



2004

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### Recommended Citation

Patrice Stappert, *A Death Sentence for Justice: The Feeney Amendment Frustrates Federal Sentencing*, 49 Vill. L. Rev. 693 (2004).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol49/iss3/7>

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## Comment

### A DEATH SENTENCE FOR JUSTICE: THE FEENEY AMENDMENT FRUSTRATES FEDERAL SENTENCING

#### I. INTRODUCTION

Sentencing might be a judge's most important role in which the use of discretion is both warranted and necessary. While only judges are uniquely qualified on the subject of sentencing, recent legislation suggests that Congress feels judges are incapable of judging.<sup>1</sup> The Feeney Amendment of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act ("PROTECT Act")<sup>2</sup> will eviscerate a very crucial part of the sentencing process—downward departures.<sup>3</sup> By limiting a judge's discretion or willingness to order sentences below those provided by the U.S. Sentencing Guidelines ("Guidelines"), defendants are no longer treated on a case-by-case basis, but rather are given a "one size fits all" approach to justice.<sup>4</sup> This draconian approach to sentencing will likely have an adverse impact throughout the system by frustrating its functioning actors—not only the judges, but also defense attorneys, prosecutors

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1. See *Mistretta v. United States*, 488 U.S. 361, 404 (1989) (qualifying judiciary as proper entity to sentence). U.S. Supreme Court Justice Kennedy commented that the "trial judge is the only actor in the system most experienced with exercising discretion in a transparent, opened, and reasoned way." Justice Anthony M. Kennedy, Address at the American Bar Association Annual Meeting 5 (Aug. 9, 2003) [hereinafter Kennedy Address] (addressing inadequacies and injustices of prison system). Justice Kennedy then requested, "Please do not use our courts but then say the judge is incapable of judging." *Id.* (urging Congress to reconsider new legislation that nearly strips judges of discretion at sentencing).

2. See Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act (PROTECT Act), Pub. L. No. 108-21, § 401, 117 Stat. 650, 667-76 (2003) (codified as amended at 18 U.S.C. §§ 3553, 3742 (2003); 28 U.S.C. §§ 994, 991 (2003)) (containing controversial "Feeney Amendment" or "Feeney"). The phrases "PROTECT Act" and "Feeney Amendment" are often used interchangeably to refer to this controversial legislation. For a discussion of the origin of the Feeney Amendment, see *infra* notes 34-46 and accompanying text.

3. See Letter from Frank O. Bowman III et al. to Senators Orrin G. Hatch and Patrick Leahy, Committee on the Judiciary, U.S. Senate 1 (Apr. 2, 2003) (on file with author) [hereinafter Letter from Bowman] (expressing law professors' concern with Feeney Amendment).

4. See 18 U.S.C. §§ 3553, 3742 (providing circumstances limiting or proscribing judicial discretion); 28 U.S.C. §§ 994, 991 (same); see also Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion May Undermine a Generation of Reform*, 27 CHAMPION 6, 9 (2003) (citing Letter from National Association of Criminal Defense Lawyers (NACDL) to Congressional Representatives (Apr. 9, 2003)).

and the U.S. Sentencing Commission (“Commission”).<sup>5</sup> The result of this collective frustration could lead to the ultimate demise of the system.

This Comment discusses the practice of federal sentencing, the impact the Feeney Amendment will have on a judge’s ability to use discretion and the effect on other actors in the sentencing process. Part II summarizes the contemporary federal sentencing system.<sup>6</sup> Part III addresses the enactment of recent legislation adverse to the sentencing system.<sup>7</sup> Part IV details the Feeney Amendment’s effect on judicial discretion in sentencing.<sup>8</sup> Part V focuses on the impact the new sentencing rules will have on different actors in the criminal justice system.<sup>9</sup> Part VI discusses the positive impact of the PROTECT Act on child protection law.<sup>10</sup> Finally, Part VII highlights and encourages efforts to repeal the controversial legislation so the Guidelines can, if needed, be redrafted in a reasoned and informed way.<sup>11</sup> While the Guidelines may not be perfect, taking away a judge’s ability to consider the particular circumstances of a defendant and the crime is not the answer.<sup>12</sup> The Feeney Amendment is potentially a life sentence for judicial discretion and a death sentence for justice.

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5. See, e.g., Jonathon Groner, *Federal Judiciary Opposes Sentencing Change*, LEGAL TIMES, Aug. 25, 2003, at 8 (discussing frustration with limiting judicial discretion of federal judiciary). At a hearing of the U.S. Sentencing Commission on August 19, 2003, “the federal judiciary formally voiced its opposition to a directive from Congress that the panel reduce the number of ‘downward departures’ in criminal sentencing.” *Id.* (noting opposition); see also Letter from Jon M. Sands, Chair, Federal Defenders’ Sentencing Guidelines Subcommittee, to The Honorable Diana E. Murphy, Chair, U.S. Sentencing Commission (Apr. 25, 2003) (on file with author) [hereinafter Letter from Sands] (detailing frustration by defense attorneys because “[i]n [their] experience, downward departures are working as intended by Congress-preserving some fairness and individualized sentencing within the guidelines system”).

6. For a discussion of the development of federal sentencing, see *infra* notes 13-33 and accompanying text.

7. For a discussion of the enactment of the PROTECT Act, see *infra* notes 34-46 and accompanying text.

8. For a discussion of the Feeney Amendment’s effects on a judge’s role in sentencing, see *infra* notes 47-86 and accompanying text.

9. For a discussion of the Feeney Amendment’s influence on defense attorneys, prosecutors and the U.S. Sentencing Commission, see *infra* notes 87-135 and accompanying text.

10. For a discussion of the effect of the Amendment on child protection laws, see *infra* notes 136-55 and accompanying text.

11. For an overview of efforts to repeal the legislation and a forecast of the Feeney Amendment’s impact, see *infra* notes 156-78 and accompanying text.

12. See John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (“For a judge to be deprived the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been the hallmark of the American system of justice.”); see also Kennedy Address, *supra* note 1, at 5 (“The Federal Sentencing Guidelines [themselves] should be revised downward.”).

## II. HISTORY OF FEDERAL SENTENCING

Judges once enjoyed broad discretion in determining whether and for how long to incarcerate an offender.<sup>13</sup> This discretion led to perceptions that “federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.”<sup>14</sup> In response, and after years of tailoring, Congress adopted the Sentencing Reform Act of 1984.<sup>15</sup>

Congress intended the Sentencing Reform Act to eliminate unwarranted sentencing disparity by establishing a consistent system of federal sentencing.<sup>16</sup> Consequently, Congress created the U.S. Sentencing Com-

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13. See *Koon v. United States*, 518 U.S. 81, 92 (1996) (providing background of federal judicial sentencing discretion).

14. *Id.* (quoting S. REP. NO. 98-225, at 38 (1983)). Throughout history, many legal scholars have expressed their distrust in the discretionary powers of judges. See, e.g., JAMES F. SIMON, *WHAT KIND OF NATION* 9 (2002) (quoting Letter from Thomas Jefferson to Spencer Roane (Mar. 9, 1821)). For example, Thomas Jefferson wrote that “[t]he great object of my fear is the federal judiciary. That body, like gravity, ever acting with noiseless foot & unalarming advance, [is] gaining ground step by step . . . . Let the eye of vigilance never be closed.” *Id.* (expressing distrust in judicial discretion). Likewise, Lord Camden noted:

[T]he discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature can be liable.

*State v. Cummings*, 36 Mo. 263, 278 (1865), *rev'd*, 71 U.S. 277 (1867) (concerning *ex post facto* law). Over a century later, Justice Ben F. Overton of the Florida Supreme Court commented:

Some writers and authorities have said that the term “judicial discretion” is a mistake or misnomer. The term “discretion” in its English usage means “with restraint.” In the broad legal sense, however, judicial discretion denotes a very real grant of power that can be the absolute and final authority in any given situation.

Justice Ben F. Overton, *The Meaning of Judicial Discretion*, in J. ERIC SMITHBURN, *JUDICIAL DISCRETION* 3 (1980) (analyzing judicial discretion in functional context).

15. See 18 U.S.C. §§ 3551-59, 3561-66, 3571-74, 3581-86 (2003) (establishing particularized standards within which convicted federal offenders shall be sentenced in conformity); 28 U.S.C. §§ 991-98 (2003) (same).

16. See generally Kirby D. Behre & Jeff Ifrah, *Perspectives on Federal Sentencing Guidelines and Mandatory Sentencing: Foreword: You Be the Judge: The Success of Fifteen Years of Sentencing Under the United States Sentencing Guidelines*, 40 AM. CRIM. L. REV. 5 (2003) (citing S. REP. NO. 98-225, at 39 (1983), which describes legislative history of Sentencing Reform Act and goals of legislation). The Sentencing Reform Act was the product of years of drafting and discussions to make the Act most adequately fulfill the goals of sentencing. See generally Statements of Senators Edward M. Kennedy and Patrick Leahy Supporting the JUDGES ACT, in 15 FED. SENTENCING REP. 372 (2003). Senator Edward M. Kennedy noted:

The Sentencing Reform Act was the result of extraordinary bipartisan cooperation. In the Senate Judiciary Committee, over a ten-year period, Senator Thurmond, Senator Hatch, Senator Biden, and I worked with the Carter and Reagan Administrations to strike the best balance between the goal of consistent sentencing in federal law and the need to give federal judges discretion to make sentences fit the crime in individual cases. There was also strong bipartisan cooperation in the House Judiciary Com-

mission to establish such a system through the development of a comprehensive set of sentencing guidelines.<sup>17</sup> The Commission promulgated the U.S. Sentencing Guidelines<sup>18</sup> in 1988, which specify an appropriate sentencing range for each class of convicted persons based on various factors related to the offender and the offense.<sup>19</sup>

While the Guidelines were developed to regulate the discretion of judges, Congress struck a careful balance between the goals of sentencing uniformity and individualized justice.<sup>20</sup> Congress recognized that the Commission could not possibly anticipate and weigh every relevant variable that could arise in each case.<sup>21</sup> Accordingly, Congress granted judges the authority to sentence outside the prescribed range if a judge finds “an aggravating or mitigating circumstance of a kind, or to a degree, not ade-

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mittee, and we worked together over several years to enact a strong, balanced, and bipartisan bill.

*Id.* (quoting Senator Kennedy to show extensive research went into adoption of Sentencing Reform Act).

17. See 28 U.S.C. § 991(a) (creating U.S. Sentencing Commission). The Commission is an independent agency within the judicial branch consisting of seven members appointed by the President and confirmed by the Senate. See *id.* (detailing composition of Commission); *id.* § 994 (charging Commission with developing Guidelines).

18. See Behre & Ifrah, *supra* note 16, at 5 (noting original version of Guidelines implemented). The current version of the Guidelines is the product of over six hundred amendments over the past fifteen years and is more than five hundred pages in length. See *id.* (comparing original version to current one). Sentencing guidelines are not usually amended because of Commission research or its review of flaws within the Guidelines. See Paul J. Hofer & Mark H. Allenbaugh, *Perspectives on the Federal Sentencing Guidelines and Mandatory Sentencing: The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 28 (2003) (noting different reason for amendments). The Guidelines are, however, often amended because Congress frequently directs the Commission to increase sentences for a particular crime when a crime receives media attention. See *id.* (evaluating philosophy of Guidelines).

