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Skye Phillips

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PROTECT DOWNWARD DEPARTURES: CONGRESS AND THE EXECUTIVE'S INTRUSION INTO JUDICIAL INDEPENDENCE

*Skye Phillips**

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.¹

INTRODUCTION

On October 9, 2003, the U.S. Court of Appeals for the Second Circuit affirmed the conviction and sentence of Jorge Santiago who had pled guilty in district court to criminal possession of a firearm.² In addition, the Second Circuit affirmed the district

* Brooklyn Law School Class of 2005; B.A., Vassar College, 1996. The author would like to thank her parents and the *Journal of Law and Policy* staff for their help and encouragement.

¹ THE FEDERALIST NO. 51, at 268-69 (James Madison) (George W. Carey & James McClellan eds., 2001).

² U.S. v. Santiago, No. 02-1217, 2003 WL 22318785, at *1 (2d. Cir. 2003). The statute prohibits any person convicted of a crime punishable by imprisonment for a term exceeding one year from possessing a firearm. *See* 18 U.S.C. § 922(g)(1) (2004). Under usual circumstances, the maximum penalty for Santiago's crime would be ten years' imprisonment. *Id.* at *3. Santiago had been convicted of two felony assault offenses and a drug trafficking offense,

court's denial of Santiago's request, based on his unique family circumstances, for a downward departure, a process by which judges may adjust a criminal sentence based on aggravating or mitigating circumstances.³

While Santiago's case presents nothing out of the ordinary, his request for a downward departure prompted a lively discussion between the assistant U.S. attorney for the District of Connecticut and the three judge panel hearing his appeal, which contained Judges Guido Calabresi, Roger J. Miner, and Chester J. Straub.⁴ Judge Calabresi told the assistant U.S. attorney, "You're telling me . . . that the system we have set up, that has been set up by Congress, which removes discretion from the judges, has given discretion to your office, as a practical matter."⁵ He continued, "[This] is a fundamental objection to that system, that it takes discretion from independent courts and gives it to dependent prosecutors, who then have to answer to the attorney general and other political figures. But that's the system and it's been held constitutional, and here we are."⁶ The assistant U.S. attorney responded by telling Judge Calabresi that Santiago had accepted a plea bargain based on the advice of his own attorney, but Judge Miner interjected by saying "[i]f we go along with your adversary, you'll probably take our names and report them to the attorney general."⁷ Judge Straub immediately said, "Be sure you spell them correctly. Especially Straub. S-T-R-A-U-B."⁸

The three judge panel's comments were in response to the April 30, 2003 enactment, of the Prosecutorial Remedies and Other

however, when he was sixteen and seventeen years old. *Id.* at *1-2. As a result, the district court sentenced him to a mandatory minimum term of fifteen years. *Id.*

³ *Id.* at 3. *See* 18 U.S.C. § 3553(b) (2004).

⁴ Tom Perrotta, *Panel Laments Lack of Judicial Discretion*, N.Y.L.J., Oct. 28, 2003, at 1.

⁵ *Id.*

⁶ *Id.* The Supreme Court upheld the constitutionality of the current sentencing system in *United States v. Mistretta*, 488 U.S. 361 (1989). *See infra* Part II.B.

⁷ Perrotta, *supra* note 4, at 1.

⁸ *Id.*

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Tools to End the Exploitation of Children Today Act (PROTECT Act).⁹ The purpose of the PROTECT Act is to comprehensively strengthen “law enforcement’s ability to prevent, investigate, prosecute and punish violent crimes committed against children.”¹⁰ The PROTECT Act contains a number of provisions, however, which are not limited to the protection of children and threaten to reduce the input of the judiciary in the uniquely judicial area of criminal sentencing.¹¹ It includes a controversial amendment authored by the Department of Justice (DOJ) and sponsored by Representative Tom Feeney.¹² The Feeney Amendment, as Judges Calabresi, Miner, and Straub noted, threatens to curb judicial discretion in criminal sentencing and may intimidate individual judges in the performance of their traditional duties.¹³ For approximately the past two decades pursuant to Congress’ mandate to the United States Sentencing Commission (Commission), judges have possessed the power to adjust criminal sentences in certain circumstances to prevent unjust punishment.¹⁴ However, the

⁹ PROTECT Act, Pub. L. No. 108-2, 117 Stat. 650 (2003) (codified in scattered sections of 18, 28 and 42 U.S.C.).

¹⁰ Office of Public Affairs Press Releases, Dep’t of Justice, 04-30-03 FACT SHEET PROTECT ACT (April, 2003), at <http://www.usdoj.gov/>.

¹¹ *Recent Legislation—Congress Amends the Sentencing Guidelines in an Attempt to Reduce Disparities*, 117 HARV. L. REV. 751, 753-54 (2003) (discussing the impact of the PROTECT Act on criminal sentencing). The PROTECT Act, among other things, limits the composition of the Sentencing Commission to “not more than three” federal judges. PROTECT Act § 401(n)(1), 28 U.S.C. § 991(a) (2004). It changes the abuse of discretion standard of appellate review to a *de novo* standard. PROTECT Act § 401(d)(2), 18 U.S.C. § 3742(e) (2004). It also imposes new data collection provisions and reporting requirements. PROTECT Act § 401(h), 28 U.S.C. § 994(w) (2004).

¹² Laurie P. Cohen & Gary Fields, *Ashcroft Intensifies Campaign against Soft Sentences by Judges*, WALL ST. J., Aug. 6, 2003, at A1.

¹³ Chief Justice William Rehnquist, Remarks of the Chief Justice at the Federal Judges Association Board of Directors meeting (May 5, 2003), at http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html. Chief Justice William H. Rehnquist noted that the Feeney Amendment “could appear to be an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties.” *Id.*

¹⁴ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2003). “The sentencing judge must select a sentence from within the guideline

PROTECT Act threatens to rein in this check on excessive criminal sentences and disrupt the balance of power in sentencing between the three branches of government.¹⁵

This note argues that judicial discretion is a key component of a just sentencing scheme and deserves protection from the current attack by the Executive and Congress. Part I of this note describes the historical background of judicial discretion in sentencing and the emergence of sentencing disparity which ultimately led to enactment of the Sentencing Reform Act of 1984 (SRA).¹⁶ Part II of this note describes the statutory purposes of the Sentencing Commission and the form and content of judicial discretion under the Sentencing Guidelines (Guidelines) promulgated by the Commission.¹⁷ Additionally, this part describes the Supreme

range. If, however, a particular case presents atypical features, the Act allows the judge to depart from the guidelines and sentence outside the range.” *Id.* Senator Patrick Leahy (D-VT) noted that “[a]s enacted, the Feeney Amendment, substantially reversed provisions allowing Federal judges to depart from sentencing guidelines when justice requires.” 149 CONG. REC. S9115-02, 9115 (daily ed. July 9, 2003) (statement of Sen. Leahy).

¹⁵ 149 CONG. REC. S9115-02, 9115 (daily ed. July 9, 2003) (statement of Sen. Leahy). Senator Leahy stated that the Feeney Amendment “effectively overturned the basic structure of the carefully crafted sentencing guideline system Not only have we compromised the sentencing system, but we have alienated and minimized the effectiveness of our Federal judges” *Id.*

¹⁶ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

¹⁷ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2003).

The Sentencing Reform Act of 1984 changed the course of federal sentencing. Among other things, the Act created the United States Sentencing Commission as an independent agency in the Judicial Branch, and directed it to develop guidelines and policy statements for sentencing courts to use when sentencing offenders convicted of federal crimes. Moreover, it empowered the Commission with ongoing responsibilities to monitor the guidelines, submit to Congress appropriate modifications of the guidelines and recommended changes in criminal statutes, and establish education and research programs. The mandate rested on Congressional awareness that sentencing was a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what

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Court's involvement in the Guidelines and the transfer of discretionary power to federal prosecutors resulting from provisions of the Guidelines. Part III describes the legislative history of AMBER Alert and the Feeney Amendment and argues that Representative Feeney and the DOJ used AMBER Alert to push through Congress their limitation on judicial discretion. This part also argues that disparity in criminal sentencing is partly attributable to the DOJ. Part IV argues that the Feeney Amendment's reduction of judicial discretion in sentencing raises constitutional and fairness issues.

I. HISTORICAL BACKGROUND OF JUDICIAL DISCRETION

Judicial discretion in sentencing has experienced several historical shifts in accordance with the prevailing philosophy of punishment.¹⁸ There are two general philosophies of punishment: retribution or "just desert," and utilitarianism.¹⁹ Utilitarianism encompasses several models of crime control, including deterrence, incapacitation, and rehabilitation.²⁰ Retributivism

motivates and controls criminal behavior.

Id.

¹⁸ Paul W. Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROBS. 528, 529-30 (1958) (discussing the historical evolution of sentencing and parole practices). One commentator noted that "[e]xperience has shown that the ascendancy of any one of these [philosophies of punishment] generally rests primarily on shifts in the political climate, not on some abstract assessment of a given goal's intrinsic value." *Developments in the Law—Alternative Punishments: Resistance and Inroads*, 111 HARV. L. REV. 1967, 1969 (1998) (discussing the way in which punishment is discussed in the United States).

¹⁹ Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 85 n.6 (2003) (discussing the philosophical approach of the federal sentencing guidelines).

²⁰ *Id.* Criminal law textbooks have also treated deterrence, retribution, rehabilitation, and incapacitation as distinct models of punishment. *Developments in the Law—Alternative Punishments: Resistance and Inroads*, *supra* note 18, at 1969. The deterrent model views man as a "pleasure-seeking, pain-avoiding creature" and states that the "objective [of punishment] is to deal with the criminal in such a way as to serve notice on potential offenders. To this

suggests that punishment is a positive moral duty and does not rely upon societal benefits.²¹ In essence, retributivism justifies punishment because an offender deserves it and should suffer in proportion to the offense or wrongdoing; it does not rely on the positive consequences to society stemming from punishment.²² On the other hand, utilitarianism focuses on the functions of punishment with regard to the total maximization of benefits to the community.²³ Thus, the rehabilitative approach focuses on the “individualization of punishment and working with the individual in such a way that he will be able to make a satisfactory adjustment, or at least a non-criminal adjustment, once he is released from the authority of the state.”²⁴ Judicial discretion evolved into its most expansive form under the rehabilitative

end the focus is on the assignment of that appropriate penalty, no more, no less, which will deter potential offenders from committing crimes.” THEORIES OF PUNISHMENT 6-7 (Stanley E. Grupp ed., 1971). The incapacitation based system “implicitly gives up on rehabilitative possibilities and on the possibilities of deterring the specific criminals to which it is applied. It prevents crime in only one way: by preventing the specific criminal from committing crimes during the duration of his sentence.” Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 464 (1997) (discussing models of crime control).

²¹ Andrew R. Strauss, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1558 (2002) (discussing the various models of punishment).

²² Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 859-60 (2002) (discussing the retributive theory of punishment). The retributivist “defends the desirability of a punitive response to the criminal by saying that the punitive reaction is the pain the criminal deserves, and that it is highly desirable to provide for an orderly, collective expression of society’s natural feeling of revulsion toward and disapproval of criminal acts.” THEORIES OF PUNISHMENT, *supra* note 20, at 5.

²³ Strauss, *supra* note 21, at 1556-57. In describing the utilitarian theory of punishment, Jeremy Bentham, an English philosopher and social reformer, wrote that “[t]he general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words to exclude mischief.” THE COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J. H. Burns & H. L. A. Hart eds., 1996).

²⁴ THEORIES OF PUNISHMENT, *supra* note 20, at 8.

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model, which emerged in the latter half of the nineteenth century.²⁵

A. Judicial Discretion Prior to the Sentencing Guidelines

Prior to this period, however, judicial discretion had a less significant position in sentencing.²⁶ From the War of Independence until the 1870s, retribution was the primary purpose of incarceration.²⁷ Discretion over criminal sentencing resided largely with the legislature.²⁸ In the early 1800s judges began to receive increased discretion but were still required to sentence within a prescribed range of punishment.²⁹ The Supreme Court noted that during this period “the excessive rigidity of the [mandatory or fixed sentence] system’ soon gave way in some jurisdictions . . . to a scheme permitting the sentencing judge . . . to consider aggravating and mitigating circumstances surrounding an offense, and, on that basis, to select a sentence within a *range* defined by the legislature.”³⁰ Thus, while Congress established the sentence

²⁵ Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 894 (1990) (discussing the historical shifts in sentencing goals).

²⁶ *Id.* at 892-93.

²⁷ *Id.* at 893.

²⁸ *Id.* at 892. Chief Justice Burger noted that “[i]n the early days of the Republic, when imprisonment had only recently emerged as an alternative to the death penalty, confinement in public stocks, or whipping in the town square, the period of incarceration was generally prescribed with specificity by the legislature.” *United States v. Grayson*, 438 U.S. 41, 45 (1978). The assertion that the legislature had control over criminal sentencing, however, may be open to debate. Two commentators have noted that proponents of mandatory sentencing guidelines are disinclined to acknowledge that federal judges have been entrusted with broad sentencing discretion since the beginning of the Republic. KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES AND THE FEDERAL COURTS* 9 & 197 n.1 (1998). For example, Congress enacted a criminal statute in 1789 which prescribed that upon conviction for bribery of a customs official, the defendant “shall . . . be punished by fine or imprisonment, or both, *in the discretion of the court* . . . , so as the fine shall not exceed one thousand dollars, and the term of imprisonment shall not exceed twelve months.” *Id.* at 9 (emphasis added).

²⁹ Nagel, *supra* note 25, at 892.

³⁰ *Grayson*, 438 U.S. at 45-46 (quoting Paul W. Tappan, *Sentencing Under*

for federal crimes and controlled the scope of judicial discretion, the fixed penalty structure gave way to increased judicial discretion.³¹

In the 1870s, the rehabilitative model of punishment began to take hold.³² The rehabilitative model would fundamentally reshape criminal sentencing for approximately the next one hundred years.³³ This model incorporated the idea that “[t]he supreme aim of prison discipline is the reformation of criminals and not the infliction of vindictive suffering.”³⁴ The Supreme Court observed in 1949 that “[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”³⁵ In conjunction with the adoption of the rehabilitative model was the

the Model Penal Code, 23 LAW & CONTEMP. PROBS. 528, 529 (1958) (discussing the historical evolution of sentencing and parole practices)). In addition, the Court explained that “[n]evertheless, the focus remained on the crime: Each particular offense was to be punished in proportion to the social harm caused by it and according to the offender’s culpability. The purpose of incarceration remained, primarily, retribution and punishment.” *Grayson*, 438 U.S. at 46 (citations omitted).

³¹ Nagel, *supra* note 25, at 893.

³² *Id.*

³³ *Grayson*, 438 U.S. at 46. The Supreme Court noted:

Approximately a century ago, a reform movement asserting that the purpose of incarceration, and therefore the guiding consideration in sentencing, should be rehabilitation of the offender, dramatically altered the approach to sentencing. A fundamental proposal of this movement was a flexible sentencing system permitting judges and correctional personnel, particularly the latter, to set the release date of prisoners according to informed judgments concerning their potential for, or actual, rehabilitation and their likely recidivism. Indeed, the most extreme formulations of the emerging rehabilitation model, with its “reformatory sentence,” posited that “convicts [regardless of the nature of their crime] can never be rightfully imprisoned except upon proof that it is unsafe for themselves and for society to leave them free, and when confined can never be rightfully released until they show themselves fit for membership in a free community.”

Id. at 46.

³⁴ Nagel, *supra* note 25, at 893.

³⁵ *Williams v. New York*, 337 U.S. 241, 248 (1949).

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development of indeterminate sentencing, which embodied the notion that a prisoner should be imprisoned until he had reformed.³⁶ Judges exercised very broad discretion under this model as the legislature delegated more sentencing responsibility to the judiciary.³⁷ Although statutes specified the penalties for crimes, the sentencing judge had wide discretion to decide whether the offender should be incarcerated, the length of incarceration, or whether probation or a fine should be imposed.³⁸

Judges were not alone in exercising broad discretion within the context of indeterminate sentencing.³⁹ In 1910, Congress created the United States Parole Board, located within the Executive Branch, to determine the actual release date of federal prisoners.⁴⁰ Reflecting the rise of progressive beliefs with regard to criminal sentencing, parole officers determined when prisoners were

³⁶ Nagel, *supra* note 25, at 893-94.

³⁷ *Id.*

³⁸ *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

³⁹ *United States v. Grayson*, 438 U.S. 41, 46 (1978). Indeterminate sentencing involved “a flexible system permitting judges and correctional personnel, particularly the latter, to set the release date of prisoners according to informed judgments concerning their potential for, or actual, rehabilitation and their likely recidivism.” *Id.* Indeterminate sentencing involved the delegation of authority to parole boards. Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 *LAW & CONTEMP. PROBS.* 99, 112 (2003) (discussing the emergence of parole in the twentieth century). The Supreme Court has noted that both indeterminate sentencing and parole were “based on concepts of the offender’s possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society.” *Mistretta*, 488 U.S. at 363. The system of indeterminate sentencing “required the judge and the parole officer to make their respective sentencing and release decisions upon their own assessments of the offender’s amenability to rehabilitation.” *Id.* at 363.

⁴⁰ William J. Powell & Michael T. Cimino, *Prosecutorial Discretion under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?*, 97 *W. VA. L. REV.* 373, 378 (1995) (discussing twentieth-century federal indeterminate sentencing). See An Act to Parole United States Prisoners, ch. 387, §§ 2-10, 36 Stat. 819 (1910) (codified as amended at 18 U.S.C. §§ 4202-4208 (2000)) (repealed 1984).

rehabilitated and could reenter society.⁴¹ Prisoners had to serve at least one third of the nominal sentence, however, unless the judge at the time of sentencing determined the offender was immediately eligible for parole.⁴² Parole officers were viewed as experts who would be able to make release decisions without succumbing to the “politics of legislatures” or “the emotions of courtrooms.”⁴³ Implicit to both systems was the ideal of individualized sentencing.⁴⁴ Thus, the judge and the parole officer exercised broad discretion under this system.⁴⁵

B. Sentencing Disparity and the Sentencing Reform Act of 1984

For over one hundred years prior to the adoption of the Sentencing Reform Act, this system was in place.⁴⁶ In the latter half of the twentieth century, a growing discontent with this system emerged.⁴⁷ Beginning in the late 1960s, reform of the criminal *sentencing* system became a priority.⁴⁸ A major reason for the

⁴¹ Jenia Iontcheva, *Jury Sentencing As Democratic Practice*, 89 VA. L. REV. 311, 326 (2003) (discussing the professionalization of the law of punishment).

⁴² See An Act to Parole United States Prisoners, ch. 387, §§ 2-10, 36 Stat. 819 (1910) (codified as amended at 18 U.S.C. §§ 4202-4208 (2000)) (repealed 1984).

⁴³ STITH & CABRANES, *supra* note 28, at 21.

⁴⁴ *Williams*, 337 U.S. at 247. Justice Black explained in 1949 that the “prevalent modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.” *Id.*

⁴⁵ *Mistretta*, 488 U.S. at 363.

