

**FEDERAL PUBLIC DEFENDER
Western District of Washington**

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Senator Patrick J. Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Office Building
Washington DC 20510-6275

Senator Edward M. Kennedy
United States Senate
Committee on the Judiciary
224 Dirksen Office Building
Washington DC 20510-6275

Dear Senators Leahy and Kennedy:

I am writing on behalf of Federal Public and Community Defenders to provide our collective view on a matter of urgent concern. On March 27, 2003, the House of Representatives agreed to the Feeney Amendment to HR1104, a substitute version of a Senate-passed child pornography bill. It is my understanding that a conference has been requested. The Feeney Amendment, which was allowed 20 minutes of debate, is a Department of Justice sponsored set of changes to the laws that govern sentencing practice in federal courts. The proposed changes are monumental in scope and will dramatically alter the role and independence of the federal judiciary in the sentencing process. That the Feeney Amendment received virtually no attention or debate is inexplicable unless one assumes that it was produced at a time and in a way designed to escape detection and debate before its passage.

I have included with this letter a section-by-section analysis of the Feeney Amendment that I prepared this morning. It is by no means comprehensive, but I hope it captures the Amendment's tone, design and predictable impact.

To summarize, the Feeney Amendment is designed to increase the actual penalties imposed against individuals convicted in federal courts by strictly limiting or barring federal judges from considering traditional, time-honored and completely legal grounds for allowing sentencing leniency in individual cases. Under the Amendment, first-time, nonviolent offenders must be sentenced without the possibility of mitigation for any positive life circumstance such as military service, community involvement or charitable work. Similarly, a first-time offender's family responsibility cannot mitigate a potential sentence. The proposed legislation, in several instances, prevents a sentencing judge from reducing a sentence unless the government attorney specifically approves the reduction. In order to assure compliance with the new strictures on sentencing authority, the Feeney Amendment directs the Attorney General to monitor the conduct of district court judges and to report to the Congress when a federal judge or a local United States Attorney is seemingly out of compliance with the directives of the Amendment.

The legislation also requires wholesale changes in the statutes governing the sentencing appeals process, changes which include overturning longstanding United States Supreme Court precedent. Though ill-positioned and untrained, the Amendment requires appellate judges to second-guess and review the factual underpinnings of every sentencing judge's decision to depart downward from the Sentencing Guidelines. Indeed,

the Feeney Amendment disrupts or voids fifteen years of developing sentencing common law under the Sentencing Reform Act. Challenges to its constitutionality are inevitable.

The potential cost of the proposal is staggering. Endless litigation is foreseeable as are inefficiencies related to the cumbersome and chilling reporting mandates of the Amendment. Tens of thousands of individuals sentenced under its provisions will be required to spend additional time in prison at untold cost -- costs well beyond dollars and cents. Thousands of nonviolent first offenders whose crimes beg for an element of compassion in the sentencing decision will be removed from communities and families, producing tragic and wholly unnecessary consequences.

That the Feeney Amendment was passed without input from federal judges, the Sentencing Commission, United States Attorneys or defense counsel should be cause for pause. The absence of balanced input is manifest in the fact that the proposal places no new limits or prohibitions on the authority of a sentencing judge to depart upward from the Sentencing Guidelines. The Feeney Amendment is as unbalanced as it is ill-conceived. It should be eliminated.

On behalf of Federal Public and Community Defenders, I respectfully urge you to share with your colleagues on both sides of the aisle, particularly those who will be participating in the conference involving the Feeney Amendment, our views concerning the risk to the fair administration of justice that it poses. Thank you.

Very truly yours,

Thomas W. Hillier II
Federal Public Defender

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Attachment