19. See *Koon v. United States*, 518 U.S. 81, 92 (1996) (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 1 (1995)). The Guidelines require a district judge to impose on a defendant in the typical case a sentence falling within the applicable Guideline range. See *id.* (noting operation of Guidelines). Judges use a grid that sets up presumptive sentences according to the seriousness of the offense and the defendant’s criminal history. See U.S. SENTENCING GUIDELINES MANUAL ch.5, pt. A (2003) (giving model of guideline grid through “Sentencing Table”); see also Frank O. Bowman III, *When Sentences Don’t Make Sense*, WASH. POST, Aug. 15, 2003, at A27 (describing procedure for determining sentences).

20. See Letter from Bowman, *supra* note 3, at 1 (noting purpose of Guidelines was to preserve individualized sentencing). Over seventy law professors, most of whom specialize in criminal law, signed a letter supporting this position. See *id.* (expressing “deep concerns” regarding legislation to eviscerate judicial discretion through granting of downward departures); see also Allenbaugh, *supra* note 4, at 9 (acknowledging objective to “bring some rationality and coherence to the sentencing process while still allowing for individualized sentences where circumstances warrant”).

21. See Letter from Bowman, *supra* note 3, at 1 (noting rational reason for allowing Guideline departures); see also *Koon*, 518 U.S. at 92-93 (describing necessity for ability to depart from sentencing ranges).

quately taken into consideration by the Sentencing Commission in formulating the [G]uidelines.”<sup>22</sup> If the judge finds an unusual case outside the “heartland” of typical cases the Commission considered and the Guidelines describe, the court may consider whether a departure is warranted.<sup>23</sup>

The Commission provided only a few factors that could never be a basis for departure and chose not to limit the considerations that might influence a decision to depart from the Guidelines.<sup>24</sup> The Commission reasoned that departure factors “cannot, by their very nature, be comprehensively listed and analyzed in advance.”<sup>25</sup> Further, departures will not occur often because the Guidelines seek to take into account those factors that made a significant difference in pre-Guideline sentencing.<sup>26</sup>

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22. 18 U.S.C. § 3553(b) (2003) (permitting sentencing outside prescribed Guideline range when aggravating or mitigating factor exists); *see also Koon*, 518 U.S. at 92 (addressing discretion permitted to district courts). In *Koon*, the Supreme Court found:

The Act did not eliminate all of the district court’s discretion, however. Acknowledging the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances . . . Congress allows for district courts to depart from the applicable Guideline range if “the court finds 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 should result in a sentence different from that described.”

*Id.* (same).

23. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (1995) (describing Guideline application in typical cases). The Introduction to the Guidelines explains:

The Commission intends the sentencing courts to treat each guideline as carving out a “heartland,” a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

*Id.* (introducing circumstance warranting proper departure consideration). To determine whether the Commission adequately considered a circumstance, courts must consider only the Guidelines, policy statements and the Commission’s official commentary. *See* 18 U.S.C. § 3553(b) (instructing considerations for determining typical case); *see also Koon*, 518 U.S. at 92-93 (discussing circumstances warranting departure).

24. *See* U.S. SENTENCING GUIDELINES §§ 5H1.10, 5H1.12, 5H1.14, 5K2.12 (2003) (prohibiting departure based on numerous factors: race, sex, national origin, creed, religion, socioeconomic status, lack of guidance as youth, drug or alcohol dependence and economic hardship); *see also* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 4(b) (1995) (“[These Guidelines do] not intend to limit the kinds of factors, whether or not mentioned anywhere else in the [G]uidelines, that could constitute grounds for departure in an unusual case.”).

25. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 4(b) (1995) (noting departure factors cannot be listed exclusively).

26. *See id.* (recognizing difficulty in prescribing single set of Guidelines to encompass “vast range of human conduct potentially relevant to sentencing decision”). The Commission noted that it is empowered to write and rewrite Guidelines, and over time, it can refine Guidelines to specify more precisely which departures should be permitted. *See id.* (describing reasoning for not including

The U.S. Supreme Court has encouraged the exercise of legislative discretion in promulgating sentencing schemes.<sup>27</sup> The Court recognized, however, that the Eighth Amendment prohibits sentences that are disproportionate to the crimes committed and enforces the constitutional principle of proportionality.<sup>28</sup> Accordingly, in *Koon v. United States*,<sup>29</sup> the Court approved the use of downward departures, the adjustment of a sentence below that suggested by the Guidelines.<sup>30</sup> Downward departures, the

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listed consideration factors); see also *Koon*, 518 U.S. at 93-94 (citing to *U.S. Sentencing Guidelines Manual*).

27. See *Solem v. Helm*, 463 U.S. 277, 286 (1983) (discussing principle of proportionality in sentencing).

28. See *id.* (holding constitutional principle of proportionality in sentencing “has been recognized explicitly in this Court for almost a century”); see also *Allenbaugh*, *supra* note 4, at 7 (discussing Supreme Court’s views on punishment). Despite the Court’s holding in *Solem*, recent case law suggests that a majority of the Court is:

[C]ontent to provide legislatures with discretion, effectively unfettered by the Eighth Amendment, to promulgate even the most draconian of sentencing schemes. Indeed, at least two of the Justices—Scalia and Thomas—believe that the Eighth Amendment applies only to the *mode* of imposing a sanction, not to its *severity*. “In [our] view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle.”

*Id.* (emphasis in original) (citing *Ewing v. California*, 538 U.S. 11, 38 (2003) (Thomas, J., concurring)).

29. 518 U.S. 81 (1996).

30. See *id.* (holding downward departures are appropriate where case falls outside “heartland” of cases considered by Guidelines). While *Koon* was largely concerned with interpreting the Sentencing Reform Act, the Eighth Amendment was most likely not the prime motivator for the decision. See generally *id.* (noting connection between *Koon* and Eighth Amendment is reaching). In *Koon*, Los Angeles police officers were acquitted on state charges of assault and use of excessive force in the beating of suspect Rodney King during his arrest. See *id.* at 85-91 (describing facts). As a result of the acquittal, widespread rioting and looting occurred in Los Angeles where “[m]ore than 40 people were killed in the riots, more than 2,000 injured, and nearly \$ 1 billion in property was destroyed.” *Id.* at 88 (recording damage done by citizens’ outrage at acquittal of police officers). The police officers were convicted under federal law for violating 18 U.S.C. § 242. See *id.* at 88 (noting conviction of willfully using unreasonable force in making arrest and willfully permitting officers to use such force). The applicable Guideline range was section 2H1.4 of the 1992 *U.S. Sentencing Guidelines*, indicating a sentence of seventy to eighty-seven months. See *id.* at 89 (calculating appropriate points that put King in said range). The district court granted one departure downward based on the victim’s misconduct and provocation, and a second departure based on a combination of factors: officers were unusually susceptible to abuse in prison, officers would lose their jobs, they had a low risk of recidivism and they had been subject to successive state and federal prosecutions. See *id.* at 88-90 (detailing decision to depart). The sentencing range after departure was thirty to thirty-seven months, and the court sentenced the officers to thirty months. See *id.* at 90 (stating sentence rendered). The Ninth Circuit reviewed the departures *de novo* and reversed. See *id.* (reversing district court’s departures). The Supreme Court held the appropriate standard of review was abuse of discretion and affirmed in part and reversed in part. See *id.* at 91 (finding appropriate question to review was whether sentencing court abused its discretion). The Court remanded to the district court to consider only valid factors. See *id.* at 113-14 (“When a re-

Court determined, are “entirely consistent with the philosophy of the Guidelines—which is to impose punishment that is deserved, and not arbitrary.”<sup>31</sup> The Court found that the Commission provided significant guidance in the Guidelines as to what factors should or should not be considered bases for departure.<sup>32</sup> In addition, the Court noted that courts must keep “in mind the Commission’s expectation that departures based on grounds not mentioned in the Guidelines will be ‘highly infrequent.’”<sup>33</sup>

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viewing court concludes a district court based a departure on both valid and invalid factors, a remand is required unless it determines the district court would have imposed the same sentence absent reliance on the invalid factors.”).

31. Mark H. Allenbaugh, *The PROTECT Act’s Sentencing Provisions, and the Attorney General’s Controversial Memo: An Assault Against the Federal Courts* (Aug. 13, 2003), at [http://www.nacdl.org/public.nsf/legislation/ci\\_03\\_41?OpenDocument](http://www.nacdl.org/public.nsf/legislation/ci_03_41?OpenDocument) [hereinafter *Controversial Memo*] (discussing necessity for downward departures); see also *Koon*, 518 U.S. at 92 (holding departures necessary because individual circumstances should be taken into account).

32. See *Koon*, 518 U.S. at 94-96 (“The Commission provides considerable guidance as to the factors that are apt or not apt to make a case atypical, by listing certain factors as either encouraged or discouraged bases for departure.”). Factors that are encouraged are those that the Commission was not able to fully take into account in formulating the Guidelines. See *id.* at 94 (quoting section 5K2.0 of *U.S. Sentencing Guidelines* and providing examples of encouraged factors). Even encouraged factors will not always be grounds for departure if “on some occasions the applicable Guideline took the encouraged factor into account.” *Id.* at 94-95 (giving example of upward departure for disruption of government “ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense”). A court may depart if a factor “is present to a degree substantially in excess of that which ordinarily is involved in the offense.” *Id.* at 95 (citing U.S. SENTENCING GUIDELINES § 5K2.0). Discouraged factors are those “not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range.” U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (1995) (acknowledging certain factors should not be factors for departure); see, e.g., U.S. SENTENCING GUIDELINES § 5H1.6 (noting family ties and responsibilities are discouraged factors); *id.* § 5H1.2 (noting educational and vocational skills are discouraged factors); *id.* § 5H1.11 (noting military and public service record are discouraged factors). Discouraged factors, however, may be relied upon in exceptional cases. See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (1995) (stating discouraged factors should only be taken into account when they are exceptional in degree or they in some way bring case outside heartland). If the factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. See *Koon*, 518 U.S. at 95-96 (noting departure cannot be granted for prohibited factors); see also U.S. SENTENCING GUIDELINES §§ 5H1.12, 5H1.4, 5K2.12 (prohibiting departure for lack of guidance as youth, drug or alcohol dependence or economic hardship, respectively).

33. *Koon*, 518 U.S. at 96 (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 6 (1995)).



### III. THE CONTROVERSIAL ENACTMENT OF THE FEENEY AMENDMENT

The Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act ("PROTECT Act")<sup>34</sup> was considered and unanimously passed in the Senate on February 24, 2003.<sup>35</sup> This legislation focused on strengthening the prosecution of offenses against children.<sup>36</sup> The House of Representatives considered the bill on March 26, 2003.<sup>37</sup> Representative Thomas Feeney of Florida introduced a surprise amendment to this legislation, which proposed to restrict downward departures in all cases to those "specifically identified as a permissible ground of departure in the sentencing guidelines."<sup>38</sup> According to Representative Feeney, the Amendment is essential to the fight against child pornography and abduction and necessary to stop judges from giving offenders a "slap on the wrist" at sentencing.<sup>39</sup>

The matter then went to the Conference Committee, and, while it was pending, virtually every segment of the criminal justice community voiced concerns about various aspects of the so-called "Feeney Amendment."<sup>40</sup> The Conference Committee reached a compromise and, as a result, narrowed the breadth of the Amendment.<sup>41</sup> The Feeney Amendment, in its

34. Pub. L. No. 108-21, 117 Stat. 650 (2003) (consisting of Feeney Amendment and laws affecting crimes against children); *United States v. VanLeer*, 270 F. Supp. 2d 1318, 1325-26 (D. Utah 2003) (discussing origin of PROTECT Act).

