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# Federal Sentencing Guidelines--The Requirement of Notice for Upward Departure

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# FEDERAL SENTENCING GUIDELINES—THE REQUIREMENT OF NOTICE FOR UPWARD DEPARTURE

## Burns v. United States, 111 S. Ct. 2182 (1991)

### I. INTRODUCTION

Must a district court inform a defendant before imposing a harsher sentence than that recommended by the Federal Sentencing Guidelines? In *Burns v. United States*,[1] the United States Supreme Court held that a district court must provide reasonable notice of its intention to depart upward from the Federal Sentencing Guidelines on a ground not articulated in the pre-sentence report or the government's pre-hearing submission.[2] The Court also held that a district court must specifically state the grounds on which it intends to base its upward departure.[3]

This Note argues that Justice Marshall, who wrote the Court's majority opinion, incorrectly interpreted Rule 32 of the Federal Rules of Criminal Procedure when he held that notice is required. This Note contends that the Court's requirement of notice was judicial legislation, unauthorized by Congress and inconsistent with its purpose in passing the Sentencing Reform Act of 1984. Further, this Note argues, a requirement of notice is unnecessary because the Guidelines themselves, by granting discretionary power of departure to a district court, notify defendants of the possibility of departure. This Note also reasons that the Court's decision violates principles of judicial neutrality by forcing a district court to state a preliminary position on the severity of a defendant's sentencing before listening to all of the arguments at the sentencing hearing. Finally, this Note concludes that the Court incorrectly raised the issue of constitutional due process because doing so is inconsistent with precedent and does not adequately consider the protections the existing system provides without a notice requirement.

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1 111 S. Ct. 2182 (1991).

2 *Id.* at 2187-88.

3 *Id.* at 2187.

## II. The Federal Sentencing Guidelines

When United States District Judge Kimba M. Wood sentenced Michael R. Milken for securities crimes,[4] she was not bound by the Federal Sentencing Guidelines.[5] After listening to counsel's arguments at the sentencing hearing and reading numerous letters both praising and damning Milken, Judge Wood faced a difficult choice: limited only by a statutory cap of twenty-eight years, what should Milken's sentence be?[6]

Judge Wood sentenced Milken to ten years in prison, followed by three years of full-time community service.[7] In the comments she made at sentencing, Judge Wood referred to several factors—the importance of prison sentences as a deterrent in the financial community, misuse of Milken's position as a leader, Milken's community service—but did not explain how she weighed these factors in making her sentencing determination.[8]

Effective for crimes committed after November 1, 1987, the Federal Sentencing Guidelines[9] eliminated the broad sentencing discretion available to federal district court judges such as Judge Wood.[10] The Guidelines, baroque in their complexity, aim for consistency in sentencing by providing a limited range of sentences for defendants convicted of similar offenses and with similar criminal records.[11] Consulting the Federal Sentencing Guidelines for the specific offense under consideration and taking into account additional factors permitted by the Guidelines, a sentencing judge ar-

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4 United States v. Milken, 3 Fed. Sent. R. 158.

5 Because Milken's crimes took place before the Guidelines were enacted, the Guidelines did not apply to his sentencing.

6 Milken's guilty plea to six counts of criminal conduct generated the broad sentencing range. *Milken* at 158.

7 *Id.* at 162.

8 *Id.* at 161. One commentator could not discern Judge Wood's sentencing priorities, concluding "Indeed, the number ten itself remains a mystery." Stanton Wheeler, *Adversarial Biography: Reflections on the Sentencing of Michael Milken*, 3 Fed. Sent. R. 167, 169 (1990).

9 United States Sentencing Commission, Federal Sentencing Guidelines Manual (1988).

10 The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017-34 (codified as amended at 28 U.S.C. §§ 991-998 (Supp. IV 1986)) established the Federal Sentencing Commission and empowered it to promulgate the Federal Sentencing Guidelines, which were to take effect six months after the Commission submitted them. 28 U.S.C. § 994(o) (Supp. IV 1986). The Commission, an "independent commission in the judicial branch of the United States," 28 U.S.C. § 991 (a) (Supp. III 1985), was held not to have violated the separation of powers principle in Mistretta v. United States, 488 U.S. 361 (1989).

11 *See* United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 8 (1987); 28 U.S.C. § 991 (b)(1)(B) (Supp. III 1985).

rives at a numerical Total Offense Level. After computing an additional number—a Criminal History Category—the judge applies these numbers to a Sentencing Table, which generates a sentencing range in months.[12] If the judge finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines"[13] the judge may depart from the Guidelines[14] and must state the reasons for doing so in open court.[15]

## III. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner William J. Burns worked for the United States Agency for International Development (AID) from 1967 until 1988.[16] While employed as a supervisor in AID's Financial Management Section, Burns authorized the payment of government funds to "Vincent Kaufman,"[17] including fifty-three government checks

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12 For a straightforward discussion of problems applying the Guidelines, especially the fact that judicial discretion still exists in making the numerical computations relating to offender and offense, see Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 86 UCLA L. REV. 83, 99-103. The events in *Milken* illustrate that the Guidelines themselves do not necessarily generate an unambiguous sentencing range. While not bound by the Federal Sentencing Guidelines, Judge Wood requested computations from both parties of the Guidelines as they applied to Milken's crimes, and received two quite different sentencing ranges, purportedly generated by the same crimes and past criminal history. While the government calculated a sentence of between forty-six and fifty-seven months, the defense figured Milken's appropriate sentence to be twenty-one to twenty-seven months. Letter from Defense Attorney Arthur Liman to Judge Kimba Wood, 3 Fed. Sent. R. 163 (1990).

After noting that the Sentencing Commission has created a software package to arrive at the appropriate figures for sentence calculation, Weigel wryly observed that "Presumably, the computers running this software will first obtain approval as constitutional due processors." Weigel, *supra* at 101.

13 18 U.S.C. § 3553 (b) (1991).

14 Such a sentence, based on a factor not considered by the Guidelines, the policy statements, and the official commentary of the Sentencing Commission, must respect:

> the need for the sentence imposed—
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> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
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> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553 (a) (2) (1991).

15 18 U.S.C. § 3553 (c) (1991).

