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President

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April 1, 2003

Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Mr. Chairman:

I write on behalf of the American Bar Association to express deep concern about the Feeney amendment to H.R. 1104, which has been incorporated in the House-passed version of S.151, your bill to ban "virtual" child pornography. This provision would fundamentally alter the carefully crafted and balanced system established by the Sentencing Reform Act, without any of the customary safeguards of the legislative process.

The Feeney 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. At the same time, it would preserve the prosecution's power to seek downward departures for defendants who have cooperated with the government, and for the first time grant the prosecution authority to seek more lenient sentences for reasons of administrative convenience in five border districts. The amendment would legislatively overrule a decision of the United States Supreme Court, *United States v. Koon*, 518 U.S. 81 (1996), and amend central provisions of the Sentencing Reform Act of 1984. It would void numerous sections of the Federal Sentencing Guidelines, and, for the first time, amend the Guidelines by direct legislation.

Should the conferees adopt the Feeney amendment, 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.

The Feeney amendment is evidently a response to the perception that judges have engaged in widespread abuses of their departure power following the Supreme Court's *Koon* decision in 1996. Based on the Sentencing Commission's statistics, I believe there are reasons to doubt the accuracy of this portrayal.

Although sentences below the guideline range are now more common than in the early days of guidelines sentencing, the primary responsibility for this result lies with the Department of Justice. In FY 2001, of 19,416 downward departures awarded federal defendants, approximately 15,318 came on government motion. Put another way, in 2001, *79% of downward departures in the United States were requested by the Government.*<sup>1</sup>

Similarly, 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 the five "fast-track" border districts *more than tripled*, from 1871 in 1996, to 5928 in 2001. In short, the increased rate of non-substantial assistance departures since *Koon* is due primarily to requests for such departures by the Department of Justice.

The foregoing figures do not, of course, present the whole picture. The percentage of judicially initiated departures has increased somewhat since *Koon*. It may well be that some judicially initiated departures are inappropriate and that some action to curb inappropriate judicial departures should be considered. However, it would seem advisable to determine the nature and extent of any problem with judicial departure power before legislating a virtual end to that power. As you yourself wisely observed some years ago:

[C]ongressional policy makers must take advantage of the most current and complete information available when making legislative decisions. Whenever possible, Congress should call upon those with relevant empirical research, encouraging those most knowledgeable of and most involved with the guidelines -- judges, prosecutors, practitioners and the Commission -- to express their views.<sup>2</sup>

I am informed that the U.S. Sentencing Commission is even now in the midst of a study of judicial departures in white-collar crime. Would it not be prudent to direct the Commission to extend that study to departures generally and report promptly to Congress on its results? (I understand that the General Accounting Office has also undertaken a study of departures, at the request of the House Judiciary Committee.) Such a congressional directive could also instruct the Commission to develop proposals to address any deficiencies revealed by the study. Once armed with full information, Congress could determine the true nature and extent of any problem, and could, if necessary, craft an appropriate, measured legislative response to any deficiencies in departure practice left unaddressed by the Commission.

The American Bar Association is confident that a period for study of current departure practice would not only yield a more accurate picture of any problems that may exist, but could not fail to produce a better solution than the Feeney Amendment.

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<sup>1</sup> In FY 2001, the government requested "substantial assistance" departures for 17.1% of all federal defendants (9,390 defendants). An additional 18.3% (10,026 defendants) received downward departures not based on cooperation. However, 5928 of these non-substantial assistance departures were granted in the five Mexican border districts in which the government seeks such departures as part of "fast-track" case processing programs. These and other data in this letter are derived from U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, App. B (2002).

<sup>2</sup> Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 197-198 (1993).

The Sentencing Reform Act of 1984 created a system of distributed authority that was designed to ensure fair, predictable sentences for defendants convicted in federal court. As contemplated by the Act itself, the Guidelines drafted by the Sentencing Commission and approved by Congress channel judicial sentencing discretion, but they do not eliminate it. This system reflects two truths about the process of making sentencing rules. First, no set of rules can anticipate the circumstances of every individual defendant. Accordingly, if justice is to be done, judges must retain the flexibility to determine that some defendants do not fit the mold envisioned by the Commission. Second, 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.

In the Sentencing Reform Act, Congress conferred upon federal judges the power to depart whenever "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" in the enabling legislation that created the U.S. Sentencing Commission, 18 U.S.C. § 3553(b). The Feeney Amendment effectively negates the original judgment of Congress about the necessity and value of a guided departure power and the important role of judges in federal sentencing. If passed, the Amendment would severely compromise critical institutional features of the federal sentencing system:

- By effectively eliminating judicial departures, the Feeney Amendment strikes a blow at judicial independence and sends an unmistakable message that Congress does not trust the judgment of the judges it has confirmed to office.
- 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.
- By bypassing the deliberative processes of Congress itself, the Feeney Amendment reflects a profoundly troubling disregard of the legislature's role in establishing federal sentencing policy. If passed, the Feeney Amendment would alter core features of federal criminal sentencing and appellate practice. Yet the Amendment has never been the subject of a hearing in either the House or Senate, and neither house has had the benefit of meaningful consultation with any of the institutions most affected by the Amendment.

The American Bar Association is firmly committed to the maintenance of a just and effective federal sentencing system. For more than twenty years, the Senate Judiciary Committee has played the central role in creating and shaping the Federal Sentencing Guidelines system. I am confident that you and the Committee will give the Feeney Amendment the careful

scrutiny it requires. I am hopeful that such scrutiny will lead you to oppose the Feeney Amendment and to support a careful study of judicial departures by the Sentencing Commission and other interested institutions, followed by a collaborative effort to address any problems such studies reveal.

Sincerely,

A handwritten signature in black ink, appearing to read "Alfred P. Carlton, Jr.", with a stylized flourish at the end.

Alfred P. Carlton, Jr.

cc: All members of Senate Judiciary Committee and all House and Senate conferees