35. See 149 CONG. REC. S2573-90 (daily ed. Feb. 24, 2003) (noting legislation passing in Senate).

36. For a further discussion of enacted legislation's effect on strengthening child protection laws, see *infra* notes 136-55 and accompanying text.

37. See 149 CONG. REC. H2320-25 (daily ed. Mar. 26, 2003) (considering bill in House).

38. *VanLeer*, 270 F. Supp. 2d at 1325-26 (citing 149 CONG. REC. H2420-22 (daily ed. Mar. 27, 2003) and discussing Representative Feeney's rationale for Amendment); see also Allenbaugh, *supra* note 4, at 8 (citing PROTECT Act).

39. See Allenbaugh, *supra* note 4, at 8 (stating purpose for Amendment). Representative Feeney stated:

This amendment is an essential component of legislation to fight against child pornography and abductions. Legislative efforts to fight against child abduction and child pornography will be a fruitless gesture if at the end of the day judges give offenders, particularly sex offenders, a slap on the wrist. And a slap on the wrist is exactly what is happening today, with increasing frequency.

*Id.* (citing Letter from Rep. F. James Sensenbrenner, Jr. & Rep. Tom Feeney to Colleagues, Support the Feeney Amendment to H.R. 1104 to Preserve Appropriate and Justifiable Departures Under Sentencing Guidelines (Mar. 26, 2003)). Additionally, Representative Feeney stated that the "justification for [the] restriction was to prevent judges from 'making up exceptions . . . as they go along.'" *VanLeer*, 270 F. Supp. 2d at 1321 (describing Feeney's motivation for Amendment); see also 149 CONG. REC. H2435 (2003) (statement by Rep. Feeney) (same).

40. See Letter from Sands, *supra* note 5 (urging Commission to preserve use of downward departures).

41. See H.R. CONF. REP. NO. 108-66, tit. IV (2003) (noting compromised amendment); see also *VanLeer*, 270 F. Supp. 2d at 1322 (noting bipartisan agreement reached). The proposed version of the Feeney Amendment would have eliminated nine specified downward departures, including ones frequently relied

altered form, was agreed upon by both the House and Senate and was included in the PROTECT Act, which was signed into law on April 30, 2003.<sup>42</sup>

Surprisingly, the Feeney Amendment, adopted under the guise of the PROTECT Act, passed through the legislature with virtually no discussion or debate and no public hearings on the Amendment's effects on sentencing law, policy and practice.<sup>43</sup> The introduction of the Amendment was supported without any input solicited from the federal judiciary, the or-

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upon. See Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENTENCING REP. 310, 310-13 (2003) (discussing changes from original to adopted version of Feeney Amendment). The statute would have eliminated departures based on aberrant behavior under section 5K2.20 of the *U.S. Sentencing Guidelines*. See *id.* (same). Additionally and more controversially, the ability to depart if any mitigating factor not taken into account by the Commission was found would have been abolished. See *id.* (discussing proposed elimination of departure under section 5K2.0 of *U.S. Sentencing Guidelines*). This residual departure method was explicitly approved in *Koon v. United States*. See generally 518 U.S. 81 (1996) (holding departures constitutional if factor based upon takes defendant outside heartland of cases). This would have precluded judges from considering the defendant or the offense individually. The ability to upwardly depart if an aggravating factor not considered was found, however, was not taken away. See 28 U.S.C. § 994 (2003) (containing no prohibition on upwardly departing if aggravators found). For a further discussion of departure limitations under the Feeney Amendment, see *infra* notes 47-135 and accompanying text.

42. See generally PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (containing Feeney Amendment). The compromise version has been called the "Hatch-Sensenbrenner-Graham Compromise Amendment" but is most popularly known as the Feeney Amendment. See 149 CONG. REC. S517-01 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch); see also *supra* note 2 (observing terms "PROTECT Act" and "Feeney Amendment" used interchangeably). The PROTECT Act is additionally famous for containing the federal version of "AMBER Alert," legislation detailing the procedure for reporting on missing children over national broadcast systems. See PROTECT Act, Pub. L. No. 108-21, §§ 301-05, 321-23, 341, 361, 363, 117 Stat. 650, 660-67 (2003) (codified as amended at 42 U.S.C. §§ 5601, 5791, 5777, 5773, 5792, 13001, 13004 (2003) and 18 U.S.C. §§ 3056, 3796 (2003)) (including "AMBER Alert" system legislation). One commentator noted that a "vote against AMBER Alert would have been like a vote against motherhood and few legislators were willing to have to defend such a vote to their constituents." Lawrence S. Goldman, *From the President: The Feeney Amendment*, 27 CHAMPION 4 (2003) (discussing passing of PROTECT Act). For a further discussion of the AMBER Alert system, see *infra* notes 138-44 and accompanying text.

43. See H.R. 1104, 108th Cong. § 243 (2003) (noting vote of 357 to 58 passed legislation); see also Allenbaugh, *supra* note 4, at 8 (noting "unprecedented scope of the legislation, coupled with the fact that it was rammed through the legislature"); Letter from Bowman, *supra* note 3, at 1 (noting adoption of Feeney Amendment by House with virtually no debate). One commentator expressed his discontent, stating that "[t]he manner in which the Feeney Amendment was enacted revealed our legislative process at its very worst. These issues are too important to our criminal justice system and the separation of powers to be decided in such a hurried, thoughtless manner." Goldman, *supra* note 42, at 4 (discussing Feeney Amendment from perspective of Lawrence S. Goldman, President of NACDL).

ganized bar, legal academics, criminal justice experts or even the Commission.<sup>44</sup>

Attorney General John Ashcroft stated that the Feeney Amendment was designed to ensure that the Guidelines “would be more faithfully and consistently enforced” and “to ensure that the incidence of downward departures [is] substantially reduced.”<sup>45</sup> In reality, the Feeney Amendment is designed to increase the actual penalties imposed against federally convicted individuals by strictly limiting, barring and, ultimately, intimidating federal judges from considering different factors that allow for leniency in sentencing in individual cases.<sup>46</sup>

#### IV. DEVASTATION TO JUDGES

The Feeney Amendment displays significant disrespect for the historic role that judges have had in the sentencing process.<sup>47</sup> The responsibility of imposing sentences on defendants is a “sensitive task” that is entrusted only to those qualified.<sup>48</sup> Nevertheless, this legislation threatens judicial discretion and authority by considerably curtailing the use of the downward departure and by placing judges under heightened scrutiny.<sup>49</sup>

While eliminating disparity in sentencing is an important goal of the Guidelines, the main goal should be individualized justice.<sup>50</sup> In *Koon*, the Supreme Court stated that “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”<sup>51</sup> Federal defendants are often individuals

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44. See Vinegrad, *supra* note 41, at 314-15 (expressing dissatisfaction with legislative process when Feeney Amendment was passed).

45. Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors, Department Policies and Procedure Concerning Sentencing Recommendations and Sentencing Appeals (July 28, 2003) [hereinafter Memorandum from Ashcroft] (citations omitted) (providing purpose of Feeney Amendment).

46. See Prison Talk, *Feeney Amendment—Sentencing Practices Part 2*, at <http://www.prisontalk.com/forums/showthread.php?t=12464&highlight=Feeney> (last visited Jan. 26, 2004) (summarizing impact of Feeney Amendment and analyzing its different sections); see also Martin, *supra* note 12, at A31 (“These amendments are an effort to intimidate judges to follow sentencing guidelines.”).

47. See Vinegrad, *supra* note 41, at 315 (contending legislation shows extraordinary disrespect for federal judges).

48. See *id.* (noting federal judges must be nominated by President and confirmed by Senate to serve).

49. See *id.* (suggesting legislation is direct attack on judges).

50. See Zachary L. Berman, *Judge Martin Leaves Bench Critical of Sentencing Rules*, N.Y.L.J., Aug. 15, 2003, at 2 (noting goal of Guidelines). Judge Martin stated, “I could end all disparity by simply hanging everyone who commits a crime,” but explained individual justice should be the main goal of sentencing. *Id.* (quoting U.S. Southern District of New York Judge John S. Martin who implies that easy solution is not correct one).

51. *Koon v. United States*, 518 U.S. 81, 113 (1996) (noting tradition of individualized sentencing); see also Berman, *supra* note 50, at 2 (quoting same).

who were not only initially dealt a bad hand in life, but had limited opportunities offered to them throughout.<sup>52</sup> Typically, judges recognize this and do allow compassion to influence their sentences when appropriate.<sup>53</sup> The use of departures has been the mechanism of compassion that judges utilize to attain individualized sentences.<sup>54</sup>

The use of downward departures does not equate to an overwhelming amount of mitigation in sentencing, as the enactment of the Feeny Amendment implies.<sup>55</sup> Departures also do not indicate judges' recalcitrance by being "soft on crime."<sup>56</sup> Judges generally sentence in accordance with the law and according to the applicable Guidelines.<sup>57</sup> Judges who depart are not giving criminals a "break," but are ensuring that their sentences are just.<sup>58</sup> A judge should only depart when the sentence range

52. See Berman, *supra* note 50, at 2-3 (recognizing judges become aware of defendant's unfortunate circumstances). One commentator described the process one judge endures during sentencing:

When [Judge Martin] examines the backgrounds of many defendants who come before him for drug-related crimes, Judge Martin said he generally finds "people who leave school in the ninth grade and come from single parent homes, sometimes with addicted parents." These people have few opportunities, Judge Martin said, "the choice is to go be a dishwasher in a restaurant or sell drugs. When you are talking about retribution for these people, it is hard to get on a moral high horse."

*Id.* (providing one judge's reflection on defendants' individual situations).

53. See *id.* (demonstrating how Judge Martin allows his compassion to influence his sentencing).

54. See *id.* at 3 (utilizing departures to show compassion in sentencing).

55. See *id.* (providing examples of "tougher" sentencing practices).

56. *Controversial Memo*, *supra* note 31 (pointing out misconception that departures mean judges are being too lenient).

57. See Vinegrad, *supra* note 41, at 315 ("Statistics show that [federal judges] have, by and large, discharged this responsibility consistent with the letter and spirit of the Guidelines."). The thrust of the debate has been about what happens with the majority of departures. There are occasions, however, where some departures may be considered foolish or at least highly suspect. See, e.g., *United States v. Roach*, 296 F.3d 565 (7th Cir. 2002) (providing example of appellate court reversing district court's questionable departure). In *Roach*, the district court granted a downward departure at sentencing, finding the defendant suffered from a serious mental condition that made it nearly impossible to control her "shopping binges." See *id.* at 566-68 (discussing facts and district court ruling). The appellate court noted that in order to depart on mental defect, the defendant must suffer from a "significantly reduced mental capacity." See *id.* at 568 (relying on section 5K2.12 of *U.S. Sentencing Guidelines*). The court held that evidence of compulsive shopping behavior is insufficient, without more, to support a departure and remanded the case for resentencing. See *id.* at 569-73 (analyzing claim).