16 United States v. Burns, 893 F.2d 1343, 1344 (D.C. Cir. 1990).

17 Burns approved payments to "Kaufman" from a governmental travel fund for the stated purpose that "Kaufman" had moved furniture for AID. No furniture was ever moved, and the payments went into an account controlled by Burns. Brief for Respondent at 2, 111 S. Ct. 2182 (1991) (No. 89-7260) [hereinafter, Brief for Respondent].

between 1982 and 1988 totaling over $1,200,000.[18] AID officials later discovered "Vincent Kaufman" was a fictitious name invented by Burns, who kept the money for himself.[19] Government authorities arrested Burns after discovering that he had purchased a $400,000 house on his yearly salary of $35,000.[20]

Burns pled guilty to: (1) theft of government funds in violation of 18 U.S.C. § 641;[21] (2) making a false claim against the government in violation of 18 U.S.C. § 287;[22] and (3) evasion of income tax in violation of 26 U.S.C. § 7201.[23] Burns pled guilty pursuant to an agreement with the government which set forth a detailed plan for his repayment of the government's money.[24] The plea agreement also stated that both parties expected the Federal Sentencing Guidelines to apply and that Burns would be sentenced according to an offense level of nineteen and a criminal history category of I (resulting in a sentencing range of thirty to thirty-seven months).[25] The probation officer's pre-sentence report agreed with the sen-

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18 *Id.*

19 *Id.*

20 *Id.*

21 Section 641 reads:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States of any department or agency thereof; or
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> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 641 (1991).

22 Section 287 reads:

> Whoever makes or presents to any person or officer in the civil, millitary, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

18 U.S.C. § 287 (1991).

23 Section 7201 reads:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more that $100,000 ($500,000 in the case of a corporation) or imprisoned not more than five years, or both, together with the costs of prosecution.

26 U.S.C. § 7201 (1991).

24 United States v. Burns, 893 F.2d 1343, 1344-45 (D.C. Cir. 1990). The plea bargain obliged Burns to give up most of his personal assets, to surrender fifty percent of his future annual income over $40,000 and one hundred percent of his future annual income over $70,000, and to cooperate fully with the government's investigation. *Id.*

25 *Id.* at 1345.

tencing range specified in the Guidelines.[26]

At the sentencing hearing, Judge Norma Holloway Johnson of the United States District Court for the District of Columbia concluded that the sentencing range specified by the Federal Sentencing Guidelines would not suffice and sentenced Burns to a prison term of sixty months.[27] Judge Johnson explained that 18 U.S.C. § 3553 (b) permitted her departure from the suggested sentencing range by allowing a sentencing judge to exercise discretion in sentencing when she finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines . . . ."[28] Judge Johnson also noted the Commission's comment that the "controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing."[29]

Judge Johnson specified the three following factors which she said that "the Guidelines either fail to address or to consider adequately": (1) the duration of Burns's criminal activity; (2) the disruption that his criminal activity caused to governmental functions; and (3) Burns' concealment of his theft and false claims crimes through tax evasion.[30] Judge Johnson took into account her "own judgment and experience" and sentenced Burns to a term of sixty months.[31]

The Court of Appeals for the District of Columbia Circuit upheld the validity of the district court's sentence.[32] In addition to upholding Judge Johnson's three specific reasons for departing from the Sentencing Commission's Guidelines, the court of appeals rejected Burns's contention that he should have had the opportunity to comment on the district court's decision to depart upward from the Guidelines. Burns argued that because Federal Rule of Criminal Procedure 32 (a) (1) obligates the court to give both sides notice of a probation officer's recommendation of deviation from the Guide-

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26 *Id.*

27 *Id.* Judge Johnson articulated her reasons for departing from the Federal Sentencing Guidelines in a memorandum order filed on October 14, 1988, 1988 WL 113811 (D.D.C.).

28 1988 WL 113811 (citing 18 U.S.C. § 3553 (b) (1991)).

29 *Id.* (citing UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES sec. 5K2.0).

30 *Id.*

31 *Id.* In her memorandum order, Judge Johnson referred to Burns's "particularly devious manner" of stealing over one million dollars of government funds over six years. *Id.* She concluded that the Guidelines sentencing range "does not reflect the magnitude of defendant's criminal conduct." *Id.*

32 United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990).

lines and allows defense counsel an opportunity to comment on the probation officer's recommendations at the sentencing hearing, Rule 32 (a) (1) implicitly requires the trial judge to give the defendant proper notice of its intent to depart from the sentencing range specified by the Guidelines.[33]

The court of appeals dismissed Burns's argument that the trial court should have given him notice of its intention to depart from the Guidelines, stressing that such notice is not envisioned by Rule 32, and that "[s]uch a requirement would constitute a radical deviation from past practice and would impose a cumbersome burden on trial judges."[34] The court of appeals added that the trial judge's decision had not "harmed" Burns because Burns had the right to address the court before sentencing and retained the right to appeal his sentence.[35] The United States Supreme Court granted certiorari to resolve a split in the Circuits[36] over whether a district

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[33] *Id* at 1348. FED. R. CRIM. P. 32(a) (1) provides:

> Sentence shall be imposed without unnecessary delay, but the court may, when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c) (2) (B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, *the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence.* Before imposing sentence, the court shall also—
>
> (A) determine that the defendant and defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c) (3) (A) or summary thereof made available pursuant to subdivision (c) (3) (B);
>
> (B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and
>
> (C) address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence.
>
> The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, or the attorney for the Government.

FED. R. CRIM. P. 32(a) (1) (1989) (emphasis added).

[34] *Burns*, 893 F.2d at 1348.

[35] *Id.*

[36] *See, e.g.*, United States v. Cervantes, 878 F.2d 50, 56 (2nd Cir. 1989) (the court of appeals reasoned that the rationale behind requiring notice of the contents of the presentence report, 18 U.S.C. § 3552 (d) (Supp. V 1987)—to "ensure accuracy of sentencing information," Advisory Committee Notes of the 1983 Amendment to Rule 32 (c)(3)(A), (B), & (C)—should also apply to notice of grounds of upward departure, suggesting that district court's comment at a sidebar that it intended not to depart may have led to a "false sense of security" which could have deprived defense counsel of an oportunity to comment on a departure); United States v. Nuno-Para, 877 F.2d 1409, 1415 (9th Cir. 1989) (District court's failure to provide notice of upward departure violated an implied notice requirement of FED. R. CRIM. P. 32(a)(1) and 18 U.S.C. § 3553 (d) by

court can depart upward from the range specified by the Federal Sentencing Guidelines without informing the parties.[37]

## IV. SUPREME COURT OPINIONS

### A. THE MAJORITY OPINION

Writing for the majority,[38] Justice Marshall reversed the holding of the court of appeals and held that Federal Rule of Criminal Procedure 32 obligates a district court to give the parties reasonable notice that it is contemplating upward departure[39] from the Guidelines and to identify the grounds for such departure.[40]

Justice Marshall first discussed the procedural reforms implemented by the Sentencing Reform Act of 1984. The Sentencing Reform Act, he explained, was enacted, *inter alia*, to promote uniformity in sentencing and to minimize the previously broad discretionary power of individual judges.[41] He said Rule 32 "[provided] for focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence."[42] In support of this conclusion, he stated that Rule 32 (c) (3) (A) requires the probation officer to provide the pre-sentence report to both parties at least ten days before the sentencing, and that in the spirit of the adversarial tradition, parties may file objections to the report.[43] Additionally, Rule 32 (a) (1) specifies that "at the sentencing hearing, the court [must] afford the counsel for the defendant and the attorney for the government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence."[44]

Justice Marshall considered the case at bar unusual. Whereas a

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failing to allow the defendant an opportunity to comment even though the facts of the presentence report in the instant case suggested departure); United States v. Otero, 868 F.2d 1412, 1415 (5th Cir. 1989)(FED. R. CRIM. P. 32 requires notice of upward departure because notice furthers Rule 32's purpose of ensuring accuracy in sentencing information by allowing defendant to comment on grounds for upward departure at the sentencing hearing).

