downward from the Guidelines

Offense/offender characteristics	Number of all drug cases	Percent of all drug cases	Percent substantial assistance departure	Percent other downward departure
Type of drug offense				
Drug trafficking	66,616	96%	28%	16%
Drug: Communication facilities	1,212	2%	20%	12%
Drug: Simple possession	1,451	2%	4%	2%
Drug type				
Cocaine	15,110	22%	31%	10%
Crack	14,562	22%	33%	8%
Heroine	5,101	8%	23%	14%
Marijuana/Hashish	21,699	32%	18%	28%
Other	11,208	17%	36%	10%
Severity of offense score				
Less than 17	14,700	21%	13%	29%
17 to 22	13,822	20%	22%	19%
23 to 28	18,453	27%	30%	10%
Greater than 28	22,206	32%	38%	9%
Weapon involved				
No enhancement	58,779	90%	27%	16%
Enhancement applied	6,630	10%	35%	8%
Mandatory minimum				
No minimum involved	27,133	39%	17%	24%
Mandatory minimum involved	42,145	61%	34%	10%
Guilty plea				
No guilty plea entered	3,352	5%	2%	10%
Guilty plea entered	65,824	95%	29%	16%
Safety valve provision				
No safety valve applied	45,788	73%	28%	16%
Safety valve applied	16,832	27%	30%	16%
Education				
Less than high school	34,197	51%	23%	18%
High school graduate	21,502	32%	31%	12%
Some college	9,819	15%	34%	13%
College graduate	1,708	3%	31%	15%

Offense/offender characteristics	Number of all drug cases	Percent of all drug cases	Percent substantial assistance departure	Percent other downward departure
Race				
White	17,405	25%	38%	13%
Black	20,355	29%	32%	8%
Hispanic	29,811	43%	18%	23%
Other	1,708	2%	32%	13%
Sex				
Male	59,801	86%	27%	15%
Female	9,467	14%	33%	19%
Citizenship				
U.S. citizen	46,928	68%	33%	12%
Non-Citizen	22,351	32%	17%	24%
Criminal history category				
1	38,798	56%	24%	18%
2	8,343	12%	31%	12%
3	10,010	14%	32%	12%
4	4,550	7%	32%	13%
5	2,185	3%	33%	13%
6	5,277	8%	35%	15%

Source: GAO analysis of USSC data.

Note: Severity Score is determined by the court. It ranges from 1 to 60 for all crimes, but the highest score for a drug crime is 46.

Our primary focus in this report involved understanding how departure sentences vary across circuits and districts. Some of this variability across circuits and districts in the percentages of substantial assistance departures and other downward departures in the sentencing of drug offenders results from differences in the characteristics of offenses and offenders sentenced across circuits and districts. Moreover, the prosecution has sole authority to initiate a downward departure for substantial assistance, and all offenders are potentially eligible for such consideration. If an offender receives a substantial assistance departure, USSC codes the case as a substantial assistance departure and does not reflect any other downward departures that the judge may have granted in that particular case. Because of this coding convention, the percentage of other downward departures is partly a function of the percentage of downward departures for substantial assistance, which result from prosecutorial motions. To understand how these percentages are derived, it is useful to consider the following two hypothetical districts and the numbers of sentences of each type in each district shown in table 4.

Table 4: Hypothetical Example Showing Effect of Two Different Methods of Computing Percentages for "Other Downward Departures"

District	Sentences above and within a guideline range	Substantial assistance departures	Other downward departures	Total
Number of sentences imposed				
A	40	20	40	**100**
B	20	50	30	**100**
Other downward departures as percent of total sentences imposed				
A	40 (base 100)	20 (base 100)	40 (base 100)	
B	20 (base 100)	50 (base 100)	30 (base 100)	
Other downward departures as percent of total sentences less substantial assistance departures				
A	40 (base 100)	20 (base 100)	50 (base 80)	
B	20 (base 100)	50 (base 100)	60 (base 50)	

Source: GAO example.

The prosecution makes its selection for substantial assistance motions after screening the total universe of 100 offenders sentenced in each district. In our hypothetical example, the prosecutor offered and the court accepted substantial assistance motions for 20 percent of 100 offenders in district A and 50 percent of 100 offenders in district B—or 30 percent less in district A. Because USSC's coding convention distinguishes substantial assistance cases from other downward departures, the universe of offenders who could be coded as receiving other downward departures is equal to the number of offenders who did not receive substantial assistance departures. In district A this would be 80 offenders (100 minus 20 substantial assistance departures) and in district B it would be 50 (100 minus 50 substantial assistance departures). Using this universe of offenders for our calculation, we would conclude that district A involves 10 percent fewer other departures than district B (40/80=50 percent versus 30/50=60 percent). While we offer percentages in some of the following tables that, following standard procedures, are based on the total number of offenders, we also use odds and odds ratios to describe the likelihoods of sentences departing. These odds and odds ratios have the advantage of utilizing the appropriate universe of offenders in making comparisons across circuits and districts.

Estimating Departure Likelihoods

In order to make a fair comparison of sentencing patterns across circuits and districts, we used logistic regression analysis to estimate the likelihood that sentences would fall below an applicable guideline range or a mandatory minimum, before and after adjusting for differences in offender and offense characteristics across circuits and districts. Our adjusted estimates of the differences in likelihoods across circuits and districts involved controlling for the following offender and offense characteristics:

- **Offender**: gender, race, education, citizenship, and criminal history category score.
- **Offense**: type of drug involved; type and severity of offense; whether the offense was eligible for mandatory minimum sentence; whether a gun was involved in commission of the offense; whether the defendant was convicted after trial or entered a guilty plea; and whether the safety valve was applied.

Because they are somewhat more amenable to adjustment for offense and offender characteristics, we use odds and odds ratios, rather than percentages and percentage differences, to estimate the likelihood of sentences falling below a guideline range and the variability in those likelihoods across circuits and districts. We first calculated the odds on substantial assistance falling below a guideline range among all sentences, and then calculated the odds on other downward departures for those sentences that did not involve departures for substantial assistance. In both cases odds were compared across circuits and districts by taking their ratios. In our simple two district example above, the odds on substantial assistance departures in districts A and B would be 20/80=0.25 and 50/50=1.0, respectively, and the odds ratio of 1.0/0.25=4.0 indicates that the likelihood of substantial assistance departures were 4 times as great in district B as in district A. The odds on other downward departures, excluding the substantial assistance departures, would be 40/40 =1.0 in district A and 30/20=1.5 in district B, and the ratio of 1.5/1.0=1.5 indicates that downward departures are 1.5 times as likely in district B as in district A.

We conducted four regression analyses. First, we conducted two regression analyses that estimated the likelihoods that drug sentences fell below an applicable guideline range due to either prosecutors' substantial assistance motions or for other reasons before and after controlling for offense and offender characteristics. Second, we conducted two regression analyses that estimated the likelihoods that drug sentences that

carried a mandatory minimum fell below an otherwise applicable mandatory minimum due to either substantial assistance or other reasons before and after controlling for offense or offender characteristics.

Limitations

Our work was limited to drug sentences imposed during fiscal years 1999-2001, and excluded drug cases in that year that lacked information on whether the case departed from the guidelines (4 percent of all drug cases). We also excluded cases for which there was insufficient information to indicate whether the sentence involved was below a mandatory minimum (0.7 percent of all mandatory minimum drug cases), and were unable to identify whether 7 percent of the cases that fell below the mandatory minimum, and did not involve substantial assistance, involved the use of the safety valve provision. Further, our ability to control for differences in the likelihood of sentences departing from the guidelines, or falling below a mandatory minimum, was also restricted to a reasonably small number of characteristics for which we had data and was affected by the amount of missing data on those characteristics. Empirical data on all factors that could influence sentencing were not available, and so an analysis that could fully explain why sentences varied was not possible.

Our analyses were also limited to determining whether sentences fell below a guideline range or a mandatory minimum, and we did not investigate whether there were differences across circuits or districts in how far below a guideline range minimum or a mandatory minimum the sentences fell. Nationwide, the average (mean) minimum sentence length, under the guidelines, for drug sentences that departed downward for substantial assistance reasons was 108 months (or about 9 years). Those sentences were reduced as a result of the substantial assistance motion, on average, by 53 months, and the resulting sentence was, on average, 49 percent of the average lowest sentence drug offenders otherwise would have received under the guidelines.[1] The average minimum sentence length under the guidelines for drug sentences that departed downward for reasons other than substantial assistance was 60 months (or 5 years). Those sentences were reduced, on average, by 22 months, and the resulting sentence was, on average, 57 percent of the average lowest

[1]The average percentage sentence reduction was calculated by taking the percentage reductions for all sentences and averaging them. This average does not necessarily equal the ratio of the average reduced sentence (as a result of a departure) to the average expected sentence (the guidelines minimum or mandatory minimum sentence length).

sentence drug offenders otherwise would have received under the guidelines.

Nearly all of the mandatory minimum drug sentences were for 5 years (48 percent) or 10 years (49 percent). The 5-year mandatory minimum sentences that were reduced for substantial assistance were reduced by an average of 33 months, resulting in an average sentence that was 45 percent of the mandatory minimum. The sentences lowered for other reasons, (primarily the safety valve), that would otherwise be subject to a 5-year mandatory minimum were reduced by an average of 26 months, resulting in an average sentence that was 57 percent of the mandatory minimum. The 10-year mandatory minimum sentences that were reduced for substantial assistance were reduced by an average of 63 months, resulting in an average sentence that was 47 percent of the mandatory minimum. The sentences lowered for other reasons, (primarily the safety valve), that would otherwise be subject to a 10-year mandatory minimum were reduced for other reasons by an average of 52 months, resulting in an average sentence that was 57 percent of the mandatory minimum.

We also did not attempt to determine, for those sentences that fell within the guideline range, across circuits and districts whether sentences fell more frequently at the lower or higher end of the guideline range. However, overall, 72 percent of drug sentences that were within the guidelines range and did not depart were at the bottom of the range.

Appendix II: Percentage of Sentences Falling below an Applicable Guideline Range or An Otherwise Applicable Mandatory Minimum

This appendix provides information on the percent of federal drug sentences that fall below an applicable guideline range or an otherwise applicable mandatory minimum. We show in tables 5 and 6 the variability across circuits and districts in the percentages of drug sentences that were (1) above the guidelines range, (2) within the guidelines range, (3) below the range due to substantial assistance, and (4) below the range for other reasons. We then show in tables 7 and 8 the variability across circuits and districts in the percentages of mandatory minimum drug cases that resulted in sentences (1) at or above a mandatory minimum sentence, (2) below a mandatory minimum due to prosecutorial motions for substantial assistance, and (3) below the mandatory minimum for other reasons.

Table 5 shows that the percentage of upward departures from the sentencing guidelines for drug cases in fiscal years 1999–2001 was similar and exceedingly small across all 12 circuits. However, the percentages of within range sentences and downward departures varied substantially across circuits. The percentage of all drug sentences that were within the guidelines range varied from 34 percent in the Ninth Circuit to 69 percent in the First and Fifth Circuits. The percentage of drug sentences that involved downward departures for substantial assistance varied from 18 percent in the Ninth Circuit to 45 percent in the Third Circuit, and the percentage that resulted in downward departures for other reasons varied from 4 percent in the Fourth Circuit to 47 percent in the Ninth Circuit. The Ninth Circuit was the only circuit in which the percentage of departures for other reasons exceeded 20 percent and the only circuit in which departures for other reasons were more common than departures for substantial assistance.