58. See *Controversial Memo*, *supra* note 31 (describing one district judge's downward departure in *VanLeer* as not being "soft" but as being just). *United States v. VanLeer* provides a good example of when a downward departure is warranted in order to make a sentence just. Paul Bradley VanLeer, the defendant, was found guilty of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). See *United States v. VanLeer*, 270 F. Supp. 2d 1318, 1319-20 (D. Utah 2003) (stating facts). VanLeer had a friend store his shotgun while he was in prison and when VanLeer had finished serving his sentence, he picked up the gun and took it to a local pawnshop because he needed rent money. See *id.* at 1319 (same). Techni-

proposed by the Guidelines is, according to the judge, more severe than what the offender deserves.<sup>59</sup>

Despite the availability of downward departures, many judges have not shied away from meting out tough sentences.<sup>60</sup> Since Congress first enacted the Guidelines, the federal prison population has increased almost five hundred percent to a total of over two million.<sup>61</sup> This is hardly evidence of a lenient judiciary.<sup>62</sup> Statistics indicate that on average, downward departures were granted only in about twelve percent of federal cases.<sup>63</sup> Proponents of the Amendment focused on the substantial increase in non-cooperation departures since *Koon* was decided in 1996.<sup>64</sup> The increase, however, was attributable to “fast track” departures granted in border districts with high immigration caseloads, accounting for seventy percent of departures cases.<sup>65</sup> In addition, government motions for downward departures for cooperating defendants account for approximately

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cally, VanLeer committed the federal crime of a “felon in possession of a firearm.” *See id.* at 1319 (acknowledging actions of defendant constituted crime). The court found that a downward departure under section 5K2.11 of the *U.S. Sentencing Guidelines* was warranted because this case did not involve the harms envisioned by Congress when it enacted felon-in-possession laws and was outside the heartland of cases supported by the Guideline range. *See id.* at 1326-27 (deciding case fell outside heartland and departure was necessary). While the Guidelines called for thirty to thirty-seven months, the court sentenced VanLeer to eighteen months. *See id.* at 1320, 1327 (imposing sentence).

59. *See* Allenbaugh, *supra* note 4, at 10 (noting “downward departures are not granted out of mercy” but only where warranted).

60. *See* Berman, *supra* note 50, at 1 (providing examples of when one judge upwardly departed and gave harsher sentences). Many severe sentences, however, are often the result of mandatory minimums over which judges have no control. *See* Talk Left, *Justice Breyer Raps Mandatory Minimums* (Sept. 22, 2003), at <http://www.talkleft.com/archives/004359.html> (discussing Justice Breyer’s denouncement of mandatory minimum sentences).

61. *See* Cokie Roberts & Steven Roberts, *Sentencing Modification Gains Some Unlikely Allies*, NASHVILLE CITY PAPER, Aug. 29, 2003, at [http://www.nashvillecitypaper.com/index.cfm?section=40&screen=news&news\\_id=26106](http://www.nashvillecitypaper.com/index.cfm?section=40&screen=news&news_id=26106) (acknowledging rise in prison sentences since Guidelines enacted).

62. *See id.* (stating “[t]he ‘lock ‘em up and throw away the key’ crowd is riding high in Washington”). Consider the words of Justice Kennedy, encouraging a perception of inmates as more than criminals and advocating that “the more than 2 million inmates in the United States are human beings whose minds and spirits we must try to reach.” *Id.* (quoting Justice Kennedy).

63. *See* Vinegrad, *supra* note 41, at 314 (providing that, since *Koon*, departure rates average 12.2% of cases); *see also* Jonathon Groner, *Panel Caught in Tussle over Judges’ Power; Lawyers: Sentencing Commission Should Resist Effort to Curb Bench*, LEGAL TIMES, Aug. 18, 2003, at 1 (reporting downward departures in 7.5% to 12.2% of all federal cases).

64. *See* Vinegrad, *supra* note 41, at 314 (providing non-cooperation departure rates increased from 4,201 in 1996 to 10,026 in 2001).

65. *See id.* (discussing “fast track” departures). Fast track departures were implemented to alleviate burdens placed on prosecutors and district courts. *See id.* (revealing necessity for departure). Congress has even directed the Commission to create a guideline for this practice. *See id.* (directing implementation of guideline in response).

eighteen percent.<sup>66</sup> There has even been a recommendation in recent years that judges should depart in more cases.<sup>67</sup>

The Feeney Amendment interferes with a judge's discretionary authority by limiting the availability of downward departures. The legislation eliminates the use of specific downward departure grounds when sentencing sexual abuse, child-victim and obscenity offenses.<sup>68</sup> No longer can a judge consider departures in these cases based on, *inter alia*, aberrant behavior, family ties, community ties or military, civic or public service when sentencing a convicted defendant.<sup>69</sup> Although the actual legislation is much narrower in scope than the proposed version, which tried to eradicate virtually all downward departures, it still considerably limits a judge's discretion.<sup>70</sup> A person found guilty of these specified offenses must now be treated as a category instead of an individual under the law.

Concomitantly, although the Feeney Amendment only explicitly takes away a judge's ability to depart in a minority of cases, the legislation might implicitly cause judges to rethink and possibly refrain from departing. The Amendment requires prosecutors to report to the Department of Justice (DOJ) when a judge departs against the DOJ's objection.<sup>71</sup> This new

66. *See id.* (noting government-supported departures make up majority of departures).

67. Letter from Sands, *supra* note 5 (noting personal experience that judges grant too few departures where they are warranted).

68. *See* 18 U.S.C. § 3552 (2003) (removing ability to depart); 28 U.S.C. § 994 (2003) (same); *see also* Vinegrad, *supra* note 41, at 313 (noting changes to original Feeney version eliminated these departure grounds entirely while enacted version eliminated them only in regard to certain crimes).

69. *See* 18 U.S.C. § 3552 (removing ability to depart and certain considerations in sentencing offenders); 28 U.S.C. § 994 (same). These grounds for downward departures are still available in cases not involving sexual abuse, a child-victim or obscenity. *See* Vinegrad, *supra* note 41, at 313 (discussing changes to originally proposed amendment).

70. *See* Vinegrad, *supra* note 41, at 314-16 (discussing negative impact of Feeney Amendment). One senator noted, however, that the type of cases affected by this limitation represent only two percent of the federal caseload. *See* 149 CONG. REC. S5113 (daily ed. Apr. 10, 2003) (statement of Sen. Sessions) (emphasizing constraint of Feeney Amendment).

71. *See* Memorandum from Ashcroft, *supra* note 45 (instructing prosecutors to report when judges depart). The Feeney Amendment requires the attorney general to submit a report to the House and Senate Judiciary Committees within fifteen days whenever a district judge departs downward in a case for reasons other than substantial assistance to the government. *See* 18 U.S.C. § 3553 (2003) (reporting departures by judges to DOJ). The effective date for this amendment was suspended for ninety days. *See id.* (detailing requirements for indefinite suspension). It will be suspended indefinitely if the attorney general takes steps to ensure vigorous pursuit of appealing unjustified downward departures. *See id.* (same).

reporting requirement will intimidate judges into not departing for fear of being reversed.<sup>72</sup> This reporting system will effectively blacklist judges.<sup>73</sup>

Likewise, this reporting system devastates the fundamental separation of powers among the branches.<sup>74</sup> Judges' records are already open and available to the public and can be used to get statistical evidence about sentencing.<sup>75</sup> Reporting to the executive agency on individual judges for conducting a specific aspect of their routine business is surely interference with the ideal structure of the federal system.<sup>76</sup>

The Feeney Amendment further requires *de novo* appellate review of departure decisions, thereby overruling the Supreme Court's decision in

72. See *Blacklisting Judges*, N.Y. TIMES, Aug. 10, 2003, § 4, at 10 [hereinafter *Blacklisting Judges*] (discussing effect of reporting system). This "blacklisting" incentivizes judges to refrain from departing (out of fear of being reversed). See *id.* (noting reporting system is attempt "to make federal judges yield to political pressures from Washington"); see also Steve Karnowski, *Courts: Judge Criticizes Federal Sentencing Policies*, PIONEER PRESS, Oct. 22, 2003, available at <http://www.twincities.com/mld/pioneerpress/2003/10/news/nation/7070526.htm?templa> (providing example of intimidated judge). U.S. District Judge Paul Magnuson admitted to feeling intimidated when explaining his decision not to grant a downward departure. See *id.* (blaming Congress and DOJ for feeling intimidated). When asked to respond to Judge Magnuson's concerns, Judge Donovan Frank replied:

Do I share Judge Magnuson's concerns about where all this is going to go, where it relates to the independence of the judiciary? Yes . . . , [b]ut have I changed how I do my sentencing? No, I have not. I don't feel intimidated and I'm not any less likely to depart up or down than I was.

*Id.* (offering contrary opinion that he felt no intimidation).

73. See *Blacklisting Judges*, *supra* note 72, at 10 (discussing blacklist effect of providing names of judges who depart to DOJ); see also 149 CONG. REC. S5137 (daily ed. Apr. 10, 2003) (statement of Sen. Leahy) ("The [final] language retains the Feeney amendment's attempt to intimidate Federal judges by compiling a 'hit list' of all judges who impose sentences that the Justice Department does not like . . . . It takes a sledge hammer to the concept of separation of powers."); Emily Bazelon, *With No Sentencing Leeway, What's Left to Judge?*, WASH. POST, May 4, 2003, at B04 ("In other words, the prosecutors are saying: We're watching you.").

74. See Albert J. Krieger, *A Wave and a Wish*, 18 CRIM. JUST. 1, 29 (2003) (discussing separation of powers implications of Feeney Amendment's reporting system). The likely response to this argument by proponents of the Amendment could possibly be that federal prosecutors work for the DOJ, and therefore, this is just a coordinated, information-gathering approach. For a further discussion of separation of powers issues in sentencing, see *infra* notes 102-08 and accompanying text.

75. See Krieger, *supra* note 74, at 29 (noting court records are public).

76. See *id.* (discussing separation of powers issues of Feeney Amendment). One criminal defense attorney eloquently stated:

Requiring the names of the judges who downwardly depart to be reported to Congress brings sickening recollections of the list of names waved by Senator Joe McCarthy. It is almost too obvious to mention that the legislature funds the other two branches of government. It is axiomatic that the purse strings can be the hangman's noose.

*Id.* (emphasizing discontent with reporting requirement of Feeney Amendment); see also Vinegrad, *supra* note 41, at 315 (recommending that bar and academics focus attention on Feeney Amendment's separation of powers issues).

*Koon*.<sup>77</sup> This standard of review offers less deference to the sentencing judge than the formerly applied “abuse of discretion” standard afforded.<sup>78</sup> *De novo* review makes it much easier for a district judge to be reversed on appeal because all it takes is a simple disagreement by the appellate court.<sup>79</sup> This change in standard, coupled with the reporting requirements, can only intrude on a judge’s realm of discretion to which the decision to depart has been traditionally reserved.<sup>80</sup>

77. Compare 18 U.S.C. § 3742 (2003) (“[T]he court of appeals shall review *de novo* the district court’s application of the guidelines to the facts.”), with *Koon v. United States*, 518 U.S. 81 (1996) (finding abuse of discretion appropriate standard of review for departure appeals); see also Allenbaugh, *supra* note 4, at 8 (stating Feeney Amendment overrules *Koon*). For a further discussion of the facts and holding of *Koon*, see *supra* notes 29-33 and accompanying text.

78. Compare BLACK’S LAW DICTIONARY 94 (7th ed. 1999) (defining “appeal *de novo*” as “[a]n appeal in which the appellate court uses the trial court’s record but reviews the evidence and law without deference to the trial court’s rulings”), with *id.* at 10 (defining “abuse of discretion” as “[a]n appellate court’s standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, or illegal”).