37 Burns v. United States, 110 S. Ct. 3270 (1990).

38 Justices Blackmun, Stevens, Scalia, and Kennedy joined Justice Marshall's majority opinion.

39 Although the Court limited its decision to a judge's *upward* departures from the sentencing guidelines, petitioner noted that the logic of his argument should require notice of a *downward* departure as well. Brief for Petitioner at p. 17, n.8, Burns v. United States., 111 S. Ct. 2182 (1991) (No. 89-7260).

40 *Burns*, 111 S. Ct. at 2184.

41 *Id.* at 2184-2185.

42 *Id.* at 2187.

43 *Id.* at 2186.

44 *Id.* at 2186 (quoting FED. R. CRIM. P. 32(a) (1)).

defendant normally is put on notice of the possibility of an upward departure by the government's recommendation or the pre-sentence report, in the present case, neither the government nor the probation officer suggested that an upward departure would be appropriate. Due to the district judge's *sua sponte* sentencing decision, neither side expected an upward adjustment in the sentence.[45]

The Court supported its reading of Federal Rule of Criminal Procedure 32 by viewing any other reading as contrary to Congress' intentions. Justice Marshall conceded that Congress had failed to comment on a circuit court's duty to give notice of its intent to depart from the Guidelines, but stated that any inference the Court could draw from such silence "certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent."[46] Justice Marshall insisted that a reading not requiring a district court to give notice of its intent to depart from the Guidelines, "renders meaningless the parties' express right 'to comment upon. . . matters relating to the appropriate sentence. The right to be heard has little reality or worth unless one is informed' that a decision is contemplated."[47] In essence, Justice Marshall alleged that the contrary reading of Rule 32 is nonsensical because it would allow a defendant to comment on his sentence at the sentencing hearing without knowing that the court was contemplating a departure upward from the Guidelines.

Justice Marshall continued his assault on the contrary reading of Rule 32 by envisioning two possible extreme outcomes if the government's reading of Rule 32 were adopted. While in one situation a desperate defendant may randomly and inefficiently attempt to anticipate a judge's possible reasons for a *sua sponte* departure from the Guidelines at the conclusion of the sentencing hearing, in another situation an otherwise zealous defense counsel may consider not raising the possibility of such a departure, not wanting to seem to concede the seriousness of a client's offense.[48] When parties fail to anticipate a circuit court's "unannounced and uninvited" departure from the Guidelines, Justice Marshall argued, "a critical sentencing determination will go untested by the adversarial process contem-

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45 *Id.* at 2185.

46 *Id.* at 2186.

47 *Id.* (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)) (balancing the individual interest protected by the Fourteeth Amendment—the "right to be heard"—against the interests of the State to determine whether statutory notice of publication meets the due process requirement of the Fourteenth Amendment).

48 *Id.*

plated by Rule 32 and the Guidelines."[49]

The Court further found its decision justified by precedent. According to Justice Marshall, in cases analogous to the instant case, the Supreme Court had previously construed statutes involving deprivation of liberty as requiring both notice and an opportunity for response.[50] Additionally, when confronted with a choice between two seemingly acceptable alternatives, the Court has repeatedly construed statutes in favor of the interpretation that does not raise a constitutional problem.[51] Justice Marshall suggested that not obliging the circuit court to provide notice in the present case would raise a due process problem, and stated that obliging the court to do so would avoid the issue altogether.[52]

### B. THE DISSENTING OPINION

Writing the dissent[53], Justice Souter characterized the majority decision as judicial legislation with no basis in either the Sentencing Reform Act or the Due Process Clause of the Constitution.[54] Justice Souter stated that the Sentencing Reform Act is procedurally complicated and comprehensive.[55] Against this backdrop of numerous procedural requirements, Justice Souter concluded that congressional silence on the issue of notice meant that Congress intended

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49 *Id.*

50 *Id.* at 2187. The Court cited the following cases to support a statutory construction in favor of notice when issues of deprivation of liberty or property are involved: American Power & Light Co. v. SEC, 329 U.S. 90, 107-108 (1946) (statute permitting Securities and Exchange Commission to order corporate dissolution); The Japanese Immigrant Case, 189 U.S. 86, 99-101(1903) (statute permitting exclusion of aliens seeking to enter United States). *Burns*, 111 S. Ct. at 2187. The Court also cited cases in which statutes were interpreted to assure "procedural fairness": Kent v. United States, 383 U.S. 541, 557 (1966) (right to full, adversary-style representation in juvenile transfer proceedings); Greene v. McElroy, 360 U.S. 474, 495-508 (1959) (right to confront adverse witnesses and evidence in security-clearance revocation proceedings); Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51(1950) (right to formal hearing in deportation proceedings). *Burns*, 111 S. Ct. at 2187.

51 *Burns*, 111 S. Ct. at 2187 (referring to Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

52 *Burns*, 111 S. Ct. at 2187.

53 Part I of Justice Souter's opinion addressed whether the terms of the Sentencing Reform Act or Supreme Court precedent compel notice of a judge's *sua sponte* decision to depart upwards from the Guidelines; Part II addressed whether lack of notice raises constitutional issues. Justices White and O'Connor joined both parts of Justice Souter's dissenting opinion. Chief Justice Rehnquist joined Part 1 of Justice Souter's opinion. *Id.* (Souter, J. dissenting).

54 *Id.* (Souter, J., dissenting).