Table 5: Percentages of Drug Cases between 1999 and 2001 Resulting in Upward Departures, Within Range Sentences, and Downward Departures, by Circuit

Circuit	Upward departure	Sentenced within guideline range	Substantial assistance departure	Other downward departure	Total number of drug cases
D.C.	0.3%	53%	30%	16%	**381**
First	0.3%	69%	21%	10%	**2,166**
Second	0.3%	48%	32%	20%	**5,166**
Third	0.2%	48%	45%	7%	**2,750**
Fourth	0.2%	63%	33%	4%	**6,302**
Fifth	0.1%	69%	20%	11%	**15,102**
Sixth	0.1%	53%	42%	5%	**5,067**
Seventh	0.3%	64%	31%	5%	**3,017**
Eighth	0.2%	55%	37%	8%	**5,255**
Ninth	0.3%	34%	18%	47%	**12,116**
Tenth	0.2%	63%	22%	15%	**3,500**
Eleventh	0.3%	64%	30%	5%	**8,457**

Source: GAO analysis of USSC data.

Note: 3,004 cases lacking information on departures were excluded.

Table 6 reveals that the percentages of sentences within the guidelines range and the percentages of sentences departing downward from them notably differed across the 94 districts, even in some cases among districts within the same circuit.

Table 6: Percentages of Drug Cases between 1999 and 2001 Resulting in Upward Departures, Within Range Sentences, and Downward Departures, by District

District	Upward departure	Sentenced within guideline range	Substantial assistance departure	Other downward departure	Total number of drug cases
D.C. Circuit					
District of Columbia	0.3%	53%	30%	16%	**381**
First Circuit					
Maine	0.0%	44%	52%	3%	**153**
Massachusetts	0.6%	51%	30%	19%	**656**
New Hampshire	0.5%	49%	43%	8%	**199**
Puerto Rico	0.1%	87%	7%	5%	**1,006**
Rhode Island	0.0%	80%	9%	11%	**152**
Second Circuit					
Connecticut	0.8%	44%	24%	31%	**264**
New York Eastern	0.3%	45%	24%	32%	**1,961**
New York Northern	0.2%	24%	68%	8%	**586**
New York Southern	0.2%	64%	24%	12%	**1,642**
New York Western	0.6%	42%	52%	5%	**508**
Vermont	0.0%	43%	37%	21%	**208**
Third Circuit					
Delaware	0.0%	52%	41%	7%	**71**
New Jersey	0.4%	60%	32%	8%	**847**
Pennsylvania Eastern	0.2%	36%	57%	6%	**1,028**
Pennsylvania Middle	0.0%	38%	56%	6%	**392**
Pennsylvania Western	0.0%	55%	37%	9%	**352**
Virgin Islands	0.0%	75%	17%	8%	**60**
Fourth Circuit					
Maryland	0.2%	43%	43%	14%	**517**
North Carolina Eastern	0.2%	56%	41%	3%	**619**
North Carolina Middle	0.8%	63%	34%	2%	**508**
North Carolina Western	0.0%	32%	62%	5%	**970**
South Carolina	0.1%	60%	38%	2%	**988**
Virginia Eastern	0.3%	89%	8%	3%	**1,360**
Virginia Western	0.2%	56%	42%	2%	**567**
West Virginia Northern	0.3%	89%	9%	2%	**339**
West Virginia Southern	0.0%	81%	16%	3%	**433**

District	Upward departure	Sentenced within guideline range	Substantial assistance departure	Other downward departure	Total number of drug cases
Fifth Circuit					
Louisiana Eastern	0.0%	74%	19%	6%	**587**
Louisiana Middle	0.0%	39%	58%	3%	**66**
Louisiana Western	0.0%	64%	32%	3%	**395**
Mississippi Northern	0.0%	42%	49%	8%	**245**
Mississippi Southern	0.0%	58%	39%	3%	**369**
Texas Eastern	0.0%	80%	14%	6%	**869**
Texas Northern	0.0%	65%	31%	4%	**960**
Texas Southern	0.1%	66%	26%	8%	**4,863**
Texas Western	0.1%	72%	12%	16%	**6,750**
Sixth Circuit					
Kentucky Eastern	0.2%	57%	40%	2%	**866**
Kentucky Western	0.0%	81%	16%	3%	**296**
Michigan Eastern	0.0%	51%	43%	6%	**871**
Michigan Western	0.3%	49%	44%	6%	**335**
Ohio Northern	0.3%	47%	44%	9%	**729**
Ohio Southern	0.0%	38%	54%	7%	**506**
Tennessee Eastern	0.1%	57%	41%	2%	**742**
Tennessee Middle	0.0%	53%	40%	7%	**205**
Tennessee Western	0.2%	56%	40%	4%	**517**
Seventh Circuit					
Illinois Central	0.5%	38%	56%	5%	**424**
Illinois Northern	0.1%	53%	38%	9%	**687**
Illinois Southern	0.3%	90%	6%	4%	**722**
Indiana Northern	0.2%	71%	25%	4%	**455**
Indiana Southern	0.0%	39%	58%	3%	**296**
Wisconsin Eastern	0.4%	65%	32%	3%	**280**
Wisconsin Western	1.3%	79%	17%	3%	**153**
Eighth Circuit					
Arkansas Eastern	0.0%	81%	16%	3%	**321**
Arkansas Western	0.0%	70%	27%	4%	**168**
Iowa Northern	1.3%	52%	41%	6%	**477**
Iowa Southern	0.1%	45%	44%	11%	**692**
Minnesota	0.2%	54%	31%	15%	**590**
Missouri Eastern	0.0%	59%	36%	5%	**908**
Missouri Western	0.1%	37%	59%	3%	**914**

District	Upward departure	Sentenced within guideline range	Substantial assistance departure	Other downward departure	Total number of drug cases
Nebraska	0.0%	65%	25%	10%	**893**
North Dakota	0.0%	53%	38%	8%	**86**
South Dakota	0.5%	69%	19%	11%	**206**
Ninth Circuit					
Alaska	0.0%	69%	19%	11%	**201**
Arizona	0.6%	28%	13%	58%	**2,560**
California Central	0.2%	72%	16%	12%	**418**
California Eastern	0.0%	64%	26%	10%	**622**
California Northern	1.5%	60%	15%	23%	**406**
California Southern	0.1%	17%	13%	70%	**5,312**
Guam	1.2%	43%	54%	1%	**83**
Hawaii	0.4%	58%	32%	10%	**524**
Idaho	0.0%	33%	62%	5%	**97**
Montana	0.0%	54%	40%	5%	**399**
Nevada	0.3%	63%	18%	18%	**315**
Northern Mariana Islands	0.0%	29%	71%	0%	**17**
Oregon	0.3%	55%	33%	12%	**366**
Washington Eastern	0.0%	62%	14%	24%	**249**
Washington Western	0.2%	52%	33%	15%	**544**
Tenth Circuit					
Colorado	0.0%	41%	52%	7%	**420**
Kansas	0.4%	63%	29%	7%	**560**
New Mexico	0.1%	66%	13%	21%	**1,672**
Oklahoma Eastern	1.4%	54%	5%	39%	**74**
Oklahoma Northern	0.8%	73%	21%	5%	**131**
Oklahoma Western	0.9%	74%	22%	3%	**229**
Utah	0.0%	67%	12%	21%	**199**
Wyoming	0.0%	59%	34%	7%	**217**
Eleventh Circuit					
Alabama Middle	0.4%	38%	55%	6%	**279**
Alabama Northern	0.0%	49%	49%	2%	**417**
Alabama Southern	0.0%	44%	49%	6%	**342**
Florida Middle	0.2%	57%	37%	6%	**2,007**
Florida Northern	0.9%	60%	38%	1%	**565**
Florida Southern	0.1%	78%	16%	6%	**3,237**
Georgia Middle	1.1%	55%	39%	5%	**558**

District	Upward departure	Sentenced within guideline range	Substantial assistance departure	Other downward departure	Total number of drug cases
Georgia Northern	0.3%	60%	30%	10%	**756**
Georgia Southern	0.0%	63%	33%	4%	**293**

Source: GAO analysis of USSC data.

Note: 3,004 cases lacking information on departures were excluded.

There were 6 districts in which the percentage of sentences departing upward from the guidelines exceeded 1 percent of all cases—Wisconsin Western (1.3 percent), Iowa Northern (1.3 percent), California Northern (1.5 percent), Guam (1.2 percent), Oklahoma Eastern (1.4 percent), and Georgia Middle (1.1). The percentage of sentences within the guidelines range varied substantially, from 17 percent in the California Southern District to 90 percent in the Illinois Southern District. Fewer than 10 percent of the sentences departed downward for substantial assistance in Puerto Rico (7 percent), Rhode Island (9 percent), Virginia Eastern (8 percent), West Virginia Northern (9 percent), Illinois Southern (6 percent), and Oklahoma Eastern (5 percent). At the same time, the percentage of cases departing downward for substantial assistance exceeded 50 percent in 16 districts, and was highest in the North Mariana Islands (71 percent), New York Northern (68 percent), North Carolina Western (62 percent), and Idaho (62 percent) Districts. Sentences departing downward for other reasons represented only 3 percent or less of all sentences in 24 districts but over 20 percent of the sentences in 10 districts; these other downward departures were especially common in New York Eastern (32 percent), Oklahoma Eastern (39 percent), Arizona (58 percent), and California Southern (70 percent) Districts. While the percentages of other downward departures were fairly similar and involved 10 percent or fewer of all cases in the various districts in the Sixth and Seventh Circuits, the range in the percentage of other downward departures were sizable across the districts in the Second Circuit (5 percent to 32 percent), Ninth Circuit (none to 70 percent), and Tenth Circuit (3 to 39 percent).

Table 7 shows the differences across circuits in the percentages of mandatory minimum drug sentences between 1999 and 2001 that were at or above an applicable mandatory minimum, below an otherwise applicable mandatory minimum due to substantial assistance, and below an otherwise applicable mandatory minimum for other reasons. The percentage of mandatory minimum sentences that were at or above an applicable mandatory minimum sentence ranged from 35 percent in the Ninth Circuit to 64 percent in the Fourth Circuit. The percentage of sentences that fell below an otherwise applicable mandatory minimum

due to substantial assistance motions ranged from 19 percent in the First Circuit to 40 percent in the Third Circuit. The percentage of mandatory minimum sentences that fell below an otherwise applicable mandatory minimum sentence for other reasons ranged from 12 percent in the Fourth Circuit to 38 percent in the Ninth Circuit.

Table 7: Percentages of Mandatory Minimum Drug Cases between 1999 and 2001 Resulting in Sentences at or above a Minimum, and below An Otherwise Applicable Minimum Due to Substantial Assistance or for Other Reasons, by Circuit

Circuit	At or above a mandatory minimum	Below a minimum due to substantial assistance	Below a minimum for other reasons	Total number of mandatory minimum drug cases
D.C.	54%	30%	17%	**236**
First	51%	19%	30%	**1,444**
Second	37%	34%	29%	**2,835**
Third	37%	40%	22%	**1,927**
Fourth	64%	25%	12%	**4,633**
Fifth	46%	20%	34%	**7,161**
Sixth	49%	39%	13%	**3,201**
Seventh	59%	24%	17%	**2,279**
Eighth	53%	31%	16%	**4,062**
Ninth	35%	27%	38%	**5,381**
Tenth	44%	22%	34%	**2,065**
Eleventh	47%	23%	29%	**6,637**

Source: GAO analysis of USSC data.

Note: 41,861 sentences carried a mandatory minimum and had complete sentence length information; 284 sentences with a mandatory minimum lacked complete sentence length information.

