

U.S. House of Representatives

Statement of the Honorable William D. Delahunt of Massachusetts

Regarding the Conference Report on S. 151, the PROTECT Act of 2003

Thursday, April 10, 2003

Mr. Speaker, I would like to be able to vote for this bill. It includes provisions that I strongly support—including the “AMBER Alert” system that would aid in finding missing children. But those children have been taken hostage by a bill that also includes so-called “sentencing reforms”—radical, sweeping changes to the federal sentencing system that were never considered by any committee of either House. Provisions that would cause an explosion in the number of people behind bars—including many who simply do not belong there.

Just three days ago, the Justice Department reported that the number of people living behind bars in the United States had exceeded two million for the first time in our history. Two million. And included in that number is a staggering 12 percent of African-American men aged 20 to 34.

If this bill is the congressional response to that situation, the public may well conclude that we have finally taken leave of our senses.

The rate of incarceration in the U.S. is seven times higher than that of such advanced nations as Germany, Italy, and Denmark. A primary reason for this is that a large number of our prisoners are serving long terms for minor nonviolent offenses. And if this bill becomes law, there will be a lot more of them.

Men in prison cannot raise families, cannot hold jobs, cannot pay taxes, and cannot support the economy. And when they get out, many who might have turned their lives around will have become hardened criminals, ready to return to the only life they know. Conservatives and liberals alike have recognized that this situation poses a threat to the future of our cities, our families, our economic well-being, and the health of our democracy itself. Growing numbers of prominent conservatives have joined in calls for an end to mandatory minimum sentences. Yet this bill takes a giant—and potentially catastrophic--step in the wrong direction.

When Congress enacted the Sentencing Reform Act of 1984, it created a system of guidelines for judges to follow. But Congress also recognized that no system of guidelines can anticipate all of the facts and circumstances of a given case. And it wisely preserved sufficient flexibility to allow the judge to depart from the guidelines when necessary.

This bill would substantially eliminate that safety valve, barring judges from making “downward departures” in a large number of cases—effectively transforming the federal guidelines into a system of mandatory minimum sentences.

When Chief Justice Rehnquist learned of this proposal, he wrote: “this legislation, if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences.” Justice Rehnquist is certainly no liberal. But even his concerns have been brushed aside.

Similar opposition was expressed by the Judicial Conference of the United States, the American Bar Association, the Leadership Conference on Civil Rights, the Washington Legal Foundation, the Cato Institute and many other groups and individuals. All to no avail.

It is true that during conference, a number of improvements were made to the original language. But the final version retains many features of the original, and barely begins to address the concerns raised by the Chief Justice.

The bill prohibits all downward departures in connection with child-related offenses and sex offenses. In all other cases, it discourages judges from making downward departures by subjecting them to burdensome reporting requirements and Justice Department scrutiny if they do so. And it directs the Sentencing Commission to amend the guidelines to ensure that downward departures are “substantially reduced.”

Since there has been virtually no debate on these radical proposals, we must guess at the reasons for them. Apparently, they are based on the belief that judges have been abusing their departure power by handing down overly lenient sentences.

No doubt errors and abuses occur. Judges are human, and some sentences will be too lenient while others are too harsh. But the system already provides a remedy for this: the government can and does appeal downward departures it considers inappropriate. And it wins approximately 80% of such appeals.

The truth is that the vast majority of the downward departures are sought, not by the judge, but by the government itself. Of the nearly 20,000 downward departures granted in 2001, 79 percent were requested by the prosecution—most in return for the cooperation of the defendant, and the rest in five Mexican border districts in which the government uses departures to clear cases more quickly.

If the sponsors of the bill have concerns about the rate of downward departures, the Justice Department is where they should be making inquiries. As a former

prosecutor, I can see plenty of reasons to question the overuse of departures as a law enforcement tool.

But depriving judges of the ability to exercise discretion cannot be the answer. A rigid, mechanical system of sentences cannot do justice—either to the accused or to the society to which the millions we imprison today will one day return.