55 *Id.* at 2188 (Souter, J., dissenting).

not to require it: "the terms of the Act reflect a decided congressional disinclination to rely on presuppositions and silent intentions in place of explicit notice requirements."[56]

Justice Souter disagreed with the majority over the meaning of a provision of Rule 32 (a) (1) which required that the parties be given "an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence."[57] The Court stated that a party could only meaningfully comment on such matters when they have been enumerated explicitly by the circuit judge.[58] But Justice Souter pointed out a logical inconsistency with this position. While the majority would infer a requirement of notice from the proposition that a defendant should be able to comment on matters related to sentencing, the Guidelines explicitly provide for notice to both parties by requiring the court to provide both parties with the results of the probation officer's pre-sentence report.[59] Rule 32 also provides that defendant and defendant's counsel "have had the opportunity to read and discuss the presentence investigation report."[60] These explicit provisions, argued Justice Souter, would be redundant under the majority reading, but Congress included them explicitly.[61]. Congress could have allowed all notice provisions to have been implied. However, it chose to enumerate some but not others.[62]

Justice Souter then attacked the Court's assertion that not requiring notice would be "absurd" because that interpretation would "render meaningless" the defendant's express right to comment on "other matters relating to the appropriate sentence."[63] Justice Souter made two criticisms of the majority's statement: (1) the defendant would only lose his ability to comment on one matter—the contemplation of the circuit court to depart from the Guidelines—

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56 *Id.* at 2189 (Souter, J., dissenting).

57 *Id.* at 2189-90 (Souter, J., dissenting). *See, supra,* note 33 for the full text of FED. R. CRIM. P. 32(a) (1).

58 *Burns,* 111 S. Ct. at 2186.

59 *Id.* at 2189 (Souter, J., dissenting) (citing to FED. R. CRIM. P. 32 (c)(3)(A), (C)). The pre-sentence report includes the probation officer's determination of the appropriate sentencing categories pursuant to 28 U.S.C. § 994 (a) and an explanation of why a deviation from the Guidelines may be appropriate. FED. R. CRIM. P. 32(c)(2)(B) (1991).

60 FED. R. CRIM. P. 32(a)(1)(A).

61 *Burns,* 111 S. Ct. at 2190 (Souter, J., dissenting).

62 Justice Souter stated: "when Congress meant to provide notice and disclosure, it was careful to be explicit, as against which its silence on the predeparture notice at issue here bespeaks no intent that notice be given." *Id.* (Souter, J., dissenting).

63 *Id.* (Souter, J., dissenting). See *supra* text accompanying notes 49-50 for the assertion that not requiring notice renders meaningless the defendant's right to comment on other matters.

leaving him free to comment on any other matter relating to his sentence that he wished;[64] and (2) the statute itself explicitly indicates the power of the circuit court to depart from the Guidelines under "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described,"[65] leaving the parties to address that possibility at the sentencing hearing as they wish.[66] Justice Souter pointedly added that "it is not our practice to supplement [congressional] provisions simply because we think that some statutory provision might usefully do further duty than Congress has assigned to it."

Justice Souter then addressed the issue of constitutional due process raised by Justice Marshall. He noted that a prisoner had a constitutionally protected interest in his expectancy that a parole board should order his release unless certain statutory criteria are fulfilled.[67] In the instant situation, he concluded that the nature of the defendant's constitutionally protected interest is his expectation that he will receive a sentence within the range provided by the Guidelines unless "aggravating or mitigating circumstances of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission"[68] exist and justify departure from the Guidelines.[69]

Justice Souter applied the three-part test articulated in *Mathews v. Eldridge*[70] to determine whether possible governmental error would infringe this constitutionally protected interest.[71] The three parts of the inquiry in *Mathews* include:

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64 *Id.* at 2190 (Souter, J., dissenting).

65 *Id.* at 2186 (Souter, J., dissenting) (quoting 18 U.S.C. § 3553 (b)).

66 *Id.* (Souter, J., dissenting). Justice Souter noted that Burns' Counsel in the case at bar had in fact addressed the possibility of the court's departing upward from the Guidelines, even though the court had not suggested that it had contemplated doing so. At the sentencing hearing, petitioner's counsel asked: "that the period of incarceration be limited enough that [petitioner] has a family to return to, that he has a future that he can work towards rebuilding, and we think the guidelines are the appropriate range, Your Honor. We ask Your Honor to consider a sentence within the guidelines." *Id.* at 2191.

67 *Id.* at 2191-2192 (citing Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1(1979)). *See infra* text accompanying notes 134-141 for a discussion of *Greenholtz*.

68 18 U.S.C. § 3553 (b)(1991).

69 *Burns*, 111 S. Ct. at 2191-92.

70 424 U.S. 319 (1976).

71 While *Mathews* took place in an administrative context, Justice Souter concluded that the three-part inquiry has been applied generally to evaluate whether procedures meet due process requirements. *Burns*, 111 S. Ct. at 2192 (Souter, J., dissenting) (citing Parham v. J.R., 442 U.S. 584 (1979); Ingrahm v. Wright, 430 U.S. 651 (1977)).

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[72]

After working through the three *Mathews* factors, Justice Souter concluded that the existing system, without a notice requirement, provided sufficient due process protection.[73]

While acknowledging the defendant has a significant interest in receiving a sentence that is not unlawfully excessive, Justice Souter stressed the additional "drain on judicial resources" that a requirement of notice would add to the sentencing process.[74] He mentioned that a recent survey of federal judges confirmed that they believed that the Guidelines, even without a notice requirement, have made sentencing more time-consuming.[75] The competing interests of the defendant and the government in the first *Mathews* consideration, Justice Souter concluded, were "substantial and contrary" and therefore he could not not easily identify either one as more important than the other.[76]

In addressing the second *Mathews* consideration, Justice Souter emphasized that existing procedures provided for the risk of both factual and legal errors that could cause a sentencing judge to depart from the sentencing Guidelines improperly.[77] Justice Souter stated that errors of fact may be found in the pre-sentence report and challenged before the sentencing hearing subject to the provisions of Federal Rule of Criminal Procedure 32(c) (3) (A).[78] Justice

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[72] *Id.* at 2192 (Souter, J., dissenting) (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[73] *Id.* at 2196 (Souter, J., dissenting).

[74] *Id* at 2193 (Souter, J., dissenting). Justice Souter distinguished between two timings of notice to the defendant: before the sentencing hearing and at the hearing itself. Notice before the hearing, Justice Souter alleged, is likely to postpone sentencing, adding more time to an already lengthy process. *Id.* Contemporaneous notice at the hearing might prompt defense counsel to argue more emphatically, but "it would not be of much help in enabling him to present evidence on disputed facts he had not previously meant to contest, or in preparing him to address the legal issue of the adequacy of the Guidelines in reflecting a particular aggravating circumstance."*Id.*, *supra* note 4.

[75] *Burns*, 111 S. Ct. at 2192 (citing REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 137 (1990))(Indicating that ninety percent of federal judges polled report that the Guidelines have increased the time they have spent on sentencing; thirty percent of the judges state that the Guidelines have increased the time they have spent on sentencing by fifty percent).

[76] *Id.* (Souter, J., dissenting).