Table 8 provides these same percentages, classified by districts rather than circuits, and shows that variability in the sentencing of mandatory minimum offenders is considerable across the 94 districts. The percentage of sentences falling below an otherwise applicable mandatory minimum for substantial assistance reasons was very different across districts, ranging from less than 10 percent of all mandatory minimum sentences in 7 districts to over 50 percent in 9 districts. The percentage of sentences falling below an otherwise applicable mandatory minimum for other reasons also varied greatly across districts, from less than 10 percent of all mandatory minimum sentences in 11 districts to 50 percent or more in 3 districts.

Table 8: Percentages of Mandatory Minimum Drug Cases between 1999 and 2001 Resulting in Sentences at or above the Minimum, and below An Otherwise Applicable Minimum Due to Substantial Assistance or For Other Reasons, by District

District	At or above a mandatory minimum	Below a minimum due to substantial assistance	Below a minimum for other reasons	Total number of mandatory minimum drug cases
D.C. Circuit				
District of Columbia	54%	30%	17%	**236**
First Circuit				
Maine	31%	52%	17%	**75**
Massachusetts	43%	33%	23%	**433**
New Hampshire	37%	42%	21%	**86**
Puerto Rico	58%	6%	36%	**762**
Rhode Island	58%	7%	35%	**88**
Second Circuit				
Connecticut	52%	22%	27%	**198**
New York Eastern	34%	30%	36%	**787**
New York Northern	17%	70%	13%	**353**
New York Southern	43%	25%	33%	**1,230**
New York Western	40%	46%	14%	**211**
Vermont	31%	54%	15%	**59**
Third Circuit				
Delaware	53%	36%	11%	**36**
New Jersey	31%	30%	39%	**577**
Pennsylvania Eastern	32%	52%	16%	**828**
Pennsylvania Middle	53%	37%	11%	**200**
Pennsylvania Western	52%	31%	17%	**263**
Virgin Islands	52%	30%	17%	**23**
Fourth Circuit				
Maryland	61%	28%	10%	**443**
North Carolina Eastern	70%	23%	7%	**505**
North Carolina Middle	70%	21%	9%	**458**
North Carolina Western	50%	41%	9%	**822**
South Carolina	61%	28%	11%	**685**
Virginia Eastern	76%	7%	17%	**996**
Virginia Western	49%	39%	12%	**456**
West Virginia Northern	82%	7%	12%	**92**
West Virginia Southern	70%	12%	18%	**174**

District	At or above a mandatory minimum	Below a minimum due to substantial assistance	Below a minimum for other reasons	Total number of mandatory minimum drug cases
Fifth Circuit				
Louisiana Eastern	55%	17%	29%	**423**
Louisiana Middle	50%	40%	10%	**42**
Louisiana Western	83%	12%	5%	**283**
Mississippi Northern	61%	27%	12%	**140**
Mississippi Southern	50%	32%	18%	**257**
Texas Eastern	71%	11%	18%	**543**
Texas Northern	57%	25%	18%	**647**
Texas Southern	40%	21%	39%	**2,702**
Texas Western	36%	18%	46%	**2,124**
Sixth Circuit				
Kentucky Eastern	32%	52%	15%	**402**
Kentucky Western	71%	14%	15%	**185**
Michigan Eastern	46%	40%	14%	**558**
Michigan Western	57%	32%	11%	**234**
Ohio Northern	45%	42%	13%	**522**
Ohio Southern	44%	47%	9%	**326**
Tennessee Eastern	52%	35%	13%	**472**
Tennessee Middle	49%	40%	12%	**136**
Tennessee Western	59%	31%	10%	**367**
Seventh Circuit				
Illinois Central	60%	35%	5%	**304**
Illinois Northern	44%	31%	26%	**570**
Illinois Southern	79%	4%	17%	**547**
Indiana Northern	60%	22%	18%	**274**
Indiana Southern	43%	45%	12%	**272**
Wisconsin Eastern	60%	23%	17%	**217**
Wisconsin Western	79%	9%	12%	**95**
Eighth Circuit				
Arkansas Eastern	68%	15%	17%	**207**
Arkansas Western	63%	18%	18%	**119**
Iowa Northern	64%	26%	10%	**388**
Iowa Southern	54%	30%	16%	**629**
Minnesota	49%	27%	24%	**472**
Missouri Eastern	53%	33%	15%	**663**
Missouri Western	38%	53%	9%	**654**

District	At or above a mandatory minimum	Below a minimum due to substantial assistance	Below a minimum for other reasons	Total number of mandatory minimum drug cases
Nebraska	57%	22%	21%	**771**
North Dakota	44%	45%	11%	**55**
South Dakota	63%	23%	14%	**103**
Ninth Circuit				
Alaska	59%	19%	22%	**130**
Arizona	18%	20%	62%	**1,157**
California Central	52%	14%	34%	**325**
California Eastern	57%	23%	20%	**401**
California Northern	54%	16%	31%	**274**
California Southern	19%	34%	47%	**1,357**
Guam	28%	52%	19%	**67**
Hawaii	44%	33%	23%	**415**
Idaho	54%	37%	8%	**59**
Montana	50%	40%	10%	**219**
Nevada	51%	18%	30%	**212**
Northern Mariana Islands	22%	67%	11%	**9**
Oregon	50%	27%	22%	**246**
Washington Eastern	51%	16%	33%	**128**
Washington Western	41%	35%	24%	**381**
Tenth Circuit				
Colorado	32%	52%	16%	**251**
Kansas	63%	22%	15%	**382**
New Mexico	29%	16%	55%	**874**
Oklahoma Eastern	57%	7%	37%	**46**
Oklahoma Northern	65%	21%	14%	**72**
Oklahoma Western	73%	17%	10%	**151**
Utah	41%	16%	43%	**107**
Wyoming	54%	27%	19%	**185**

District	At or above a mandatory minimum	Below a minimum due to substantial assistance	Below a minimum for other reasons	Total number of mandatory minimum drug cases
Eleventh Circuit				
Alabama Middle	43%	48%	9%	**193**
Alabama Northern	52%	37%	11%	**301**
Alabama Southern	49%	41%	10%	**267**
Florida Middle	53%	28%	19%	**1,642**
Florida Northern	59%	33%	8%	**477**
Florida Southern	35%	14%	50%	**2,686**
Georgia Middle	65%	25%	10%	**305**
Georgia Northern	57%	22%	21%	**566**
Georgia Southern	75%	19%	7%	**197**

Source: GAO analysis of USSC data.

Note: 41,861 sentences carried a mandatory minimum and had complete sentence length information; 284 sentences with a mandatory minimum lacked complete sentence length information.

Appendix III: Likelihood of Sentences Falling below a Guideline Range or an Otherwise Applicable Mandatory Minimum

This appendix provides odds and odds ratios to describe the differences across circuits and districts in sentences falling below a guideline range or an otherwise applicable mandatory minimum for substantial assistance and other reasons, both before and after controlling for differences in offender and offense characteristics. In the left columns of tables 9 and 10, we show the odds on substantial assistance departures across circuits and districts and ratios indicating differences across circuits and districts, before and after we adjust for characteristics of offenses and offenders. In the right columns of tables 9 and 10, we show the odds on other downward departures across circuits and districts and ratios indicating differences between them, before and after we adjust for characteristics of offenses and offenders. In the comparisons across circuits, we used the Eighth Circuit as the reference category, so the odds ratios reflect how much more or less likely other circuits were than that circuit to depart in sentencing offenders. In comparisons across districts, the Minnesota District was used as the reference category. The offense and offender characteristics we controlled for were described earlier in appendix I. The ratios that estimate differences before and after adjusting for these characteristics were derived from logistic regression models. We focus on adjusted ratios in the following discussion, since they provide us with our best estimates of differences across circuits and districts after taking into account the differences in the drug cases handled across jurisdictions.

Table 9 shows that both the odds on substantial assistance departures and other downward departures varied substantially across circuits. After adjusting for differences across circuits in offense and offender characteristics, the odds on substantial assistance departures were significantly greater in three circuits than the Eighth Circuit. In the Third Circuit, for example, substantial assistance departures were 2.2 times as likely as in the Eighth Circuit. Four circuits were not significantly different from the Eighth Circuit in terms of the likelihood of sentences departing for substantial assistance, and in the remaining 4 circuits substantial assistance departures were significantly less likely. In the First Circuit, for example, substantial assistance departures were less likely by a factor of 0.64, or 36 percent less likely, than in the Eighth Circuit. The fact that some circuits are less likely than the Eighth Circuit while others are more likely than the Eighth Circuit to depart for substantial assistance implies that some differences between other circuits are larger than those explicitly indicated by these ratios. For example, these ratios imply that substantial assistance departures in the Third Circuit are 2.2/0.64=3.4 times as likely as in the First Circuit.

Table 9: Odds on Substantial Assistance Departures and Other Downward Departures, and Odds Ratios Indicating the Differences between Circuits, before and after Adjusting for Offense and Offender Characteristics

Circuit	Odds on substantial assistance departures	Unadjusted ratios	Adjusted ratios	Odds on other downward departures	Unadjusted ratios	Adjusted ratios
Eighth	0.59			0.14		
D.C.	0.44	0.75*	1.15	0.31	2.19*	2.16*
First	0.26	0.44*	0.64*	0.14	1.02	0.78*
Second	0.47	0.81*	1.4*	0.41	2.92*	2.39*
Third	0.83	1.41*	2.2*	0.15	1.05	0.93
Fourth	0.49	0.84*	1.01	0.06	0.43*	0.37*
Fifth	0.25	0.43*	0.85*	0.16	1.11	0.55*
Sixth	0.71	1.22*	1.68*	0.10	0.69*	0.57*
Seventh	0.45	0.78*	0.91	0.08	0.55*	0.48*
Ninth	0.22	0.38*	0.75*	1.38	9.9*	6.87*
Tenth	0.29	0.49*	0.78*	0.23	1.67*	1.2*
Eleventh	0.43	0.74*	0.98	0.09	0.61*	0.5*

Source: GAO analysis of USSC data.

Note: Odds on substantial assistance departures were calculated using all cases. Odds on other downward departures were calculated using only cases not involving downward departures for substantial assistance. Ratios were calculated using the Eighth Circuit as the referent category. Adjusted ratios are from logistic regression models that control for offense and offender characteristics.

*Odds ratio coefficients that are significant at the 0.05 level.

Table 9 also shows that for those sentences that do not involve substantial assistance departures, (and again after adjusting for offense and offender characteristics), other downward departures are significantly more likely in 4 circuits than in the Eighth Circuit, significantly less likely in 6 circuits than in the Eighth Circuit, and no different in the other one. The fact that other downward departures are 6.87 times more likely in the Ninth Circuit than in the Eighth Circuit, but less likely by a factor of 0.37 in the Fourth Circuit than in the Eighth Circuit, implies that such departures are 6.87/0.37 = 18.6 or 19 times as likely in the Ninth Circuit as in the Fourth Circuit.

Table 10 shows that both the adjusted odds ratios on substantial assistance departures and other downward departures also varied substantially and significantly across districts. Substantial assistance departures were significantly more likely in 41 districts than in the Minnesota District. In the small Northern Mariana Islands District, for

example, substantial assistance departures were 10 times more likely than in the Minnesota District, and in the large New York Northern District, they were 5 times more likely. Twenty-three districts were not significantly different from the Minnesota District in terms of the likelihood of sentences departing for substantial assistance, and in the remaining 29 districts substantial assistance departures were significantly less likely. In the Illinois Southern District, for example, substantial assistance departures were less likely by a factor of 0.11, which implies that the likelihood of substantial assistance departures were 9 times higher in the Minnesota District than they were there. Other districts, these odds imply, were even more disparate from one another. For example, these ratios imply that substantial assistance departures in the New York Northern District were 5.5/0.11=49.5 or 50 times more likely than in the Illinois Southern District.