⁴⁶ Nagel, *supra* note 25, at 894.

⁴⁷ S. REP. NO. 98-225, at 38 (1983).

⁴⁸ Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 294-95 (1993) (discussing the background of reform leading to the enactment of the Sentencing Reform Act of 1984). Prior to this point, reform efforts focused on revision of the substantive criminal law and criminal procedure. STITH & CABRANES, *supra* note 28, at 27-29. The American Law Institute reformed the substantive criminal law when it drafted the Model Penal Code in 1962. *Id.* at

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discontent with the rehabilitative model was its subjectivity, in that it led to widespread sentencing disparity.⁴⁹ One problem was the difficulty in determining whether or when a prisoner was rehabilitated.⁵⁰ Another was that individual judges, absent statutory guidance, applied their own notions of the purposes of sentencing.⁵¹ Sentencing disparity, Congress recognized, contradicts notions of fairness and certainty.⁵² For example, as of 1983, “the average federal sentence for bank robbery was eleven years, but in the northern district of Illinois it was only five and one-half years.”⁵³ Congress deemed that parole officers and judges

29. During the 1960s, the Supreme Court implemented a variety of new procedural restraints. *Id.* at 27 & 205 n.111. In addition, Congress established the National Commission on Reform of Federal Criminal Laws (the “Brown Commission”) to propose a revision of federal criminal provisions. Feinberg, *supra*, at 294. One commentator noted that “by proposing consistent, rational, and fair classification of crimes, both efforts [the Model Penal Code and the Brown Commission] paved the way for bolder, more comprehensive, sentencing reform.” *Id.*

⁴⁹ S. REP. NO. 98-225, at 38 (1983). Congress explained:

One offender may receive a sentence of probation, while another—convicted of the very same crime and possessing a comparable criminal history—may be sentenced to a lengthy term of imprisonment. Even two such offenders who are sentenced to terms of imprisonment for similar offenses may receive widely differing prison release dates; one may be sentenced to a relatively short term and be released after serving most of the sentence, while the other may be sentenced to a relatively long term but be denied parole indefinitely.

Id.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ S. REP. NO. 98-225, at 41 (1983). A study was performed for the Department of Justice in which:

208 active federal judges specified the sentences they would impose in 16 hypothetical cases, 8 bank robbery cases, and 8 fraud cases. In only 3 of the 16 cases was there a unanimous agreement to impose a prison term. Even where most judges agreed that a prison term was appropriate, there was a substantial variation in the lengths of prison terms recommended. In one fraud case in which the mean prison term was 8.5 years, the longest term was life in prison. In another case the

were responsible for sentencing disparity.⁵⁴

The widespread sentencing disparity stemming from discretion in the criminal system led to increasing criticism from academic circles and the political left during this period.⁵⁵ The most powerful voice for reform of judicial sentencing discretion came from Judge Marvin E. Frankel, who served as a United States District Judge in New York City.⁵⁶ Judge Frankel wrote a book describing the unchecked sentencing authority of judges as “terrifying and intolerable for a society that professes devotion to rule of law” and professed the view that “arbitrary cruelties [were] perpetrated daily.”⁵⁷ He called for the creation of an administrative

mean prison term was 1.1 years, yet the longest prison term recommended was 15 years.

Id. at 44 (footnote omitted).

⁵⁴ S. REP. NO. 98-225, at 38 (1983). The Senate Report observed:

These disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any statutory guidance or review procedures to which courts and parole boards might look.

Id. The SRA abolished parole. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2003). The introduction to the Guidelines noted that “[t]he Act requires the offender to serve virtually all of any prison sentence imposed, for it abolishes parole and substantially restructures good behavior adjustments.”

Id.

⁵⁵ See STITH & CABRANES, *supra* note 28, at 33-34. For example, Professor Kenneth Culp Davis of the University of Chicago Law School examined the discretionary authority of a wide variety of actors in the criminal sentencing scheme, including police, prosecutors, judges, and parole officials. *Id.* at 33. See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY. The American Friends Service Committee, a Quaker organization devoted to service, development, social justice, and peace programs throughout the world, called for limits on judicial discretion and adoption of determinate sentencing. STITH & CABRANES, *supra* note 28, at 34. See AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE. A REPORT ON CRIME AND PUNISHMENT IN AMERICA, PREPARED FOR THE AMERICAN FRIENDS SERVICE COMMITTEE (1971).

⁵⁶ STITH & CABRANES, *supra* note 28, at 35.

⁵⁷ *Id.* at 35-36 (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER).

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sentencing commission with the purpose of creating “binding guides” on federal courts.⁵⁸ Judge Frankel’s reform proposals were taken up by Senator Edward M. Kennedy, a Democrat from Massachusetts.⁵⁹

In 1975, Senator Kennedy introduced legislation to establish a Federal Sentencing Commission with the mandate of creating sentencing guidelines to redress sentencing disparity.⁶⁰ It was not until nine years later that President Ronald Reagan signed the Sentencing Reform Act of 1984.⁶¹ The passage of the Sentencing Reform Act occurred in conjunction with a growing public fear of crime and a determination by Congress and President Reagan to “crack down” on criminals.⁶² The passage of the Sentencing Reform Act made explicitly clear “the rejection of the rehabilitative model and goals upon which past sentencing decisions had been made, in favor of the new bases for sentencing—to punish, to promote respect for the law, to deter, and to incapacitate.”⁶³ Thus, the rehabilitative model began its descent from its position as the philosophical underpinning of criminal sentencing.⁶⁴

⁵⁸ *Id.* at 36. A “detailed chart or calculus [would] be used . . . in weighing the many elements that go into a sentence . . . that would include, wherever possible, some form of numerical or other objective grading.” *Id.*

⁵⁹ Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 223 (1993) (discussing the legislative history of the Sentencing Reform Act of 1984).

⁶⁰ *Id.* at 224-25.

⁶¹ *Id.* (analyzing the legislative history and political compromises which ultimately led to the enactment of the Sentencing Reform Act of 1984). *See also* Feinberg, *supra* note 48, at 298-304. Beginning in 1975, Senator Kennedy introduced versions of his reform bill in the next four Congresses before it was passed in 1984. STITH & CABRANES, *supra* note 28, at 38 & 208 n.4.

⁶² *See* Stith & Koh, *supra* note 59, at 258-59, 262.

⁶³ Nagel, *supra* note 25, at 928.

⁶⁴ *Developments in the Law—Alternative Punishments: Resistance and Inroads*, *supra* note 18, at 1969. It has been noted that “[w]hether because of a failure in implementation or a deeper psychological shift in attitude towards criminals in the wake of rising crime rates, the rehabilitative model went into decline in the mid-1970s.” *Id.*

II. JUDICIAL DISCRETION AND THE SENTENCING GUIDELINES

The creation of the new sentencing scheme begged the question of what role judicial discretion would play under the Guidelines. When it enacted the SRA, the main intent of Congress with regard to judicial discretion was to ensure that judges had a structure within which to operate while not abrogating their ability to depart downward in appropriate cases: “The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.”⁶⁵ The Supreme Court has also emphasized the uniquely valuable role of the Judicial Branch in criminal sentencing.⁶⁶ Perhaps one of the unintended consequences of the Guidelines, however, is to increase the prosecutorial discretion in the criminal sentencing system.

A. Congress Creates the United States Sentencing Commission

Congress created the United States Sentencing Commission under the Sentencing Reform Act of 1984.⁶⁷ It established the Commission “as an independent commission” located in the Judicial Branch.⁶⁸ The President appoints the Commission’s seven voting members by and with the advice and consent of the Senate.⁶⁹ At the time of its creation, the Commission was composed of “at least three” federal judges recommended to the President by the Judicial Conference of the United States.⁷⁰ The

⁶⁵ S. REP. NO. 98-225, at 52 (1983).

⁶⁶ *See* *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (explaining that judicial contribution to sentencing is appropriate because of the “experience and expertise” of that branch).

⁶⁷ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

⁶⁸ 28 U.S.C. § 991(a) (2004).

⁶⁹ *Id.*

⁷⁰ 28 U.S.C. § 991(a) (1984). Under the provisions of the PROTECT Act, the composition of the Sentencing Commission is now limited to “not more than

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SRA transferred much of the sentencing authority previously exercised by the judiciary to the Sentencing Commission.⁷¹ Even though Congress delegated broad authority to the Commission to create the Sentencing Guidelines, it provided detailed instructions with regard to the rationalization of the sentencing process.⁷²

Congress authorized the Sentencing Commission to establish sentencing policies and practices for the federal criminal justice system.⁷³ The SRA established that the purposes of the sentence imposed were to (1) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.⁷⁴ These purposes respectively are retribution,

three” federal judges. PROTECT Act, Pub. L. No. 108-2, § 401(n)(1), 117 Stat. 650 (2003) (codified at 28 U.S.C. § 991(a)).

⁷¹ Powell & Cimino, *supra* note 40, at 380.

⁷² U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2003).

⁷³ 28 U.S.C. § 991(b)(1) (2001). The Sentencing Reform Act of 1984 states:

The purposes of the United States Sentencing Commission are to—(1) establish sentencing policies and practices for the Federal criminal justice system that—(A) assure the meeting of the purposes of sentencing as set forth in [the Act]; (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and (2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in [the Act].

Id.

⁷⁴ 18 U.S.C. § 3553(a)(2)(A)-(D) (2004).

deterrence, incapacitation, and rehabilitation.⁷⁵ The SRA required judges to consider these purposes of sentencing when imposing a sentence.⁷⁶ In particular, Congress instructed the Sentencing Commission to create categories of offense behavior and offender characteristics.⁷⁷ For example, an offense behavior category might consist of “bank robbery/committed with a gun/\$2500 taken,” and an offender characteristic category might be an “offender with one prior conviction not resulting in imprisonment.”⁷⁸ Congress required the Commission to prescribe guidelines ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories.⁷⁹

In addition, Congress instructed the Commission as to the form and content of judicial discretion under the Guidelines.⁸⁰ The SRA provides that a court must impose a sentence within the applicable guideline range unless “the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a

⁷⁵ Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, The False Trail Of Uniformity And Process, And The Way Back Home*, 54 S.C. L. REV. 649, 654 (2003) (describing the goals of criminal sentencing).

⁷⁶ 18 U.S.C. § 3553(a)(2)(A)-(D).

⁷⁷ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2003). The background commentary to the U.S. Sentencing Guidelines notes that the Act “delegates to the Commission broad authority to review and rationalize the federal sentencing process. The statute contains many detailed instructions as to how this determination should be made, but the most important of them instructs the Commission to create categories of offense behavior and offender characteristics.” *Id.* See the editorial note of U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2003) for the original text of the introduction to the Sentencing Guidelines, which this section cites.

⁷⁸ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt.

⁷⁹ *Id.*

⁸⁰ *Id.* The introduction to the Sentencing Guidelines noted that “[p]ursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure.” *Id.*

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sentence different from that prescribed.”⁸¹ Pursuant to this approach, the introduction to the Sentencing Guidelines notes that the Sentencing 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.”⁸² If a case falls outside the “heartland” of the applicable guidelines, the court possesses the power to grant an upward or downward departure.⁸³ The Sentencing Commission provided guidance to courts with regard to the departure power by listing encouraged and discouraged bases for departure.⁸⁴ The Commission noted, however, that it would be impossible to predict in advance all of the bases for downward departures.⁸⁵ Thus, the Guidelines provide courts with residual authority to depart downward in appropriate circumstances.⁸⁶

Congress considered several different sentencing models to

⁸¹ 18 U.S.C. § 3553(b) (2003).

⁸² U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2002).

⁸³ *Id.* The Sentencing Guidelines note that “[w]hen 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.*

⁸⁴ *Koon v. United States*, 518 U.S. 81, 94 (1996). For example, “[i]f the victim’s wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense.” U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (2003). The Guidelines list several factors that the court cannot take into account as grounds for departure. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2002). For example, grounds that are not relevant in the determination of a sentence are race, sex, national origin, creed, religion, and socio-economic status. U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2003).

⁸⁵ U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2002). “Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis.” *Id.*

⁸⁶ Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT. R. 310 (Vera Inst. Just.) (June 2003), at 2003 WL 22208841.

guide the Sentencing Commission in formulating the Guidelines.⁸⁷ At one end of the spectrum, Congress considered making the sentencing guidelines advisory only.⁸⁸ At the other end, Congress considered a strict determinate sentencing model that would virtually remove judicial discretion.⁸⁹ Ultimately, Congress directed the Sentencing Commission to adopt a “mandatory guideline system” because it would be “successful in reducing sentence disparities while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case.”⁹⁰ Even though the creation of federal sentencing guidelines reduced judicial discretion, Congress continued to view such discretion as a fundamental component of a viable sentencing scheme.⁹¹

B. *The Supreme Court and the Sentencing Guidelines*

In 1989, the Supreme Court upheld the constitutionality of the SRA in *Mistretta v. United States*.⁹² The petitioner, who was convicted of selling cocaine, argued that Congress granted the Commission excessive legislative discretion violating the constitutional non-delegation doctrine and that the composition and location of the Commission violated separation of powers principles.⁹³ The Court upheld the SRA’s delegation of authority to the Sentencing Commission to establish sentencing policy because the SRA set forth sufficient policies and standards to guide the Commission’s formulation of the Guidelines.⁹⁴

⁸⁷ *United States v. Mistretta*, 488 U.S. 361, 367 (1989).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ S. REP. NO. 98-225, at 51 (1983). “The sentencing guidelines system will not remove all of the judge’s sentencing discretion. Instead, it will guide the judge in making his decision on the appropriate sentence.” *Id.*

⁹² *Mistretta v. United States*, 488 U.S. 361, 410 (1989). Petitioner and another were indicted in the United States District Court for the Western District of Missouri on three counts in a cocaine sale. *Id.* at 370.

⁹³ *Id.* at 370.

⁹⁴ *Id.* at 379. See 28 U.S.C. § 994(a) (2001) for the SRA text delegating authority to the Commission. See *Mistretta*, 488 U.S. at 371-79 for the Court’s entire analysis of *Mistretta*’s delegation argument.

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The Court then turned to *Mistretta*'s separation of powers argument.⁹⁵ The Court began its analysis by affirming that the principle of separated powers is essential to the maintenance of governmental structure.⁹⁶ The Court observed that the system of checked power, contained within the separation of powers principle, provides security against the tendency of each of the separate Branches to aggrandize power at the expense of the others.⁹⁷ The practical application is that "provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch," violate separation of powers principles.⁹⁸ The Court observed that Congress' creation of the Sentencing Commission was constitutional provided that Congress had not vested powers in the Commission that are "more appropriately performed by the other Branches" or "that undermine the integrity of the Judiciary."⁹⁹

The petitioner argued that the SRA violated both of these constitutional principles because the SRA required individual

⁹⁵ *Mistretta*, 488 U.S. at 380.

⁹⁶ *Id.* at 380. The Court wrote that it has "consistently given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Id.* The Court further noted that the "Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct." *Id.* Indeed, James Madison defended the position of the Framers that the three Branches should not be hermetically sealed by observing that separation of powers "d[oes] not mean that these [three] departments have no *partial agency* in, or no *controll* over the acts of each other," but rather "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." THE FEDERALIST NO. 47, at 251 (James Madison) (George W. Carey & James McClellan eds., 2001).

⁹⁷ *Mistretta*, 488 U.S. at 381-82. The Court observed that "this concern of encroachment and aggrandizement . . . has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" *Id.* at 382 (citations omitted).

⁹⁸ *Id.* at 382.

⁹⁹ *Id.* at 385.

Article III judges to exercise legislative authority through the creation of sentencing rules and eroded the integrity and independence of the Judiciary by requiring Article III judges to sit on the Commission.¹⁰⁰ With regard to Mistretta's first argument, the Court held that there was no *per se* rule against judicial rulemaking.¹⁰¹ Congress may delegate nonadjudicatory functions to the Judicial Branch that do not encroach upon the powers of another Branch and comport to the central mission of the Judiciary.¹⁰² Indeed, the Court suggested that the rulemaking duties of the Sentencing Commission were particularly appropriate for the Judicial Branch.¹⁰³ The Court likened the role of the

¹⁰⁰ *Id.* at 383-84. With regard to the first claim, Petitioner specifically argued that the SRA unconstitutionally required the Judicial Branch to exercise not only judicial authority but legislative authority in the creation of sentencing policy. *Id.* at 383. Petitioner argued that "rulemaking authority" may be exercised by Congress or delegated by Congress to the Executive, but may not be delegated or exercised by the Judicial Branch. *Id.* Petitioner's second claim specifically argued that Congress threatened the independence of the Judiciary by requiring that the judges on the Commission share their authority with non-judges and by giving the President appointment and removal power over the Commission's members. *Id.* at 384. Petitioner argued further that "Congress, consistent with the separation of powers, may not upset the balance among the Branches by co-opting federal judges into the quintessentially political work of establishing sentencing guidelines, by subjecting those judges to the political whims of the Chief Executive, and by forcing judges to share their power with nonjudges." *Id.* at 384.

¹⁰¹ *Id.* at 386. The Court noted that "we specifically have held that Congress, in some circumstances, may confer rulemaking authority on the Judicial Branch." *Id.* See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941) (in which the Court declared that Congress has power to "regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States").

¹⁰² *Id.* at 388. The Court noted that, by established practice, it had recognized Congress' power to create entities, such as the Judicial Conference of the United States, comprised of judges and non-judges, which do not exercise judicial power in the constitutional sense of deciding cases and controversies, but share the common purpose of providing for the fulfillment of responsibilities that are properly the province of the Judiciary. *Id.* at 388-89.

¹⁰³ *Id.* at 380-90. The Court stated:

Thus, although the judicial power of the United States is limited by

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Commission in promulgating the Guidelines to the accepted role of the Supreme Court in establishing rules of civil and criminal procedure under various enabling Acts.¹⁰⁴ Thus, the Court upheld the location of the Commission in the Judicial Branch.¹⁰⁵

The Court also upheld the composition of the Sentencing Commission.¹⁰⁶ The Court determined that the SRA did not undermine the integrity of the Judicial Branch by mandating that the Commission contain “at least three” federal judges because the SRA does not conscript judges to serve on the Commission¹⁰⁷ and the Constitution does not prevent Article III judges from participating in certain extrajudicial activities such as serving on

express provision of Article III to “Cases” and “Controversies,” we have never held, and have clearly disavowed in practice, that the Constitution prohibits Congress from assigning to courts or auxiliary bodies within the Judicial Branch administrative or rulemaking duties that, in the words of Chief Justice Marshall, are “necessary and proper . . . for carrying into execution all the judgments which the judicial department has power to pronounce.” Because of their close relation to the central mission of the Judicial Branch, such extrajudicial activities are consonant with the integrity of the Branch and *are not more appropriate for another Branch*.

Id. (citations omitted) (emphasis added).