[77] *Id.* at 2193-2194 (Souter, J., dissenting).

[78] *Id.* at 2194 (Souter, J., dissenting). FED. R. CRIM. P. 32(c) (3) (A) provides that:

Souter added that a judge's departure upward from the Guidelines is a matter of law without the need for fresh evidentiary proof, and is therefore subject to meaningful appellate review.[79]

Finally, Justice Souter discussed the due process implications of allowing judges to determine that a given defendant deserves a sentence above the range dictated by the guidelines.[80] In doing so, he considered the remedies available when a sentencing judge unreasonably imposes a sentence above the range specified by the Guidelines.[81] The nature of sentencing, Justice Souter explained, is imprecise, and a range of sentences exist that a judge may reasonably consider appropriate for a particular defendant.[82] The *Sentencing Reform Act* provides two remedies to ensure that the judge's sentencing decision "falls within this zone of reasonableness."[83]

First, a defendant has the opportunity to address the court at the sentencing hearing. Because the terms of the Act provide for departure from the Guidelines when the court finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating its Guidelines,"[84] a defendant may choose to address that possibility specifically at the sentencing hear-

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At a reasonable time before imposing sentence the court shall permit the defendant and his counsel to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. *The court shall afford the defendant and his counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.*

FED. R. CRIM. P. 32(c) (3) (A) (emphasis added).

79 *Burns*, 111 S. Ct. at 2194 (Souter, J., dissenting). Justice Souter contended that whether an aggravating or mitigating circumstance exists to justify a departure from the Guidelines is a matter of law because it involves a determination of the intentions of the Federal Sentencing Commission when it passed the SENTENCING REFORM ACT of 1984. *Id.*

Justice Souter conceded that defendants whose terms are specified by the Guidelines to be less than the time it takes to process an appeal find themselves in a position where an appeal cannot entirely right the wrong caused by an erroneous decision to depart upward from the Guidelines. *Id.*, n.7. But he dismissed this potentially vulnerable class of defendants by reasoning that "a process must be judged by the generality of cases to which it applies, and therefore a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them." *Id.*, n.7 (quoting Walters v. National Assn. of Radiation Survivors, 473 U.S. 305, 330 (1985)).

80 *Id.* at 2195. (Souter, J., dissenting).

81 *Id.* at 2195 (Souter, J., dissenting).

82 *Id.* (Souter, J., dissenting).

83 *Id.* (Souter, J., dissenting).

84 18 U.S.C. § 3553 (b) (1982).

ing.[85] If a defendant chooses not to address explicitly the possibility of a departure from the Guidelines, Justice Souter noted that "pleas for leniency within the Guidelines often duplicate the arguments that can be made against upward departure."[86]

In addition to arguments at the sentencing hearing, Justice Souter again stressed the possibility of appellate review of the sentence.[87] Because of the availability of appellate review for an unreasonable departure from the Guidelines, a defendant does not face the risk of serving an unreasonably long sentence and thus due process does not require notice.[88] Rather, a defendant faces the risk of not being able to craft a specific argument to address the stated possibility of an upward departure or not being able to address with the benefit of notice where a judge should sentence the particular defendant within the "zone of reasonableness" permitted by the Guidelines.[89]

## V. ANALYSIS

In *Burns*, the Supreme Court improperly required sentencing judges to provide notice of their intention to depart from the Federal Sentencing Guidelines and to provide notice of their anticipated grounds for departure. With no authority from Congress, the Court added a burdensome procedural requirement that contradicts precedent and does not conform with Congress' intentions.

### A. THE COURT ENGAGED IN JUDICIAL LEGISLATION

The Court improperly assumed legislative authority in *Burns*, by essentially amending The Sentencing Reform Act of 1984 without an opportunity for congressional debate and without allowing Congress—representing the people—to vote on the change. The Court purported to read Congress' mind in *Burns*. From statutory and legislative silence, the Court created a new requirement for sentencing judges: to exercise their statutory right to depart upwards from the Sentencing Guidelines when they find "that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the

85 *Burns*, 111 S. Ct. at 2195 (Souter, J., dissenting). At the sentencing hearing, Burns's counsel actually addressed the possibility of an upward departure. *See supra* note 66.

86 *Burns*, 111 S. Ct. at 2195 (Souter, J., dissenting).

87 *Id.* at 2196 (Souter, J., dissenting).

88 *Id.* (Souter, J., dissenting). *But see, supra* note 79 for the exception to this statement.

89 *Burns*, 111 S.Ct. at 2196 (Souter, J., dissenting).

guidelines," sentencing judges must now give "reasonable notice"[90] that they are considering departure and list their grounds for doing so.[91]

Justice Marshall began his analysis by discussing the fact that Congress did not address the issue of requiring notice. First, he belittled the government's attempt to derive "decisive meaning from congressional silence."[92] The government noted, said Justice Marshall, that Rule 32(c) (3) (A) expressly requires the district court to give both parties 10 days notice of the contents of the pre-sentence report.[93] The government concluded from this provision for explicit notice that the absence of other explicit requirements of notice meant that Congress did not intend to require notice in the present case.[94]

Justice Marshall took issue with the government's conclusion, arguing that in the absence of explicit provision, notice should be compelled by "the textual and contextual evidence of legislative intent."[95] Justice Marshall explained that in some situations, "Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective."[96] He stated that an inference drawn from congressional silence would not be allowed if "contrary to all other textual and contextual evidence of congressional intent."[97] Justice Marshall concluded that not requiring notice contradicts Congressional intent[98]

After deriding the government for deriving " decisive meaning

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90 *Id.* at 2187.

91 *Id.*

92 *Id.*

93 *Id.* at 2186. FED. R. CRIM. P. 32 provides that:

> At least ten days before imposing sentence, unless this minimum period is waived by the defendant, the court shall provide the defendant and the defendant's counsel with a copy of the report of the presentence investigation including the information required by subdivision (c)(2) and not including any final recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

FED. R. CRIM. P. 32 (c) (3) (A).

94 *Burns*, 111 S. Ct. at 2186.

95 *Id.*

96 *Id.*

97 *Id.*

98 *See supra* text accompanying notes 46-49.

from congressional silence,"[99] Justice Marshall did the same thing himself. While acknowledging that Congress had not decided the issue, he created a rule that he believed to be consistent with congressional intent. But any direction given by congressional intent—in the text of the legislation and the legislative history—is far from clear.[100] In the absence of a clear legislative mandate, Justice Marshall incorrectly introduced the additional requirement of notice into the already complex Federal Sentencing Guidelines.