Table 10: Odds on Substantial Assistance Departures and Other Downward Departures, and Odds Ratios Indicating the Differences between Districts, before and after Adjusting for Offense and Offender Characteristics

District	Odds on substantial assistance departures	Unadjusted ratios	Adjusted ratios	Odds on other downward departures	Unadjusted ratios	Adjusted ratios
Minnesota	0.45			0.27		
D.C. Circuit						
District of Columbia	0.44	0.97	1.19	0.31	1.12	1.12
First Circuit						
Maine	1.10	2.44*	2.79*	0.07	0.27*	0.28*
Massachusetts	0.42	0.93	1.01	0.37	1.35	1.17
New Hampshire	0.75	1.66*	2.23*	0.15	0.56	0.42*
Puerto Rico	0.08	0.17*	0.17*	0.06	0.23*	0.19*
Rhode Island	0.10	0.23*	0.28*	0.13	0.48*	0.42*
Second Circuit						
Connecticut	0.32	0.71*	0.69*	0.69	2.56*	2.42*
New York Eastern	0.31	0.68*	0.97	0.71	2.61*	2.48*
New York Northern	2.13	4.75*	5.51*	0.34	1.23	0.95
New York Southern	0.32	0.7*	0.78*	0.19	0.69*	0.66*
New York Western	1.10	2.44*	4.5*	0.11	0.4*	0.49*
Vermont	0.58	1.28	1.47*	0.48	1.78*	1.81*

District	Odds on substantial assistance departures	Unadjusted ratios	Adjusted ratios	Odds on other downward departures	Unadjusted ratios	Adjusted ratios
Third Circuit						
Delaware	0.69	1.54	1.78*	0.14	0.50	0.37*
New Jersey	0.47	1.04	1.29*	0.12	0.46*	0.45*
Pennsylvania Eastern	1.33	2.96*	3.41*	0.17	0.62*	0.6*
Pennsylvania Middle	1.25	2.79*	3.44*	0.17	0.62	0.56*
Pennsylvania Western	0.59	1.30	1.25	0.16	0.57*	0.49*
Virgin Islands	0.20	0.44*	1.00	0.11	0.41	0.54
Fourth Circuit						
Maryland	0.75	1.66*	1.76*	0.33	1.20	1.23
North Carolina Eastern	0.71	1.57*	1.37*	0.05	0.18*	0.15*
North Carolina Middle	0.52	1.15	1.05	0.03	0.11*	0.09*
North Carolina Western	1.66	3.7*	3.06*	0.16	0.6*	0.44*
South Carolina	0.62	1.38*	1.35*	0.03	0.11*	0.09*
Virginia Eastern	0.09	0.2*	0.2*	0.03	0.12*	0.12*
Virginia Western	0.72	1.61*	1.43*	0.04	0.14*	0.11*
West Virginia Northern	0.10	0.22*	0.24*	0.02	0.09*	0.06*
West Virginia Southern	0.19	0.41*	0.46*	0.04	0.15*	0.12*
Fifth Circuit						
Louisiana Eastern	0.24	0.52*	0.53*	0.09	0.32*	0.34*
Louisiana Middle	1.36	3.02*	3.94*	0.08	0.28	0.32
Louisiana Western	0.48	1.07	1.03	0.05	0.19*	0.16*
Mississippi Northern	0.98	2.17*	2.02*	0.19	0.71	0.62
Mississippi Southern	0.63	1.41*	1.42*	0.05	0.19*	0.18*
Texas Eastern	0.16	0.37*	0.38*	0.07	0.28*	0.23*
Texas Northern	0.44	0.98	0.97	0.07	0.25*	0.22*
Texas Southern	0.36	0.8*	1.28*	0.11	0.42*	0.35*
Texas Western	0.13	0.3*	0.55*	0.22	0.81	0.6*

District	Odds on substantial assistance departures	Unadjusted ratios	Adjusted ratios	Odds on other downward departures	Unadjusted ratios	Adjusted ratios
Sixth Circuit						
Kentucky Eastern	0.68	1.51*	1.96*	0.04	0.16*	0.17*
Kentucky Western	0.19	0.43*	0.47*	0.03	0.12*	0.14*
Michigan Eastern	0.76	1.68*	2.02*	0.12	0.44*	0.43*
Michigan Western	0.80	1.78*	1.91*	0.13	0.47*	0.42*
Ohio Northern	0.77	1.72*	1.8*	0.20	0.74	0.76
Ohio Southern	1.19	2.65*	3.18*	0.19	0.70	0.76
Tennessee Eastern	0.69	1.54*	1.56*	0.04	0.14*	0.12*
Tennessee Middle	0.65	1.45*	1.58*	0.14	0.51*	0.58
Tennessee Western	0.68	1.51*	1.4*	0.07	0.26*	0.22*
Seventh Circuit						
Illinois Central	1.27	2.82*	2.62*	0.14	0.52*	0.37*
Illinois Northern	0.60	1.34*	1.52*	0.17	0.62*	0.67*
Illinois Southern	0.06	0.14*	0.11*	0.04	0.15*	0.11*
Indiana Northern	0.34	0.76	0.97	0.05	0.18*	0.18*
Indiana Southern	1.39	3.08*	2.69*	0.09	0.32*	0.35*
Wisconsin Eastern	0.47	1.05	0.96	0.04	0.14*	0.12*
Wisconsin Western	0.20	0.46*	0.35*	0.03	0.12*	0.1*
Eighth Circuit						
Arkansas Eastern	0.19	0.43*	0.35*	0.04	0.14*	0.12*
Arkansas Western	0.37	0.81	0.83	0.05	0.19*	0.18*
Iowa Northern	0.69	1.54*	1.03	0.12	0.44*	0.41*
Iowa Southern	0.79	1.76*	1.20	0.24	0.89	0.77
Missouri Eastern	0.57	1.26*	1.19	0.09	0.32*	0.31*
Missouri Western	1.44	3.21*	2.63*	0.09	0.33*	0.3*
Nebraska	0.33	0.73*	0.52*	0.16	0.58*	0.54*
North Dakota	0.62	1.38	1.16	0.15	0.56	0.65
South Dakota	0.24	0.54*	0.57*	0.15	0.56*	0.58*
Ninth Circuit						
Alaska	0.24	0.54*	0.61*	0.17	0.61	0.69
Arizona	0.15	0.34*	0.61*	1.98	7.3*	7.41*
California Central	0.19	0.42*	0.55*	0.17	0.63*	0.69
California Eastern	0.35	0.78	0.86	0.15	0.55*	0.51*
California Northern	0.18	0.4*	0.48*	0.38	1.4*	1.68*
California Southern	0.15	0.33*	0.65*	4.18	15.39*	14.69*

District	Odds on substantial assistance departures	Unadjusted ratios	Adjusted ratios	Odds on other downward departures	Unadjusted ratios	Adjusted ratios
Guam	1.18	2.63*	2.12*	0.03	0.1*	0.13*
Hawaii	0.47	1.05	1.06	0.16	0.6*	0.76
Idaho	1.62	3.61*	4.16*	0.16	0.57	0.58
Montana	0.68	1.5*	1.76*	0.10	0.36*	0.41*
Nevada	0.23	0.5*	0.55*	0.28	1.02	1.01
Northern Mariana Islands	2.40	5.34*	10.08*	0.00	0.00	0.00
Oregon	0.48	1.07	1.02	0.22	0.80	0.59*
Washington Eastern	0.16	0.36*	0.44*	0.39	1.43	1.45
Washington Western	0.50	1.11	1.34*	0.28	1.04	1.17
Tenth Circuit						
Colorado	1.07	2.38*	3.82*	0.17	0.64	0.76
Kansas	0.41	0.92	0.96	0.11	0.4*	0.4*
New Mexico	0.15	0.34*	0.54*	0.31	1.14	1.02
Oklahoma Eastern	0.06	0.13*	0.11*	0.71	2.6*	3.28*
Oklahoma Northern	0.27	0.6*	0.55*	0.07	0.27*	0.26*
Oklahoma Western	0.28	0.62*	0.52*	0.04	0.15*	0.11*
Utah	0.14	0.31*	0.4*	0.31	1.13	1.29
Wyoming	0.52	1.15	0.73	0.13	0.46*	0.43*
Eleventh Circuit						
Alabama Middle	1.23	2.74*	3.84*	0.16	0.58	0.64
Alabama Northern	0.96	2.13*	2.11*	0.04	0.14*	0.15*
Alabama Southern	0.98	2.17*	2.1*	0.15	0.54*	0.5*
Florida Middle	0.59	1.3*	1.28*	0.10	0.36*	0.31*
Florida Northern	0.62	1.39*	1.25	0.02	0.06*	0.05*
Florida Southern	0.19	0.42*	0.44*	0.07	0.26*	0.24*
Georgia Middle	0.64	1.42*	1.88*	0.09	0.33*	0.31*
Georgia Northern	0.43	0.96	0.89	0.16	0.6*	0.55*
Georgia Southern	0.49	1.08	1.09	0.07	0.26*	0.22*

Source: GAO analysis of USSC data.

Note: Odds on substantial assistance departures were calculated using all cases. Odds on other downward departures were calculated using only cases not involving downward departures for substantial assistance. Ratios were calculated using the Minnesota district as the referent category. Adjusted ratios are from logistic regression models that control for offense and offender characteristics.

*Odd ratio coefficients that are significant at the 0.05 level.

Table 10 also shows that for those sentences that do not involve substantial assistance departures, other downward departures are significantly more likely in 7 districts than in the Minnesota district, significantly less likely in 62 districts than in the Minnesota district, and no different in the remaining 23 districts.[1] The fact that other downward departures are 15 times more likely in the California Southern District than in the Minnesota district, but less likely by a factor of 0.09 in the South Carolina District than in the Minnesota District, implies that such departures are 15/0.09 = 167 times as likely in the California Southern District as in the South Carolina District.

Tables 11 and 12 pertain to mandatory minimum sentences and show that substantial and often significant variation in the likelihood of sentences falling below an otherwise applicable mandatory minimum exists even after controls for differences in offense and offender characteristics across circuits and districts. If we focus on the adjusted ratios in table 11 first, which estimate the differences among circuits after controls, we find that there were some circuits in which the odds on sentences falling below an otherwise applicable mandatory minimum due to substantial assistance were significantly higher than in the Eighth Circuit, and others in which those odds were significantly lower.

[1] As noted in table 10, USSC data contained no "other downward departure" sentences in drug cases in the Northern Mariana Islands District for fiscal years 1999 through 2001.

Table 11: Odds on Mandatory Minimum Sentences Falling below an Otherwise Applicable Mandatory Minimum for Substantial Assistance and for Other Reasons, and Odds Ratios Indicating the Differences between Circuits, before and after Adjusting for Offense and Offender Characteristics

Circuit	Odds on falling below for substantial assistance	Unadjusted ratios	Adjusted ratios	Odds on falling below for other reasons	Unadjusted ratios	Adjusted ratios
Eighth	0.44			0.36		
D.C.	0.42	0.95	1.54*	0.33	0.91	2.55*
First	0.23	0.53*	0.67*	0.64	1.78*	0.99
Second	0.51	1.16*	1.7*	0.85	2.38*	1.53*
Third	0.68	1.53*	2.29*	0.75	2.08*	1.54*
Fourth	0.33	0.74*	0.99	0.23	0.64*	0.94
Fifth	0.25	0.55*	0.71*	0.85	2.37*	1.17
Sixth	0.63	1.43*	1.74*	0.33	0.93	0.94
Seventh	0.31	0.71*	0.88*	0.33	0.93	1.01
Ninth	0.37	0.83*	1.04	1.21	3.37*	2*
Tenth	0.29	0.65*	0.78*	0.89	2.47*	1.25
Eleventh	0.30	0.68*	0.9*	0.75	2.09*	1.14

Source: GAO analysis of USSC data.