¹⁰⁴ *Id.* at 391. The Court noted: “Such guidelines, like the Federal Rules of Criminal and Civil Procedure, are court rules—rules, to paraphrase Chief Justice Marshall’s language in *Wayman*, for carrying into execution judgments that the Judiciary has the power to pronounce.” *Id.* Petitioner argued in response that the analogy between the Guidelines and the rules of procedure is flawed because creating sentencing policy is substantive in nature. *Id.* at 392. The Court responded that separation of powers analysis does not turn on the labeling of an activity but rather on the “unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.” *Id.* at 393. First, the Court explained that because Congress vested the power to create sentencing guidelines in an independent agency, rather than a court, Congress did not combine legislative and judicial power within the Judicial Branch. *Id.* at 394. Second, locating the Sentencing Commission in the Judicial Branch did not inappropriately accumulate power in that Branch because prior to the passage of the Act, the Judicial Branch “decided precisely the questions assigned to the Commission.” *Mistretta*, 488 U.S. at 395.

¹⁰⁵ *Mistretta*, 488 U.S. at 395.

¹⁰⁶ *Id.* at 397-412.

¹⁰⁷ *Id.* at 405-06.

the Commission.¹⁰⁸ The Court affirmed that the Judiciary's involvement in the "political work" of the Commission would not undermine public confidence in the disinterestedness of the Judicial Branch because "[j]udicial contribution to the enterprise of creating rules to limit the discretion of sentencing judges does not enlist the resources or reputation of the Judicial Branch in either the legislative business of determining what conduct should be criminalized or the executive business of enforcing the law."¹⁰⁹ Indeed, the Court affirmed the importance of having a "significant judicial voice" on the Commission.¹¹⁰ Finally, the Court held that the President's removal power does not threaten judicial independence because a federal judge, absent impeachment, would continue to have tenure under the "good behavior" provision of the Constitution.¹¹¹ Thus, the Supreme Court held that Congress neither unconstitutionally delegated legislative power to the Sentencing Commission nor violated the separation of powers doctrine.¹¹²

Issues surrounding the SRA reached the Court again in *Koon v. United States*.¹¹³ The Supreme Court explicitly approved the "heartland" approach contained in the Sentencing Guidelines and the ability of judges to depart on non-specified grounds.¹¹⁴ *Koon* concerned the prosecution of the Los Angeles Police Department officers who were sentenced to thirty months imprisonment for beating Rodney King.¹¹⁵ The officers appealed their convictions

¹⁰⁸ *Id.* at 404.

¹⁰⁹ *Id.* at 407.

¹¹⁰ *Id.* at 408.

¹¹¹ *Id.* at 410. See U.S. CONST. art. III, §1.

¹¹² *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

¹¹³ 518 U.S. 81 (1996).

¹¹⁴ *Vinegrad*, *supra* note 86. See *supra* text accompanying notes 82-83 (discussing the "heartland" approach).

¹¹⁵ *Koon*, 518 U.S. at 86-90. The District Court departed downward eight levels. *Id.* at 85. The Court of Appeals for the Ninth Circuit rejected the District Court's rulings, and, over the published objection of nine of its judges, declined to rehear the case en banc. *Id.* The Supreme Court granted certiorari to determine the appropriate standards of appellate review of a district court's decision to depart from the Guidelines. *Id.*

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and the Government appealed the sentences.¹¹⁶ The Court observed that district judges must impose a sentence within the guideline range if the case is an “ordinary” one.¹¹⁷ While directing sentencing courts to bear in mind the Commission’s expectations that departures on non-specified grounds will be “highly infrequent,” the Court affirmed the ability of judges to depart outside the heartland in appropriate circumstances.¹¹⁸

In addition, the Court addressed the appropriate standard of review in departure cases.¹¹⁹ The SRA established appellate review in criminal sentencing.¹²⁰ Prior to *Koon*, the SRA directed appellate courts to accept a sentencing judge’s findings of fact unless they were “clearly erroneous” and to give “due deference” to the judge’s application of the Guidelines to the facts.¹²¹ The Sentencing Commission put in place appellate mechanisms to provide recourse to the defendant for an upward departure or to the

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 92.

¹¹⁸ *Id.* at 96. The Supreme Court explained that a sentencing court considering a downward departure should ask four questions:

- 1) What features of this case, potentially, take it outside the Guidelines’ “heartland” and make of it a special, or unusual, case?
- 2) Has the Commission forbidden departures based on those features?
- 3) If not, has the Commission encouraged departures based on those features?
- 4) If not, has the Commission discouraged departures based on those features?

Id. at 95.

¹¹⁹ *Id.* at 96.

¹²⁰ Michael Goldsmith & Marcus Porter, *Lake Wobegon and the U.S. Sentencing Guidelines: The Problem of Disparate Departures*, 69 GEO. WASH. L. REV. 57, 66 (2000) (discussing appellate review of district court departure decisions).

¹²¹ 18 U.S.C. § 3742(e) (1995).

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and . . . shall give due deference to the district court’s application of the guidelines to the facts.

Id.

government for a downward departure.¹²² It did not, however, articulate the standard of review.¹²³ Subsequently, in *Koon*, the Supreme Court determined that the appellate court should not review the departure decision *de novo*, but rather should apply the abuse of discretion standard.¹²⁴ The Court noted that the text of the SRA reveals congressional intent that district courts retain much of their traditional sentencing discretion.¹²⁵ Additionally, in 1988 Congress amended the Guidelines to further emphasize the unique position of the district judge in determining the appropriate sentence.¹²⁶ The language of the 1988 amendment imposed the requirement that the courts of appeals “give due deference to the district court’s application of the guidelines to the facts.”¹²⁷

C. Downward Departures

Departures afford a method to avoid mechanical application of the Sentencing Guidelines in appropriate circumstances.¹²⁸ *United States v. Vanleer* provides an example of a case in which mechanical application of the Guidelines would have resulted in an

¹²² U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2002). “If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure.” *Id.*

¹²³ *Id.* See also 18 U.S.C. § 3742(e).

¹²⁴ *Koon*, 518 U.S. at 91.

¹²⁵ *Id.* at 97. See *supra* notes 80-85 and accompanying text.

¹²⁶ *Koon*, 518 U.S. at 97. See 18 U.S.C. § 3742 (1988).

¹²⁷ *Koon*, 518 U.S. at 97. After all, the Senate Report stated at the time of the creation of the Guidelines that “[t]he sentencing provisions of the reported bill are designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court.” S. REP. NO. 98-225, at 150 (1983).

¹²⁸ S. REP. NO. 98-225, at 51-52 (1983). The Senate Report noted that “[t]he committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case.” *Id.* at 52.

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excessive sentence.¹²⁹ The defendant in that case had a history of non-violent criminal offenses related to his use of illegal drugs and had served time in prison for forgery.¹³⁰ Prior to becoming a convicted felon, the defendant had given his shotgun to a friend.¹³¹ Following his release from prison, the defendant needed money and took the shotgun to a pawn shop.¹³² During the transaction, he gave the sales clerk his correct name, address, and fingerprint to verify his identity.¹³³ About one month later, a police officer conducted a record check and determined that the defendant was a convicted felon.¹³⁴ The defendant pled guilty to being a felon in possession of a firearm.¹³⁵ The appropriate sentencing range for this crime was 30 to 37 months.¹³⁶ Vanleer requested a downward departure.¹³⁷ The court explained that the basis for the downward departure was that the crime did not “threaten the harm or evil” intended to be prevented by the statute.¹³⁸ In granting the downward departure, the deciding judge affirmed that “departures—both downward and upward—are a critical

¹²⁹ 270 F. Supp. 2d 1318 (D. Utah 2003).

¹³⁰ *Id.* at 1319.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Vanleer*, 270 F. Supp. 2d at 1319.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* The Guidelines explain:

[C]onduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

U.S. SENTENCING GUIDELINES MANUAL § 5K2.11 (2003). Here, the harm or evil the law sought to prevent was violent crimes leading to personal injury or death. *VanLeer*, 270 F. Supp. 2d at 1326. The defendant’s conduct naturally did not threaten this because, in the words of the court, “VanLeer briefly possessed the gun only because he intended to dispose of the gun When a felon acts illegally to get rid of a firearm, that criminal offense is simply less culpable than when a felon continually possesses a firearm.” *Id.* at 1326.

component of the sentencing guideline scheme.”¹³⁹ VanLeer was merely attempting to get rid of his gun to pay his rent so it would have been an unjust result for Vanleer to serve a full sentence.¹⁴⁰

In addition, departures contribute to the development of the Guidelines by providing feedback to the Commission on the way in which courts are applying the Guidelines.¹⁴¹ Congress created a duty on the part of the Sentencing Commission to periodically review and revise the Guidelines.¹⁴² The appropriate judge or

¹³⁹ *Id.* at 1320.

¹⁴⁰ *Id.* at 1326-27.

¹⁴¹ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2002). The Sentencing Commission notes that:

First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Id. One commentator noted that “[a]ccording to reformers, an articulation and review of the reasons for deviating from the guidelines’ presumptive sentences would provide meaningful feedback for the continuous evolution of sentencing law and policy within the guidelines system.” Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 34 (2000) (discussing departure jurisprudence under the Federal Sentencing Guidelines). Alfred P. Carlton, Jr., the President of the American Bar Association, noted that “the departure power is a means of providing feedback from judges to the Sentencing Commission and Congress. By studying departure patterns, the Commission can identify those guideline rules that judges are consistently finding to be inappropriate for certain classes of defendants.” Letter from Alfred P. Carlton, Jr., President of the American Bar Association to Senator Orrin G. Hatch, (Apr. 1, 2003), available at <http://www.nacdl.org/departures>.

¹⁴² 28 U.S.C. § 994(o) (2004). The Commission is responsible for:

- (a) Collecting systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;
- (b) publishing data concerning the sentencing process;
- (c) collecting systematically and disseminating information

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judicial officer is required to submit to the Commission a report.¹⁴³ The Commission uses the report to compile data files on federal sentencing practices to inform the decision-making process of amendments to the Guidelines.¹⁴⁴ The result of the compilation process is that if particular portions of the Sentencing Guidelines are causing unjust results or failing to reflect changes in views on punishment of specific crimes, then the Sentencing Commission must adjust the Guidelines accordingly.¹⁴⁵ This review process involves consulting with authorities and representatives of the Federal criminal justice system and recommending to Congress modifications of the Guidelines for which an adjustment appears

concerning sentences actually imposed, and the relationship of such sentences to the statutory purposes of sentencing set forth in [the Sentencing Reform Act]; (d) collecting systematically and disseminating information regarding effectiveness of sentences imposed; and, (e) maintaining and making available for public inspection a record of the final vote of each member on any action taken by it.

Public Access to Sentencing Commission Documents and Data, 54 Fed. Reg. 51279, 51279-80 (Dec. 13, 1989) (citations omitted).

¹⁴³ 28 U.S.C. § 994(w) (amended by Pub.L. 108-21, § 401(h)). Subsection (w) formerly read:

The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed (other than a sentence imposed for a petty offense, as defined in title 18, for which there is no applicable sentencing guideline) a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

Id.

¹⁴⁴ Charles Loeffler, *An Overview of U.S. Sentencing Commission Data*, 16 FED. SENT. R. 14 (Vera Inst. Just.) (Oct. 2003), at 1, available at 2003 WL 23269265.

¹⁴⁵ 28 U.S.C. § 991(b)(1)(C) (2004). The purposes of the United States Sentencing Commission are to “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.” *Id.*

appropriate.¹⁴⁶

D. Federal Prosecutors and the Sentencing Guidelines

While the Sentencing Guidelines served to limit discretion exercised by judges, they transferred power over the sentencing system to the Executive.¹⁴⁷ The federal prosecutor determines the charges against an offender, which directly impacts the sentencing range applied to the offender's crime.¹⁴⁸ The transfer of power to the federal prosecutor is evident in the relevant conduct and departure provisions of the Sentencing Guidelines.¹⁴⁹ Under the Guidelines, the "relevant conduct" provision provides for the consideration in sentencing of alleged offender-conduct related to the offense, but not presented to the jury under the beyond a reasonable doubt standard.¹⁵⁰ The decision whether to raise the

¹⁴⁶ 28 U.S.C. § 994(r) (2004). The authorities involved in the consultation include 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. 28 U.S.C. § 994(o).

¹⁴⁷ Powell & Cimino, *supra* note 40, at 373.

¹⁴⁸ Gerald W. Heaney, *The Reality of Guidelines Sentencing*, 28 AM. CRIM. L. REV. 161, 190 (1991) (noting that "[n]ot only does [the prosecutor] determine who should be charged and what the charges should be, but the information that he controls largely determines the time to be served by the offender.>").

¹⁴⁹ Powell & Cimino, *supra* note 40, at 384-95. Two commentators noted that "[p]erhaps nowhere in the Sentencing Guidelines is the discretion of the prosecutor, and the opportunity to abuse that discretion, more visible than in Section 1B1.3 of the Sentencing Guidelines, innocently entitled 'Relevant Conduct (Factors that Determine the Guideline Range).'" *Id.* at 384.

¹⁵⁰ U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2003).

Relevant Conduct (Factors that Determine the Guideline Range) (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following: (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and (B) in the case of a jointly undertaken criminal activity

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relevant conduct of an offender at sentencing is within the sole discretion of the prosecutor.¹⁵¹ The federal prosecutor retains the discretion to indict and charge the most readily provable offense and introduce the remaining charges at the sentencing hearing in which there are lower standards of admissibility and proof.¹⁵²

(a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense; (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction; (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and (4) any other information specified in the applicable guideline. (b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Id. One commentator noted that “[i]n jury conviction cases, the ‘relevant conduct’ standard allows the AUSA to introduce evidence of another crime at the sentencing stage that was withheld from trial because the AUSA could not prove it ‘beyond a reasonable doubt.’” Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1714 (1992) (discussing the background of the relevant conduct provision under the Guidelines).

¹⁵¹ Powell & Cimino, *supra* note 40, at 389.

¹⁵² *Id.* at 388-89. *U.S. v. Ebbole* illustrates the unjust consequences that can result from this system. *See* *United States v. Ebbole*, 917 F.2d 1495 (7th Cir. 1990). There, the defendant was sentenced to seven years and eight months in federal prison after pleading guilty to distributing a gram of cocaine to an undercover police officer. *Id.* at 1495. The plaintiff’s presentence report contained evidence that he had purchased 1.7 kilograms of cocaine in the time period surrounding the encounter with the undercover police officer. *Id.* The court noted that had the report contained only the quantities that the plaintiff pled guilty to distributing then the sentencing range would have been 27 to 33 months. *Id.* at 1495-96. Plaintiff argued that “due process requires that judges have the discretion to discount penalties imposed for uncharged conduct because

The departure provisions of the Guidelines have also enhanced prosecutorial discretion.¹⁵³ The Sentencing Guidelines provide that the court may depart from the Guidelines upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.¹⁵⁴ Although the sentencing judge retains final authority to impose the departure, the judge may exercise this power only with prosecutorial approval.¹⁵⁵ It is within prosecutorial discretion, therefore, to alter the sentence of an offender by making a substantial assistance motion.¹⁵⁶ Thus, the Guidelines have enhanced the role of the federal prosecutor in criminal sentencing.¹⁵⁷

III. AMBER ALERT AND CONGRESS' ENACTMENT OF THE FEENEY AMENDMENT AND THE PROTECT ACT

As Congress has the power to determine the scope of judicial discretion, the enactment of the Feeney Amendment raises the question whether Congress is dissatisfied with the level of judicial discretion currently exercised by federal judges. On the surface it may appear so.¹⁵⁸ Representative Feeney and the DOJ evaded a

the prosecution need establish such acts by only a preponderance of the evidence presented for sentencing purposes." *Id.* at 1496. The court held that application of the relevant conduct provision did not deny defendant but that the relevant conduct provision of the Guidelines invites the prosecutor to indict for a less serious offense and then expand them at sentencing. *Id.* at 1501. The court further noted that in this case, the "United States Attorney's office appears to have accepted this dubious invitation." *Id.*

¹⁵³ Powell & Cimino, *supra* note 40, at 389-95.

¹⁵⁴ U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2001).

¹⁵⁵ STITH & CABRANES, *supra* note 28, at 76.

¹⁵⁶ Powell & Cimino, *supra* note 40, at 390.

¹⁵⁷ Heaney, *supra* note 148, at 190.

¹⁵⁸ *How Will Judicial Discretion Change under the Feeney Amendment?*, N.Y.L.J., Feb. 23, 2004, at M12. Judge John S. Martin, of the Southern District of New York, who resigned last year in protest over the Feeney Amendment, observed:

Everybody talks about the Feeney Amendment, and they say, well, this is what Congress wanted. Hogwash Because, if the Justice

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meaningful debate, however, on the underlying implications of their measure to reduce judicial discretion by attaching it in a last minute maneuver to the AMBER Plan, a widely supported legislative effort to codify a successful system that works to quickly locate kidnapped children.¹⁵⁹

A. Congress and Amber Alert

In 1997, the AMBER (America's Missing: Broadcast Emergency Responses) Plan, a partnership between law-enforcement agencies and broadcasters to activate an urgent bulletin in child-abduction cases, was created in response to the kidnapping and murder of Amber Hagerman in Arlington, Texas.¹⁶⁰ In 2001, the National Center for Missing & Exploited

Department were so sure that this is what Congress wanted, why did they use stealth tactic? Why didn't they allow Congress to hold hearings, and hold these issues up to the light of day, and say: "Is this a problem?"

Id.

¹⁵⁹ 149 CONG. REC. S6708-01, 6712 (daily ed. May 20, 2003) (statement of Sen. Kennedy). Senator Kennedy noted that "[b]ecause the Feeney Amendment was introduced at the last possible moment, Congress was deprived of full and balanced information on whether departure decisions are made in inappropriate instances." *Id.* In addition, Senator Kennedy observed:

[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. Its provisions effectively strip Federal judges of discretion to impose individualized sentences, and transform the longstanding sentencing guidelines system into a mandatory minimum sentencing system.

149 CONG. REC. S7528-01, 7531 (daily ed. June, 9, 2003) (statement of Sen. Kennedy). Senator Leahy noted that "House Republicans saddled the bipartisan, non-controversial AMBER Alert bill with numerous unrelated and ill- conceived provisions, collectively known as the 'Feeney Amendment'" 149 CONG. REC. S9115-02, 9115 (daily ed. July 9, 2003) (statement of Sen. Leahy).