Did Congress intend the revolutionary Sentencing Reform Act of 1984 to be a bare, unfinished procedural skeleton which appellate courts may flesh out on an *ad hoc* basis? The Act's substantive and procedural complexities indicate that Congress intended to enact comprehensive sentencing legislation, with few broad provisions subject to interpretation by the judiciary. Indeed, Congress itself has amended the Sentencing Reform Act several times[101] adding even more substantive procedure and detail, suggesting that Congress intended additional procedural requirements to be its own province or that of its creation, the Federal Sentencing Commission, not that of the judiciary.

Justice Marshall asserted that "textual and contextual evidence of legislative intent" suggest a requirement of notice.[102] That evidence apparently lies in the text of Federal Rule of Criminal Procedure 32, which was amended by the Sentencing Reform Act of 1984.[103] Interpreting Rule 32, Justice Marshall said that not requiring notice "renders *meaningless* the parties' express right [found in Rule 32(a)(1)] 'to comment on. . . matters relating to the appropriate sentence.' "[104] He further concluded that "the government's construction of congressional 'silence' would . . .render what Congress has expressly said *absurd*."[105]

Justice Marshall's reasoning is not convincing. Congress chose to give a convicted criminal the right to "comment" on "matters relating to the appropriate sentence."[106] Despite Justice Marshall's

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99 *Burns*, 111 S. Ct. at 2186.

100 Only a slim majority agreed with Justice Marshall. *See supra* note 38.

101 18 U.S.C. § 3553's amendments include: Pub. L. 99-570, Title I, § 1007(a), Oct. 27, 1968, 100 Stat, 3207-7; Pub. L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub. L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub. L. 100-690, Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416).

102 *Burns*, 111 S. Ct. at 2186.

103 Pub. L. No. 98-473, 98 Stat. 1987, 2017 (1984).

104 *Burns*, 111 S. Ct. at 2186 (emphasis added).

105 *Id.* (emphasis added).

106 FED. R. CRIM. P. 32(a)(1). *See supra* note 33 for full text of FED. R. CRIM. P. 32(a)(1).

efforts to prove the contrary, "comment" means "comment," not the right to be informed on every conceivable matter relating to the sentence.[107] The "comment" and "matters relating to the appropriate sentence" language was included to make it clear that the defendant's right to comment extended beyond the traditional right to allocution—a general plea for mercy.[108] Instead, the statutory language clearly does not restrict a defendant to the matters contained in the pre-sentence report; he may comment on any matter he wishes.[109] There is no evidence that Congress intended this right to "comment" to include judicial contemplation of departure. As Justice Souter pointed out in his dissent, a defendant lacking judicial notice of possible upward departure may comment on any matter she wishes, *including* the possibility of upward departure.[110] Justice Marshall's conclusion rings particularly false considering that petitioner's counsel commented at the sentencing hearing, ". . .we think the guidelines are the appropriate range, Your Honor. We ask Your Honor to consider a sentence within the guidelines."[111]

Justice Marshall did not recognize that Congress may have had good reason to provide for notice of the contents of the pre-sentence report[112] and not to provide notice of a trial judge's decision to depart upwards from the Guidelines.[113] Notice of the contents of the pre-sentence report is necessary to provide the parties an opportunity to comment on the factual basis for the sentencing. Notice of a decision to depart upwards from the Guidelines, on the other hand, presents a far less compelling benefit: it gives defendants the benefit of a judge's tentative legal opinion, which if erroneous may be reversed on appeal. In addition, though, such a requirement of notice interferes with important principles of judicial impartiality[114] and adds an additional administrative burden to already overburdened trial judges. Any proposition on which the Act is silent, Justice Marshall appeared to say, may be justified if it is consistent with the Court's interpretation of congressional intent. This disturbing idea is a mandate for judicial legislation.

During the Senate debates on departure from the Guidelines, the Senators did not explicitly discuss a notice requirement for a

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107 *See* Brief for Respondent, *supra* note 17, at 24 n.9.

108 *Id.* (citing Green v. United States, 365 U.S. 301, 304 (1961) (plurality opinion)) (Describing common-law right of allocution).

109 *Id.*

110 Burns v. United States, 111 S. Ct. 2182, 2190-91 (1991) (Souter, J., dissenting).

111 *Id.* at 2191.

112 FED. R. CRIM. P. 32 (c)(3)(A).

113 *Burns,* 111 S. Ct. at 2186-7.

114 *See infra* text accompanying notes 130-133.

sentencing departure.[115] Senator Hart, who proposed the amendment specifying under what circumstances a judge may depart,[116] described the amendment:

> [T]he amendment adding the "aggravating or mitigating circumstances" language of 18 U.S.C. § 3553 (b)] says that a judge shall sentence a convicted offender within the guidelines established by the sentencing commission unless there are aggravating or mitigating circumstances of an extraordinary nature; *then, that he must report what those circumstances are in deviating from the guidelines* laid down by the sentencing commission.[117]

Senator Hart's language here may be helpful in figuring out whether notice is consistent with Congress' intentions.[118] When Senator Hart said that a judge must specify grounds for departure "*in deviating* from the guidelines,"[119] it seems clear that he meant that the grounds must be stated at the same time that sentencing is imposed, not stated in advance of sentencing, as *Burns* now requires.[120] Senator Hart's second summary of the purpose of the amendment, which notes that a judge "must state what those circumstances are *in rendering* his sentence outside the guidelines,"[121] also clearly indicates that the amendment's author meant that announcement of the grounds for upward departure should be made contemporaneously with the actual sentencing and not before.

Justice Marshall's undocumented assertion that not requiring notice is "contrary to all other textual and contextual evidence of legislative intent"[122] is therefore not persuasive. A statement by an amendment's proposer during Senate debates is certainly "contextual evidence of legislative intent."[123] Senator Hart's uncontra-

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115 *See* 124 CONG. REC. 382-83 (1973).

116 The amendment reads, in pertinent part:

> The court shall impose a sentence within the range described in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a different sentence.

18 U.S.C. § 3553 (b) (1982).

117 124 CONG. REC. 383 (1973) (Statement of Sen. Hart) (emphasis added).

118 That Senator Hart echoed this language when he reiterated the purpose of the amendment is further reason that his words should be taken seriously:

> All this amendment does is to state a sentence the judge must operate within the framework of the guidelines unless there are aggravating or mitigating circumstances. *Then he must state what those circumstances are in rendering his sentence outside the guidelines.*

124 CONG. REC. 383 (1973) (Statement of Sen. Hart) (emphasis added).

119 *Id.*

120 Burns v. United States, 111 S. Ct. 2182, 2184 (1991).

121 124 CONG. REC. 383 (1973) (Statement of Sen. Hart) (emphasis added).

122 *Burns*, 111 S. Ct. at 2186.