Note: The odds on sentences falling below for substantial assistance were calculated using all cases. The odds on sentences falling below for other reasons were calculated using only cases that did not fall below for substantial assistance. Ratios were calculated using the Eighth Circuit as the referent category. Adjusted ratios are from logistic regression models that control for offense and offender characteristics.

*Odds ratio coefficients that are significant at the 0.05 level.

The same is true of the likelihood of sentences falling below an otherwise applicable mandatory minimum for reasons other than substantial assistance. The adjusted ratios in table 11 suggest that the biggest difference in the likelihood of mandatory minimum sentences falling below an otherwise applicable mandatory minimum due to substantial assistance involved the Third and First Circuits (such sentences were 2.29/0.67=3.4 times more likely in the former circuit than in the latter), while the biggest difference in the likelihood of mandatory minimum sentences falling below an otherwise applicable mandatory minimum for reasons other reasons, such as the safety valve, involved the D.C. vs. the Fourth and Sixth Circuits (such sentences were 2.55/0.94=2.7 times more likely in the former circuit than in the latter two).

Table 12 shows, similarly, that in many districts judges were much more likely than in the Minnesota district to issue sentences below a mandatory

minimum to offenders facing a mandatory minimum, both for reasons of substantial assistance and for other reasons; and, at the same time, judges in many other districts were less likely to do so, overall.

Table 12: Odds on Mandatory Minimum Sentences Falling below an Otherwise Applicable Mandatory Minimum for Substantial Assistance and for Other Reasons, and Odds Ratios Indicating the Differences between Districts, before and after Adjusting for Offense and Offender Characteristics

District	Odds on falling below for substantial assistance	Unadjusted ratios	Adjusted ratios	Odds on falling below for other reasons	Unadjusted ratios	Adjusted ratios
Minnesota	0.37			0.54		
D.C. Circuit						
Dist of Columbia	0.42	1.13	2.78	0.33	0.6*	1.83
First Circuit						
Maine	1.08	2.91*	1.02	0.72	1.33	0.70
Massachusetts	0.50	1.34*	2.55*	0.57	1.05	1.03
New Hampshire	0.72	1.94*	0.69	0.82	1.50	0.42
Puerto Rico	0.07	0.18*	0.27*	0.65	1.20	0.74
Rhode Island	0.07	0.2*	0.31	0.63	1.16	0.81
Second Circuit						
Connecticut	0.28	0.75	3.69*	0.57	1.05	3.89*
New York Eastern	0.43	1.17	3.5*	1.17	2.15*	1.68
New York Northern	2.33	6.26*	2.75*	0.98	1.8*	2.02
New York Southern	0.33	0.88	6.16*	0.80	1.48*	0.75
New York Western	0.85	2.29*	1.02	0.43	0.80	1.34
Vermont	1.19	3.19*	6.71	0.53	0.97	3.95
Third Circuit						
Delaware	0.57	1.52	0.43	0.29	0.53	1.50
New Jersey	0.43	1.16	0.8	1.50	2.77*	0.87
Pennsylvania Eastern	1.07	2.88*	2.33*	0.62	1.13	1.37
Pennsylvania Middle	0.59	1.58*	0.32*	0.33	0.60	4.49*
Pennsylvania Western	0.45	1.2	1.18	0.36	0.66*	0.92
Virgin Islands	0.44	1.18		0.33	0.61	0.34
Fourth Circuit						
Maryland	0.40	1.07	0.44*	0.23	0.42*	1.87
North Carolina Eastern	0.30	0.8	0.28*	0.15	0.27*	0.44
North Carolina Middle	0.27	0.72*	0.46*	0.15	0.28*	0.38*
North Carolina Western	0.70	1.88*	0.53*	0.36	0.66*	3.04*

District	Odds on falling below for substantial assistance	Unadjusted ratios	Adjusted ratios	Odds on falling below for other reasons	Unadjusted ratios	Adjusted ratios
South Carolina	0.39	1.05	0.39*	0.23	0.43*	0.64
Virginia Eastern	0.08	0.2*	0.83	0.23	0.42*	0.5*
Virginia Western	0.63	1.69*	1.92	0.29	0.54*	0.58
West Virginia Northern	0.07	0.19*		0.15	0.27*	0.31
West Virginia Southern	0.14	0.37*	0.39	0.29	0.53*	1.07
Fifth Circuit						
Louisiana Eastern	0.20	0.53*	0.57	0.58	1.07	1.68
Louisiana Middle	0.68	1.83	0.23*	0.33	0.61	0.85
Louisiana Western	0.14	0.37*	0.12*	0.08	0.14*	0.24*
Mississippi Northern	0.37	1	0.36*	0.27	0.49*	2.88*
Mississippi Southern	0.48	1.28	0.27*	0.45	0.83	0.34*
Texas Eastern	0.12	0.33*	0.39*	0.28	0.52*	0.52
Texas Northern	0.33	0.88	0.43*	0.40	0.74	0.63
Texas Southern	0.27	0.72*	0.63	1.07	1.96*	0.77
Texas Western	0.22	0.59*	0.45*	1.44	2.65*	1.76*
Sixth Circuit						
Kentucky Eastern	1.10	2.97*	2.46*	0.52	0.96	0.71
Kentucky Western	0.16	0.44*	0.16*	0.23	0.42*	0.4*
Michigan Eastern	0.67	1.79*	0.85	0.38	0.71*	0.89
Michigan Western	0.46	1.24	0.16*	0.32	0.58*	0.79
Ohio Northern	0.73	1.96*	0.85	0.38	0.7*	1.37
Ohio Southern	0.87	2.35*	0.6	0.29	0.54*	0.59
Tennessee Eastern	0.54	1.44*	0.45*	0.32	0.59*	0.57
Tennessee Middle	0.66	1.77*	1.4	0.30	0.54*	0.65
Tennessee Western	0.46	1.23	0.69	0.22	0.4*	0.65
Seventh Circuit						
Illinois Central	0.54	1.46*	0.38*	0.14	0.27*	0.37
Illinois Northern	0.45	1.2	0.71	0.71	1.30	1.07
Illinois Southern	0.04	0.11*	0.42	0.22	0.4*	0.78
Indiana Northern	0.29	0.77	0.59	0.33	0.6*	0.85
Indiana Southern	0.81	2.19*	0.55	0.39	0.71	1.49
Wisconsin East	0.29	0.78	0.66	0.34	0.63*	0.77
Wisconsin West	0.10	0.28*	0.09*	0.17	0.31*	0.1*

District	Odds on falling below for substantial assistance	Unadjusted ratios	Adjusted ratios	Odds on falling below for other reasons	Unadjusted ratios	Adjusted ratios
Eighth Circuit						
Arkansas Eastern	0.18	0.47*	0.62	0.27	0.5*	0.64
Arkansas Western	0.23	0.61	0.15*	0.35	0.64	0.78
Iowa Northern	0.35	0.93	0.35*	0.21	0.39*	0.75
Iowa Southern	0.43	1.15	0.33*	0.42	0.77	1.02
Missouri Eastern	0.48	1.3*	0.6	0.33	0.61*	0.61
Missouri Western	1.12	3.02*	1.29	0.29	0.54*	0.61
Nebraska	0.27	0.74*	0.94	0.39	0.73*	0.73
North Dakota	0.83	2.24*	1.98	0.27	0.50	0.27
South Dakota	0.30	0.82	0.39	0.23	0.43*	0.16*
Ninth Circuit						
Alaska	0.24	0.64	0.67	0.38	0.70	1.09
Arizona	0.26	0.69*	1.87	3.73	6.87*	7.5*
California Central	0.16	0.42*	0.53	0.73	1.35	0.86
California Eastern	0.30	0.8	0.77	0.42	0.77	0.57
California Northern	0.19	0.5*	1.07	0.60	1.11	1.04
California Southern	0.51	1.37*	2.27*	2.68	4.94*	2.61*
Guam	1.09	2.94*	1.55	0.72	1.33	0.2*
Hawaii	0.49	1.31	1.36	0.56	1.03	0.3*
Idaho	0.59	1.6	0.34*	0.25	0.46	1.07
Montana	0.66	1.77*	0.89	0.22	0.41*	0.81
Nevada	0.23	0.61*	0.48	0.63	1.15	0.65
Northern Mariana Islands	2.00	5.37*	0.28	1.00	1.84	0.93
Oregon	0.37	1.01	0.27*	0.56	1.02	0.66
Washington Eastern	0.20	0.53*	0.66	0.70	1.29	0.73
Washington Western	0.54	1.44*	1.23	0.69	1.27	1.48
Tenth Circuit						
Colorado	1.07	2.89*	0.68	0.73	1.34	1.57
Kansas	0.28	0.76	0.3*	0.28	0.51*	0.41*
New Mexico	0.19	0.5*	1	1.99	3.66*	0.86
Oklahoma Eastern	0.07	0.19*		0.65	1.20	10.79*
Oklahoma Northern	0.26	0.71	0.53	0.24	0.45*	1.50
Oklahoma Western	0.21	0.56*	0.88	0.16	0.29*	0.22*
Utah	0.19	0.51*		1.05	1.92*	2.50
Wyoming	0.37	1	0.18*	0.42	0.77	1.19

District	Odds on falling below for substantial assistance	Unadjusted ratios	Adjusted ratios	Odds on falling below for other reasons	Unadjusted ratios	Adjusted ratios
Eleventh Circuit						
Alabama Middle	0.91	2.45*	0.46*	0.34	0.62	1.81
Alabama Northern	0.59	1.59*	0.63	0.27	0.49*	0.75
Alabama Southern	0.69	1.85*	0.75	0.27	0.49*	0.3*
Florida Middle	0.38	1.03	0.46*	0.44	0.82	0.68
Florida Northern	0.49	1.32	1.63	0.16	0.3*	0.79
Florida Southern	0.17	0.44*	0.56	1.56	2.87*	1.12
Georgia Middle	0.33	0.88	0.2*	0.21	0.39*	0.23*
Georgia Northern	0.28	0.75*	0.26*	0.47	0.86	1.11
Georgia Southern	0.23	0.62*	0.18*	0.12	0.21*	0.25*

Source: GAO analysis of USSC data.

Note: The odds on sentences falling below for substantial assistance were calculated using all cases. The odds on sentences falling below for other reasons were calculated using only cases that did not fall below for substantial assistance. Ratios were calculated using the Minnesota District as the referent category. Adjusted ratios are from logistic regression models that control for offense and offender characteristics.

*Odd ratio coefficients that are significant at the 0.05 level.

Appendix IV: Data for Analyzing Departures and Mandatory Minimum Sentences at Circuit and District Court Levels Limited

Overall, the data the U.S. Sentencing Commission (USSC) has received from district courts and judges were generally sufficient for our analyses of downward departures and mandatory minimum sentences across circuits and for most districts. Missing data due to missing sentencing documents or information posed few limitations for our analysis. However, opportunities for improvement exist.

Documents USSC Requests from District Courts

Under the authority of the Sentencing Reform Act of 1984, USSC required courts to forward to it the following five sentencing documents in every guidelines case.[1] The PROTECT Act of 2003 codifies this data collection requirement:

- the Judgment and Commitment Order (J&C);
- the Statement of Reasons (SOR);
- the Pre-sentence Report (PSR);
- any written plea agreements, if applicable; and
- all indictments or other charging documents.