When questioned on the Feeney Amendment’s change in standard of review, Assistant Federal Public Defender Anne Blanchard commented:

It would be all too easy to misconstrue this change as a minor modification to a rather technical legal standard. In practice, it is anything but minor or technical. The nuances that are gleaned at sentencing hearings often tip the scales ever so slightly in favor of or against a downward departure. District judges are not merely listening for the bare facts. They are making the myriad of personal observations which inform their ultimate view of an issue. For example, they see and hear the actual effect on the family member who will be without their sole means of support. They hear first hand the insight the doctor provides as to why the diminished mental capacity contributed so mightily to a defendant’s involvement with the crime. They evaluate the witnesses one by one as they come before the court to tell of the defendant’s extraordinary efforts and success at rehabilitation and restitution to the victims. The merits of proposed departures often turn on such intangibles as demeanor, credibility, genuine remorse or whether a certain defendant or circumstance is truly extraordinary. The nuances that are available to a district court in deciding these matters are simply unavailable to a court reviewing a cold record. While we would never permit a system whereby guilt was determined by a jury who was only given a transcript of a trial, this is precisely what the Protect Act mandates with respect to appeals of equally delicate sentencing matters. A further result of this change in the standard of review is that the government gets a second bite of the apple. They can relitigate all departure motions with the appellate court with the advantage that none of the nuances the district court relied upon and perhaps very little of the real world justice the district court was trying to achieve will be brought to bear on the ultimate sentence the individual will receive. Such a state of affairs is both unwise and unjust.

E-mail from Anne Blanchard, Assistant Federal Public Defender, District of New Jersey, to Patrice Stappert (Apr. 2, 2004, 05:52:43 EST) (on file with author).

79. See Vinegrad, *supra* note 41, at 315 (noting appellate courts may reverse district courts “simply because they disagree with them”).

80. See Berman, *supra* note 50, at 12 (discussing pressure on judges). After being asked what advice a retiring judge had for new judges, the judge responded that new judges should not be afraid to take risks or worry about being reversed because departing from the Guidelines is “precisely [the issue] that district judges should most be willing to risk reversal.” *Id.* (urging new judges to ignore possibility of reversal).



The Feeney Amendment also heightens the writing requirements for district judges by demanding a judge state with specificity every possible alternative ground for departure or risk forfeiting that departure ground on remand.<sup>81</sup> The PROTECT Act requires district judges in virtually every instance to state their reasons for departures “with specificity in the written order of judgment and commitment.”<sup>82</sup> Although this heightened writing standard furthers the goal of a reasoned and structured sentencing system, the district judge loses the ability to make departures on remand if these departure grounds were not specifically included in the judge’s original sentence.<sup>83</sup>

In addition, the composition of the Commission was altered to limit judicial representation. Before the Feeney Amendment, the Commission consisted of seven voting members, of which at least three had to be federal judges.<sup>84</sup> Under the Feeney Amendment, no more than three federal judges may serve on the Commission at one time.<sup>85</sup> By providing a maximum instead of a minimum number of judges, the Commission conceivably could lack judicial representation once the current judges’ terms expire.<sup>86</sup> This alteration is both illogical and inexplicable as it is the judges on the Commission who bring invaluable first-hand knowledge of sentencing.

## V. THE FEENEY AMENDMENT FRUSTRATES THE SYSTEM

The Feeney Amendment makes a variety of changes related to federal sentencing procedures.<sup>87</sup> While it may appease Congress, it frustrates each major player in the game of sentencing to an unparalleled degree. Defense counsel, prosecutors and the U.S. Sentencing Commission have all been adversely affected by this legislation.<sup>88</sup>

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81. See 18 U.S.C. § 3553 (2003) (demanding reasons for departure must “be stated with specificity in the written order of judgment and commitment”); see also *id.* § 3742 (limiting review to written reasons).

82. *Id.* § 3553 (requiring specificity).

83. See *id.* § 3742 (limiting departures on remand). For a further discussion on the limitation to depart on remand, see *infra* notes 89-97 and accompanying text.

84. See 28 U.S.C. § 991(a) (2003) (establishing composition of Commission).

85. See *id.* (striking “[a]t least three” and inserting “[n]ot more than 3” in statute); see also Vinegrad, *supra* note 41, at 314 (noting Feeney Amendment limited judicial representation on Commission).

86. See Vinegrad, *supra* note 41, at 314 (noting possible implications of maximum judge requirement). One commentator noted this change is a “discrete but unmistakable slap at the federal judiciary.” *Id.* (acknowledging deliberate effect of change). Currently, there are four federal judges on the Commission. See Groner, *supra* note 63, at 1 (providing current status of judges on Commission).

87. See Memorandum from Ashcroft, *supra* note 45 (describing Feeney Amendment as “landmark piece of legislation”).

88. For a further discussion of the Feeney Amendment’s adverse effects, see *infra* notes 89-135 and accompanying text.

A. *Defense*

The Feeny Amendment detrimentally impacts defense counsel and their clients. The Amendment forces defense counsel to raise every conceivable basis for departure or risk permanent waiver in any future remand.<sup>89</sup> Essentially, the Amendment disrupts the defense's strategy and compels the defense to argue the departure issue far more thoroughly than it otherwise would have had to absent the Amendment's waiver consequences.<sup>90</sup>

Before the PROTECT Act, "[m]ost seasoned defense attorneys . . . would follow the wise adage 'quit while you're ahead,' and sit down without pressing for specific rulings on the alternative departure grounds."<sup>91</sup> This was because the arguments would be preserved on remand because, while defense counsel raised the alternative departure grounds, they declined to specifically press the judge to rule upon them.<sup>92</sup> Now, defense counsel is effectively forced to seek and obtain written rulings on every possible basis or alternative basis for a downward departure, lest these po-

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89. See 18 U.S.C. § 3742(g) (2003) (restricting district court's ability to depart downward on remand); see also *id.* § 3553(c) (requiring district court to state reasons for departure with specificity); Lisa A. Cahill & Kevin F. Clines, *Waiver Dangers Under the PROTECT Act*, N.Y.L.J., Aug. 25, 2003, at 4 (discussing Feeny Amendment's effect on defense attorneys).

90. See Cahill & Clines, *supra* note 89, at 4-6 (discussing impact on defense attorneys).

91. *Id.* (describing defense attorneys' tactical approach). To illustrate the effects of the Amendment the authors provide the following hypothetical:

In the pre-sentence submission, defense counsel argues for a downward departure based on the client's cooperation, his voluntary disclosure of the offense, and the aberrant nature of the offense, all recognized departure bases under the guidelines (U.S.S.G. §§ 5K1.1, 5K2.16, 5K2.20). The government opposes all departures. The district court begins the sentencing proceeding by announcing that the defendant's cooperation does warrant a departure, and that the defendant will be sentenced to time served based on that departure ground alone. The court avoids as moot any ruling on the "aberrant nature" or "voluntary disclosure" grounds for departure. . . . [U]nder the new act, if the government successfully appealed the one departure ground ruled upon by the district court . . . on remand the sentencing court would be barred from considering alternative departure grounds not specifically included in the original sentence.

*Id.* (providing illustration of effects of Amendment).

92. See *id.* (noting procedure before PROTECT Act). Typically, parties are restricted from raising any new arguments on remand that they did not make in connection with their original sentencing. See *United States v. Quintieri*, 306 F.3d 1217, 1227 (2d Cir. 2002), *cert. denied sub nom.*, *Donato v. United States*, 123 S. Ct. 2246 (2003) (discussing "mandate rule"). An argument, however, is "not considered waived on resentencing if the party did not, at the time of the purported waiver, 'have both an opportunity and an incentive to raise it before the sentencing court or on appeal.'" Cahill & Clines, *supra* note 89, at 6 (citing *Quintieri*, 306 F.3d at 1229).

tential departures be waived on remand.<sup>93</sup> Defense counsel must press the court and insist that it rule on every alternative basis for departure and include those accepted grounds in the written ruling.<sup>94</sup>

The rule also imposes significant extra costs and pressures on the defense. Additional time researching and drafting possible departure grounds amount to greater financial costs to the defendant and greater temporal costs to the attorney.<sup>95</sup> Sentencing hearings that might have taken a short time will be dragged out so debates can occur over departure grounds that might never affect the sentencing.<sup>96</sup> Furthermore, the rule has the potential to flood appellate courts with ineffective assistance of counsel claims.<sup>97</sup>

An amendment that purports to treat each defendant and each case alike inevitably will frustrate defense counsel. The defense's role is hard enough with the uneven playing field of the current judicial system.<sup>98</sup> Typically, defense counsel gets the case long after the prosecution conducts a full investigation, gathered and examined evidence and interviewed witnesses.<sup>99</sup> The resources available to defense counsel are

93. See Cahill & Clines, *supra* note 89, at 4 (discussing practicalities of amendments).

94. See *id.* at 6 (“[D]efense counsel must now find a way to insist politely but firmly that the initial sentencing court rule on every alternative basis for departure and that it include those accepted bases in the written statement of reasons for the departure in the judgment and commitment order.”).

95. See *id.* (noting hardships placed on defense counsel).

96. See *id.* (considering significantly longer sentencing proceedings). This lengthened time commitment will burden the courts by creating backups for each judge and prosecutor. See *id.* (same).

97. See *id.* (“[I]t is an ‘ineffective assistance’ minefield for the unwitting lawyer who thought it was always not only safe but smart practice to quit while ahead.”).

98. See generally H. RICHARD UVILLER, *THE TILTED PLAYING FIELD* (1999) (analyzing fairness of criminal justice system). The author acknowledges that in the existing system, the adversaries in a criminal case will not be evenly endowed. See *id.* at 279 (discussing inequalities in current system depending on defendant's guilt). The author poses to the reader:

[H]ave we at least settled on a working definition of what we mean by fair? At least, are we agreed that we do not mean what sports fans would consider fair—that is, an evenly matched contest? Playing on a level playing field? I suppose one might say that, absent gross oppression, what is fair in the criminal justice system—as in life in general—is what is familiar . . . . I must say it seems to me that the American system for the delivery of criminal justice, while tilted in many respects, is not out of balance in that, in the main, it embodies a fair distribution of licenses and limits to the parties, an allocation that closely corresponds to their differing functions in the process. It is, in other words, tolerably fair.

*Id.* at 305-07 (concluding system is workable).

99. See generally *id.* at 73-112 (considering resources available in adversarial system); see also MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* 675 (2d ed. 2003) (“During the earliest phases of the criminal process, defense lawyers are rarely to be seen.”). While the defense usually does not have the opportunity to begin its case until much later in the process, a considerable amount of value should be given to the method's

generally minimal compared to those available to the prosecution.<sup>100</sup> Often the defense counsel's only line of defense is to argue that the defendant's individual circumstance warrants a departure from the severity of the applicable Guideline range.

### B. *Prosecution*

The Feeney Amendment significantly affects federal prosecutors. While the sentencing system already gives the prosecution considerable discretion, the Feeney Amendment purports to increase its power even more.<sup>101</sup> The rationale for this increase of prosecutorial power in the sentencing process is unfounded and inappropriate.

Traditionally, the federal prosecutor's discretion to determine what charges to bring was counterbalanced in sentencing by judges who determined the actual sentence to be imposed.<sup>102</sup> Trends over the last twenty years have greatly eroded the separation between charging and sentencing, basically shifting both to the prosecution.<sup>103</sup> Prosecutors decide "who to charge, what to charge, what plea to accept and, increasingly, what the sentence, or at least sentencing range, is."<sup>104</sup> Despite their already deeply rooted and overwhelming discretion, prosecutors in U.S. Attorneys' Of-

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attempt to ensure the government is only indicting people after full investigations. See generally *id.* at 797-836 (supporting necessity for complete investigation).