¹⁶⁰ Nat'l Ctr. for Missing and Exploited Children, About AMBER Plan, *at* <http://www.missingkids.com> (last visited Mar. 6, 2004). In response to the murder of Amber Hagerman, the Dallas/Fort Worth Association of Radio Managers joined local law-enforcement agencies in northern Texas to develop a warning system to quickly locate abducted children. *Id.* Once law enforcement

Children (NCMEC) launched the AMBER Plan to assist localities with creating their own emergency alert plan.¹⁶¹ Subsequently, a series of high-profile kidnappings demonstrated the need for legislative action in this area to encourage adoption of AMBER Alert plans nationwide.¹⁶² As a result, the National Amber Alert Network Act of 2002 was introduced in the Senate and House, respectively as S. 2896 on September 3, 2002, and H.R. 5326 on September 4, 2002.¹⁶³

The main thrust of the National Amber Alert Network Act of 2002 was to create a national AMBER alert system to assist local and state authorities in tracking kidnappers who attempt to cross state lines.¹⁶⁴ The bill authorized the Attorney General, in cooperation with the Secretary of Transportation and the Chairman

authorities receive notification about an abducted child, they determine whether the situation warrants an alert. *Id.* If it does, alert information is compiled including descriptions and pictures of the missing child, the suspected abductor, a suspected vehicle, and any other information available and valuable to identifying the child and suspect. *Id.* The information is sent to designated radio stations under the Emergency Alert System (EAS). *Id.* The radio stations send the information to area radio and television stations where it is immediately broadcast. *Id.* Some states also employ electronic highway billboards, typically used to disseminate traffic information to drivers, to alert the public of abducted children. *Id.*

¹⁶¹ *Id.*

¹⁶² 148 CONG. REC. H7048-01, 52 (daily ed. Oct. 7, 2002) (statement of Rep. Jackson-Lee). Representative Sheila Jackson-Lee (D-TX) stated that throughout “the country we have seen a rash of children being abducted Still, the vast majority of America’s communities have not established an Amber Plan to protect our children. That is why it is critical that Congress moves to build on the success of the AMBER Plan.” *Id.*

¹⁶³ H.R. REP. NO. 107-723(I), at 90 n.1, 2 (2002). On September 3, 2002, Senators Dianne Feinstein (D-CA) and Kay Hutchinson (R-TX) introduced S. 2896. *Id.* at n.2. On September 4, 2002, Representatives Martin Frost (D-TX) and Jennifer Dunn (R-TX) introduced H.R. 5326, the companion bill in the House of Representatives. *Id.* at n.1.

¹⁶⁴ *Id.* at 89. Representative Royce (R-CA) stated that there “is no national coordination With the recent expansion of the AMBER Alert Program, a system is needed to ensure that neighboring states and communities will be able to honor each other’s alerts when an abductor is traveling with the child to other parts of the country.” 148 CONG. REC. NO. H7048-01, 7053 (daily ed. Oct. 7, 2002) (statement of Rep. Ed Royce).

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of the Federal Communications Commission (FCC), to appoint a National AMBER Alert Coordinator to direct the Alert's communication network regarding abducted children.¹⁶⁵ The bill also created two federal grant programs to assist and encourage states to implement the costly AMBER Alert system.¹⁶⁶ S. 2896 quickly passed the Senate on September 10, 2002.¹⁶⁷

H.R. 5326 stalled in the House, however, because House Judiciary Committee Chairman F. James Sensenbrenner, Jr. (R-WI) introduced his own legislation, H.R. 5422, which included the provisions of H.R. 5326 but added several other measures.¹⁶⁸

¹⁶⁵ Patrick Leahy, *An Amber Alert Nationl [sic] System*, CONG. TESTIMONY, Sept. 4, 2002, available at 2002 WL 25098327.

¹⁶⁶ *Id.* The bill provided funding for statewide notification and communication systems, including overhead electronic highway notification boards, along highways. *Id.* In addition, it provided a grant program managed by the Attorney General for the support of AMBER Alert communications plans with law enforcement agencies and others in the community. *Id.*

¹⁶⁷ H.R. REP. NO. 107-723(I), at 90 n.3.

¹⁶⁸ News Advisory, U.S. House of Representatives Comm. on the Judiciary, Sensenbrenner Introduces Comprehensive Child Abduction Prevention Bill (Sept. 24, 2002), at <http://www.house.gov/judiciary/news092402.htm>. H.R. 5422 included H.R. 4679, providing judges with discretion to permit supervision of released sex offenders for a maximum of life, which passed the House by a vote of 409-3 but was blocked in the Senate. *Id.* It also included H.R. 1877, adding new wiretap provisions relating to sexual crimes against children, which passed the House by a vote of 396-11 but was blocked in the Senate. *Id.* It also contained H.R. 4477, dealing with persons who travel to foreign countries to engage in sexual activities with minors, which passed the House by a vote of 418-8 but was blocked in the Senate. *Id.* H.R. 5422 also included H.R. 2146, establishing mandatory life imprisonment for twice-convicted child sex offenders, passing the House by a vote of 382-34 and blocked in the Senate. *Id.* The concern of opponents of H.R. 5422 was that if the Senate had refused to pass these controversial measures before, then the AMBER Plan provisions would not be implemented because the Senate would refuse to pass a bill saddled with the same provisions it had already refused in the past. See 148 CONG. REC. H7048-01, 7051 (daily ed. Oct. 7, 2002) (statement of Rep. Scott) (explaining that if "the Senate has not seen fit to take any of them up because they do not have sufficient merit, now or in the last three Congresses, why would we think the Senate would see more merit in them with more new death penalties and additional mandatory minimums?"). Of particular concern was that H.R. 5422 contained a "two strikes you're out"

Opponents of the extra provisions called for the enactment of a clean Amber Alert bill.¹⁶⁹ In reaction to the stalemate, President Bush, on October 2, 2002, urged the Republican leadership in the House to pass the AMBER Alert legislation, S. 2896, drafted by

provision which mandated life imprisonment if the offender had a prior sex conviction in which a minor was the victim, unless the sentence of death was imposed. *Id.* The “two strikes you’re out provision” was controversial because of its broad definition of sexual activity, which included consensual sexual activity between an 18-year old and his 14-year-old girlfriend. *Id.* Another serious concern was the bill would have a disproportionate affect on Native Americans because it only applied where there was federal jurisdiction. *Id.* Additionally, victims may be reluctant to come forward to report sex crimes by family members if the victim knows the offender will serve life without parole. *Id.*

¹⁶⁹ H.R. REP. NO. 107-723(I), at 89 (2002). Representatives John Conyers, Jr. (D-MI), Howard L. Berman (D-CA), Robert C. Scott (D-VA), and Melvin L. Watt (D-NC), all Democratic members of the House Judiciary Committee, explained in the dissenting view in the House report:

We are very disappointed with the approach being taken by the Majority to deal with the very serious problem of child abduction Bipartisan legislation was introduced . . . that would create a national Amber alert system to assist local and state authorities in tracking kidnapers that attempt to cross state lines. That bipartisan bill quickly passed the Senate and it should have quickly passed the House and been sent on to the president. Instead, what we have is a bill that includes the non-controversial Amber alert provisions and far more controversial provisions concerning death penalties, mandatory minimum sentences, wiretap extensions, pre-trial release, and a whole host of other unrelated provisions.

Id. Opposition to H.R. 5422 focused, in part, on its mandatory minimum sentences and death penalty provisions. H.R. REP. 107-723(I), at 89-90 (2002). Representatives Conyers, Berman, Scott, and Watt stated:

The majority knows that many on this side of the aisle cannot as a matter of principal support the death penalty and mandatory minimum sentences, particularly with all of the problems we have seen in these areas in this country Namely, the unacceptably high rate of wrongful convictions, inadequate legal representation and a system that is applied in a racially discriminatory manner Mandatory minimum sentences have been studied extensively and have been shown to be ineffective in preventing crime, to distort the sentencing process and to be a considerable waste of taxpayers’ money.

Id.

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Senators Kay Bailey Hutchison (R-TX) and Diane Feinstein (D-CA), which was the same as the original legislation, H.R. 5326, introduced in the House.¹⁷⁰ Bush explained that “[t]he House hasn’t acted yet, so I am going to,” and announced the implementation of a modified version of AMBER Alert.¹⁷¹ He also stated that “[i]f possible, it would be very helpful if the House passed the Hutchison-Feinstein law before they go home.”¹⁷² Nevertheless, on October 8, 2002, the House approved Representative Sensenbrenner’s bill, H.R. 5422, by a 390-24 margin.¹⁷³ There was not enough time left in the legislative session, however, to reconcile the two different versions passed by the House and Senate.¹⁷⁴

The National Amber Alert Network Act was reintroduced in Congress at the beginning of the next legislative session.¹⁷⁵ The bill unanimously passed the Senate on January 21, 2003.¹⁷⁶ On March 5, 2003, Chairman Sensenbrenner introduced H.R. 1104, which was virtually identical to H.R. 5422.¹⁷⁷ Chairman

¹⁷⁰ *Bush Promotes ‘Amber Alert’ System; House Urged to Pass Bill Targeting Child Kidnappings*, WASH. POST, Oct. 3, 2002, at A02.

¹⁷¹ *Id.* President Bush’s plan called for the placement of an AMBER Alert coordinator at the DOJ and the designation of \$10 million to “AMBER training and education programs and to facilitate the use of overhead electronic highway message boards and other systems as part of AMBER Alert Plans.” *President Bush Announces Immediate Action to Improve AMBER Alert System*, U.S. NEWSWIRE, Oct. 2, 2002, at 2002 WL 22072232.

¹⁷² *Bush Promotes ‘Amber Alert’ System; House Urged to Pass Bill Targeting Child Kidnappings*, *supra* note 170, at A02.

¹⁷³ *House Overwhelmingly Passes Comprehensive Child Abduction Prevention Legislation; Sensenbrenner Urges Swift Senate Action*, U.S. NEWSWIRE, Oct. 8, 2002, 2002 WL 22072456.

¹⁷⁴ *Bush Promotes ‘Amber Alert’ System; House Urged to Pass Bill Targeting Child Kidnappings*, *supra* note 170, at A02.

¹⁷⁵ H.R. REP. NO. 108-47(I), at 110 n.1, 2 (2003). On January 9, 2003, the National Amber Alert Network Act of 2003 was reintroduced as S.121 by Senators Feinstein and Hutchinson. H.R. REP. NO. 108-47(I), at 110 n.2 (2003). On January 28, 2003, the companion bill was reintroduced as H.R. 412 by Representatives Frost and Dunn. H.R. REP. NO. 108-47(I), at 110 n.1 (2003).

¹⁷⁶ H.R. REP. NO. 108-47(I), at 110 n.2 (2003).

¹⁷⁷ H.R. 1104, 108th Cong. (2003), available at <http://thomas.loc.gov>. Chairman Sensenbrenner stated that “[H.R. 1104] is virtually identical to H.R.

Sensenbrenner (R-WI) argued that a stand-alone AMBER bill would merely codify current practice and that a more comprehensive approach was required to address the problem of child abductions.¹⁷⁸ The same concerns remained, however, that implementation of the AMBER plan would fail due to congressional divisiveness over an AMBER Alert bill encumbered with controversial provisions.¹⁷⁹ Meanwhile, on January 13, 2003,

5422, which overwhelmingly passed the House last October by a vote of 390 to 24. Like so many other meritorious bills sent to the other body in the last Congress, this legislation was allowed to die by the Democrat leadership.” 149 CONG. REC. H2405-05, 2405 (daily ed. Mar. 27, 2003) (statement of Rep. Sensenbrenner).

¹⁷⁸ 149 CONG. REC. H2405-05, 2406 (daily ed. Mar. 7, 2003) (statement of Rep. Sensenbrenner). Representative Melvin L. Watt (D-NC) stated, however, that:

I am struck by the argument that the chairman of our committee has put forward to us. On the one hand, he says the AMBER Alert part of this bill really does nothing that is not already able to be done, and then I scratch my head and I said, well, if that is the case, why are we even here doing the AMBER Alert part of this? Is the AMBER Alert part of this bill, which all of us feel so strongly about, which all of us would vote for in a heartbeat if it were a stand-alone bill, is it being used as a bus to load on all of these other controversial provisions that otherwise would not be considered? If these other provisions have merit, let them be considered as separate stand-alone bills, let us evaluate them, let us evaluate their impact on reducing crime and addressing the problems that exist in our Nation, and let the Senate and the House vote on those things separately.

Id. at 2408-09 (daily ed. Mar. 27, 2003) (statement of Rep. Watt).

¹⁷⁹ 149 CONG. REC. S5137-01, 5138 (daily ed. Apr. 10, 2003) (statement of Sen. Leahy). Senator Patrick Leahy (D-VT) stated:

Twice now we rapidly passed our bill through the Senate on unanimous, bipartisan votes-last fall and again in January. Both times House leaders chose not to pass it, instead delaying its assured passage into law by using the bill as a “sweetener” for a package of other controversial provisions that the Senate has not previously considered . . . Had House leaders opted to stand up and do what is right from the beginning, we would already have a nationwide AMBER Alert system in place to save our children’s lives when they are abducted. We will never know how many children could have been saved by a nationwide AMBER Plan-if the House had simply passed

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S. 151, the Prosecutorial Remedies and Tools against the Exploitation of Children Today Act (PROTECT Act of 2003), was introduced in the 108th Congress by Senator Orrin Hatch (R-UT) to address virtual child pornography.¹⁸⁰ Senator Patrick Leahy (D-VT) was the principal cosponsor.¹⁸¹ The Senate passed the PROTECT Act, S. 151, on February 24, 2003.¹⁸² On March 27, 2003, the House took up H.R. 1104, the Child Abduction Prevention Act, which incorporated the text of S. 151.¹⁸³

As the debate between proponents of a clean AMBER Alert bill and those favoring Representative Sensenbrenner's controversial bill continued in the House, Representative Tom Feeney (R-FL) introduced an amendment to H.R. 1104.¹⁸⁴ The DOJ drafted the version of the Feeney Amendment introduced by Representative Feeney.¹⁸⁵ The Feeney Amendment as introduced would have virtually eliminated the ability of judges to depart downward from the Guidelines, thereby eliminating the thoughtful imposition of sentences encouraged by Congress at the time of the enactment of the SRA.¹⁸⁶ Debate on the Feeney Amendment was limited to twenty minutes.¹⁸⁷ The Feeney Amendment presents yet

our bill when the Senate did, I daresay the number of children rescued from their abductors and death would be much higher. Efforts to protect our children do not deserve to be used as pawns by groups who play politics by attaching it to more controversial measures.

Id.

¹⁸⁰ S. REP. NO. 108-2, at 1-2 (2003).

¹⁸¹ *Id.*

¹⁸² S. 151, 108th Congress, available at <http://thomas.loc.gov>.

¹⁸³ *House Overwhelmingly Approves Child Protection Legislation; Includes Amber Alert, Strong Penalties Against Kidnappings, Other Protections, supra* note 173. See generally 149 CONG. REC. S5113-01, 5114-15 (daily ed. Apr. 10, 2003). See also S. 151, 108th Congress, available at <http://thomas.loc.gov>, for the bill summary of S. 151.

¹⁸⁴ 149 CONG. REC. H2405-05, 2420 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney).

¹⁸⁵ Cohen & Fields, *supra* note 12, at A1. Representative Feeney said that he was the "messenger" of the amendment that was drafted by two Justice Department officials. *Id.*

¹⁸⁶ See *supra* text accompanying notes 65, 91.

¹⁸⁷ See H.R. Res. 106, 108th Cong. (2003), available at

another example of attempts by certain members of Congress to manipulate the valid and uncontroversial goals of the AMBER Alert bill.¹⁸⁸ The amendment passed by a vote of 357 to 58.¹⁸⁹

One reason members of the House may have voted for H.R. 1104, however, is because of concern and frustration over the delay in enactment of the AMBER Alert portions of the bill.¹⁹⁰ Protection of children is a highly charged issue, particularly in light of the recent spate of high profile kidnappings, but the issue was virtually lost in the controversial measures that were attached to the AMBER Plan.¹⁹¹ The AMBER Plan is a highly successful

<http://thomas.loc.gov/> (limiting debate on Rep. Feeney's amendment to twenty minutes).

¹⁸⁸ 149 CONG. REC. H2405-05, 2423 (daily ed. Mar. 27, 2003) (statement of Rep. Scott). Representative Scott state in opposition to Representative Feeney's proposal that "this amendment would have the effect of turning the sentencing guidelines into mandatory sentences in the cases it affects. We have not had hearings or markups on this matter; and this is not the way we should amend the sentencing guidelines, without thought or consideration." *Id.*

¹⁸⁹ *VanLeer*, 270 F. Supp. 2d. 1318, 1321 (D. Utah 2003). *See also* United States v. Mellert, No. CR 03-0043, 2003 WL 22025007, at *1 (N.D. Cal. July 30, 2003).

¹⁹⁰ 149 CONG. REC. H3059-02, 3072 (daily ed. Apr. 10, 2003) (statement of Rep. Kilpatrick). Representative Kilpatrick stated in the subsequent conference committee report on the PROTECT Act:

It is vital that we implement AMBER Alert systems, not just in our local communities, but nationwide. Our efforts to crack down on child abductors and abusers will be fruitless if we cannot transcend state borders quickly enough to catch these vicious criminals . . . There are many provisions in this bill that, while attempting to deter these criminals from committing such heinous acts, infringe upon the livelihoods of many innocent individuals and prohibit what would normally be harmless, legal acts. I vote for the H.R. 1104, the House version of this conference report in hopes that conferees would come together and agree upon a bill that would attack the key issue at hand, protecting our children from molesters and pedophiles. After reviewing the conference report, I did not see any substantive alterations or any elimination of these bad provisions, but rather I noticed additional provisions that, again, hurt the livelihood of innocent individuals and legal acts.

Id.

¹⁹¹ 149 CONG. REC. H2405-05, 2406 (daily ed. Mar. 27, 2003) (statement of

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system to recover kidnapped children; it does not involve the sentencing and punishment of criminals.¹⁹² Indeed, attaching the largely unrelated provisions of the Feeney Amendment to the AMBER Alert bill made it difficult for those legislators who opposed the DOJ's attack on judicial discretion to oppose H.R. 1104.¹⁹³ Thus, the Feeney Amendment was included in the version the House passed.¹⁹⁴ On April 10, the different versions passed by the Senate and House went to a Conference Committee to resolve the differences between them.¹⁹⁵

B. The Original Feeney Amendment

The original Feeney Amendment contained a "Sentencing Reform" provision that would have restricted downward departures in all cases.¹⁹⁶ Downward departures would be

Rep. Scott). Representative Scott stated:

Last Congress, many of us warned the majority that coupling the AMBER Alert bill with controversial sound bites would mean that neither the AMBER Alert nor the sound bites would be passed, but the House passed the same kind of omnibus bill anyway; and, as expected, the whole thing died in the Senate. Yet, here we are again facing the same misguided strategy and this time again with even more reasons for the Senate to reject the bill which the AMBER Alert bill is buried in.

Id.

¹⁹² Nat'l Ctr. for Missing and Exploited Children, About Amber Plan, at <http://www.missingkids.com> (last visited Dec. 1, 2003).

¹⁹³ Lawrence S. Goldman, *The Feeney Amendment*, 27 CHAMPION 4, 4 (June 2003) (discussing passage of the Feeney Amendment). One commentator observed 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." *Id.*

¹⁹⁴ *House Again Passes Virtual Child Porn Ban*, WARREN'S WASH. INTERNET DAILY, Mar. 28, 2003, at 2003 WL 16116966.

¹⁹⁵ See 149 CONG. REC. S5113-01 (daily ed. Apr. 10, 2003) for the record of the Conference Committee meeting.