Under the PROTECT Act, courts are to send to USSC a "Report of Sentence" enclosing the required sentencing documents within 30 days of a judgment, and the Chief Judge in every district is to ensure that their courts do so.[2]

How USSC Uses Documents to Create Its Database

Of the five sentencing documents submitted by district courts, USSC officials told us they rely primarily on the J&C, SOR, and PSR to obtain the sentencing information that USSC staff code into USSC database. From the J&C, USSC obtains data on the sentence, including the number of months of any imprisonment, the statute of conviction, and whether any mandatory minimum sentence applied. USSC officials also said that they rely almost exclusively on the SOR to obtain data on the basis for the sentence, such as whether the sentence imposed fell within or outside the applicable sentencing guidelines range as determined by the court, the reason(s) for any departure, and whether a substantial assistance motion or safety valve adjustment was used. If the SOR is missing, USSC coding

[1] 28 U.S.C. 994(w), 995(a)(8). Courts are also to forward additional documentation related to actions taken after sentencing, such as revocations of probation or resentencing under Federal Rule of Criminal Procedure 35(b).

[2] P.L. 108-21, sec. 401(h), *amending* 28 U.S.C. 994(w).

procedures have required document analysts to record the departure status as missing, although other documents, such as the plea agreement, may have information that indicate whether and why the sentence departed. USSC is initiating some changes in its coding procedures as discussed below. From the PSR, which is drafted by a district probation officer, USSC obtains demographic and other background information about offenders, an initial sentencing recommendation according to the guidelines, and other sentencing information such as whether the offense of conviction had a mandatory minimum (should this information not be noted in the J&C), and whether the safety valve could potentially be applied (in certain limited circumstances where this information has not been recorded in a SOR).

USSC Receives Most of Requested Sentencing Documents

Our analysis shows that district courts provided these five sentencing documents to USSC for the great majority of drug sentences imposed in fiscal years 1999-2001. Of 72,283 drug sentences imposed during this period, district courts submitted between 96 and 99 percent of the three key sentencing documents– the J&C (99 percent), SOR (96 percent), and PSR (98 percent)—from which USSC obtains sentencing data. According to USSC data, a lower percentage of plea agreements (89 percent) and indictments (87 percent) were submitted during this time period. During the period of our review, USSC did not primarily rely on these two documents for departure information. Table 13 shows, by circuit, the percentage of each type of sentencing document USSC did not receive in fiscal years 1999-2001.

Table 13: Percent of Missing Drug Sentencing Documents, by Circuit, as Shown in USSC's Database for Fiscal Years 1999-2001

Sentencing documents	National average	D.C.	First	Second	Third	Fourth	Fifth	Sixth	Seventh	Eighth	Ninth	Tenth	Eleventh
Judgment and commitment order	0.7%	2.0%	0.2%	0.8%	1.1%	1.4%	0.5%	0.5%	0.3%	0.4%	1.0%	0.4%	0.6%
Statement of reasons	3.7%	0.5%	4.9%	5%	1.4%	7.4%	1.6%	1.9%	2.5%	1.3%	6.6%	4.5%	2.4%
Presentence report	1.5%	1.3%	2.3%	1.8%	1.8%	1.7%	1.2%	1.3%	2.3%	1.1%	1.6%	1.8%	0.9%
Plea agreement	11%	33%	12%	50%	5%	7%	9%	7%	8%	5%	8%	9%	9%
Indictment	13%	39%	3%	75%	32%	10%	5%	3%	20%	3%	5%	6%	7%

Source: GAO analysis of UUSC data.

Among the 12 circuits, the rate of missing SORs—the principal document used to determine the reason for a sentencing departure—ranged from less than 1 percent to about 7 percent. Two of the 4 circuits in which the highest number of drug sentences were imposed were also missing the highest percent of their SORs–the 9th Circuit at 6.6 percent and the Fourth Circuit at 7.4 percent. A circuit's average can mask wide differences among the districts within the circuit. For example, the percentages of missing SORs among districts in the Ninth Circuit ranged from less than 1 percent to 58 percent and in the Fourth Circuit from less than 1 percent to 20 percent.

USSC Takes Steps to Reduce Missing Document Rate

USSC reviews the documents it receives from the district courts and annually sends a letter to each district court identifying the cases in which documents appear to be missing. Additionally, in its annual report, USSC discloses the overall document submission rate for all criminal cases for the J&C, SOR, and PSR documents. USSC also attempts to identify guidelines cases for which the courts may not have submitted any sentencing documents. By linking data from a database maintained by AOUSC with the data on cases in its database, USSC develops a list of cases for which it has not yet received documentation. USSC sends this list of cases to the relevant district courts and asks them to review the list and forward any documents USSC should have received.

Missing or Difficult to Interpret Information Can Affect Analysis of Departures

In addition to missing sentencing documents, the documents USSC received in fiscal years 1999-2001 had missing information or information that was difficult to interpret. As shown in table 14, among the circuits departure data were missing for 1 percent to 7 percent of drug sentences imposed in fiscal years 1999-2001. In addition, for 4 percent to 15 percent of sentences, information was missing on whether the safety value was used as the basis for sentencing below a mandatory minimum.

Table 14: Percent of Missing Drug Sentencing Information on Documents USSC Received, by Circuit, Fiscal Years 1999-2001

Sentencing information	National average	D.C.	First	Second	Third	Fourth	Fifth	Sixth	Seventh	Eighth	Ninth	Tenth	Eleventh
Departure information	4%	3%	5%	5%	2%	8%	2%	2%	3%	1%	7%	5%	3%
Safety valve applied	8%	11%	10%	10%	13%	15%	4%	5%	7%	6%	12%	7%	4%

Source: GAO analysis of UUSC data.

Nationally, of the 72,283 federal drug sentence imposed in fiscal years 1999-2001, 3,004 (4 percent) were coded as missing information necessary to determine whether the sentence departed from an applicable guideline range. Of these, 2,118 sentences were missing information because the SOR had not been received, and for 570, the SOR was received but did not include departure information.

Missing or unclear data also limited our ability to determine when the safety valve was used as the basis for sentencing below an otherwise applicable mandatory minimum. For example, in our preliminary analysis, we found that of the 11,256 federal drug sentences for which the offense of conviction carried a mandatory minimum and fell below that minimum, about 1,600 (14 percent) were coded by USSC as falling below the applicable mandatory minimum but not involving either the safety valve or substantial assistance. We discussed this issue with USSC. After reviewing the underlying documents used for coding these 1,600 sentences, USSC determined that over 900 sentences were miscoded. These miscoded sentences were recoded in a variety of ways, including some coded as involving the safety valve, some coded as involving substantial assistance, some coded as having a changed drug quantity that affected the applicable mandatory minimum, and some coded as missing safety valve information. USSC did not recode 681 sentences; these sentences remained coded as falling below a mandatory minimum but involving neither the safety valve nor substantial assistance. In addition, safety valve information was determined to be missing from 770 sentences for which the offense of

conviction carried and fell below a mandatory minimum. A USSC official said that there is no specific prompt on the SOR asking for information on the application of the safety valve or whether the offense of conviction carried a mandatory minimum.

On the basis of our analysis, missing or incomplete sentencing information is unlikely to affect analyses nationally or by circuit but could affect the analysis of departures in districts where the missing documents or information are concentrated. Missing or incomplete sentencing information may also affect USSC's records for individual judges and thus USSC's ability to provide accurate judge-specific sentencing analysis were Congress to request this information under the auspices of the PROTECT Act.

USSC Actions to Improve Coding

USSC officials told us that they have not generally followed-up with district courts to obtain information that is missing from submitted documents or is unclear (e.g., whether the safety valve provision was the basis for a sentence below an applicable mandatory minimum). USSC staff does not use information from one document to substitute for missing or unclear information in another document. As a result of coding issues we identified during this review, USSC plans to implement new quality control and review procedures for sentences where information on the SOR is missing, incomplete, or unclear. These include identifying common errors for coding staff, using technology to develop automatic edit checks for apparently contradictory coding information for a sentence (e.g., those below an applicable mandatory minimum whose reason for departure is not substantial assistance or the safety valve), and having a staff attorney review sentences in which the coding supervisor is unable to determine the appropriate coding.

Multiple Reasons Cited for Missing Documentation and Information

Officials from USSC, the AOUSC, and the Judicial Conference Committee on Criminal Law cited several reasons that sentencing documents or information on sentencing documents were missing. First, USSC and AOUSC officials told us that some judges do not provide all the documents, in part because judges may be unclear whether documents under court seal or that pertain to individuals in the federal witness protection program are to be forwarded to USSC.

Second, USSC relies almost exclusively on the SOR to determine whether the sentence departed, met a mandatory minimum, or involved substantial assistance. If the SOR is missing, USSC's coding procedures require

document analysts to record the departure status as missing, even if other documents, such as the plea agreement, suggests that a departure may by recommended by the government. As a result, incomplete information prevents USSC from collecting some sentencing data, as illustrated below by two examples drawn from drug sentences imposed during fiscal years 1999-2001:

- In one case, the SOR did not indicate the reason the court sentenced the offender to 97 months—a sentence below the applicable 10-year (120 month) mandatory minimum. Without this information on the SOR, under the coding conventions used, USSC document analysts could not record substantial assistance as the reason that the sentence of 97 months fell below a mandatory minimum even though the plea agreement (prepared by the parties) and the PSR (prepared by the probation officer) indicated that a substantial assistance motion was to have been made.

- In another case, the SOR stated that the court was crediting the offender for time served but failed to state the specific amount of time being credited. Unable to determine the amount of time being credited, and thus the sentence length being imposed, USSC document analysts could not determine whether the sentence departed or met an applicable mandatory minimum.

Third, judges report the information using different versions of the SOR forms that can make consistent interpretation more difficult. For example, some jurisdictions provide one-page, single-spaced narratives that report the sentence and, in rare cases, others provide a transcript of the sentencing hearing instead of an SOR. According to USSC officials, interpreting multiple forms that report sentencing information in different ways and in different locations complicates the process of coding sentencing data such as departure status and use of the safety valve and may lead to missing sentencing information. USSC officials stated the single most effective step towards improving the completeness of data the courts report and USSC's ability to code it would be the increased use of a standard SOR. The Judicial Conference at its September 2003 meeting accepted revisions to the standard SOR. The Conference designated the revised form as the mechanism by which courts comply with the requirements of the PROTECT Act to report reasons for sentences to USSC. The Committee plans to encourage judges to use it through education about the benefits of its use, but the Chair of the Committee stated that the Committee does not believe it has the authority to require the use of the new SOR. Officials from AOUSC and the Committee said they believe that with additional education judges will routinely use the

new standard SOR, resulting in more useful and higher quality data reported to USSC.

Last, according to officials from AOUSC and the Criminal Law Committee, judges and other court officials lack an awareness of how to complete the SORs with a level of detail that would allow USSC to collect sentencing information. The Committee official said that education for judges and other court officials is needed on how to properly complete the SOR. In addition, no feedback mechanism is in place to inform judges that information on the SOR was incomplete or unclear to USSC and, therefore, cases are coded as missing sentencing information. Although USSC contacts the courts to request missing sentencing documents be submitted, it does not provide a similar list of documents that contained information coded as missing. Without knowing which cases are coded as missing sentencing information, judges cannot clarify or complete information needed by USSC.

While USSC and the Federal Judicial Center offer programs and workshops on application of the guidelines to judges and other court officials, no education programs are provided on how to complete the SOR in ways that provide clear, complete information. Officials from USSC, AOUSC, and Criminal Law Committee said that education on how to apply increasingly complex guidelines has been their focus, not educating judges and other officials to correctly complete the SOR. Officials also said that in the future it would be possible to provide programs at judicial workshops or through the Federal Judicial Center that educates judges and other court officials on how to provide clear, complete reports on sentencing.