123 *Id.*

dicted, repeated statements of his amendment's purpose[124] demonstrate that it is the Court's judicially-created requirement of notice that seems to contradict legislative intent.

The Court's judicial legislation is further unwarranted because it is unnecessary, not just because it is inconsistent with Congress' intentions and an improper usurpation of legislative authority. The Court's requirement of notice is redundant because all defendants who are sentenced according to the terms of the Guidelines are already put on notice by the Guidelines themselves that departure is a possibility. Because the Federal Sentencing Act is a public record, and because the Act specifically grants a sentencing judge the discretion to depart when she finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines. . ."[125], defendants and their counsel are simply already on notice that departure might occur without the needless requirement of notice provided by *Burns*.

Congress could have chosen to weigh the advantages and disadvantages of a notice requirement, but it did not do so. In *Burns* the Court improperly assumed Congress' role by creating a new procedural requirement—the requirement of notice—which a judge must now meet in order to exercise her explicitly granted discretion to depart upward from the Guidelines.

### B. THE *BURNS* COURT'S NOTICE REQUIREMENT ERODED THE APPEARANCE OF JUDICIAL NEUTRALITY

The result reached by the Court clashes with fundamental principles of judicial neutrality. To compel a sentencing judge to announce that she is considering the possibility of upward departure from the Guidelines either before or during the sentencing hearing requires the judge to state a position, however tentative, before the conclusion of the sentencing hearing. Such a requirement suggests that a sentencing judge has formed a preliminary idea about the severity of the sentence she will grant before listening to the complete sentencing hearing. This pre-judgment subverts the appearance of judicial neutrality, whether or not the judge in fact departs from the Guidelines.

The Court's requirement of notice actually forces judges to make potentially premature statements about their sentencing inclinations before the conclusion of the sentencing hearing; if judges

124 124 CONG. REC. 383 (1973) (Statement of Sen. Hart).
125 18 U.S.C. § 3553(b).

do not make that determination and announce that they are considering departure from the Guidelines, they now eliminate the option of departure that Congress specifically authorized in the Federal Sentencing Act. After *Burns*, a judge may not wait until the conclusion of the sentencing hearing, ponder her decision, and exercise her discretionary power to depart from the Guidelines. Such a perverse result may well force judges to announce at every sentencing hearing their contemplation of departure from the Guidelines in order to preserve their right to do so. If that altogether possible scenario were to come about, such a *pro forma* announcement of contemplation of departure would become a meaningless ritual with very little conceivable benefit to the litigants.

Additionally, a judge who is forced by *Burns* to make a preliminary announcement that she is contemplating departure from the Guidelines may become less receptive to mitigating evidence at the sentencing hearing. If a sentencing judge only rarely makes an announcement that she is considering departure, several factors suggest that it will be difficult for her to change her mind later, even after defense counsel has had the opportunity to make a specific plea against departure from the Guidelines. Before the sentencing hearing begins, the judge knows of the contents of the pre-sentence report which provide the factual basis for sentencing and thus will not be confronted with any additional facts to consider about the defendant and the offense. Any change in the judge's position during the sentencing hearing will result from arguments made by defense counsel, not by any change in the defendant's factual situation. In addition to the difficulty of changing her mind about departing from the Guidelines with no further factual information to persuade her that such a departure is unwarranted, the judge may face psychological difficulty in retreating from her initial statement and openly admitting that she had made a mistake.

Knowing the judge has announced that she is considering upward departure, a defendant may consider the sentencing hearing to be a futile exercise in front of a partisan judge. Granted, the defendant learns the "ground on which the district court is contemplating an upward departure"[126] when the court provides notice. But far from furthering the admirable goal of adversarial development of the court's stated preliminary reason for departure, as urged by Justice Marshall,[127] stating reasons for departure prematurely will likely cause a defendant to believe the court has taken

[126] *Burns*, 111 S. Ct. at 2187.
[127] *Id.* at 2186-87.

sides. This perceived unfairness may lead to unwanted appeals.[128]

The government, knowing the court has made an announcement contemplating departure, has information that may substantively affect its sentencing request, or at least the tenor of its argument at the sentencing hearing. For example, in the instant case, the government did not request a sentence exceeding the Guidelines. But if the court had stated that it was considering a departure, surely the government would have revised its sentencing request upward, based only on judicial notice, not on any substantive difference in the factual or legal circumstances surrounding the crime.[129] From the defendant's point of view, this perceived encouragement of the prosecution may provoke prosecutorial rhetoric that could neutralize whatever pleas for leniency defense counsel may make that knowledge of a judge's intent to depart may have permitted.

### C. LACK OF NOTICE DOES NOT PRESENT CONSTITUTIONAL PROBLEMS

The Court's cursory constitutional analysis misapplies a canon of statutory interpretation, ignores relevant precedent, and fails to consider the present system's protection of a defendant's due process interest. The Court raised the specter of due process and stated the Court's preference for construing statutes to prevent "serious constitutional problems unless such construction is plainly contrary to the intent of Congress."[130] The majority opinion tersely concluded that because Rule 32 does not specifically permit departure without notice the Court must choose the statutory construction—requirement of notice—that seems to present no constitutional problems.[131]

The majority raises the issue of due process to suggest a choice between competing acceptable constructions of Rule 32: to require notice or not to require notice. But Justice Marshall presents a misleading framework. Justice Marshall would offer a choice between (1) a "construction" of Rule 32 (requiring notice) that creates a procedural requirement not found in the text and arguably inconsistent with the text and with congressional intent[132] and (2) a construction

128 *See infra* text accompanying notes 146-155.

129 This scenario puts aside the terms of the plea bargain agreement in this case. *See supra* text accompanying notes 25-26, regarding the Government's statement that it expected the sentencing guidelines to apply.

130 *Burns*, 111 S. Ct. at 2187 (quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

131 *Id.*

132 *See supra* text accompanying notes 106-124.

not requiring notice that is clearly consistent with the fact that Congress did not address the issue of notice directly. As Justice Souter pointed out in his dissent, the majority's "construction" of Rule 32 "comes closer to reconstruction than construction."[133]