¹⁹⁶ 149 CONG. REC. H2405-05, 2423 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney). "This would eliminate ad hoc departures based on vague grounds, such as 'general mitigating circumstances.'" *Id.* His proposal, however, met opposition:

permissible only to the extent that the grounds had been “affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements,” which would eliminate the “heartland” approach adopted by the Supreme Court in *Koon*.¹⁹⁷ Additionally, the original Feeney Amendment required courts of appeals to review *de novo* the district court’s application of the Guidelines.¹⁹⁸ It also required the Attorney General, not later than 15 days after a district court’s grant of a downward departure in any case, other than a case involving a downward departure for substantial assistance, to report the departure to the House and Senate Committees on the Judiciary, setting forth the facts involved and the identity of the district court judge.¹⁹⁹ Additionally, it required the Chief Judge of each district to submit a written report in every criminal case to the Sentencing Commission with sentencing, offense, and offender information, and required the Commission to make the reports and underlying documents available to the House and Senate Committees on the Judiciary.²⁰⁰ The DOJ did not notify or consult

This amendment would have the effect of turning the sentencing guidelines into mandatory sentences The purpose of the sentencing guidelines is to provide intelligent consistency in sentencing, considering each sentence within the overall framework of other sentences, and ensuring that the more serious crimes get more serious punishment.

149 CONG. REC. H2405-05, 2423 (daily ed. Mar. 27, 2003) (statement of Rep. Scott).

¹⁹⁷ *Provisions of Original Feeney Amendment as Introduced and Passed by the House of Representatives March 27, 2003*, 15 FED. SENTENCING REP. 336, June, 2003, at 1. See § 401(a)(2)(A). The specific offender characteristics which would have warranted downward departure included age and extraordinary physical impairment. *Id.* at 2. Drug, alcohol, or gambling dependence or abuse was not a reason for imposing a sentence below the guidelines. *Id.* See also 149 CONG. REC. H2405-05, 2420 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney).

¹⁹⁸ *Provisions of Original Feeney Amendment as Introduced and Passed by the House of Representatives March 27, 2003*, *supra* note 197, at 4. See § 401(d)(2).

¹⁹⁹ *Id.* at 8. See § 401(l)(1).

²⁰⁰ *Id.* at 6. See § (h)(1)-(3).

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with the Sentencing Commission in advance of the introduction of the Feeney Amendment in the House.²⁰¹

Proponents of the limitations on judicial discretion contained in the Feeney Amendment explained that judges had been departing from the Guidelines at an increasing rate since *Koon* because the decision underscored the available justifications for departures.²⁰² Representative Feeney introduced the amendment to “address the long-standing and increasing problems of downward departures from the Federal sentencing guidelines.”²⁰³ The DOJ supported the original version of the Feeney Amendment because it “enacts long-overdue reforms to address the longstanding, and still-growing, problem of downward departures from the Sentencing Commission’s Federal Sentencing Guidelines.”²⁰⁴ Representative Feeney explained that the rate of downward departures for reasons other than providing substantial assistance to federal prosecutors increased 51 percent from fiscal year 1997 to fiscal year 2001.²⁰⁵ The DOJ explained in a letter to Congress supporting the original Feeney Amendment that the rate of departures in non-immigration cases has climbed from 9.6 percent in 1996 to 14.7 percent in fiscal year 2001.²⁰⁶

²⁰¹ Cohen & Fields, *supra* note 12, at A1. Commissioner Michael O’Neill said that “Clearly, you’d like to have had a lot more debate.” *Id.*

²⁰² Tom Perrotta, *Foes of Limits on Sentence Departures Make Headway*, N.Y. L. J., Apr. 10, 2003, at col. 4. Representative Feeney stated that *Koon* gave the “green light” to district courts who have increasingly granted downward departures since the decision. Tom Feeney, *Reaffirming the Rule of Law in Federal Sentencing*, CRIM. JUST. ETHICS, July 1, 2003, at 2003 WL 74961888.

²⁰³ 149 CONG. REC. H2405-05, 2422 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney).

²⁰⁴ Perrotta, *supra* note 202, at col. 4.

²⁰⁵ Feeney, *supra* note 202. According to Representative Feeney, the rate of downward departures in fiscal year 1997 was 12.1 percent compared to 18.3 percent in fiscal year 2001. *Id.*

²⁰⁶ *Letter from Justice Department Supporting Original Feeney Amendment*, 15 FED. SENT. R. 355 (Vera Inst. Just.) (June 2003), at 2, at 2003 WL 22208851. The DOJ’s statement that the downward departure rate in cases other than substantial assistance and immigration has climbed to 14.7 percent in FY2001 conflicts with the Sentencing Commission’s data which places the rate at 10.2 percent. *See supra* text accompanying note 211.

Representative Feeney did not explain, however, that although the rate of non-substantial assistance departures has increased since the *Koon* decision, the vast majority of that increase is attributable to the fact that the number of departures in “fast-track” border districts more than tripled, from 1871 in 1996, to 5928 in 2001.²⁰⁷ In fiscal year 2001, 79 percent of downward departures were requested by the Government.²⁰⁸ Thus, the DOJ has requested the majority of non-substantial assistance departures since *Koon*.²⁰⁹ Indeed, the Sentencing Commission noted that policies implemented in districts with a high volume of immigration cases may affect departure rates.²¹⁰ The non-substantial assistance departure rate without those districts reduced to 10.2 percent.²¹¹ Furthermore, Senator Kennedy suggested the DOJ may have misled Congress because its letter of support did not mention that the Senate Report accompanying the SRA had anticipated a

²⁰⁷ Letter from Alfred P. Carlton, Jr., President of the American Bar Association to Senator Orrin G. Hatch, (Apr. 1, 2003), *available at* <http://www.nacdl.org/departures>.

Fast-track programs were established by United States Attorneys offices to expedite the prosecution of immigration cases; if an immigration offender pleads guilty in a timely fashion, the prosecutor is authorized to pursue an additional downward departure. Importantly, until the PROTECT Act, these departures were not authorized by the Federal Sentencing Guidelines. The fast-track programs are no longer limited to immigration cases, prosecutors now have extended them to drug cases and do not limit their use to Southwestern border districts, but use them also in other high-volume or port-of-entry districts.

NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, NACDL FEDERAL SENTENCING GUIDELINES COMMITTEE ANALYSIS, *at* <http://www.nacdl.org/departures> (last visited Nov. 12, 2003).

²⁰⁸ Letter from Alfred P. Carlton, Jr., President of the American Bar Association to Senator Orrin G. Hatch 3 (Apr. 1, 2003), *available at* <http://www.nacdl.org/departures> (noting that “[i]n FY 2001, of 19,416 downward departures awarded federal defendants, approximately 15,318 came on government motion.”)

²⁰⁹ *Id.*

²¹⁰ Letter from the United States Sentencing Commission to Senators Hatch and Leahy 1 (Apr. 2, 2003), *at* <http://www.nacdl.org/departures>.

²¹¹ *Id.*

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departure rate of about 20 percent.²¹² The actual departure rate of 10.2 percent reached without the inclusion of government authorized fast track departures is substantially lower than the 20 percent anticipated by Congress.²¹³

Opposition to the Feeney Amendment centered on the sentencing and downward departures provisions and the attempt of the DOJ and Representative Feeney to push their amendment through Congress without any input from the Sentencing Commission, bar associations, or the federal judiciary.²¹⁴ Senators Kennedy and Leahy expressed concern that the Feeney

²¹² 149 CONG. REC. S6708-01, 6711 (daily ed. May 20, 2003) (statement of Sen. Kennedy). Senator Kennedy stated:

The Justice Department . . . submit[ed] a highly misleading letter on April 4th expressing its “strong support” for the Amendment. The Department argued that the Amendment was justified because an epidemic of lenient sentences was undermining the Sentencing Reform Act. It failed, however, to mention that the committee report accompanying the 1984 Act anticipated a departure rate of about 20 percent. Today, the rate at which judges depart from the guidelines over the objection of the government is slightly more than 10 percent—well within acceptable rates. The Department claimed that there are too many downward departures from the sentencing guidelines, but it failed to mention that, according to the American Bar Association, almost 80 percent of these departures are requested by the Justice Department itself.

Id.

²¹³ S. REP. NO. 98-225, 425 n. 193 (1983) (citation omitted). The Senate Report stated that:

The United States Parole Commission currently sets prison release dates outside its guidelines in about 20 percent of the cases in its jurisdiction. It is anticipated that judges will impose sentences outside the sentencing guidelines at about the same rate or possibly at a somewhat lower rate since the sentencing guidelines should contain recommendations of appropriate sentences for more detailed combinations of offense and offender characteristics than do the parole guidelines.

Id.

²¹⁴ Perrotta, *supra* note 202, at col. 4. See *Materials from Interested Groups Opposing Original Feeney Amendment*, 15 FED. SENT. R. 346 (Vera Inst. Just) (June 2003), at 2003 WL 22208850, for letters and press releases written in opposition to the original Feeney Amendment.

Amendment, with its broad impact on judicial discretion, had been passed by the House with virtually no debate.²¹⁵ The voting members of the Sentencing Commission expressed concern that the review and analysis procedures of the Commission had been bypassed.²¹⁶ They also acknowledged congressional concern over

²¹⁵ 149 CONG. REC. S5137-01, 5145 (daily ed. Apr. 10, 2003) (statement by Sen. Leahy). Senator Leahy stated:

The substance of the Hatch-Sensenbrenner amendment—whether in the form that was voted on in conference, or in the form that was circulated after the conference adjourned—is just as outrageous as the way in which it was adopted. This amendment modifies in very limited ways the Feeney amendment, which was added to the bill on the House floor after only 20 minutes of debate. This far-reaching proposal will undermine the Federal sentencing system and prevent judges from imposing just and responsible sentences. In short, it amounts to an attack on the Federal judiciary.

Id. Senator Kennedy stated that:

In the final hours of the consideration of the AMBER bill in the House of Representatives, there was an amendment to the AMBER bill offered by Congressman Feeney. In a period of 20 minutes, it was accepted without any hearings. It was a part of the conference. The Feeney amendment affected the whole issue of sentencing, not just for these kinds of heinous crimes that take place against children but also against the underlying concept of our criminal sentencing provisions, affecting every type of criminal sentence, whether we are talking about terrorists, murderers, burglars or white-collar crime. The amendment had nothing to do with the abduction of children, but would affect all of the other circumstances.

149 CONG. REC. S5113-01, 5116 (daily ed. Apr. 10, 2003) (statement of Sen. Kennedy).

²¹⁶ Letter from the United States Sentencing Commission to Senators Hatch and Leahy 1 (Apr. 2, 2003), at <http://www.nacdl.org/departures>. The Sentencing Commission stated:

We, the voting members of the United States Sentencing Commission, join in expressing our concerns over the amendment entitled, “Sentencing Reform” recently attached to Child Abduction Prevention Act of 2003, H.R. 1104, 108th Cong. 2003 In the past, with an issue of such magnitude, Congress has directed that the Commission conduct a review and analysis which would be incorporated in a report back to Congress. The Commission is uniquely qualified to serve Congress by conducting such studies due to its ability to analyze its

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the increasing rate of departures from the Guidelines but requested that Congress allow the Commission to perform its statutory purpose of reviewing departures and recommending changes where appropriate.²¹⁷ The Sentencing Commission also explained, however, that “[t]he Commission adopted the departure policy not only to carry out congressional intent but also in recognition of the limits of adopting a perfect guideline system that would address all human conduct that might be relevant to a sentencing decision.”²¹⁸ The American Bar Association expressed concern that the Feeny Amendment “would all but eliminate the discretionary power of federal judges to achieve justice in individual cases, and effectively transform the Sentencing Guidelines into a system of mandatory minimum sentences.”²¹⁹ Chief Justice William Rehnquist, expressing the view of the Judicial Conference of the United States, wrote that “this legislation, if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and reasonable sentences.”²²⁰ The Federal Judges Association explained that “[t]his amendment undermines the essential

vast database, obtain the views and comments of various segments of the federal criminal justice community, review the academic literature, and report back to Congress in a timely manner. Indeed, such a process is contemplated by the original legislation which established the Commission over 15 years ago. *See* 28 U.S.C. § 994(o).

Id.

²¹⁷ *Id.* The Sentencing Commission stated that it was undertaking an extensive review of all non-substantial assistance departures. *Id.* The Commission noted that there are a number of factors requiring examination before drawing conclusions about non-substantial assistance departure rates. *Id.*

²¹⁸ *Id.*

²¹⁹ Letter from Alfred P. Carlton, Jr., President of the American Bar Association to Senator Orrin G. Hatch, 1 (Apr. 1, 2003), *available at* <http://www.nacdl.org/departures>. The letter stated that if the Feeny Amendment was adopted “all these dramatic changes would be accomplished through a House floor amendment to an unrelated bill, adopted without committee hearings by either the House or the Senate, or the benefit of consultation with the U.S. Sentencing Commission, the federal judiciary, or the organized Bar.” *Id.*

²²⁰ Letter from Chief Justice William Rehnquist to Senator Patrick Leahy 2 (Apr. 2003), *available at* <http://www.nacdl.org/departures>.

attribute of judging, which is to apply the law to the specific case by making an informed and dispassionate judgment.”²²¹

C. The Final Version of the Feeney Amendment Passed by Congress

As a result of these types of concerns, the departure provisions of the original Feeney Amendment were modified by an amendment introduced by Senators Orrin Hatch (R-UT), Lindsey Graham (R-SC), and Rep. Jim Sensenbrenner (R-WI), known as the Hatch-Sensenbrenner-Graham amendment.²²² The final version of the amendment, however, retained many aspects of the original Feeney Amendment.²²³ The *de novo* appellate review standard would apply in all downward departure cases.²²⁴ The final version retained the requirement that the Chief Judge of each district court submit a report to the Sentencing Commission within 30 days following entry of judgment in every criminal case.²²⁵

²²¹ Letter from the Federal Judges Association to Senator Orrin G. Hatch 1 (Apr. 3, 2003), available at <http://www.nacdl.org/departures>. The Federal Judges Association also stated that “the Feeney Amendment eviscerates fifteen years of judicial practice following the Sentencing Reform Act as well as the cooperative efforts of Congress, the Executive Branch, and the Judiciary to bring about a more just sentencing system.” *Id.* at 2.

²²² 149 CONG. REC. H3059-02, 3062 (daily ed. Apr. 10, 2003) (statement of Rep. Feeney).

²²³ See 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, 12 (June 2003). Senator Leahy noted that “[d]espite such objections, and without any serious process in the House or Senate, these provisions were pushed through conference with minor changes and enacted.” 149 CONG. REC. S9115-02, 9115 (daily ed. July 9, 2003) (statement of Sen. Leahy).

²²⁴ 18 U.S.C. § 3742(e) (2004) (stating that “the court of appeals shall review *de novo* the district court’s application of the guidelines to the facts).

²²⁵ PROTECT Act, Pub. L. No. 108-21, § 401(h)(1)(a)-(f), 117 Stat. 650, 672 (codified at 28 U.S.C. § 994(w)(1)). The PROTECT Act directs:

The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and

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Additionally, this version retained the requirement that the Attorney General send a report, including the identity of the judge, to the Committees on the Judiciary of the House of Representatives and the Senate not later than fifteen days after a district court's grant of a downward departure in any case other than a case involving a downward departure for substantial assistance.²²⁶ Procedurally, the final version requires judges to describe with specificity in writing all upward and downward departures.²²⁷

information regarding factors made relevant by the guidelines. The report shall also include—(A) the judgment and commitment order; (B) the statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range); (C) any plea agreement; (D) the indictment or other charging document; (E) the presentence report; and (F) any other information as the Commission finds appropriate.

Id.

²²⁶ *Id.* at § 401(l)(2)(A)-(B) (codified at 18 U.S.C. § 3553 (note)). The PROTECT Act directs:

Not later than 15 days after a district court's grant of a downward departure in any case, other than a case involving a downward departure for substantial assistance to authorities . . . the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate containing the information described under subparagraph (B). (B) Contents—The report submitted pursuant to subparagraph (A) shall set forth—(i) the case; (ii) the facts involved; (iii) the identity of the district court judge; (iv) the district court's stated reasons, whether or not the court provided the United States with advance notice of its intention to depart; and (v) the position of the parties with respect to the downward departure, whether or not the United States has filed, or intends to file, a motion for reconsideration.

Id.

²²⁷ *Id.* at § 401(c) (codified at 18 U.S.C. § 3553(c)). The law requires:

The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . is not of the kind, or is outside the range, described in [the Guidelines] the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment

Id. Previously the sentencing judge could orally state the reasons for a departure. *VanLeer*, 270 F. Supp. 2d at 1324.

Substantively, it only restricts downward departures in cases involving child crimes and sexual offenses.²²⁸ The new amendment limits the composition of the Sentencing Commission to “not more than three” federal judges instead of “at least three.”²²⁹ This provision was added during the Conference Committee’s one meeting on the AMBER Alert bill.²³⁰ Finally, it requires the Sentencing Commission to issue appropriate amendments to the guidelines to ensure that the incidence of downward departures is substantially reduced within 180 days of enactment of the Act.²³¹ Congress agreed to this version and it became effective on April 30, 2003.²³²

²²⁸ PROTECT Act § 401(b) codified at 18 U.S.C. § 3553(b)(2)). Senator Leahy noted:

Rather than directly address important measures to protect our children, the AMBER Alert conference committee effectively rewrote the criminal code on the back of an envelope. First, the final language established one set of sentencing rules for child pornographers and a more flexible set of sentencing rules for other Federal defendants, including terrorists, murderers, mobsters, civil rights violators, and white collar criminals. No one here believes that sex offenders deserve anything less than harsh sentences, but I cannot understand why we would treat the terrorists better.

149 CONG. REC. S6708-01 (daily ed. May 20, 2003) (statement of Sen. Leahy).

²²⁹ PROTECT Act § 401(n)(1) (codified at 28 U.S.C. § 991(a)).

²³⁰ 149 CONG. REC. S6708-01, 6713 (daily ed. May 20, 2003) (statement of Rep. Leahy) (explaining that the provision reducing the number of members on the Commission was introduced during the Conference Committee meeting).

²³¹ PROTECT Act § 401(m)(1)(A). The Sentencing Commission complied with this requirement by amending the Sentencing Guidelines to substantially reduce the incidences of downward departures. *See Report to the Congress: Downward Departures from the Federal Sentencing Guidelines (October 2003)*, submitted in response to section 401(m) of the PROTECT Act of 2003, Pub. L. No. 108-21, available at <http://www.nacdl.org/departures>.