100. See MILLER & WRIGHT, *supra* note 99, at 797-836 (comparing system resources as whole and pertaining to financial resources of individual defendants).

101. For a discussion of the increase in prosecutorial discretion granted by the PROTECT Act, see *infra* notes 102-21 and accompanying text.

102. See Ian Weinstein, *Perspectives on Federal Sentencing Guidelines and Mandatory Sentencing: Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 103 (2003) (tracing history of prosecutorial discretion).

103. See *id.* (noting trend to combine power over charging and sentencing). Three trends occurred which shifted the power both to charge and sentence to the prosecutor, particularly in federal narcotics cases. See *id.* (discussing trends). It has been described that:

The first trend is accelerating overcriminalization. Federal authorities now have jurisdiction over a greater range of conduct and can bring charges from an ever-expanding menu of more specific and serious charges. The second trend is the emergence of mandatory minimum sneering statutes that have turned the power to charge into power to dictate the sentence. Charging and sentencing are much more tightly bound than they were under old law. A third trend, increasingly harsh sentences, has made the increase in discretion more significant because prosecutors not only have more control over cases, but they also wield a bigger stick when they exercise that authority.

*Id.* (detailing trends).

104. Goldman, *supra* note 42, at 4 (expressing disgust with prosecutorial desire for more power over sentencing). The author points out that "[f]our out of five downward departures from the Sentencing Guidelines are requested by prosecutors. But the one out of five that a judge imposes without their agreement bothers them. They want to eliminate or greatly curtail these departures." *Id.* (commenting on prosecution's motivation).

fices and the DOJ lobbied and pressed the Feeney Amendment through Congress to gain more.<sup>105</sup>

Under the new legislation, the attorney general is directed to take certain steps toward aggressively appealing improper downward departures.<sup>106</sup> Accordingly, Attorney General Ashcroft issued a memorandum that outlined the DOJ's policies on downward departures and the appeals process to all federal prosecutors.<sup>107</sup> Ashcroft instructed federal prosecutors to "acquiesce" to departures only in rare occurrences and appeal in far more cases.<sup>108</sup>

Studies show, however, that a prosecutor almost never appeals when a judge gives a defendant a lesser sentence than the Guidelines recommend.<sup>109</sup> The low appeal rate suggests that most prosecutors do not disagree when a judge gives a particular defendant leniency.<sup>110</sup> When these limited appeals are made, the circuit courts reverse the departures granted by the district courts in the majority of cases, signifying that courts are not reluctant to reverse arguable departure decisions.<sup>111</sup>

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105. See Bazelon, *supra* note 73, at B04 (noting Feeney Amendment was driven by prosecutors).

106. See 18 U.S.C. § 3553 (2003) (encouraging efforts to appeal departure decisions).

107. See *Controversial Memo*, *supra* note 31 (discussing Ashcroft Memorandum); see also Memorandum from Ashcroft, *supra* note 45 (detailing appropriate action under PROTECT Act by prosecutors).

108. See Memorandum from Ashcroft, *supra* note 45 ("Government acquiescence in a downward departure should be, as the Guidelines Manual itself suggests, a 'rare occurrenc[e]'. . . . Department attorneys also have an affirmative obligation to *oppose* any sentencing adjustments, including downward departures, that are not supported by the facts and the law."); see also *Controversial Memo*, *supra* note 31 (instructing prosecutors to resist departures); Groner, *supra* note 63, at 1 (discussing Ashcroft's instruction to appeal in far more cases).

109. See Bazelon, *supra* note 73, at B04 (discussing appeal statistics).

110. See *id.* (finding "most prosecutors agree, or at least are not outraged, when a judge thinks a defendant deserves leniency"). Federal prosecutors appealed in only 282 cases from 1991 to 2002, which is less than 0.1% of the time. See *id.* (providing statistics); see also Letter from Bowman, *supra* note 3, at 3 (explaining low appeal rate by prosecutors).

111. See Letter from Bowman, *supra* note 3, at 1 (stating that even under *Koon* standard of review courts were "not shy about reversing legally questionable departures"); see also U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 58 (2002) (providing that in fiscal year 2001, circuit courts reversed departures in more than seventy-five percent of rare cases in which government appealed); Bazelon, *supra* note 73, at B04 (finding "[t]he prosecutors who fought to curtail judges' discretion did so to increase their own"). Studies show that "[i]n 2001, judges nationally 'departed downward' from the Guidelines in only 18 percent of cases or in about 10,000 of 55,000 cases." *Id.* (providing statistics). Further inquiry revealed that "[a]bout 6,000 of [these] departures were in five districts along the Mexican border, where courts often reduce sentences to 'fast track' immigration violations with the assent of the U.S. Attorneys' offices there." *Id.* (explaining in majority of cases departures are encouraged by prosecutors).

Additionally, the new legislation, consistent with the instructions given by Ashcroft, requires prosecutors to report to the DOJ when a judge grants a departure over a prosecutor's objection.<sup>112</sup> As a result, the decision to appeal, which is normally reserved to the prosecutor, is shifted to the DOJ.<sup>113</sup> When most departures come at the behest of the prosecution, it seems injudicious to place this undeserved pressure on judges.<sup>114</sup>

Further, Ashcroft's memorandum strengthens the DOJ's dominion over the practice of plea-bargaining and ultimately discourages its use.<sup>115</sup> While prosecutors request departures based on several factors, the typical request is for the substantial assistance the defendant provides during the course of the investigation.<sup>116</sup> This cooperation provides prosecutors with

112. See 18 U.S.C. § 3553 (2003) (requiring prompt notification by attorneys to DOJ in Washington); see also Memorandum from Ashcroft, *supra* note 45 (instructing prosecutors to report when judges depart); *Controversial Memo*, *supra* note 31 (same). The Ashcroft Memorandum requires the prosecutor to file the report within fourteen days after the judge imposed the adverse departure. See *id.* (providing time limit for reporting).

113. See *Blacklisting Judges*, *supra* note 72, at 10 (discussing shift in decision-making power). One analyst stated:

Under the new law, federal prosecutors will be required in many cases to report when a judge departs downward from the sentence recommended by the federal guidelines . . . . At the very least, the Ashcroft plan would subject federal prosecutors to an unusual, and undesirable, degree of top-down management. Right now, individual prosecutors decide when to appeal a judge's sentence. Mr. Ashcroft seems to want that decision to be a review from Washington. A prosecutor who feels a given judge is consistently handing out sentences that are too mild can certainly let his or her feelings be known to superiors. This new, rigorous and rigid reporting system seems to treat prosecutors as lackeys, and also as some kind of minor civil servants who can be ordered around by the president and his appointees.

*Id.* (expressing criticisms of reporting system).

114. See Letter from Bowman, *supra* note 3, at 3 ("When downward departures are provided, they are almost always made at the behest of prosecutors-belying any suggestion that departures represent some sort of systematic judicial bias against the government or the guidelines' goals of fairer or more consistent sentencing."). In fiscal year 2001, seventy-nine percent of downward departures were requested by the government. See U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2002) (providing data on frequency of departures requested by government). In addition, this reporting requirement creates a judicial "black list" which may intimidate judges and keep them from departing. See *Blacklisting Judges*, *supra* note 72, at 10 (discussing possible effect on judges).

115. See Bowman, *supra* note 19, at A27 (discussing memorandum's effects); see also Memorandum from Ashcroft, *supra* note 45 (detailing proper negotiations). The prosecutor cannot "fact bargain" or be a party to any agreement that provides the sentencing court with less than a "full understanding of all readily provable facts relevant to sentencing." *Id.* at 3 (limiting plea agreements). Plea agreements must not be entered into where the government's right to object is waived. See *id.* (same). Further, prosecutors must not recommend departures unless fully consistent with all sentencing acts. See *id.* (same).

116. See Behre & Ifrah, *supra* note 16, at 8 (discussing powers of prosecutors in sentencing).

important leverage in plea negotiations.<sup>117</sup> Potentially, the Feeney Amendment could considerably alter a prosecutor's ability to make plea agreements with defendants, as departures might be granted less often, thus forcing prosecutors to lose their bargaining tool.<sup>118</sup>

Finally, the legislation requires a formal motion for the defendant to receive an additional one-level reduction for acceptance of responsibility.<sup>119</sup> This reduction was previously granted without motion from the government.<sup>120</sup> These changes by the Feeney Amendment certainly bolster the role of the prosecutor in federal sentencing.<sup>121</sup>

### C. Sentencing Commission

The Feeney Amendment is the most significant attempt to relegate the role of the Sentencing Commission since the Commission's creation.<sup>122</sup> Despite the Commission's role as the very body charged with the responsibility of creating and amending the Guidelines, it was virtually ig-

117. *See id.* (same).

118. *See* Bowman, *supra* note 19, at A27 (discussing potential departures as leverage).

119. *See* 28 U.S.C. § 994(a) (2003) (requiring motion from government); U.S. Sentencing Comm'n, *Sentencing Commission Sends Amendments to Congress*, GUIDELINES 1 (July 2003) [hereinafter *Commission Sends Amendments to Congress*] (listing PROTECT Act amendments).

120. *See* U.S. SENTENCING GUIDELINES § 5K2.0 (2002) (providing means to depart based on acceptance of responsibility); *see also id.* § 3E.1 (limiting departure for particularly defined acceptance of responsibility).

121. Much criticism has been voiced about this increase in power. *See, e.g.*, Berman, *supra* note 50, at 1 (quoting Judge John S. Martin). Judge Martin stated: "I find it most disturbing how much power Congress has ceded to the Justice Department. This is a very dangerous system, when you give the U.S. Attorney that much power and you have taken the discretion that should be in sentencing out of the hands of [federal judges]." *Id.* (contending grant of power to DOJ excessive). Similarly, Justice Kennedy stated:

Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided. The policy gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.

Kennedy Address, *supra* note 1, at 5 (opposing shift of power from judges to prosecutors).

122. *See* Vinegrad, *supra* note 41, at 315 (addressing Feeney Amendment's disregard for Sentencing Commission). One commentator noted, "The Justice Department has embarked on a mission to eviscerate the autonomy of the Sentencing Commission in general. . . . I've never seen this kind of assault on the Sentencing Commission before." Jonathon Groner, *Sentencing Commission Panel Readies for Battle*, N.Y.L.J., Aug. 20, 2003, at 1 (discussing shock of "attack" on Commission). For a further discussion of the Commission's origin, see *supra* notes 17-23 and accompanying text.

nored when Congress created the Feeney Amendment.<sup>123</sup> The Commission was, however, disturbed greatly by the Amendment, with the imposition of a new composition, new requirements and prohibitions.