Justice Marshall failed to demonstrate how the absence of a notice requirement presents due process problems. He merely asserted that it did so without reference to case law or treatises. Justice Marshall made no attempt to distinguish the instant case from *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*[134] which the United States discussed in its Brief to the Court.[135] Reversing a decision by the Eighth Circuit Court of Appeals of the Eighth Circuit[136], the Court in *Greenholtz* rejected a requirement that a parole board provide "written notice of the precise time of the [parole] hearing reasonably in advance of the hearing, *setting forth the factors which may be considered by the Board in reaching its decision.*"[137] The Court held that due process did not require notice of factors considered by the Board and that informing the inmate of the time of the parole hearing without posting notice of the factors considered by the Board satisfied the requirements of due process.[138] The Court referred to previous practice in making its determination that notice was not required, stating that Nebraska's parole statute resembled a "sentencing judge's choice. . . to grant or deny probation following a judgment of guilt, a choice never thought to require more than what Nebraska now provides for the parole-release determinations."[139] While *Greenholtz* was a pre-Federal Sentencing Guidelines case, dealing with whether a parole board should provide notice to an inmate, as Justice Souter noted, the inmate's interest in early parole resembles a criminal defendant's interest in a shorter sentence.[140] Justice Marshall should have explained how he would have reconciled the fact that due process did not require notice in *Greenholtz* with his suggestion that due process would require notice in the case at bar.[141]

Justice Marshall did not perform the due process balancing-of-interests test articulated in *Mathews*[142] that Justice Souter performed

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133 *Burns*, 111 S. Ct. at 2191 (Souter, J., dissenting).
134 442 U.S. 1 (1979).
135 Brief for Respondents, *supra* note 17, at pp. 11-12.
136 576 F.2d 1274 (8th Cir. 1978).
137 *Greenholtz*, 442 U.S. at 6 (emphasis added).
138 *Id.* at 14, n.6.
139 *Id.* at 16.
140 *Burns*, 111 S. Ct. at 2196 (Souter, J., dissenting).
141 *Id.* at 2187.
142 Mathews v. Eldridge, 424 U.S. 319 (1976).

in his dissent.[143] He did not articulate the nature of the petitioner's interest that might be subject to due process protection. As such, he did not consider the remedies that existed for the petitioner without requiring notice. In addition to remedies of addressing the court at the sentencing hearing and meaningful appellate review, the terms of the Sentencing Reform Act of 1984 themselves put the petitioner on notice that departure was possible even without the requirement created by the Court in *Burns*.[144]

Justice Marshall's argument that principles of statutory interpretation suggest a notice requirement[145] depends on his erroneous assumption that not requiring notice would pose serious constitutional problems. Particularly troubling is Justice Marshall's failure to attempt to explain what petitioner's protected interest is, and why—seemingly contrary to relevant precedent and without going through the *Mathews* balancing test—due process would require notice in the instant case.

## VI. *BURNS* IN PRACTICE: APPEARANCE OF PARTISANSHIP DURING THE SENTENCING HEARINGS AND A WASTEFUL APPEAL?

As of the time of this writing, one appellate decision, *United States v. Padron*[146], has followed *Burns*. In accordance with the holding in *Burns*,[147] the district court judge in *Padron* informed the defense counsel during trial that he had intended to increase the defendant's applicable sentencing guideline range by two points if the defendant testified and was found guilty.[148] At trial the court considered such testimony an "aggravating circumstance,"[149] and explained to defense counsel:

> I am not at all trying to chill your interest in presenting a defense. I simply think that in fairness, since the appellate courts seem to think we should advise people in advance when we're going to go above the

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143 *Burns*, 111 S. Ct. at 2192-96.

144 18 U.S.C. § 3553 explicitly provides that a sentencing judge may depart from the Guidelines. 18 U.S.C. § 3553(b).

145 *Burns*, 111 S. Ct. at 2187.

146 938 F.2d 29 (2nd Cir. 1991)(After a jury trial, defendant was found guilty of conspiracy to distribute heroin and distribution of heroin. Defendant's petition, due to the district court's warning at trial that the court would depart from the Guidelines if defendant testified and was convicted, was denied).

147 Although the district court's decision is in conformity with *Burns*, it made its decision attempting to follow second circuit precedent; *Burns* had not yet been decided. However, the Court of Appeals for the Second Circuit cited *Burns* in upholding the correctness of the lower court's decision.

148 United States v. Padron, 938 F.2d 29, 30 (2nd Cir. 1991).

149 *Id.*

guidelines, which it strikes me is not a very workable approach, they seem to think we should do it.

I thought you should be aware of it.[150]

While *Burns* held that a sentencing judge must announce that she is contemplating departure from the Guidelines, the sentencing judge in *Padron* did more than just contemplate departure. He unambiguously stated that he would depart from the Guidelines if the defendant were to testify and was found guilty. The United States Court of Appeals for the Second Circuit recognized that the court's warning was "flawed" because the departure was conditioned on whether the defendant testified at trial. Nevertheless, the court of appeals found the sentencing judge's comments to be "not inappropriate," and denied the defendant's petition for rehearing.[151] The court of appeals, citing *Burns*, downplayed the sentencing judge's strong statement, terming it "well-intentioned."[152] Supporting its decision to deny rehearing, the court mentioned as noteworthy the fact that the defendant chose not to testify and that there was in fact a great risk that judge and jury would have disbelieved his testimony at trial.[153]

Despite the sentencing judge's unusual zealousness, *Padron* highlights some of the practical problems courts may face in trying to conform with *Burns*. In *Padron*, the court referred at trial to the possibility of a future "aggravating circumstance,"[154] the defendant's potential testimony at trial. Even if the court had more cautiously stated that it would merely contemplate the possibility of departure if the defendant were to testify, that statement at trial could create a partisan climate that "chills" the defense's efforts, the court's admonitions to the contrary notwithstanding.[155]

The sentencing court in *Padron* made a good faith attempt to warn the parties of a possible departure. By obligating the sentencing judge to state that she is contemplating a departure, *Burns* opens the door for future, potentially wasteful petitions for rehearing such as that in *Padron*. By attempting to follow the holding in *Burns*, judges may cause future defendants to claim that their options for presenting a defense have been unfairly limited, and use that perceived unfairness as a basis for appeal.

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150 *Id.*

151 *Id.* The court in *Padron* concluded that, "Padron surely cannot complain of imprecision in the wording of Judge Goettel's warning in the absence of any objection when the caution was given." *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

## VII. CONCLUSION

The Court's opinion in *Burns* is troubling both for its result and its reasoning. The district court judge listened to arguments made at Burns's sentencing hearing and then exercised her discretionary power to depart upward from the Guidelines, stating three reasons why she believed the departure to be necessary. Under *Burns* future judges must explicitly state what the Federal Sentencing Act makes clear by itself: that judges may use their discretionary power to depart from the range suggested by the Guidelines. The Court's requirement in *Burns* is not only unnecessary, it is also incompatible with principles of judicial neutrality, forcing a judge to reveal her sentencing inclination prematurely. Further, the reasoning in the decision permits the Court to second-guess Congress, creating procedural requirements where Congress did not specify them. Finally, the absence of notice does not infringe on the defendant's right to due process. The Court in *Burns* therefore incorrectly required sentencing judges to provide notice that they are contemplating departure and the grounds on which they intend to depart.

THOMAS GILSON