Other Downward Departures Do Not Solely Reflect Judicial Discretion

The category "other downward departures" generally thought to represent judicial discretion may also reflect downward departures resulting from prosecutorial discretion and initiative. In this report we classified departures as either "substantial assistance" or "other downward" departures. Substantial assistance departures can be viewed as a measure of prosecutorial discretion because only the prosecutor has the authority to initiate and recommend to the court that an offender be given a reduced sentence for substantial assistance to the prosecution. Neither the judge nor defense counsel may do so. The remaining departures, "other downward departures," are generally considered to be an indication of judicial discretion. AOUSC officials suggested, however, that the category "other downward departures" provides an imprecise measure of judicial discretion. For example, AOUSC officials noted that some departures classified in USSC database as other departures may actually arise from

agreements, particularly plea bargains, that either were initiated or supported by the government. We did not confirm this statement with federal prosecutors. USSC documents in its database up to three reasons judges provide for an other downward departure. According to USSC database for drug sentences in fiscal years 1999-2001, the first reason provided for an other downward departure in 18 percent of the sentences was the government's fast track programs;[3] in 16 percent, plea agreement; and in 4 percent, deportation. Tables 15, 16, and 17 detail for drug sentences the number and percent of other downward departures associated with the first, second, and third reasons provided for those departures.

Table 15: First Reason Provided by Judges for Other Downward Departure in Drug Sentences Nationwide, Fiscal Years 1999-2001

First reason	Number of other downward departures	Percent of other downward departures for drug sentences
No Reason given	16	*
(5G1.3) Convictions on related counts	10	*
(5H1.1) Age	40	*
(5H1.2) Educational and vocational skills	1	*
(5H1.3) Mental and emotional conditions	55	1%
(5H1.4) Physical condition	223	2%
(5H1.4) Drug dependence and alcohol abuse	21	*
(5H1.5) Previous employment record	5	*
(5H1.6) Family ties and responsibilities	360	3%
(5H1.6) Community ties	14	*
(5K1.1) Substantial assistance at motion	1	*
not 5K1.1 Cooperation without motion	30	*
Cooperation (motion unknown)	34	*
(5K2.0) Several persons injured	1	*
(5K2.2) Physical injury	1	*
(5K2.3) Extreme psychological injury	1	*
(5K2.6) Weapons and dangerous instrumentalities	1	*

[3] "Fast-track" or other early disposition programs in the southwest border districts provide lower sentences initiated by prosecutors for low-level drug trafficking offenses.

First reason	Number of other downward departures	Percent of other downward departures for drug sentences
(5K2.10) Victim's conduct	2	*
(5K2.11) Lesser harm	4	*
(5K2.12) Coercion and duress	74	1%
(5K2.13) Diminished capacity	207	2%
Fast Track - Immigration	1,969	18%
(2A1.1) Death not caused intentionally	2	*
(2A6.1) Factors not incorporated in guideline	4	*
(2D1.1) Unusually high drug amount	16	*
(2Q1.2, 2Q1.3) Harm resulting from risk	1	*
(4A1.3) Pattern of conduct	2	*
(4A1.3) Pending cases	1	*
General adequacy of criminal history; does not reflect seriousness of criminal history	7	*
Significance or similarity of past conduct	6	*
Criminal history category over-represents the defendant's involvement	1,169	11%
Pursuant to a plea agreement	1,680	16%
Due to stipulations	10	*
Other plea agreement reason	1	*
Mule/Role in the offense	89	1%
Deportation	472	4%
Local conditions	4	*
Adequate punishment to meet the purposes of sentencing	82	1%
Deterrence	36	*
Prey to other inmates	3	*
Guidelines do not reflect the seriousness of the offense	8	*
No prior record/first offender	6	*
Put defendant's sentence in line with co-defendant's. Reduce disparity.	9	*
Lack of culpability/accountability of defendant	5	*
Time or cost involved in the investigation	3	*
Acceptance of responsibility	91	1%
Limited/minor prior record	2	*

First reason	Number of other downward departures	Percent of other downward departures for drug sentences
Rehabilitation	191	2%
Restitution	2	*
Incapacitation	4	*
Sufficient punishment	23	*
Nature/seriousness of the offense	5	*
First felony conviction	2	*
Dollar amount involved in crime (general)	2	*
Currently receiving punishment under state or federal jurisdiction	1	*
Defendant's positive background/good character	2	*
Military record	1	*
Not representative of the "heartland"	93	1%
Guidelines too high/offense level over-represented	2	*
Guidelines too low/offense level under-represented	1	*
(5K2.0) General aggravating or mitigating circumstance	1,671	15%
Other (SPECIFY)	804	7%
Defendant is a law enforcement officer or ex-law enforcement officer	1	*
Offense behavior was an isolated incident	995	9%
Lower sentence gives defendant a chance to be a productive member of society	1	*
(5K2.16) Voluntary disclosure	7	*
Lack of youthful guidance	2	*
Delay in prosecution; evidentiary concerns	2	*
Time served	28	*
Child abuse (child abuse/battered child syndrome)	4	*
Remorse	2	*
Missing/indeterminable	191	2%

Source: GAO analysis of USSC data.

Note: These percentages are based on 10,891 drug sentences imposed during fiscal years 1999-2001 for which departure information is available and the sentence was coded an other downward departure. USSC codes up to three reasons provided by judges as the bases for departing.

*Less than 1percent.

Table 16: Second Reason Provided by Judges for Other Downward Departure in Drug Sentences Nationwide, Fiscal Years 1999-2001

Second reason	Number of drug sentences	Percent of drug sentences
(Second Reason field left blank)	8,986	82%
No reason given	1	*
(5H1.1) Age	20	*
(5H1.2) Educational and vocational skills	2	*
(5H1.3) Mental and emotional conditions	34	*
(5H1.4) Physical condition	71	1%
(5H1.4) Drug dependence and alcohol abuse	7	*
(5H1.5) Previous employment record	4	*
(5H1.6) Family ties and responsibilities	105	1%
(5H1.6) Community ties	3	*
not 5K1.1 Cooperation without motion	7	*
Cooperation (motion unknown)	4	*
(5K2.10) Victim's conduct	1	*
(5K2.12) Coercion and duress	15	*
(5K2.13) Diminished capacity	34	*
Fast Track - Immigration	206	2%
(2A6.1) Factors not incorporated in guideline	1	*
(2D1.1) Unusually high drug purity	1	*
(2D1.1) Unusually high drug amount	1	*
Significance or similarity of past conduct	1	*
Criminal history category over-represents the defendant's involvement	72	1%
(4B1.1) Career offender	1	*
Pursuant to a plea agreement	61	1%
Due to stipulations	2	*
Other plea agreement reason	1	*
Mule/role in the offense	44	*
Deportation	39	*
Local conditions	3	*
Adequate punishment to meet the purposes of sentencing	9	*
Deterrence	13	*
Charge/plea does not reflect the seriousness of the offense	1	*
No prior record/first offender	7	*

Second reason	Number of drug sentences	Percent of drug sentences
Put defendant's sentence in line with codefendant's. Reduce disparity.	4	*
Lack of culpability/accountability of defendant	1	*
Lack of available facilities/overcrowding	1	*
Time or cost involved in the investigation	2	*
Acceptance of responsibility	18	*
Rehabilitation	46	*
Incapacitation	1	*
Sufficient punishment	12	*
First felony conviction	1	*
Defendant's positive background/good character	2	*
Military record	1	*
Not representative of the "heartland"	18	*
(5K2.0) General aggravating or mitigating circumstance	282	3%
Other (SPECIFY)	160	1%
Unknown	2	*
Offense behavior was an isolated incident	567	5%
(5K2.16) Voluntary disclosure	1	*
Lack of youthful guidance	6	*
Time served	2	*
Child abuse (child abuse/battered child syndrome)	3	*
Missing/indeterminable	4	*

Source: GAO analysis of USSC data.

Note: These percentages are based on 10,891 drug sentences imposed during fiscal years 1999-2001 for which departure information is available and the sentence was coded an other downward departure. USSC codes up to three reasons provided by judges as the bases for departing.

*Less than 1percent.

Table 17: Third Reason Provided by Judges for Other Downward Departure in Drug Sentences Nationwide, Fiscal Years 1999-2001

Third reason	Number of drug sentences	Percent of drug sentences
(Third Reason field left blank)	10,705	98%
(5H1.1) Age	7	*
(5H1.2) Educational and vocational skills	1	*
(5H1.3) Mental and emotional conditions	4	*
(5H1.4) Physical condition	15	*
(5H1.5) Previous employment record	3	*
(5H1.6) Family ties and responsibilities	20	*
Cooperation (motion unknown)	2	*
(5K2.11) Lesser harm	1	*
(5K2.12) Coercion and duress	3	*
(5K2.13) Diminished capacity	6	*
Fast Track - Immigration	5	*
(2D1.1) Unusually high drug amount	1	*
Criminal history category over-represents the defendant's involvement	9	*
Pursuant to a plea agreement	6	*
Mule/role in the offense	8	*
Deportation	3	*
Local conditions	1	*
Deterrence	3	*
No prior record/first offender	3	*
Put defendant's sentence in line with codefendant's. Reduce disparity	1	*
Acceptance of responsibility	3	*
Rehabilitation	12	*
Incapacitation	7	*
Defendant's positive background/good character	1	*
Not representative of the "heartland"	6	*
(5K2.0) General aggravating or mitigating circumstance	17	*
Other (SPECIFY)	13	*
Offense behavior was an isolated incident	24	*
Lack of youthful guidance	1	*

Source: GAO analysis of USSC data.

Note: These percentages are based on 10,891 drug sentences imposed during fiscal years 1999-2001 for which departure information is available and the sentence was coded an other downward departure. USSC codes up to three reasons provided by judges as the bases for departing.

*Less than 1percent.

Appendix V: Comments from U.S. Sentencing Commission

Diana E. Murphy, Chair

October 9, 2003

William O. Jenkins, Jr.
Director, Homeland Security and Justice
General Accounting Office
Washington, DC 20548

Dear Mr. Jenkins:

The United States Sentencing Commission appreciates the opportunity to comment on the General Accounting Office's proposed report entitled "Federal Drug Sentences: Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2000, GAO-04-105." We have read the report with interest. It shows your staff's understanding and appreciation of the complexities of the federal sentencing system. It also demonstrates what challenging work the Sentencing Commission faces in creating a comprehensive database of federal sentencing.

In reviewing the draft report, we noticed that where geographical differences in departure rates are discussed in the GAO report, the significant impact of "fast track" programs on the departure rates in some judicial districts, particularly along the southwest borders, does not appear to be fully discussed. The Sentencing Commission is also completing a report on departures, pursuant to a congressional directive in the PROTECT Act, and will address this impact in its analysis of departures, subject of course to limitations in the data.

GAO's suggested measures to improve our dataset are helpful and consistent with our own thinking. Such measures may exceed our current resource capacities, however. The annual collection, coding, and analysis of over 60,000 case files representing the nation's federal criminal docket is an extensive undertaking managed by fewer than 30 Sentencing Commission employees. Since enactment of the PROTECT Act, the Sentencing Commission has observed a noticeable increase in the

volume of sentencing documents it receives. The quality control measures currently in place, including the data match system described in the GAO report, are strained under the influx of documents. Moreover, in light of the greater level of detail required for each case under the PROTECT Act, further improvements to the Sentencing Commission's internal data quality control will have to be made, including additional measures to obtain incomplete information or to clarify conflicting information.

As recommended in the GAO report, the Sentencing Commission is working to develop standardized, more detailed sentencing documentation, to improve procedures for submitting sentencing information to the Sentencing Commission, and to increase education of sentencing courts and court personnel on the importance of providing complete and accurate sentencing information. This outreach, however, will also need additional resources.

