

April 2, 2003

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
104 Hart Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Off. Bldg
Washington, DC 20510

RE: S. 151/H.R. 1104, Feeney Amendment to the "Child Abduction
Prevention Act"

Dear Senators Hatch and Leahy:

As law teachers, most of whom specialize in criminal law and procedure, we write to express our deep concerns regarding the Feeney Amendment to H.R. 1104.¹ Although adopted by the House with essentially no public hearings or debate, the Feeney Amendment would effect a dramatic and unwarranted change in federal sentencing law. We respectfully urge you and all members of the Conference Committee to oppose the Amendment.

The Feeney Amendment would eviscerate a crucial component of the sentencing system created by Congress almost twenty years ago. In adopting the Sentencing Reform Act of 1984, Congress struck a careful balance between the goals of sentencing uniformity and individualized justice. While Congress created a new Sentencing Commission to develop uniform sentencing guidelines, Congress also sensibly recognized that no Commission could ever possibly anticipate and weigh every relevant variable that would arise in every case. Accordingly, Congress determined that federal judges should have the authority to sentence outside a prescribed guidelines range 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."²

Notwithstanding Congress's considered judgment in crafting the Sentencing Reform Act, the Feeney Amendment would radically impair the ability of federal judges to consider even the most extraordinary mitigating circumstances. Indeed, the Feeney Amendment would turn the Sentencing Reform Act on its head. Where the 1984 law authorized downward departures for circumstances not adequately considered by the Commission, the Feeney Act would limit downward departures to circumstances that have been considered and specifically identified by the Commission as permissible grounds for departure. This distorts the essential logic of the departure

¹ H.R. 1104 is the House-passed version of S.151, the "virtual" child pornography ban.

² 18 U.S.C. § 3553(b).

mechanism, which was intended to provide for situations that the Commission could not anticipate or fully consider in advance.

Curiously, the Feeney Amendment does not limit the ability of judges to depart *upward* on the basis of *aggravating* circumstances not adequately considered by the Commission. Thus, the Feeney Amendment implicitly acknowledges the particular need for individualized sentencing determinations in some cases. And, if federal judges are deemed qualified to weigh extraordinary aggravating circumstances, there seems no principled basis to conclude that they are unqualified to weigh extraordinary mitigating circumstances.

The guidelines in operation today may not perfectly reflect the original congressional design. But, if anything, the Feeney amendment would take the guidelines even further from a balanced and stable system. Several years ago, Senator Hatch wrote in a law review article recognizing the continued importance of individualized case-by-case judgments in criminal sentencing:

Many of the guidelines' problems, including their perceived rigidity and their facilitation of hidden bargaining and increased prosecutorial leverage, can be traced to their compulsory nature. Congress must review whether these problems can be appropriately remedied within a compulsory guidelines system. If not, Congress . . . may need to examine whether the most effective way of addressing these problems is to return a greater degree of flexibility to the judiciary.³

In addition to rejecting fundamental elements of the earlier congressional design for federal sentencing, the Feeney Amendment likewise rejects the accumulated experience and expertise of the Sentencing Commission and the federal judiciary. The Amendment would override several specific guidelines developed by the Commission, as well as a host of judicial decisions dealing with the departure mechanism and other matters. Perhaps most notably, the Amendment would overrule the *unanimous* decision of the United States Supreme Court that appellate court judges should give at least some measure of deference to trial court judges in deciding when departures are warranted.⁴ Over nearly two decades, the Commission and the courts have acquired an unparalleled degree of knowledge about how to make a system of guided sentencing operate fairly and efficiently. Congress should seek to harness that wisdom, rather than override it.

³ 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, 191 (1993).

⁴ *Koon v. United States*, 518 U.S. 81 (1996).

To justify a rejection of the considered decisions of Congress, the Sentencing Commission, the United States Supreme Court, and much of the rest of the federal judiciary, the Conference Committee should demand truly compelling evidence that the current system does not work. To date, no such evidence has been forthcoming.

The great majority of federal sentences lie within prescribed guidelines ranges. When downward departures are provided, they are almost always made at the behest of *prosecutors*⁵ – belying any suggestion that departures represent some sort of systematic judicial bias against the government or the guidelines’ goals of fairer and more consistent sentencing.

Moreover, whenever a district judge grants a downward departure that the government views as unwise or improper, the prosecutor is authorized to appeal the departure. Statistics collected by the Sentencing Commission for fiscal year 2001 indicate that prosecutors felt the need to appeal a downward departure in less than two dozen cases (out of more than 55,000 cases sentenced in the federal courts), and, even under the *Koon* standard of review, the federal appellate courts have not been shy about reversing legally questionable departures.⁶

The existing system already has a sound mechanism for addressing any troublesome trends in the use of departure authority. Through its guideline amendment powers, the Commission can “overrule” dubious grounds for departures if it fears that the goals of the Sentencing Reform Act are jeopardized. The Commission has used this authority in the past, and there is no basis to believe that the current Commission is unable or unwilling to do so if warranted in the future.

In short, the departure mechanism already contains a complex set of checks and balances to prevent abuse, and there is no reason to believe that judges are systematically departing downward too frequently. This is not to say, of course, that the current departure mechanism works perfectly. Indeed, in a system that sentences tens of thousands of defendants each year, we would be quite surprised if there were not occasionally some questionable results. But that is not a sound basis for rejecting the fundamental premises of the system. To the extent that reforms are undertaken, such reforms should be balanced, deliberate, and narrowly tailored to address demonstrable shortcomings. The Feeney Amendment – far more of a wrecking ball than a scalpel – is none of these things.

Finally, even if there were some evidence of widespread abuse of downward departures, a change in the law as radical as the Feeney Amendment should not be

⁵ In FY 2001, 79% of downward departures were requested by the government, including both substantial assistance departures and departures based on other grounds. *See* U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, App. B (2002).

⁶ In FY 2001, the circuit courts reversed a granted departure in more than three-quarters of those rare cases in which the government decided to challenge a downward departures on appeal. *See* U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 58 (2002).

adopted without first providing ample opportunity for public debate and obtaining the considered input of judges, practitioners, and other experts. Regrettably, the Amendment passed the House with virtually no debate as a last-minute addition to an unrelated bill. Indeed, few judges, practitioners, and other experts even became aware of the Amendment's existence until *after* its passage.

Whatever its merits, the Amendment should be severed from the child protection bill so that it may receive more careful consideration in its own right. Indeed, we understand that both the Sentencing Commission and the General Accounting Office are presently examining aspects of the departure mechanism. There can be no doubt but that Congress's deliberation on these matters could be greatly enriched by awaiting the reports from these pending studies. We see no reason for Congress to rush what would be the most far-reaching set of changes to the guidelines system since its creation.

We thank you for your attention to these important issues, and we hope that you will join us in opposition to the Feeney Amendment.

Respectfully,

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