

April 7, 2003

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

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators Hatch and Leahy:

We write, as former United States Attorneys in the Southern and Eastern Districts of New York, to express our concern about Section 109 of S. 151/H.R. 1104, the Child Abduction Prevention Act. This proposed legislation - which contains some of the most far-reaching revisions of the federal sentencing process in many years - was passed by the House of Representatives on March 27, 2003. Our concern regarding this legislation is based not only on the questionable justification for many of its provisions, but also on the fact that it has already been adopted by one house of Congress without any meaningful input from the judiciary, the Sentencing Commission, members of the bar or other interested experts and members of the criminal justice community.

This legislation proposes very significant changes in the federal sentencing process. It would abolish all downward departures under the Sentencing Guidelines except for a relatively small number of specified factors. Moreover, it would eliminate a significant number of the specified factors that presently exist, including departures based on aberrant behavior; family ties and responsibilities; community ties; prior military, civic, charitable or public service; employment-related contributions, and prior good works - even when these factors are present to an unusual or even extraordinary degree. It would overrule the Supreme Court's decision in Koon v. United States and authorize appellate courts to review downward departure decisions without according any deference to sentencing judges who are uniquely qualified to make sensitive, fact-specific sentencing determinations. It would require the government's consent before a sentencing judge could afford a defendant additional credit for pleading guilty in a timely fashion. And it would prohibit the Sentencing Commission from promulgating any additional ground for downward departure at any time before May 1, 2005.

These and other proposed changes collectively represent the most-far reaching changes to the Sentencing Guideline system since the advent of the Guidelines over 15 years ago. Such reforms should not be enacted in haste and without meaningful scrutiny and public debate. Indeed, the original legislation that established the Sentencing Commission contemplated that the Commission would periodically review and revise the Guidelines after consulting with authorities on, and representatives of, the federal criminal justice system. See 28 U.S.C. § 994(o). This is the same process that has been utilized on many occasions since the Guidelines became effective in 1987. The proposed legislation not only disregards the Sentencing Commission's unique role in the federal sentencing process, but also ignores Congress' own admonition that the views of interested parties in the federal criminal justice system be carefully considered before changes to the Guidelines are enacted.

The proposed legislation raises serious questions on its merits as well. To start, the justification for such sweeping changes is unclear. Although the number of downward departures not based on cooperation has increased in the last several years, 70% of that increase is attributable to departures in a small number of "border" districts that handle an extraordinary number of immigration cases which place unique demands on the criminal justice system. The localized nature of this increase does not justify a nationwide restriction on the availability of downward departures in all cases.

The sparse legislative history of this proposal similarly reflects that it is an unnecessarily broad response to a particularized concern. The amendment's author has stated that the legislation is prompted by the fact that a "disturbing trend has occurred, especially in child pornography cases" and that departures have become a "common occurrence." If downward departures have become commonplace in one particular type of case, then careful scrutiny of the reasons for this phenomenon, and of the appropriateness of the Guideline level for that type of case, may well be warranted. It does not, however, justify a wholesale restriction of downward departures for all cases within the criminal justice system.

The legislation also contemplates unwarranted limitations on the exercise of sentencing discretion by the federal judiciary. A United States District Judge has the unique and difficult responsibility of imposing criminal punishment on a defendant based on an individualized assessment of the facts and circumstances of a particular case. Indeed, Congress has explicitly recognized that the Sentencing Guidelines are intended not only to avoid unwarranted disparity in sentencing but also to maintain "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B). Thus, the Guidelines authorize both upward and downward departures when the facts in a particular case are sufficiently extraordinary or unusual that variance from the Guideline sentence is warranted, even when the basis for departure has not been delineated in one of the Guidelines' specific departure provisions. In practice, sentencing judges have exercised that discretion infrequently. In FY 2001, putting aside the "border" districts and departures based on cooperation (which require the government's consent), district judges departed downward only 10.2% of the time. Moreover, 85% of all defendants who received non-cooperation downward departures that year nevertheless were sentenced to prison. What these statistics reveal is a

authorized the promulgation of the Guidelines.

The legislation also would overrule the Supreme Court's decision in Koon v. United States, 518 U.S. 81 (1996). This, too, is of serious concern. In Koon, all nine Justices of the Supreme Court recognized that an appellate court should review a decision to depart from the Guidelines with "due deference" to the district court's decision, and that such a decision should be overruled only if the district court abuses its discretion. The decision correctly recognized that district judges are uniquely qualified to decide whether a departure from the Guidelines is justified by the particular circumstances of a given case or the background of a particular defendant. See Koon, 518 U.S. at 98 ("[T]he 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.... District courts have an institutional advantage over appellate courts in making these sorts of determinations[.]"). The legislation's substitution of a de novo standard of review would allow appellate courts to second-guess sentencing decisions without any meaningful guidance as to when those decisions should or should not be upheld. Moreover, given the fact that the government currently has the ability to appeal unauthorized or excessive downward departures and is successful in such appeals about 80% of the time, a change in the appellate standard of review appears unnecessary to enable appellate courts to overturn unwarranted departures.

These and other concerns have prompted objections to the proposed legislation from representatives of a wide variety of interested parties to this issue. This includes the Secretary of the Judicial Conference of the United States, all five current voting members of the United States Sentencing Commission, all three Chairpersons of the Commission since its creation, the President of the American Bar Association, and numerous other bar organizations. As former members of the Department of Justice, we respectfully urge you to allow careful consideration of their views, and those of other interested parties, in a public forum before deciding upon the wisdom of any of the sentencing reforms contained in this proposed legislation.

Respectfully,

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cc: Members of the Senate Judiciary Committee
Senate and House Conferees