²³² *VanLeer*, 270 F. Supp. 2d at 1322. S. 151 incorporated H.R. 1104. *House Overwhelmingly Approves Conference Report on Child Protection Legislation*, *supra* note 173. S. 151, however, modified the controversial “two strikes you’re out” provision. 149 CONG. REC. S5137-01, 5146 (daily ed. Apr. 10, 2003) (statement by Sen. Leahy). Senator Leahy stated that “[a]mong other things, the conference clarified that the ‘two strikes’ law would not apply to a defendant whose only prior sex conviction was a misdemeanor under state law. The conference also provided a limited affirmative defense for defendants

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AND INTRUDES INTO JUDICIAL INDEPENDENCE

The intervention of several interested groups preserved the ability of judges to depart except in situations involving sexual offenses against children.²³³ The Feeney Amendment, however, impacts the judicial exercise of discretion and downward departures in less direct methods by limiting the number of judges who can serve on the Sentencing Commission, establishing judge specific reporting requirements, and overturning the deferential standard of review for departures from the Guidelines.²³⁴ These provisions represent a general effort to limit judicial discretion because of the perception by the DOJ and certain members of Congress that judges have been too lenient.²³⁵

*A. Limiting the Composition of the Sentencing Commission to
“Not More than Three” Federal Judges*

The Feeney Amendment threatens to quiet the voice of the judiciary by limiting the composition of the Sentencing Commission to “not more than three” federal judges.²³⁶ The SRA located the Commission in the Judicial Branch and, as originally enacted, required that the membership of the Commission comprise “at least three” federal judges.²³⁷ As there are seven

convicted under certain Federal statutes that have less culpable applications.” *Id.*

²³³ See *supra* text accompanying notes 214-21.

²³⁴ See generally 28 U.S.C. § 991 (2004); 28 U.S.C. § 994 (2004); 18 U.S.C. § 3742(e) (2004); *Koon v. United States*, 518 U.S. 81 (1996).

²³⁵ Laurie L. Levenson, *The War on Sex Abuse*, NAT’L L. J., June 2, 2002, at col. 4.

²³⁶ 28 U.S.C. § 991(a) (2004).

²³⁷ 28 U.S.C. § 991(a) (2001). See *supra* Part II.B. It has been noted that:

[Despite] the extraordinarily limited role that the 1984 bill left for the judiciary in appointing commissioners and developing the sentencing guidelines, the measure still proclaimed that the Commission would be an “independent commission in the judicial branch” The primary reason for this obfuscation was apparent: supporters were fearful that the Supreme Court might hold the Sentencing Commission unconstitutional unless it were considered part of the judicial, rather

voting members on the Commission, the Feeney Amendment changes the composition of the Commission so that there will never be a majority of federal judges contributing to the development of principled guidelines.²³⁸ The Feeney Amendment reduces the input of the judiciary, which is uniquely placed to consider sentencing issues, in the promulgation of the Guidelines and transfers increased power to Congress and the Executive in the sentencing system.²³⁹

than the executive, branch of government. Moreover, the insistence that the Sentencing Commission was part of the “judicial branch” made the proposed reforms appear less radical than they were.

STITH & CABRANES, *supra* note 28, at 45. (footnotes omitted).

²³⁸ 28 U.S.C. § 991(a) (2004).

²³⁹ *United States v. Mellert*, No. CR-03-0043 MHP, 2003 WL 22025007, at *1 (N.D. Cal. July 30, 2003). Chief U.S. District Judge Marilyn Patel of the Northern District of California noted in a recent case that:

This piece of legislation would add not only more mandatory minimums, but also insinuate Congress even further into the process of actually drafting and promulgating Sentencing Guidelines, thus taking over the role of the Sentencing Commission as well as the judiciary’s traditional role of sentencing. Indeed, [the PROTECT Act changes] the composition of the Sentencing Commission to delete the requirement that “at least three” of the members of the Commission be “Federal judges” to “not more than three”, further diluting the judiciary’s input and decision making with respect to the guidelines The thrust of the legislation is to remove more and more of the determination and discretion in sentencing from an independent judiciary and the Commission and vest it in the Department of Justice, which, of course, is a partisan in our system of justice.

Id. at *1-2. Senator Leahy, a co-sponsor of the PROTECT Act, explained:

The Hatch-Sensenbrenner amendment not only maintains the worst aspects of the controversial Feeney Amendment-provisions that have nothing to do with child protection-but also adds in new provisions that were not in the original Feeney Amendment. For example, it limits the number of Federal judges who can serve on the Sentencing Commission because, as Chairman Sensenbrenner explained, “we don’t want to have the Commission packed with Federal judges that have a genetic predisposition to hate any kind of sentencing guidelines.” I, for one, believe that judges are extremely valuable members of the Commission. They bring years of highly relevant experience, not to mention reasoned judgment, to the table. The Republicans apparently

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The framers of the Constitution declined to assign the responsibility of federal sentencing to any one of the three branches.²⁴⁰ The sentencing system has always involved the participation of each branch of government.²⁴¹ This sharing of responsibility is in accord with separation of power principles. The Supreme Court has observed that “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”²⁴² The sentencing process reflects this integration of dispersed powers by affording Congress the power to set sentencing ranges and determine the scope of judicial discretion,²⁴³ the Executive the power to prosecute crimes,²⁴⁴ and the Judiciary the power to determine sentences and exercise discretion within the framework established by Congress.²⁴⁵

believe that their knowledge is of limited value. I find it ironic that the Republicans, in forcing through this measure, will undercut one of the signature achievements of Ronald Reagan’s Presidency—a firm, tough, fair system of sentencing in the Federal criminal justice system.

149 CONG. REC. S5137-01, 5146 (daily ed. Apr. 10, 2003) (statement of Sen. Leahy).

²⁴⁰ *Mistretta*, 488 U.S. at 364. The Supreme Court observed that “[h]istorically, federal sentencing—the function of determining the scope and extent of punishment—never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government.” *Id.*

²⁴¹ *Id.* The Supreme Court has noted that “under the indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch’s parole official eventually determined the actual duration of imprisonment.” *Id.* at 365

²⁴² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952).

²⁴³ *Mistretta*, 488 U.S. at 364.

²⁴⁴ *I.N.S. v. Chadha*, 462 U.S. 919, 1002 (1983). Additionally, the President has the power to grant “reprieves and pardons for offenses against the United States.” U.S. CONST. art. II, § 2, cl. 1.

²⁴⁵ *Mistretta*, 488 U.S. at 391. The Supreme Court noted the “consistent responsibility of federal judges to pronounce sentence within the statutory range established by Congress . . .” *Id.* The Supreme Court also observed that the “Guidelines bind judges in their uncontested responsibility to pass sentence in

Although Congress has the power to establish sentencing ranges, judicial contribution to the promulgation of the Guidelines is essential because of the political nature of criminal sentencing.²⁴⁶ The public's perspective on crime is influenced by the media, and Congress reacts to public concerns by toughening criminal sentences.²⁴⁷ The danger of placing complete control over the development of the Guidelines in the hands of Congress is that members of Congress may be influenced by the need to appear "tough on crime" for reelection purposes rather than engage in a meaningful analysis of whether current sentencing practices are fair.²⁴⁸ Indeed, the evidence suggests that the sentencing system,

criminal cases." *Id.*

²⁴⁶ Strauss, *supra* note 21, at 1591-92. One commentator observed that "[s]ince the politicization of crime . . . in the 1960s, politicians' fear of being labeled 'soft on crime' has led to a constant ratcheting-up of punitiveness." *Id.*

²⁴⁷ Hofer & Allenbaugh, *supra* note 19, at 28. Two commentators noted:

[M]any guideline amendments are not initiated by the Commission based on research identifying flaws in the existing rules. The Guidelines are often amended because Congress directs the Commission to increase sentences for a particular type of crime, often a crime that has received media attention. For example, in 2000, Congress directed the Commission to increase penalties for trafficking in the "club drug" MDMA, commonly known as "ecstasy." The Commission responded with an amendment doubling, and in some cases tripling, penalties.

Id. Judge John S. Martin, Jr., of the Southern District of New York, noted that "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." John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31.

²⁴⁸ *Developments in the Law—Alternative Punishments: Resistance and Inroads*, *supra* note 18, at 1967. One commentator noted:

Few social problems receive more political attention than crime. When national crime rates soar, as they did from the 1960s through the early 1990s, politicians respond to the public fear of violent crime by attacking the failure of government to accomplish its most basic purpose—the protection of its citizens. In our political culture, what are sometimes contemptuously referred to as "lock 'em up" arguments resonate deeply with the electorate. Concerns about the cost-effectiveness of incarceration raised in the pages of scholarly journals and books, and other technical arguments, do not translate into

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driven by mandatory minimums and the Guidelines, is leading to distortions of the fairness and equality originally intended by the Guidelines because these measures have resulted in a disparate impact on minorities.²⁴⁹ Additionally, America's prison population has dramatically increased since the enactment of the Guidelines and the implementation of mandatory minimums.²⁵⁰ The constitutional guarantees of lifetime tenure and protection against salary diminishment enhance judicial impartiality and afford

effective campaign speeches. The public is fed up with crime and frustrated with theory and speculation that fail to produce the result they care about—safer streets.

Id.

²⁴⁹ Dan Rodricks, *Given Failed War on Drugs, Lewis Charges No Surprise*, BALTIMORE SUN, Mar. 4, 2004, at 1B. One commentator noted that “[t]he Sentencing Project in Washington reports that in 1980, the year Ronald Reagan was elected to his first term as president, there were 40,000 Americans in prison solely for drug offenses. By last year, that number had grown to 450,000, and 75 percent of them were black or Hispanic.” *Id.* Another critic observed:

The number of African-American men in college is less than the number of those under supervision of the courts [The war on drugs] has seen the rate of imprisonment of drug offenders jump by 700 percent since 1980; a war that depends on narrowly targeted law enforcement and on mandatory prison sentences The war on drugs has been disproportionately a war on young black men.

James Carroll, *American ‘Values’ Cast a Global Shadow*, BOSTON GLOBE, Dec. 30, 2003, at A15. Justice Anthony Kennedy recently reflected on the state of the nation's prisons when he explained that “[w]ere we to enter the hidden world of punishment, we should be startled by what we see. Consider its remarkable scale. The nationwide inmate population today is about 2.1 million people We should revisit this compromise. The Federal Sentencing Guidelines should be revised downward.” Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at <http://www.nacdl.org/departures>.

²⁵⁰ Rodricks, *supra* note 249, at 1B. One commentator noted that “[i]t took about 150 years for the American prison population to reach 500,000 inmates, and that occurred in 1980. Since then, the American penal nation has grown by 1.6 million.” *Id.* Another critic observed that the “American prison population recently went over 2 million for the first time, putting the United States ahead of Russia as the world capital of incarceration Thirty years ago, one in 1,000 Americans was locked up; today, almost five are.” Carroll, *supra* note 249, at A15.

judges greater protection against the same political and public pressures exerted on Congress.²⁵¹ Federal judges uniquely contribute to the work of the Commission because of their greater impartiality and expertise in criminal sentencing.²⁵²

Furthermore, the Supreme Court affirmed the necessity of the judicial role in sentencing when it upheld the constitutionality of the Sentencing Commission in *Mistretta v. United States*.²⁵³ The Petitioner argued that the participation of federal judges in the making of policy threatens the impartiality and non-partisanship of the Judicial Branch.²⁵⁴ The Supreme Court held that, although it “is a judgment that is not without difficulty,” the inclusion of federal judges on the Sentencing Commission does not threaten the impartiality of the judiciary because of one “paramount consideration,” the judicial function of criminal sentencing.²⁵⁵ The Court observed that “the Sentencing Commission is devoted

²⁵¹ Gerald E. Rosen & Kyle W. Harding, *Reflections Upon Judicial Independence as We Approach the Bicentennial of Marbury v. Madison: Safeguarding the Constitution's "Crown Jewel"*, 29 FORDHAM URB. L.J. 791, 797 (2002) (noting that “[b]y insulating judges from political and public pressure, judicial independence affords courts the freedom to decide cases based on the law.”).

²⁵² 149 CONG. REC. S6708-01, 6713 (daily ed. May 20, 2003) (statement of Sen. Leahy). Senator Leahy stated that “I, for one, believe that judges are extremely valuable members of the Commission. They bring years of highly relevant experience, not to mention reasoned judgment, to the table. The Republicans apparently believe that their expertise is of limited value.” *Id.*

²⁵³ *Mistretta*, 488 U.S. at 390-91.

²⁵⁴ *Id.* at 397. The Court noted:

We are somewhat more troubled by petitioner’s argument that the Judiciary’s entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch. While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.

Id. at 407.

²⁵⁵ *Id.*

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exclusively to the development of rules to rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch. In our view, this is essentially a neutral endeavor and one in which judicial participation is peculiarly appropriate.”²⁵⁶ Indeed, the Senate Report on the SRA approved the primacy of the relationship between federal sentencing and the judiciary: “Placement of the commission in the judicial branch is based upon the committee’s strong feeling that even under this legislation, sentencing should remain primarily a judicial function.”²⁵⁷ Thus, the Court observed that Congress had simply recognized the role of the judiciary in criminal sentencing.²⁵⁸ Additionally, the Court stated that “judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch’s own business—that of passing sentence on every criminal defendant.”²⁵⁹ Reducing the input of the judiciary to “not more than three” federal judges undermines the Supreme Court’s reasoning in *Mistretta* that the Sentencing Commission should properly be located in the Judicial Branch.

Moreover, the requirement that “not more than three” federal judges sit on the Commission implies that the Commission does not have to contain any federal judges.²⁶⁰ Yet the opinion in *Mistretta* raises doubts about the constitutionality of the Commission if it is located in the Executive or Legislative Branches. One of the theories used by the Supreme Court in *Mistretta* to uphold the constitutionality of the SRA was that the

²⁵⁶ *Id.*

²⁵⁷ S. REP. NO. 98-225, at 159 (1983).

²⁵⁸ *Mistretta*, 488 U.S. at 396-97. The Court noted:

In sum, since substantive judgment in the field of sentencing has been and remains appropriate to the Judicial Branch, and the methodology of rulemaking has been and remains appropriate to that Branch, Congress’ considered decision to combine these functions in an independent Sentencing Commission and to locate that Commission within the Judicial Branch does not violate the principle of separation of powers.

Id.

²⁵⁹ *Id.* at 408.

²⁶⁰ Vinegrad, *supra* note 86.

Sentencing Commission was properly located in the Judicial Branch because the judiciary is uniquely placed to consider sentencing issues:

The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here. Nor does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges. Accordingly, we hold that the Act is constitutional.²⁶¹

Indeed, the Supreme Court in *Mistretta* entertained the hypothetical of a decision by Congress to place the task of creating sentencing guidelines within the Executive Branch: "[H]ad Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch."²⁶² Reducing the composition of the Commission to a minority or no federal judges raises the question whether the Sentencing Commission is properly characterized as an agency within the Judicial Branch.²⁶³

As the Court articulated in *Mistretta*, placement of the Commission in the Executive Branch raises separation of powers

²⁶¹ *Mistretta*, 488 U.S. at 412.

²⁶² *Id.* at 391 n.17. The Court quoted Ronald L. Gainer, former Associate Deputy Attorney-General at the U.S. Department of Justice, where he supervised the Department's fifteen-year effort to develop a new Federal Criminal Code, who testified in 1977 before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary of the 95th Congress that "[i]f guidelines were to be promulgated by an agency outside the judicial branch, it might be viewed as an encroachment on a judicial function . . ." *Id.*

²⁶³ *Id.* at 385-97. The Court emphasized that the Commission is an "independent" body, including at least three federal judges. *Id.* at 385.

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issues because the Executive's power to prosecute criminals and execute the laws would be linked with the power to create sentencing law.²⁶⁴ Indeed, Congress also recognized when it created the Commission that placing the Commission in the Executive Branch would inappropriately unite the power to prosecute with the power to set criminal sentences:

Traditionally, the courts and Congress have shared responsibility for establishing Federal sentencing policy. Congress defines criminal conduct and sets maximum sentences, while the courts impose sentences in individual cases. Any suggestion that the Executive Branch should be responsible for promulgating the guidelines would present troubling constitutional problems. More importantly, it would fundamentally alter the relationship of the Congress and the Judiciary with respect to sentencing policy and its implementation. Giving such significant control over the determination of sentences to the same branch of government that is responsible for the prosecution of criminal cases is no more appropriate than granting such power to a consortium of defense attorneys. If the power of the Executive Branch to prosecute criminal violations were joined with the power to prescribe sentences for those convicted, it would constitute a potential for tyranny. These powers should not be lodged in the prosecuting branch any more than in a "consortium of defense attorneys."²⁶⁵

Not only does the Executive exercise the power to prosecute, but it also wields some control over the composition of the Commission in the President's sole authority to appoint and remove the Commission's members.²⁶⁶ Diluting judicial input in the work of

²⁶⁴ *Id.* at 391 n.17. In addition, the Court noted that "[i]n the field of sentencing, the Executive Branch never has exercised the kind of authority that Congress has vested in the Commission." *Id.* at 387 n.14.

²⁶⁵ *U.S. v. Roy*, 694 F. Supp. 635, 639 (D. Minn. 1988) (quoting House Report to Sentencing Revision Act of 1984, H.R. Res. 6012, H.R. Rep. No. 98-1017, 98th Cong. 2d Sess., Sept. 13, 1984 at 94-95) (citations omitted).

²⁶⁶ 28 U.S.C. § 991(a) (2004). The President appoints the seven voting members of the Commission by and with advice and consent of the Senate. *Id.*

the Commission improperly concentrates power over the sentencing process in the Executive because of its already considerable authority to prosecute criminals and influence the composition of the Commission.

Judicial involvement in the work of the Commission provides a safeguard against “transient political considerations.”²⁶⁷ If the Commission were to develop the Guidelines without the input of federal judges, then the function of the Commission to create sentencing law suggests that the Commission is a legislative body and should be subject to the legislative safeguards of bicameralism and presentment.²⁶⁸ In upholding the constitutionality of Congress’

The federal judges are chosen from a list of six judges recommended to the President by the Judicial Conference of the United States. *Id.* The members of the Commission are subject to removal only for neglect of duty or malfeasance in office or for other good cause shown. *Id.*

²⁶⁷ Letter from Alfred P. Carlton, Jr., President of the American Bar Association to Senator Orrin G. Hatch, (Apr. 1, 2003), *available at* <http://www.nacdl.org/departures>. The President of the American Bar Association wrote:

By overriding the Sentencing Commission and legislatively rewriting the Guidelines, the Feeney Amendment threatens the legitimacy of the Commission. The Commission was created by Congress to ensure that important decisions about federal sentencing were made intelligently, dispassionately, and, so far as possible, uninfluenced by transient political considerations. Congress should accord the Commission and its processes some deference unless and until the Commission has demonstrably failed in its duties.

Id.