The process of creating and amending the Guidelines was statutorily granted to the Commission.<sup>124</sup> The Commission has the authority to periodically review and revise the Guidelines after consulting with various players in the criminal justice system.<sup>125</sup> Interested organizations, such as the Federal Public Defenders and the U.S. Probation System, communicate to the Commission any observations, comments or questions pertinent to the maintenance of the Guidelines and, in addition, must submit annual reports making suggestions to the Commission.<sup>126</sup> After voting, the Commission submits the amendments to Congress, accompanied by a statement of the reasons for the changes.<sup>127</sup> Congress blatantly disre-

123. See Vinegrad, *supra* note 41, at 314-15 (describing Congress's avoidance of Commission).

124. See 28 U.S.C. § 994 (2003) (establishing duties of Commission). The Commission "shall promulgate and distribute to all courts of the United States and to the United States Probation System—(1) guidelines, as described in this section, for the use of a sentencing court in determining the sentence to be imposed in a criminal case." *Id.* § 994(a)(1) (emphasis added) (stating authority to create Guidelines); see also *id.* § 994(o) (granting Commission authority to revise Guidelines).

125. See *id.* § 994(o) (providing procedure for revision of Guidelines). The statute states:

The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system.

*Id.* (giving Commission ability to revise Guidelines).

126. See *id.* (noting input from various aspects of criminal justice system important to functioning of Guidelines). The statute provides:

The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

*Id.* (providing procedure for receiving outside input for revising Guidelines).

127. See *id.* § 994(a)(1) (stating vote of at least four members needed); *id.* § 994(p) (setting procedure for submission of amendments to Congress). The Commission must submit these amendments or modifications to previously submitted amendments before the first day of May during a regular session. See *id.* (indicating time frame for submission). In addition, the Commission shall specify a date the amendment shall take effect if approved by Congress. See *id.* (noting effective date should be "no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted").



garded the “predictable structure and reasoned process by which the guidelines have been evaluated, administered and reformed.”<sup>128</sup>

In addition, the composition of the Commission was altered to minimize the participation of federal judges.<sup>129</sup> The Feeney Amendment further prohibits the Commission from making any new downward departure guidelines in the next two years.<sup>130</sup> Concurrently, it ordered the Commission to review the authorized grounds for downward departures and amend the Guidelines and policy statements to ensure the incidence of downward departures is substantially reduced within a 180-day time period.<sup>131</sup> The Commission was required to do this regardless of whether it believed this measure was necessary.<sup>132</sup> The Commission received input from the bench, the bar and other organizations to assist in its deliberations through letters, reports and public hearings.<sup>133</sup> While it could not be predicted how the Commission would handle Congress’s directive or

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128. Vinegrad, *supra* note 41, at 315 (noting destruction of predictable process for changes of Guidelines); *see also* Allenbaugh, *supra* note 4, at 11 (“In contrast [to Congress], an expert sentencing body such as the Commission can continuously, dispassionately and scientifically evaluate sentencing trends, and do so *transparently*, not privately, with input from the public, and proceed to adjust what naturally must be considered an evolving body of law.”); Martin, *supra* note 12, at A31 (“Congress has tried to micromanage the work of the commission and has undermined its efforts to provide judges with some discretion in sentencing or to ameliorate excessively harsh terms.”).

129. *See* 28 U.S.C. § 991 (2003) (changing composition of Commission); Groner, *supra* note 122, at 1 (noting change as “a slap at the commission, which stung many judges”). For a further discussion of the composition change and its effects on the judiciary, *see supra* notes 84-86 and accompanying text.

130. *See* 28 U.S.C. § 994 (limiting Commission). The statute prohibits the Commission from adding any new grounds for downward departures in Part K of Chapter V until May 1, 2005. *See id.* (imposing suspension of promulgating new departures); *see also Commission Sends Amendments to Congress, supra* note 119 (discussing same).

131. *See* 28 U.S.C. § 994 (instructing Commission to evaluate Guidelines). The Act gave the Commission a deadline of October 27, 2003 for this task. *See Commission Sends Amendments to Congress, supra* note 119 (same). Diana E. Murphy, Chair of the Commission, stated, “We certainly need your help with this directive and are publishing related issues for comment and will have a public hearing in late summer.” *Id.* at 2 (inviting assistance in task).

132. *See* Vinegrad, *supra* note 41, at 315 (forcing Commission to make change regardless of necessity).

133. *See* Groner, *supra* note 122, at 1 (noting Commission received input during comment periods and public hearings). For example, on July 31, 2003, the Federal Judges Association, an independent group that represents more than ninety percent of federal district and appeals judges, told the Commission in a comment that the Feeney Amendment should be repealed, stating, “Change can be for the better. These changes were not.” *Id.* In addition, the Practitioners’ Advisory Group, which is composed of criminal defense lawyers, suggested the Commission should take “a modest approach” to cutting back departures. *See id.* (providing input to Congress). The National Association of Criminal Defense Lawyers (NACDL) also asked the Commission to “undertake a comprehensive review of not only downward departures but also of those Guidelines which are so unjust or illsuited [sic] that they lead judges to grant downward departures.” Goldman, *supra* note 42, at 4 (same).

the pressures from the various members of the criminal justice community, Congress formulated a new package of Guideline amendments now awaiting final approval on or before May 1, 2004.<sup>134</sup> The report encourages significant limitations on departures.<sup>135</sup>

## VI. THE PROTECT ACT'S GOOD INTENTIONS

Despite the contention produced by the Feeney Amendment, the PROTECT Act was enacted with some good intentions. The legislation dedicates with full force resources to protect our nation's children.<sup>136</sup> Law enforcement's ability to prevent, investigate and punish violent crimes against children has been comprehensively strengthened.<sup>137</sup>

The PROTECT Act establishes the America's Missing Broadcast Emergency Response Alert bill ("AMBER Alert") to help locate and recover

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134. See generally Admin. Office of the U.S. Courts, *USSC Acts to Reduce Downward Departures*, 35 THIRD BRANCH (Issue 10, Oct. 2003), available at <http://www.uscourts.gov/ttb/oct03ttb/ussc/index.html> [hereinafter *Downward Departures*] (summarizing Commission's report). The president of the NACDL commented that "[t]he Sentencing Commission is composed of decent and conscientious members who . . . are attempting to achieve a rational, workable and fair sentencing structure. They have however, the swords of Congress at their necks." Goldman, *supra* note 42, at 4. One commentator posed an important question: "Will the Sentencing Commission withstand the Congressional pressure to radically reduce the incidence of downward departures and instead promulgate reasoned reforms that preserve judicial discretion?" Vinegrad, *supra* note 41, at 316 (questioning Commission's pending decision).

The report submitted by the Commission to Congress is over 177 pages in length and provides substantial discussions on its decisions and includes several charts and graphs. See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES (Oct. 2003), available at <http://www.ussc.gov/departprt03/departprt03.pdf> (answering Feeney Amendment's directive).

135. See generally *Downward Departures*, *supra* note 134 (summarizing Commission's report). The new package of amendments:

[P]rohibited departures based solely on the existence of plea agreement; prohibited a number of existing grounds for downward departures: acceptance of responsibility, minor role in the offense, gambling addiction, and legally-required restitution . . . ; limited the availability of a departure based on family ties and responsibilities[,] aberrant behavior[,] and similar circumstances; significantly limited both the availability and the extent of departures permissible for certain offenders with substantial criminal history; implemented a directive authorizing limited departures pursuant to early disposition (fast track) programs authorized by the Attorney General and the U.S. Attorney; emphasized throughout the guideline amendment the requirement for courts to state with specificity their reasons for departures in order to comply with the PROTECT Act and to facilitate the USSC's ongoing monitoring of departure practice as well as appellate review.

*Id.*

136. See DOJ, *Fact Sheet: PROTECT Act* (Apr. 30, 2003), at [http://www.usdoj.gov/opa/pr/2003/April/03\\_ag\\_266.htm](http://www.usdoj.gov/opa/pr/2003/April/03_ag_266.htm) [hereinafter *DOJ Fact Sheet*] (providing list of problems and solutions addressed by PROTECT Act).

137. See *id.* (supporting effect of PROTECT Act on law enforcement's ability to combat violence towards children).

missing and abducted children.<sup>138</sup> This bill supports national coordination of state and local AMBER Alert programs.<sup>139</sup> Most importantly, the AMBER Alert system “galvanizes entire communities to assist law enforcement in the time-sensitive search for and safe return of child victims.”<sup>140</sup> National and state broadcast systems report abductions instantly upon receiving notification.<sup>141</sup> Information including any descriptions of the abductor and victim, vehicle model and license plate number, and any other indicators are broadcasted.<sup>142</sup> A national coordinator was appointed and substantial funds were provided to monitor and support AMBER Alert systems.<sup>143</sup> The National Center for Missing and Exploited Children reported that, as of January 27, 2004, over 122 children were recovered since AMBER Alert’s implementation.<sup>144</sup>

Additionally, the Act provides new investigative tools to assist in detecting and stopping child pornography. Law enforcement is now permitted to use wiretaps, an important tool used in crimes involving the Internet to lure children for sexual abuse and trafficking.<sup>145</sup> The Act en-

138. *See id.* (discussing solution to law enforcement having inadequate tools to help locate missing children). The AMBER Alert bill honors Amber Hagerman, who was kidnapped and murdered in Arlington, Texas, in 1996 at age nine. *See Vinegrad, supra* note 41, at 310 (describing that AMBER Alert was “widely supported and provoked little controversy”).

139. *See DOJ Fact Sheet, supra* note 136 (noting coordination of different jurisdictions).

140. *Id.* Over eighty-nine plans exist nationwide. *See id.* (suggesting coordinator working to develop “seamless nationwide child protection system in EVERY state”).

141. *See* Code Amber Found., *The Web’s Amber Alert System*, at <http://codeamber.org/> (last visited Jan. 30, 2004) (providing information on AMBER Alert). While each individual state program establishes its own criteria, the National Center for Missing and Exploited Children suggests three criteria that should be met before an alert is activated. *See id.* (detailing elements of effective system). First, a child abduction is confirmed by law enforcement. *See id.* (listing first criterion). Next, law enforcement must believe that the child is in danger of serious bodily harm or death because of circumstances surrounding the abduction. *See id.* (listing second criterion). Third, enough information concerning the abduction must exist to believe an immediate broadcast would help. *See id.* (listing third criterion). Typically, if the three criteria are met, alert information is put together for public distribution over radio, television and the Internet. *See id.* (demonstrating actions taken if criteria are met).

142. *See id.* (suggesting any information is helpful).

143. *See DOJ Fact Sheet, supra* note 136 (establishing guidance and funds for program). On October 2, 2002, Attorney General John Ashcroft designated Deborah Daniels, Assistant Attorney General for the Office of Justice Programs, to serve as coordinator. *See id.* (appointing coordinator of AMBER Alert). A total of twenty-five million dollars was provided in fiscal year 2004 for the states to build and support the AMBER Alert system. *See id.* (affording monetary support).

144. *See* National Center for Missing and Exploited Children, *AMBER Plan*, at [http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=EN\\_US&PageId=991](http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=EN_US&PageId=991) (last visited Jan. 27, 2004) (updating daily lives saved as result of PROTECT Act).

145. *See id.* (providing example of existing legal tools now used to combat full range of crimes against children). Under prior law, wiretaps were not allowed for

courages Internet service providers to voluntarily report child pornography found on their systems.<sup>146</sup> Further, the PROTECT Act revises and strengthens the prohibition on virtual child pornography, barring any obscene materials depicting children.<sup>147</sup>

Further, prosecutions for crimes against children can no longer be barred by the statute of limitations because the PROTECT Act eliminated the statute of limitations for abductions and physical or sexual abuse of children.<sup>148</sup> Under previous law, the statute of limitations expired when the victim turned twenty-five years old.<sup>149</sup> This limit potentially allowed offenders to go free if law enforcement could not solve the crime in time.<sup>150</sup> Similarly, under prior law, post-release supervision of sex offenders was capped at five years.<sup>151</sup> Now, any term of supervised release can be imposed, including a term of life supervision, which is more appropriate considering the high rate of recidivism for this type of crime.<sup>152</sup>

The benefits of the PROTECT Act could have been achieved without so severely limiting judges' discretion and without such a disruption of the sentencing scheme. The PROTECT Act provides enhanced penalties for alleged offenders. The legislation makes it more difficult for a person accused of a crime against children to attain bail.<sup>153</sup> Increased sentences for

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various crimes associated with luring children over the Internet. *See id.* (describing change in law).

