

March 26, 2003

Re: Vote No on Feeney Amendment to Child Abduction bill (H.R. 1104), which would take away judicial discretion to make the punishment fit the crime

Dear Representative:

On Thursday, March 27, the House will consider Congressman Feeney's amendment to the pending Child Abduction bill. That amendment would revise the standard and procedures for judicial departures from the sentencing guidelines in all federal criminal cases. This amendment goes far beyond any effort to crack down on child abductors – it overrules a key Supreme Court sentencing decision and makes far-reaching changes to the entire federal criminal justice system.

The Feeney amendment would eviscerate a federal judge's power to depart from the Sentencing Guidelines. Departures are an integral part of the Sentencing Reform Act that Congress enacted in 1984. That Act struck a balance between uniformity and judicial discretion. Congress understood that a guidelines system that encompasses every relevant sentencing factor is neither possible nor desirable. Departures are a necessary and healthy part of the guideline system.

Departures do not reflect an avoidance of the law by federal judges but rather their conscientious compliance with the Congressional mandate to impose a guideline sentence unless the court finds a circumstance not adequately considered by the Commission that warrants departures.

The Sentencing Reform Act already contains substantial limits on judicial discretion. A large majority of federal sentences are within the guidelines written by the Presidentially-appointed Sentencing Commission. Judges may only depart from the guidelines if the case involves circumstances not adequately considered by the Commission. The government may appeal any downward departure.

Without judicial discretion, the Sentencing Guidelines will become little more than mandatory minimum sentencing laws, which cause rampant injustice and unwarranted racial disparity. Departures are the only means by which federal prosecutors are held accountable to an independent authority for their charging and plea-bargaining decisions.

The Feeney amendment overturns an important Supreme Court decision. In the 1996 case of *Koon v. United States*, which was in relevant part a unanimous decision, the Supreme Court interpreted the departure standard in a way that limited departures but left some room for judicial discretion. The Feeney amendment recklessly overturns that landmark decision without meaningful input from judges or practitioners.

Departures preserve some measure of fairness in the Sentencing Guidelines.

Without the discretionary authority to depart, all crimes regardless of the circumstances would have to be sentenced exactly the same. The secretary who aids her boss in processing the fraudulent claim for fear of losing her job must receive the same sentence as the boss who profited and devised the fraudulent scheme because she is responsible for the same amount of loss as he is. Without the authority to depart, one size must fit all, predetermined by the body of experts sitting in Washington, D.C.

The departure process is already under review. Departures are the one area of the Guidelines where the Commission can see if its sentencing policies are working or whether an adjustment needs to be made. A high departure rate in certain types of cases can indicate flaws in the guidelines that the Commission needs to address. The Sentencing Commission has repeatedly demonstrated its willingness to police the departure power and recently announced that it will be conducting a study of the issue. We urge Congress to let this process work.

Thank you for considering our views. Please contact Kyle O'Dowd at the National Association of Criminal Defense Lawyers if we can provide more information. He can be reached at 202-872-8600, ext. 226.

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