²⁶⁸ *Mistretta*, 488 U.S. at 413. Justice Scalia wrote in his sole dissenting opinion in *Mistretta* that locating the Commission in the Judicial Branch was unconstitutional because the Guidelines “have the force and effect of laws, prescribing the sentences criminal defendants are to receive.” *Id.* The Constitution dictates that “[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . .” U.S. CONST. art. I, § 7, cl. 2. With regard to the Presentment Clause, the Supreme Court has noted that the “President’s role in the lawmaking process also reflects the Framers’ careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures.” *I.N.S. v. Chadha*, 462 U.S. 919, 947-48 (1983). In the context of bicameralism, the Supreme Court has observed that “[b]y providing that no law could take effect without the concurrence of the

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delegation of rulemaking power to the Commission, the majority opinion in *Mistretta* noted that delegation of rulemaking power “pursuant to a legislative delegation is not the exclusive prerogative of the Executive.”²⁶⁹ The majority opinion further noted that when “we characterized rulemaking as ‘Executive action’ not governed by the Presentment Clauses, we did so as part of our effort to distinguish the rulemaking of administrative agencies from ‘lawmaking’ by Congress which is subject to the presentment requirements of Article I.”²⁷⁰ By analogy, rulemaking authority delegated to agencies in the Judicial Branch is not subject to presentment and bicameralism requirements as reflected in the procedure for passing the Guidelines under the SRA.²⁷¹ If the Commission, however, is “a sort of junior-varsity Congress,” as suggested by Justice Scalia in his dissenting opinion in *Mistretta*, then the promulgation of guidelines should receive the same legislative safeguards as other laws.²⁷²

prescribed majority of the Members of both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation’s elected officials.” *Id.* at 948-49.

²⁶⁹ *Id.* at 387 n.14. See *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

²⁷⁰ *Mistretta*, 488 U.S. at 387 n. 14. See *Chadha*, 462 U.S. at 953 n.16.

²⁷¹ 28 U.S.C. § 994(a) (2004). SRA directs:

The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute 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 use of a sentencing court in determining the sentence to be imposed in a criminal case

Id.

²⁷² *Mistretta*, 488 U.S. at 427. Justice Scalia supported the majority’s opinion with regard to the petitioner’s delegation argument that “the doctrine of unconstitutional delegation of legislative authority has been violated because of the lack of intelligible, congressionally prescribed standards to guide the Commission.” *Id.* at 416. He disagreed with the majority, however, because “the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.” *Id.* at 417. Executive and judicial powers are not lawfully exercised by the Commission because “[t]he lawmaking function of the Commission is completely divorced from any responsibility for execution of the law or

*B. Reporting Requirements and Data Collection Provisions
Interfere with Judicial Independence*

The reporting provisions of the PROTECT Act challenge the premise of judicial independence by establishing Executive and Legislative monitoring of the traditional judicial function of sentencing.²⁷³ The independence of the federal judiciary is a cornerstone of governmental structure and a fundamental component of separation of powers.²⁷⁴ Although the SRA limited

adjudication of private rights under the law.” *Id.* at 420.

²⁷³ Chief Justice William H. Rehnquist, 2003 Year-End Report on the Federal Judiciary (Jan. 1, 2004), *available at* <http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html>. Chief Justice Rehnquist explained that the “subject matter of the questions Congress may pose about judges’ decisions, and whether they target the judicial decisions of individual federal judges, could appear to be an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties.” *Id.*

²⁷⁴ THE FEDERALIST NO. 78, at 406 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). Alexander Hamilton recognized that the independence of the judiciary “guard[s] the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men . . . sometimes disseminate among the people themselves . . .” *Id.* at 405. He also observed the importance of the judiciary to the proper maintenance of separation of powers:

Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of [unjust and partial] laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them

Id. at 406. Hamilton also observed the weakness of the judiciary with regard to the legislative and executive branches. *Id.* at 402. He noted that the judiciary “has no influence over either the sword or the purse . . . [and] may truly be said to have neither FORCE nor WILL, but merely judgment.” *Id.* He noted the “natural feebleness of the judiciary,” and its “continual jeopardy of being overpowered, awed or influenced by its coordinate branches . . .” *Id.* at 403. In recognition of this potential, the Constitution provides the judiciary with lifetime appointments, protection against salary diminishment while in office, and removal only by impeachment for violating the constitutional “good behavior” standard. U.S. CONST. art. III, § 1. Chief Justice William Rehnquist explained:

One of the critical challenges of American government is to preserve the legitimate independence of the judicial function while recognizing

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the ability of judges to exercise discretion, it preserved the ability of judges to engage in individualized assessment of cases to the extent permitted by the departure provisions.²⁷⁵ The Feeney Amendment undermines judicial independence and provides a framework for intimidation of judges by requiring the Sentencing Commission to make available to the House and Senate Committees on the Judiciary, upon request, the written reports and all underlying records accompanying the reports, that the Chief Judge of each district court is required to submit in every criminal case to the Sentencing Commission.²⁷⁶ Additionally, the Feeney Amendment requires that the Sentencing Commission make available to the Attorney General, upon request, the data files that the Commission maintains based on the information provided by the Chief Judge, including the identity of the sentencing judge.²⁷⁷ The data files contain, among other things, the judgment, statement

the role Congress must play in determining how the judiciary functions. Article III of the Constitution grants to Article III judges two significant protections of their independence: they have tenure during good behavior, and their compensation may not be diminished during their term of office. But federal judges are heavily dependent upon Congress for virtually every other aspect of their being—including when and whether to increase judicial compensation.

Chief Justice William H. Rehnquist, Address at the Federal Judges Association Board of Directors Meeting (May 5, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html (last visited Feb. 2, 2004).

²⁷⁵ 149 CONG. REC. S5113-01, 5116 (daily ed. Apr. 10, 2003) (statement of Sen. Kennedy). Senator Kennedy noted:

As one of the authors of the Sentencing Reform Act, I can say that Congress did not intend to eliminate judicial discretion. We recognized that the circumstances that may warrant departure from the guideline range cannot, by their very nature, be comprehensively listed or analyzed in advance. In interpreting the Act, both the Supreme Court and the Sentencing Commission have emphasized this point. This is not a partisan position. Judicial authority to exercise discretion when imposing a sentence was and is an integral part of the structure of the Federal sentencing guidelines and indeed of every guideline system in use today.

Id.

²⁷⁶ 28 U.S.C. § 994(w)(2) (2004).

²⁷⁷ *Id.* at § 994(w)(4).

of reasons for the sentence imposed, any plea agreement, the presentence report, and any other information which the Commission finds appropriate.²⁷⁸ These reporting requirements hinder the traditional judicial function of sentencing by creating a tool for congressional and executive intimidation of judges who grant downward departures.²⁷⁹

The reporting provisions of the Feeney Amendment are unnecessary because the Commission, located in the Judicial Branch, compiles sentencing information pursuant to its statutory mandate to periodically review and revise the Guidelines and report any amendments to Congress.²⁸⁰ Indeed, the Sentencing Commission is required to submit to Congress at least annually an analysis of the reports submitted by the Chief Judge of each district court and an accounting of those districts that the Commission considers have not complied with the reporting requirements.²⁸¹ The reporting provisions of the PROTECT Act, however, subject the decisions and identity of individual judges to full disclosure and review by the Executive and Congress even though the Sentencing Commission is already required to analyze and submit information on departure decisions.²⁸²

²⁷⁸ *Id.* at § 994(w)(1).

²⁷⁹ 149 CONG. REC. S5113-01, 5119 (daily ed. Apr. 10, 2003) (statement of Sen. Kennedy). Senator Kennedy noted:

I must express my deep concern for the provision of the legislation that requires the Commission to report to the Judiciary Committees of the Congress and even to the Attorney General confidential court records and even “the identity of the sentencing judge.” *I do not believe that this provision serves any legitimate interests of the Congress.* I do not believe that authorizing disclosure of this information to the executive branch is warranted. I have deep concerns that this provision lacks the respect owed by the Congress to a co-equal branch.

Id. (emphasis added).

²⁸⁰ *See* 28 U.S.C. § 994(o)-(p) (2004).

²⁸¹ *Id.* at § 994(w)(3). “The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.” *Id.*

²⁸² *See* 28 U.S.C. § 994(w)(1)-(4) (2004). Leonidas Ralph Mecham,

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One of the most troubling examples of the possible consequences of the reporting requirements was shown in the actions taken against Chief Judge James M. Rosenbaum of the United States District Court for the District of Minnesota after his testimony concerning a proposed amendment to the Guidelines.²⁸³ In May 2001, the Sentencing Commission unanimously submitted to Congress a proposal to limit to a maximum of ten years the sentence defendants could receive who played a minor role in a drug operation.²⁸⁴ The amendment sought to resolve the problem that minor offenders carrying small amounts of drugs were receiving harsher sentences than supervisors in the drug trade since drug quantity is the determining factor in sentencing.²⁸⁵ In response to the proposed amendment, Representative Lamar Smith (R-TX) introduced H.R. 4689, for himself and among others, Representative Sensenbrenner, to block the Commission's recommendation.²⁸⁶

On May 14, 2002, the Subcommittee on Crime, Terrorism, and

Secretary of the Judicial Conference of the United States wrote:

Among other things, this data [provided by the Sentencing Commission] provides for each court the percentage of defendants who receive substantial assistance departures and the percentage of defendants who receive other downward departures. We urge Congress to meet its responsibility to oversee the functioning of the criminal justice system through use of this and other information without subjecting individual judges to the risk of unfair criticism in isolated cases where the record may not fully reflect the events leading up to and informing the judge's decision in a particular case.

Letter from Leonidas Ralph Mecham, Secretary of the Judicial Conference of the United States, to Senator Orrin G. Hatch, (Apr. 1, 2003), *available at* <http://www.nacdl.org/departures>.

²⁸³ Douglas A. Kelley, *Federal Judge Draws Congressional Ire*, 60 BENCH & B. OF MINN. 22, 23-25 (2003) (describing House Republican's response to Chief Judge Rosenbaum's testimony).

²⁸⁴ Tony Mauro, *Judiciary Committee to Debate Disparity in Drug Sentences*, THE LEGAL INTELLIGENCER, May 21, 2002, at 4. See H.R. REP. NO. 107-769, at 6-7 (2002) for a description of the amendment.

²⁸⁵ Mauro, *supra* note 284, at 4. In one year, for example, couriers and mules were held accountable for almost as much powder cocaine (4,900 grams) as managers and supervisors (5,000 grams). H.R. REP. NO. 107-769, at 9 (2002).

²⁸⁶ H.R. 4689, 107th Cong. (2002).

Homeland Security held a legislative hearing on H.R. 4689.²⁸⁷ Judge Rosenbaum testified in support of the Commission's amendment because it would contribute to the development of a more equitable system with respect to low-level drug offenders.²⁸⁸ Judge Rosenbaum has a reputation for being a tough sentencing judge.²⁸⁹ He testified that the "present sentencing system sentences minor and minimal participants who do a day's work, in an admittedly evil enterprise, the same way it sentences the planner and enterprise-operator who set the evil plan in motion and who figures to take its profits."²⁹⁰ Before the Committee, he gave examples of actual cases involving low-level offenders where application of the Commission's amendment would result in a more just outcome.²⁹¹

Following the hearing, the House Judiciary Committee requested from Judge Rosenbaum downward departure information in the cases he discussed in his testimony.²⁹² Judge Rosenbaum supplied information which reflected that he had granted downward departures in certain cases but did not include the reasons for the departures.²⁹³ Judge Rosenbaum declined to provide further information following subsequent requests for departure information and suggested that the Committee order transcripts of the sentencing proceedings.²⁹⁴ The Committee did so.²⁹⁵ Based on the transcripts, the Committee charged that Judge Rosenbaum misrepresented the sentences imposed in the example cases because he had departed below the guideline range, belying

²⁸⁷ H.R. REP. NO. 107-769, at 7 (2002).

²⁸⁸ *Id.* at 9.

²⁸⁹ Kelley, *supra* note 283, at 22. Judge Rosenbaum was nominated by conservative Senator Rudy Boschwitz and appointed by President Ronald Reagan. *Id.* Additionally, his sentences for drug offenders exceeded the national median each year between 1998 and 2002. *Id.*

²⁹⁰ H.R. REP. NO. 107-769, at 9-10 (2002).

²⁹¹ Kelley, *supra* note 283, at 22. Rosenbaum discussed several recent cases in the District of Minnesota. H.R. REP. 107-769, at 10 (2002).

²⁹² H.R. REP. NO. 107-769, at 10 (2002).

²⁹³ *Id.*

²⁹⁴ *Id.* at 11.

²⁹⁵ *Id.*

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his testimony that the Commission's amendment was necessary to mitigate unwarranted sentencing harshness.²⁹⁶ Within a week, the House Judiciary Committee, of which Representative Sensenbrenner is Chairman, accused Rosenbaum of misleading the Committee about his examples and demanded all of his documents because of his "record of hostility" to the Guidelines.²⁹⁷ Judge Rosenbaum refused, however, and the House Judiciary Committee threatened him with a subpoena.²⁹⁸ In February of 2003, the Judiciary Committee attempted to obtain Judge Rosenbaum's records from the General Accounting Office (GAO), but was unsuccessful because the GAO does not investigate individual judges.²⁹⁹ The Committee did not rule out impeachment as a course of action against Judge Rosenbaum.³⁰⁰

Chief Justice William Rehnquist revealed the troubling nature of the actions of the Judiciary Committee against Judge Rosenbaum.³⁰¹ In a speech to the Board of Directors of the Federal Judges Association he stated that "Congress has recently indicated rather strongly, by the Feeney Amendment, that it believes there have been too many downward departures from the Sentencing Guidelines. It has taken steps to reduce that number. Such a

²⁹⁶ *Id.* at 13-14.

²⁹⁷ Kelley, *supra* note 283, at 24. See H.R. REP. NO. 107-769, 9-32 (2002) for a complete description of the charges leveled against Rosenbaum.

²⁹⁸ Jason Hoppin, *Drug-Sentencing Probe Worries Bench*, LEGAL INTELLIGENCER, Mar. 24, 2003, at 4. The subpoena would have included "Rosenbaum's records from his cases since Jan. 1, 1999, identifying drug-related cases in which he departed from sentencing guidelines. He also has been asked to provide sentencing transcripts, the status of appeals, copies of all decisions and the names any court personnel who helped in his testimony before Congress." Rob Hotakainen & Pam Louwagie, *State's Chief U.S. Judge Might Face Subpoena; House Panel Investigating Sentencing in Drug Case*, STAR TRIBUNE, Mar. 13, 2002, at 1A, available at 2003 WL 5530675.

²⁹⁹ Kelley, *supra* note 283, at 24. See also Hoppin, *supra* note 298, at 4.

³⁰⁰ Kelley, *supra* note 283, at 24 (citing Jess Braven & Gary Fields, *House Panel to Probe U.S. Judge: Minnesota Jurist's Records Expected to be Subpoenaed in an Unusual Showdown*, WALL ST. J. (Mar. 12, 2003)).

³⁰¹ Chief Justice William Rehnquist, Remarks of the Chief Justice at the Federal Judges Association Board of Directors meeting, available at http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html (May 5, 2003).

decision is for Congress, just as the enactment of the Sentencing Guidelines nearly 20 years ago was.”³⁰² He also affirmed that collection of information about sentencing practices is “a legitimate sphere of congressional inquiry, in aid of its legislative authority.”³⁰³ While Chief Justice Rehnquist approved of the general authority of Congress to collect information in aid of formulating legislation on sentencing, he went on to explain that individualized collection of information on a judge-by-judge basis “is more troubling For side-by-side with the broad authority of Congress to legislate and gather information in this area is the principle that federal judges may not be removed from office for their judicial acts [A] judge’s judicial acts may not serve as a basis for impeachment.”³⁰⁴ This principle, the Chief Justice observed, has existed for nearly 200 years, following the trial of Justice Samuel Chase of the Supreme Court by the Senate.³⁰⁵

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* The Chief Justice remarked:

Chase was one of those people who are intelligent and learned, but seriously lacking in judicial temperament. He showed marked partiality in at least one trial over which he presided, and regularly gave grand juries partisan federalist charges on current events. For this the House of Representatives, at President Thomas Jefferson’s instigation, impeached him, and he was tried before the Senate in 1805. That body heard fifty witnesses over a course of ten full days. The Jeffersonian Republicans had more than a two-thirds majority in the body, and if they had voted as a block Chase would have been convicted and removed from office. Happily, they did not vote as a block. . . . The significance of the outcome of the Chase trial cannot be overstated—Chase’s narrow escape from conviction in the Senate exemplified how close the development of an independent judiciary came to being stultified. Although the Republicans had expounded grandiose theories about impeachment being a method by which the judiciary could be brought into line with prevailing political views, the case against Chase was tried on a basis of specific allegations of judicial misconduct. Nearly every act charged against him had been performed in the discharge of his judicial office. Instead it represented a judgment that impeachment should not be used to remove a judge for conduct in the exercise of his judicial duties. The political precedent set by Chase’s

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Aside from the Feeney Amendment's intrusion into judicial independence, the reporting provisions damage the protection afforded by downward departures against excessive sentences by potentially deterring judges from granting downward departures.³⁰⁶ Individualized assessment is a key component of a fair criminal justice system because the process allows judges to review the totality of the circumstances surrounding a crime to prevent unjust consequences.³⁰⁷ Mandatory minimums have resulted in harsh sentences by limiting the ability of judges to exercise discretion and reduce sentences in appropriate circumstances.³⁰⁸ Moreover,

acquittal has governed that day to this: a judge's judicial acts may not serve as a basis for impeachment.

Id.

³⁰⁶ David M. Zlotnick, *The War within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 234 (2004) (discussing judicial reaction to the reporting provisions of the Feeney Amendment). For example, in a recent case, Judge Donald Molloy, of the District Court of Montana, wrote:

I believe . . . that the Feeney Amendment, in seeking to strip federal judges of their judgment, will lead to more unjust sentences and that what we will end up with is a third branch of administrators heeding the beck and call of those who have sense of justice reflected in the old testament.

Id. (quoting Sent. Tr. at 26, *United States v. Chang Gou You*, Cr. 02-15-H-DWM (D. Mon. Sept. 11, 2003)). Judge Martin observed that "I certainly hope my former colleagues wouldn't give in to that pressure, but look . . . judges don't like to be reversed. Some judges are more concerned about their reversal rate than others. Some judges obviously are more concerned about the possibility of being reported." *How will Judicial Discretion Change under the Feeney Amendment?*, *supra* note 158, at M12.

³⁰⁷ 149 CONG. REC. S5113-01, 5119 (daily ed. Apr. 10, 2003) (statement of Sen. Kennedy). Senator Kennedy observed 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." *Id.* Judge Martin noted that "[f]or most of our history, our system of justice operated on the premise that justice in sentencing is best achieved by having a sentence imposed by a judge who, fully informed about the offense and the offender, has discretion to impose a sentence within the statutory limits." Martin, *supra* note 247, at A31.

³⁰⁸ *U.S. v. Dyck*, 287 F. Supp. 2d 1016, 1022-23 (D.N.D. 2003). Judge

the impact of the reporting provisions of the Feeney Amendment is beginning to emerge in the federal courts. In the recent case of *United States v. Kirsch*, the court determined that the defendant's case did not fall outside the heartland and denied a downward departure.³⁰⁹ The court added, however, that there was an additional reason why it refused to depart downward:

The Court believes that the day of the downward departure is past. Congress and the Attorney General have instituted policies designed to intimidate and threaten judges into refusing to depart downward, and those policies are working. If the Court were to depart, the Assistant U.S. Attorney would be required to report that departure to the U.S. Attorney, who would in turn be required to report to the Attorney General. The Attorney General would then report the departure to Congress, and Congress could call the undersigned to testify and attempt to justify the departure. This reporting requirement system accomplishes its goal: the Court is intimidated, and the Court is scared to depart Our justice system depends on a fair and

Rodney S. Webb, appointed by President Reagan and a former federal prosecutor, of the District Court of North Dakota, wrote:

[T]he Court submits that the pendulum for sentencing within the criminal justice system has moved too far to the right in favor of harsh sentences. We must adopt sentencing goals beyond retribution and deterrence. Our current system costs too much and we are in danger of losing a substantial portion of a whole generation of young men to drugs as their futures rot within our prisons. A society can be tough on crime without being vindictive, unjust or cruel Perhaps this opinion, as an appeal for a restoration of individualized sentencing, will provoke some thoughtful discussion on these important issues and help restore the traditional sentencing discretion of the district courts usurped by the legislative and executive branches of our government.