146. *See id.* (encouraging greater reporting of child pornography).

147. *See id.* (discussing child pornography over Internet). The Supreme Court held in *Ashcroft v. Free Speech Coalition* that a federal law that criminalized the possession of "virtual" child pornography was unconstitutional. *See* 535 U.S. 234, 273 (2002) (discussing holding). Virtual child pornography includes materials that depict minors engaging in sexual activity, but uses computer-generated images instead of real children. *See id.* at 241-42 (describing Court's reasoning that virtual pornography does not directly hurt children because children are not used in its creation). This decision made it difficult for prosecutors to prove that child pornography involved the use of real children, and therefore, defendants often successfully avoided conviction by claiming there was reasonable doubt that the computer image involved a real child. *See id.* at 254-55 (recognizing burden on prosecution); *see also DOJ Fact Sheet, supra* note 136 (addressing difficulty of distinguishing virtual pornography from pornography involving actual children).

148. *See* PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, 660 (2003) (codified as amended at 18 U.S.C. § 3283 (2003)) (eliminating statute of limitations). The statute provides that "[n]o statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnapping, of a child under the age of 18 years shall preclude such prosecution during the life of the child." *Id.*

149. *See DOJ Fact Sheet, supra* note 136 (noting former statute of limitations).

150. *See id.* (discussing prior implications of statute of limitations).

151. *See id.* (noting cap on post-release supervision).

152. *See* PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, 651 (codified as amended at 18 U.S.C. § 3583) (eliminating cap on term imposed); *see also DOJ Fact Sheet, supra* note 136 (recognizing child sex offenders usually repeat crime).

153. *See* PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, 660 (codified as amended at 18 U.S.C. § 3142) (making attainment of bail more difficult).

child abductors and child pornographers were also implemented.<sup>154</sup> Despite being perceived as benefits by some, these changes made by the PROTECT Act discordantly curtail the judiciary's authority to reduce sentences and, therefore, force a judge to treat each offender similarly.<sup>155</sup>

## VII. CONCLUSION

Since its original proposal, the Feeney Amendment has been under constant criticism.<sup>156</sup> The disapproval is mostly due to Congress's passage of the Amendment without the benefit of full and balanced information on the use and misuse of downward departures in federal sentencing.<sup>157</sup> The statistics utilized by Congress misrepresented downward departures as overused, indicating a judiciary content in handing out lenient sentences.<sup>158</sup> This legislation passed dubiously without any input or influence by the federal judiciary, the Sentencing Commission or other members of the criminal justice system.<sup>159</sup> While the federal sentencing scheme is not without flaws and the Guidelines are not perfect in their application, the drastic measures taken by the Feeney Amendment are alarming. Accordingly, the opposition comes strong and committed to remedying the effects of this controversial legislation.

### A. *The JUDGES Act: Possibility of Parole from the Feeney Amendment*

On May 20, 2003, the Judicial Use of Discretion to Guarantee Equity in Sentencing Act of 2003 ("JUDGES Act")<sup>160</sup> was introduced in Congress.<sup>161</sup> This bill, supported by several senators, is an effort to repeal the provisions of the PROTECT Act, namely the Feeney Amendment, that do

154. See PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, 652-56 (codified as amended at 18 U.S.C. §§ 111, 2251, 2251A, 2252, 2252A, 2422-23, 1591; 28 U.S.C. §§ 994, 2423, 3559 (2003)) (increasing sentences); see also *DOJ Fact Sheet*, *supra* note 136 (detailing enhanced penalties).

155. See 18 U.S.C. § 3552 (2003) (removing judges' ability to depart downward in cases involving children); 28 U.S.C. § 994 (2003) (same).

156. See Statements of Senators Edward M. Kennedy and Patrick Leahy Supporting the JUDGES Act, *supra* note 16, at 372 ("The Judicial Conference of the United States, the American Bar Association, the U.S. Sentencing Commission, and many prosecutors, defense attorneys, law professors, civil rights organizations, and business groups vigorously oppose [the Feeney Amendment]."). For further discussion on criticism of the Feeney Amendment, see *supra* notes 1-5, 43-44 and accompanying text.

157. For further discussion on the Feeney Amendment's adoption, see *supra* notes 40-44 and accompanying text.

158. For further discussion of statistics considered, see *supra* note 63.

159. For further discussion on the lack of stakeholder input, see *supra* notes 43-44 and accompanying text.

160. H.R. 2213, 108th Cong. (2003).

161. See Vinegrad, *supra* note 41, at 316 (indicating Senator Edward M. Kennedy and Representative John Conyers, Jr. introduced bill).

not specifically deal with the exploitation of children.<sup>162</sup> One senator commented that the Feeney Amendment has “nothing to do with protecting children, and everything to do with handcuffing judges and eliminating fairness in our federal sentencing system.”<sup>163</sup>

If passed, the JUDGES Act would effectively repeal the provisions of the Feeney Amendment.<sup>164</sup> Conceding that the Guidelines and sentencing structure may need reform, the JUDGES Act requires the Commission to report on the incidence of downward departures.<sup>165</sup> The JUDGES Act requires the Commission to submit the report to Congress within 180 days of its passage.<sup>166</sup> The report shall include: a history of departures in the federal sentencing system, an extensive study of variations of departure rates per districts and circuits, a comparison between federal and state departure authority, an analysis of district judges’ grounds for departures, a review of departure appeals and assessments extensively covering departures and their promotion of the federal sentencing scheme.<sup>167</sup> The Commission is also required to hold at least one public hearing to solicit views of interested parties on the topic.<sup>168</sup>

Such a report, had it been done and relied upon, would have been useful to Congress when considering the Feeney Amendment and may have justified its adoption.<sup>169</sup> The goal is that if the JUDGES Act goes into effect, the report will provide Congress with a solid basis for further action.<sup>170</sup> If the report suggests that judges are abusing their discretion and granting too many departures, *then and only then* will Congress be justified

162. See Statements of Senators Edward M. Kennedy and Patrick Leahy Supporting the JUDGES Act, *supra* note 16, at 372 (providing motivation for bill proposal). Additionally, in September 2003, the Judicial Conference voted to support repealing the controversial amendments to the PROTECT Act. See Admin. Office of the U.S. Courts, *Judicial Conference Seeks Restoration of Judges’ Sentencing Authority*, 35 THIRD BRANCH (Issue 10, Oct. 2003), available at <http://www.uscourts.gov/ttb/oct03ttb/restoration/index.html> (setting forth support provisions needing repeal).

163. Statements of Senators Edward M. Kennedy and Patrick Leahy Supporting the JUDGES Act, *supra* note 16, at 372.

164. See H.R. 2213, 108th Cong. § 3 (2003) (repealing Feeney Amendment of PROTECT Act).

165. See *id.* § 2 (requiring report issued by Commission to Congress).

166. See *id.* § 2(a) (setting deadline for report).

167. See *id.* § 2(b)(1)-(10) (providing specific content desired in report).

168. See *id.* § 2(c) (requiring public hearing to solicit views). Recommended views to solicit include those of the federal judiciary, DOJ and the defense bar. See *id.* § 2(c)(2) (naming parties from whom Commission should solicit input).

169. For further discussion of considerations in passing the Sentencing Reform Act, see *supra* note 16.

170. See Statements of Senators Edward M. Kennedy and Patrick Leahy Supporting the JUDGES Act, *supra* note 16, at 373 (noting report will justify subsequent action by Congress).

in limiting that discretion.<sup>171</sup> If it is revealed that judges should be given more discretion, then Congress should so provide.<sup>172</sup>

### B. Impact

Precisely how each actor in the system will respond to the Feeney Amendment or operate under its confines is unpredictable.<sup>173</sup> One unfortunate result has already transpired: good judges are tossing in their gavels and leaving the bench out of frustration.<sup>174</sup> The Honorable John S. Martin, Jr., a federal district judge, announced his resignation only two months after the Feeney Amendment's enactment.<sup>175</sup> The judge remarked:

For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice . . . . I no longer want to be part of our unjust criminal justice system.<sup>176</sup>

Hopefully, this retreat from the bench will be isolated and limited.<sup>177</sup> The message, however, along with those of many other judges voicing their concerns and refusing to be intimidated by the Act, must be clearly heard.<sup>178</sup>

171. See *id.* (showing objective report might direct decreased judicial discretion).

172. See *id.* (same).

173. See Vinegrad, *supra* note 41, at 316 (presuming reactions will result and questioning response by each actor).

174. See Martin, *supra* note 12, at A31 (illustrating judge leaving in response to legislation).

175. See *Controversial Memo*, *supra* note 31 (explaining PROTECT Act caused judge to leave bench).

176. *Id.* Judge Martin pointed out every sentence of imprisonment imposed not only affects the defendant but also the lives of innocent family members. See *id.* (acknowledging other sentencing considerations).

177. See *id.* (hoping response to legislation would not involve judges leaving bench). The Honorable Myron H. Bright of the U.S. Court of Appeals for the Eighth Circuit, in his concurring opinion in *United States v. Flores*, urged district judges to use their opinions to disclose their views about the "injustice in the sentencing decision or decisions [they] are obligated to impose by Congressional mandate and/or the Sentencing Guidelines." 336 F.3d 760, 767 (8th Cir. 2003) (Bright, J., concurring). Chief Judge Marilyn Hall Patel of the U.S. District Court for the Northern District of California commented that "the wisdom of the years and breadth of the experience accumulated by judges and the Sentencing Commission in adjudicating criminal cases and sentencing defendants is chucked for the inexperience of young prosecutors and the equally young think-tank policy makers in the legislative and executive branches." *Controversial Memo*, *supra* note 31 (criticizing PROTECT Act).

178. See Talk Left, *New York's Federal Judges Protest Sentencing Law Changes*, at [http://talkleft.com/new\\_archives/004577.html#004577](http://talkleft.com/new_archives/004577.html#004577) (last visited Apr. 19, 2004) (acknowledging efforts of U.S. Court of Appeals for the Second Circuit Judge John M. Walker Jr. and twenty-six other judges around country issuing statement calling

Additionally, one can only hope that the steady erosion of judges' discretion in federal sentencing will come to a swift conclusion.<sup>179</sup> While only time will reveal its long-term effect, the Feeney Amendment stands as a significant and unwelcome development in federal sentencing law.<sup>180</sup> Unfortunately, sometimes "[j]ustice is incidental to law and order."<sup>181</sup>

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for repeal of Feeney Amendment and encouraging "judges from around the country [to] follow the example of these outspoken New York jurists and 'just say no' to Feeney").

179. See Vinegrad, *supra* note 41, at 316 (offering desire that judges regain discretion).

180. See *id.* (contending legislation disfavored).

181. LAWYERS: JOKES, QUOTES, AND ANECDOTES 264 (Patrick Regan ed., 2001) (quoting former FBI Director J. Edgar Hoover).