Sincerely,

Judge Diana E. Murphy
Chair

cc: Commissioners

Appendix VI: Comments from the Judicial Conference Committee on Criminal Law

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
9535 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, Texas 77002

Honorable Donetta W. Ambrose
Honorable William M. Catoe, Jr.
Honorable William F. Downes
Honorable Richard A. Enslen
Honorable David F. Hamilton
Honorable Henry M. Herlong, Jr.
Honorable James B. Loken
Honorable A. David Mazzone
Honorable William T. Moore, Jr.
Honorable Norman A. Mordue
Honorable Wm. Fremming Nielsen
Honorable Emmet G. Sullivan

Honorable Sim Lake, Chair

TELEPHONE
(713) 250-5177

FACSIMILE
(713) 250-5010

October 10, 2003

Mr. William O. Jenkins, Jr.
Director, Homeland Security and Justice
United States General Accounting Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Jenkins:

Thank you for the opportunity for the Judicial Conference Committee on Criminal Law to comment on the General Accounting Office (GAO) draft report entitled *Federal Drug Offenses: Departures from Sentencing Guidelines and Mandatory Minimum Sentences, 1999-2001*. It is apparent that a great deal of work went into your study of sentencing data for drug-related offenses. It is also apparent that the report does not answer a question that has been raised by some regarding the extent to which judges themselves, absent a prosecutor's request, have imposed sentences that fall below the sentencing guideline range. Appendix IV of the report does, however, contain critical information that demonstrates that at least 90 percent of downward departures are fairly attributable to prosecution initiatives and that judges are not exercising departure authority in violation of the letter or the spirit of the Sentencing Reform Act of 1984.

As you know, in its annual reports, the United States Sentencing Commission presents data on the percentage of offenders receiving downward departures. The Commission presents this data in only two categories. One category is pursuant to "substantial assistance" motions filed by the government. The other category is simply called "other downward" departures, and it covers a variety of reasons for departures.

The overly general categorization of "other departures" is not a meaningful way to analyze sentencing actions. Moreover, this approach to reporting the data has resulted in confusion, misinformation, and misuse by some who mistakenly infer that all "other downward" departures are

attributable to judges. Indeed, some have suggested that the data show that judges are abusing their departure authority. This misinterpretation of the facts may have prompted the enactment of the PROTECT Act.

The report correctly concludes, however, that although sufficient data are not available to accurately identify the reasons for departures in every case, the information available in the Sentencing Commission's database is sufficient to demonstrate that at least 38 percent of the other reasons for departures are attributable to plea agreements, fast-track or early disposition programs, and deportation actions that are prosecutor-initiated or supported. Current data cannot show the exact percentage of downward departures attributable solely to the courts. But, the results of the GAO study verify that the percentage of downward departures made over the objection of the government is very low. Moreover, less than one-half of one percent of these cases between 1999-2001 have been appealed by the government.

When other downward departures initiated and supported by prosecutors are considered together with substantial assistance motions made by the government, the proportion of downward departures initiated by the prosecutors is well over 90 percent. As noted by one chief judge who commented on the report, a large number of "other departures" are incorporated into guilty pleas.[1] Many of these pleas are binding plea agreements under Rule 11(c)(1)(C). In this kind of plea agreement, the court must either accept the stipulated sentence or reject the entire plea agreement. Another chief judge noted that binding plea agreements are used in lieu of substantial assistance motions due to security concerns. It is unfortunate that, prior to the enactment of the PROTECT Act, adequate time was not given to study, review, and analyze these facts about downward departure practices.

These factors demonstrate that the rate of downward departures that may be attributable to judges has remained fairly constant and is consistent with the expectation of the framers of the Sentencing Reform Act of 1984, who sought to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender and not to eliminate the thoughtful imposition of individualized sentences. Many of the provisions of the PROTECT Act, as enacted, undermine the basic structure of the sentencing system, give federal prosecutors unprecedented power, and make it even more difficult for judges to impose just and reasonable sentences as individual circumstances and the facts of a case may warrant.

The PROTECT Act is troubling to judges nationwide. Because the judiciary and the Sentencing Commission were not consulted in advance concerning this legislation, the Judicial Conference of the United States voted overwhelmingly at its September 2003 session to support repeal of certain sentencing provisions of the PROTECT Act. The GAO report's findings demonstrate why consultation was needed. As your data analysis confirms, at Appendix I, Table 3, substantial assistance agreements are offered by the government to defendants in drug cases who have

[1] As you know, a copy of the report was distributed to district judges to provide them an opportunity to comment on the facts and findings of the report, particularly with regard to specific court statistics as provided in the report's appendices.

Copy of testimony is not included.

higher sentencing guideline offense levels, use weapons, and have serious prior criminal records. These are the defendants who often have information useful to the government. But, the least culpable, first-time offenders who have greater potential for rehabilitation, often have nothing to offer the government in return for a motion for substantial assistance. Without some sentencing flexibility, judges would often be required to give harsher sentences to defendants who play minor roles. This would result in the very disparity the Sentencing Reform Act was intended to eliminate.

The limited data available made it impossible to fully explain why sentences varied when comparing districts' and circuits' departure rates. As the report noted, a significant concentration of sentences below mandatory minimums pursuant to the application of the safety valve (rather than substantial assistance motions) are found in circuits and districts that adjoin the southwest border and in a few other places, such as Florida Southern, New Jersey, New York Eastern, and Washington State, where there are large ports of entry. Using what are referred to as "fast-track" or "early disposition" programs, some of these districts are able to handle increasing caseloads caused by various law enforcement initiatives. The programs differ somewhat in operation, but all are operated with the consent of the government, the court, and the defense counsel.

Such programs are vital to relieve court congestion and conserve resources. A chief judge in a district that sentenced more guideline defendants than any other district noted that the fast-track programs benefit the system in a number of ways. By encouraging an early disposition of cases, the program reduces the cost and need for grand jurors, petit jurors, interpreters, deputy United States marshals, prosecutors, Criminal Justice Act panel attorneys, federal defenders, immigration judge time, magistrate judge time, district court time, and appellate court time. Overall, the participants value the benefits of an early disposition program. A copy of Chief Judge Marilyn L. Huff's testimony presented at a recent United States Sentencing Commission hearing on the fast-track programs is enclosed.

However, there has been no uniformity in the manner in which these programs are administered. As such, departures granted for these programs pursuant to a plea agreement are not always identified in the Commission's data. For example, in the district of Arizona, which accounts for 1,809 of the slightly more than 10,000 downward departures granted in 2001, departures under a fast-track program are often granted pursuant to a plea agreement for "general mitigating circumstances" under §5K2.0 of the guidelines. Unless the Commission's data fully captures and reports these reasons for downward departures, these cases are inappropriately included in "other downward" departures.

Similar confusion arises in connection with the applicability of mandatory minimum sentences. In the report, there are only two choices provided for explaining why a sentence is below the mandatory minimum–"substantial assistance" and "for other reasons." One chief judge expressed his concern about this portrayal as follows: "I frankly could not understand why the stats were so high 'for other reasons' particularly since I always understood mandatory minimums to be exactly that, mandatory. Then I realized, of course, that the 'safety valve' provisions allow us to go below the mandatory minimum to the guideline range. I assume that this is what the 'for other reasons' largely represents in fact." Another chief judge noted "[s]entences under the 'safety valve' are at the direct authorization (and presumably encouragement) of Congress. Furthermore, 'safety valve' sentences

Mr. William O. Jenkins, Jr.
Page 4

are not 'downward departures' but rather result in sentences within the applicable guideline range, albeit lower than the otherwise mandatory minimum."

Another chief judge explained that there are other reasons why a case may fall below what appears to be an applicable mandatory minimum. "One critical factor in determining the appropriate sentencing guideline relates to the amount of drugs attributable to a specific defendant. While the amount of drugs ascribable to a courier (often called a mule) may be readily available, the amounts attributable to individual defendants within a conspiracy is more difficult to affix. At the time a conspiracy indictment is returned by the grand jury, the indictment reflects the amount of drugs known to the investigators at the time and, presumably, all co-conspirators are bound by that amount. At the time of sentencing, the government often acknowledges that while there was probable cause to establish the amount of drugs involved at the time of the incident, the government cannot prove that amount beyond a reasonable doubt. . . . In each instance, the judge must adjust the guidelines to the appropriate provable level. However, the presentence report often reflects the amount of drugs stated in the indictment which has been determined unprovable as to certain defendants. Too often, revision of the presentence report is deemed a departure rather than appropriate adjustment based on provable facts."

Judges recognize their obligation to sentence defendants in accordance with the law and comply with the sentencing guidelines to meet that obligation. But, a clear understanding of sentencing decisions has been limited because of incomplete data. Accordingly, the Judicial Conference has taken significant steps to help the Sentencing Commission improve its data collection. As you know, the Conference revised the Statement of Reasons and designated it as the mechanism by which courts will comply with the requirements of the PROTECT Act to report reasons for sentences to the Sentencing Commission. Also, the Criminal Law Committee will work with the Commission and the Federal Judicial Center to develop educational programs and information for judges and other court staff to implement this Conference policy. However, it will also be important for the Commission to ensure that its procedures will correctly analyze and report data on the reasons for all sentencing decisions. We will continue our positive working relationship with the Commission and its staff and further revise the Statement of Reasons to help the Commission perfect its data collection and reporting efforts.

On behalf of the Criminal Law Committee, I appreciate the opportunity to comment on the draft report.

Very truly yours,

Sim Lake

Enclosure

Appendix VI: GAO Contacts and Staff Acknowledgments

GAO Contacts

William O. Jenkins, Jr. (202) 512-8757
David Alexander (202) 512-4223

Staff Acknowledgments

In addition to the persons named above, the following persons made key contributions to this report: William W. Crocker, III, Christine Davis, Barbara Hills, David Makoto Hudson, E. Anne Laffoon, William Sabol, Doug Sloane, Wendy Turenne.

GAO's Mission

The General Accounting Office, the audit, evaluation and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

Obtaining Copies of GAO Reports and Testimony

The fastest and easiest way to obtain copies of GAO documents at no cost is through the Internet. GAO's Web site (www.gao.gov) contains abstracts and full-text files of current reports and testimony and an expanding archive of older products. The Web site features a search engine to help you locate documents using key words and phrases. You can print these documents in their entirety, including charts and other graphics.

Each day, GAO issues a list of newly released reports, testimony, and correspondence. GAO posts this list, known as "Today's Reports," on its Web site daily. The list contains links to the full-text document files. To have GAO e-mail this list to you every afternoon, go to www.gao.gov and select "Subscribe to e-mail alerts" under the "Order GAO Products" heading.

Order by Mail or Phone

The first copy of each printed report is free. Additional copies are $2 each. A check or money order should be made out to the Superintendent of Documents. GAO also accepts VISA and Mastercard. Orders for 100 or more copies mailed to a single address are discounted 25 percent. Orders should be sent to:

U.S. General Accounting Office
441 G Street NW, Room LM
Washington, D.C. 20548

To order by Phone:	Voice:	(202) 512-6000
	TDD:	(202) 512-2537
	Fax:	(202) 512-6061

To Report Fraud, Waste, and Abuse in Federal Programs

Contact:

Web site: www.gao.gov/fraudnet/fraudnet.htm
E-mail: fraudnet@gao.gov
Automated answering system: (800) 424-5454 or (202) 512-7470

Public Affairs

Jeff Nelligan, Managing Director, NelliganJ@gao.gov (202) 512-4800
U.S. General Accounting Office, 441 G Street NW, Room 7149
Washington, D.C. 20548

PRINTED ON RECYCLED PAPER