Id.

³⁰⁹ 287 F. Supp. 2d 1005, 1006 (2003). The defendant was convicted of conspiracy to defraud the government and making false statements to a federal agency. *Id.* at 1006. The defendant requested a downward departure based on his contention that his case fell outside the "heartland" because of his "strong family, the history of employment, his strong community report, his education, and his amenability to probationary supervision." *Id.*

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impartial judiciary that is free from intimidation from the other branches of government. The departure reporting requirements constitute an unwarranted intimidation of the judiciary.³¹⁰

This type of reaction, though, is not uniform. Other judges have rejected the notion of a judicial “black list” to threaten and intimidate individual judges and affirm that the Feeney Amendment will have limited impact on criminal sentencing.³¹¹

The opinion in *United States v. Vanleer* reflects this alternative perspective.³¹² The judge based his notion that the Feeney Amendment will have minimal substantive change on the ability of judges to downward depart on two areas.³¹³ First, the idea of a judicial “black list” is erroneous because judicial departure decisions are already a matter of public record.³¹⁴ The court stated that it was “not concerned about close scrutiny of its downward (or upward) departure decisions by Congress, the public, or otherwise.”³¹⁵ Second, the Feeney Amendment in its final form only restricts the ability of judges to downward depart in child abduction and sex offense cases.³¹⁶ The judge wrote that the Feeney Amendment makes “one *limited* change in the ability of district courts to depart downward in child abduction and sex offense cases [A] prominent journal circulated to defense attorneys seemingly suggested that the Feeney Amendment ‘essentially eliminates judges’ discretion in *all* cases. This description is not accurate”³¹⁷ In all other cases, judges retain their traditional ability to depart downward in appropriate circumstances.³¹⁸

This view, however, ignores that all downward departure decisions will be monitored by the Department of Justice and

³¹⁰ *Id.* at 1006-07.

³¹¹ *See* *United States v. VanLeer*, 270 F. Supp. 2d 1318 (D. Utah 2003).

³¹² *Id.*

³¹³ *Id.* at 1323-24.

³¹⁴ *Id.* at 1324.

³¹⁵ *Id.*

³¹⁶ *Id.* at 1323.

³¹⁷ *Vanleer*, 270 F. Supp. 2d at 1323.

³¹⁸ *Id.*

Congress.³¹⁹ This inevitably broadens the effect of the Feeney Amendment because individual judges may be less willing to depart for fear of reprisal.³²⁰ Additionally, the court in *Vanleer* deflected criticism of the Feeney Amendment by contending that the new system is substantially similar to the old.³²¹ The individual reporting requirements that have concerned Chief Justice Rehnquist, however, are specific to the new system.³²² The argument as to the degree of difference between the two systems is misplaced, however, given the addition of the monitoring provisions. It is the potential for abuse brought about the addition of the monitoring provisions that is problematic.³²³ Whatever may be the philosophy of one court, the judicial branch deserves protection in accordance with the historical and constitutional tradition of judicial independence.³²⁴

³¹⁹ 28 U.S.C. § 994(w)(1)-(4) (2004).

³²⁰ See *United States v. Kirsch*, 287 F. Supp. 2d 1005 (2003). In addition, Representative Conyers stated:

Now my friends on the other side of the aisle will claim not to worry, that they fixed the Feeney Amendment which they will say is limited to sex offenses. But the truth is that the revised Feeney language would radically alter the sentencing regime for every single criminal case in the legal system. It does this by adding a whole host of new procedural requirements for a judge to show any form of mercy in all federal cases. The bill also adds new requirements on the Justice Department and the Sentencing Commission with regard to downward departures in all Federal cases. At the end of the day, what we will have is something very close to the original purpose of the Feeney Amendment—mandatory minimums in all federal criminal cases.

149 CONG. REC. H3059-02, 3075 (daily ed. Apr. 10, 2003) (statement of Rep. Conyers).

³²¹ *VanLeer*, 270 F. Supp. 2d at 1323-25.

³²² See *supra* text accompanying notes 276-278 for a description of the reporting provisions.

³²³ *How will Judicial Discretion Change under the Feeney Amendment?*, *supra* note 158, at M12. Judge Martin noted that “[t]his was legislation which was put on as, in my view, just a total attack on judges. And with an attempt to intimidate.” *Id.*

³²⁴ 149 CONG. REC. S6708-01, 6713 (daily ed. May 20, 2003) (statement of Sen. Leahy). Senator Leahy noted:

[T]he Feeney Amendment effectively created a “black list” of judges

FEENEY AMENDMENT & JUDICIAL DISCRETION 1017*C. The Feeney Amendment Overturns the Supreme Court Decision in Koon*

Two commentators have noted that the principle purpose of the Feeney Amendment was to overrule *Koon*.³²⁵ *Koon* implemented a deferential abuse of discretion standard, which recognized the “institutional advantage” of district judges to determine whether a case falls outside the “heartland” because they preside over many more Guidelines cases than appellate courts.³²⁶ The Feeney Amendment undermines the traditional sentencing discretion of trial judges, as articulated in *Koon*, to make factually driven sentencing decisions.³²⁷ It shifts sentencing discretion away from

that stray from the draconian mandates of the new law. The enacted amendment attempt [sic] to intimate [sic] the Federal judiciary by compiling a list of all judges who impose sentences that the Justice Department does not like. Again, this provision is not limited to crimes against children, but applies in any type of criminal case. It takes a sledge hammer to the concept of separation of powers.

Id.

³²⁵ Paul Shechtman & Nathaniel Z. Marmor, *Retroactive Application of the PROTECT Act*, N.Y. L.J., June 24, 2003, at col. 4. They cite Representatives Feeney’s statement that:

[T]he Department of Justice believes that much of this damage is traceable to the Supreme Court’s 1996 decision in *Koon* versus the United States. In the *Koon* case, the court held that any factor not explicitly disapproved by the sentencing commission or by statute could serve as grounds for departure. So judges can make up exceptions as they go along. This has led to an accelerated rate of downward departures.

149 CONG. REC. H2405-05, 2422-23 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney).

³²⁶ *Koon v. United States*, 518 U.S. 81, 98 (1996).

³²⁷ 149 CONG. REC. S6708-01, 6711-12 (daily ed. May 20, 2003) (statement of Sen. Kennedy). Senator Kennedy noted:

[The Feeney Amendment] limits in several ways the ability of judges to depart downwards from the guidelines. It overturns a unanimous 1996 Supreme Court decision, *Koon v. United States*, which established a deferential standard of review for departures from the guidelines based on the facts of the case—thereby undermining what the Court described as the “traditional sentencing discretion” of trial courts and the

district courts to appellate judges by changing the standard of review from “due deference” to *de novo*.³²⁸ Judge Jack B. Weinstein, of the Eastern District of New York, recently commented that “[f]or a judge to exercise what amounts to original power to sentence without actually seeing the person being sentenced is contrary to American tradition, as recognized in *Koon*.”³²⁹ Changing the standard of review to *de novo* further reduces the ability of judges to exercise discretion in the harsh criminal sentencing system.³³⁰

Sentencing data supports the proposition that district judges are exposed to a significantly higher number of departure cases compared to appellate courts, and this undermines the DOJ’s justification for overturning *Koon*.³³¹ The DOJ appealed only 19

“institutional advantage” of Federal district courts over appellate courts to make fact-based sentencing determinations.

Id. *Koon*, 518 U.S. at 87.

³²⁸ 18 U.S.C. § 3742(e) (2004).

³²⁹ *In re Sentencing*, 219 F.R.D. 262, 262 (E.D.N.Y. 2004) (order granting all sentencing hearings to be recorded by a video recording device).

³³⁰ *Id.* Judge Weinstein noted:

Passage of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (“PROTECT Act”) carries further the attenuation of the capacity of federal judges to do their work properly by requiring the Court of Appeals to review *de novo* a District Court’s departure from the applicable Sentencing Guidelines range. In effect, primary sentencing authority is shifted to the appellate judges whenever a trial court provides a lower sentence than do the Guidelines matrices.

Id. (internal citations omitted).

³³¹ *Koon*, 518 U.S. at 98. In *Koon*, the Court noted:

Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases.

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departure sentences in fiscal year 2001.³³² Defendants appealed 340 departure sentences, which represents only 4.5 percent of the total criminal sentences appealed in 2001.³³³ Furthermore, the DOJ explained that the Feeney Amendment would facilitate government appeal of “illegal” downward departures by requiring appellate courts to undertake a *de novo* review of the case.³³⁴ Senator Kennedy stated, however, that “in arguing for the abrogation of the Supreme Court’s ruling in *Boon [sic] v. United States*, the Department also failed to mention that it wins 78 percent of all sentencing appeals, or that 85 percent of all defendants who receive downward departures based on grounds other than cooperation with the government nevertheless receive prison time.”³³⁵ Of the 19 departure sentences appealed by the DOJ in fiscal year 2001, the departure decision was affirmed 21 percent of the time.³³⁶ The DOJ had a success rate of 79 percent, therefore, which fails to suggest that the abuse of discretion standard has hindered the DOJ in the appeals process.³³⁷

Not only are district court judges required to preside over a significantly greater number of sentencing cases than appellate courts, but the nature of the sentencing process places district court judges in the best position to determine the appropriate sentence of an offender.³³⁸ In 2001, 96.6 percent of defendants accepted guilty pleas resulting in only 3.4 percent of cases reaching the trial

Id.

³³² UNITED STATES SENTENCING COMM’N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 58, at <http://www.ussc.gov/annrpts.htm> (last visited Mar.10, 2003).

³³³ *Id.* at tbl. 57.

³³⁴ *Letter from Justice Department Supporting Original Feeney Amendment*, 15 FED. SENT. R. 355 (Vera Inst. Just. June 2003) at 3, at 2003 WL 22208851.

³³⁵ 149 CONG. REC. S6708-01, 6711 (daily ed. May 20, 2003) (statement of Sen. Kennedy).

³³⁶ UNITED STATES SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 58, at <http://www.ussc.gov/annrpts.htm> (last visited Mar.10, 2003).

³³⁷ *Id.*

³³⁸ *In re Sentencing*, 219 F.R.D. 262, 262-63 (E.D.N.Y. 2004).

stage.³³⁹ The virtual removal of the federal criminal trial has shifted discretion away from judges and defense counsel to prosecutors, and placed significant emphasis on the sentencing hearing as the means to evaluate the offender and the facts of the case.³⁴⁰ A probation officer prepares a presentence report for every defendant in a criminal case.³⁴¹ In addition to using the presentence report as a means of evaluating the defendant, district courts judges are able to personally assess and observe the defendant and interrogate the defendant and the defendant's family members.³⁴²

³³⁹ UNITED STATES SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, fig. C, at <http://www.ussc.gov/annrpts.htm> (last visited Mar. 10, 2003).

³⁴⁰ U.S. v. Speed Joyeros, S.A., 204 F. Supp. 2d 412, 417-18 (E.D.N.Y. 2002). Judge Weinstein noted:

The virtual elimination of federal criminal trials, substituting administrative decisions not to prosecute or pleas of guilty, has substantially changed our federal criminal law system. Increased prosecutorial discretion and power have raised the percent of guilty pleas Discretion not to prosecute for the crime committed is widely exercised. Enhancement of control of sentencing by the prosecutor as a result of sentencing guidelines and minimum sentences has increased the government's power to coerce defendants. There has been a change from the paradigmatic concept of investigation and accusation by the government of almost all persons believed to have committed crimes, trial by jury with a strong role for defense counsel, and discretion in sentencing by the court, to a system sharply reducing the role of defense counsel, the jury and the judge, and whatever protections they can afford a defendant.

Id. Judge Weinstein noted further that "sentencing hearings routinely conducted following the entering of a guilty plea are the critical events in criminal prosecutions." *In re Sentencing*, 219 F.R.D. at 262.

³⁴¹ FED. R. CRIM. P. 32(c)(1)(A). The presentence report includes, among other things, the defendant's history and characteristics, including any prior criminal record and any circumstances affecting the defendant's behavior that might be helpful in imposing a sentence. *Id.* at (d)(2)(A)-(F).

³⁴² *In re Sentencing*, 219 F.R.D. at 263. Judge Weinstein noted:

Those attending a sentencing hearing typically include the defendant and defendant's counsel, an Assistant United States Attorney, a probation officer (who prepared the presentence report), a court reporter, the judge, and the family, friends, employers, and other witnesses for the defendant and for the government. If the defendant is

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Judge Weinstein explained:

The sentencing hearing normally requires that the defendant be observed for credibility, mental astuteness, physical characteristics, ability to withstand the rigors and dangers of incarceration, and a myriad other relevant factors. In many instances, it is necessary to observe the employer's and familial ties to the defendant. A judge applies mental impressions of many tangible and intangible factors when imposing a sentence. *Many of these factors do not appear in the transcript.* The defendant's words, his facial expressions and body language, the severity of any infirmity, the depth of his family's reliance, or the feebleness of his build cannot be accurately conveyed by a cold record. Many defendants are ill educated and inarticulate. They do not have the intellectual capacity to articulate, as might a great novelist, what is in their hearts. They are, after all, mere people.³⁴³

The sentencing transcript and presentence report are unable, therefore, to properly encapsulate the district court judge's impressions of the defendant, which means that this type of individualized assessment will be lost because "[i]t is unlikely that the Court of Appeals judges would elect to require a criminal defendant to appear in the appellate courtroom so its judges could in fact revisit the sentence *de novo*."³⁴⁴

The change of the standard of review results in the possibility

in custody, he or she is brought to court clad in prison garb, under the watchful eye of the United States Marshals. Otherwise, the defendant arrives in civilian attire. The closest family members are invited to sit with the defendant so that the court may observe them and interrogate them if necessary, and so that they and the defendant can furnish each other with emotional support. Given that the majority of defendants are charged with drug crimes, there is rarely a tangible "victim" in the court [D]efense counsel, the defendant, the prosecutor and the victim (if present) are given opportunities to speak The court then imposes a sentence "without unnecessary delay."

Id. (citations omitted).

³⁴³ *Id.* at 264 (citations omitted) (emphasis added).

³⁴⁴ *Id.*

that defendants will receive excessive sentences because appellate courts lack the experience and opportunity to assess the defendant and the circumstances surrounding the defendant's crime.³⁴⁵ For example, Dyck, a citizen of Canada, was a nineteen-year old with a fourth grade education who served a mitigated sentence of 12 months for his minor role as "mule" in trafficking 85 pounds of marijuana into the United States.³⁴⁶ Following his release, the Immigration and Naturalization Service (INS) ordered him to permanently leave the United States and the defendant returned to Canada.³⁴⁷ Subsequently, the defendant paid a driver to take him to another part of Canada to visit friends.³⁴⁸ The driver decided to travel through the United States because of the better highway system but failed to inform the defendant of his plans.³⁴⁹ Defendant fell asleep during the trip but awoke as the car approached the border.³⁵⁰ The border patrol officer stopped the vehicle and the defendant was charged with attempting to illegally reenter the country.³⁵¹ The district court judge refused to impose the 41 to 51 month sentence, which reflected his criminal history category based on his prior drug trafficking offense, and sentenced Dyck to 6 months because his case fell outside the heartland as he was not attempting to reenter the United States to distribute drugs.³⁵² The Government appealed and the Court of Appeals vacated the decision and mandated a sentence within the 41 to 51 month range because it refused to consider Dyck's minor role in the prior drug offense as a basis for downward departure.³⁵³

³⁴⁵ U.S. v. Dyck, 287 F. Supp. 2d 1016, 1019 (D.N.D. 2003) (noting that the "district courts also enjoy familiarity with history of the case and reap the benefits of face-to-face contact with the defendants, their families, and their victims"). *Id.*

³⁴⁶ *Id.* at 1017.

³⁴⁷ *Id.*

³⁴⁸ *Id.* See 8 U.S.C. § 1326(a) (2003).

³⁴⁹ Dyck, 287 F. Supp. 2d at 1017-18.

³⁵⁰ *Id.* at 1018.

³⁵¹ *Id.*

³⁵² *Id.* See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2003).

³⁵³ Dyck, 287 F. Supp. 2d at 1020. The district court noted that the circuit court "fails to recognize the injustice of enhancing a defendant's net offense

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The Feeney Amendment deprives defendants, such as Dyck, of the wisdom and experience of district court judges. The district court judge in *Dyck* observed this fact upon remand of Dyck's case:

In the matter of the sentencing of Pedro Dyck, this Court enjoys the exact advantages over the appellate court the Supreme Court was referring to in *Koon*. The Court is located in an agricultural border state and regularly sentences defendants involved in immigration and drug crimes. The sentencing judge has over forty years experience in criminal law as a defense attorney, prosecutor, and judge; and as a judge, has sentenced hundreds of defendants under the direction of the Guidelines. The Court participated in all aspects of the case from pre-trial matters to trial to sentencing. The Court has met the defendant, conversed with the defendant, and peered into the whites of the defendant's eyes. The district court is therefore in the better position to determine if this case falls outside the heartland of cases.³⁵⁴

As noted by the district court judge in *Dyck*, the sentencing system should afford district court judges the deference they deserve because of their experience in evaluating the circumstances surrounding the commission of a crime: "The need [in punishment] is not for blindness, but for insight, for equity, for what Aristotle called 'the correction of the law where it is defective owing to its universality.' This can occur only in a judgment that takes account of the complexity of the individual case."³⁵⁵ District court judges should be allowed to accomplish these goals.

CONCLUSION

Enactment of the Feeney Amendments does not reflect the

level for a prior offense, while failing to consider the role in the prior offense as a basis for departure." *Id.*

³⁵⁴ *Id.*

³⁵⁵ STITH & CABRANES, *supra* note 28, at 79 (quoting COMPLETE WORKS OF ARISTOTLE (Barnes ed., 1984), 1796).

legislative process at its best. Considering the devastating impact the original Feeney Amendment would have wrought on judicial sentencing discretion, it is remarkable that the House passed it based on a mere twenty minutes of debate. Although part of the reason for the enactment of the Feeney Amendment was due to concern over implementing the AMBER Plan on a nationwide scale, enactment of the Feeney Amendment reveals that the Judicial Branch requires protection from members of Congress and the Executive who fundamentally distrust judicial independence and discretion in sentencing or fail to appreciate the moral consequences of a sentencing system lacking the input of the judiciary.