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Stephanos Bibas

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# THE FEENEY AMENDMENT AND THE CONTINUING RISE OF PROSECUTORIAL POWER TO PLEA BARGAIN

STEPHANOS BIBAS\*

Congress has come close to a drive-by rewrite of sentencing law, and a sentencing revolution may still be in the works. On April 10, 2003, Congress passed the PROTECT bill (popularly known as Amber Alert), which creates a national notification system for child kidnappings. On March 26, while the bill was pending, the House of Representatives passed the Feeney Amendment to the bill.<sup>1</sup> The original amendment was an unprecedented attempt by Congress to rewrite the Sentencing Guidelines by itself without the input or expertise of the Sentencing Commission. The House-Senate Conference Committee narrowed the amendment, limiting many of its changes to child pornography and child sex cases. The revised amendment nonetheless changes the Sentencing Guidelines substantially, and it instructs the Sentencing Commission to make many more changes within the next six months. The likely result is many fewer Guideline departures, less judicial discretion, and more prosecutorial control. The losers are defendants and judges, and the winners are prosecutors. Prosecutorial leverage to plea bargain will be at an all-time high, resulting in fewer trials, more bargains, and higher sentences. Judges used to check prosecutorial harshness, but now they are increasingly powerless unless prosecutors deign to grant leniency.

## I. THE SCOPE OF THE REVISED FEENEY AMENDMENT

The enacted version of the Feeney Amendment is substantially narrower than the original proposal. Among other changes, the original amendment would have eliminated all unenumerated downward departures

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\* Associate Professor, University of Iowa College of Law; former Assistant U.S. Attorney, Criminal Division, U.S. Attorney's Office for the Southern District of New York (bibas@philo.org). B.A., Columbia; B.A., M.A., Oxford; J.D., Yale. I am grateful to Doug Berman for his advice and insights on this topic.

<sup>1</sup> The amendment is named after its sponsor, Representative Tom Feeney, a Florida Republican.

and all downward departures for family ties, diminished capacity, aberrant behavior, educational or vocational skills, mental or emotional conditions, employment record, good works, or overstated criminal history.<sup>2</sup> A bevy of defense lawyers, law professors, current and former Sentencing Commissioners, the President of the American Bar Association, Chief Justice Rehnquist, and others wrote to Congress opposing the amendment.<sup>3</sup> Perhaps as a result of these protests, the House-Senate Conference Committee narrowed the amendment. The enacted bill limits the changes described above to crimes involving pornography, sexual abuse, child sex, and child kidnapping and trafficking.<sup>4</sup> It also raises penalties for child pornography and child sex abuse.<sup>5</sup>

Nonetheless, the Feeney Amendment reaches well beyond these particular crimes. Its changes include the following:

**Appellate review.** The revised amendment overturns *Koon v. United States*,<sup>6</sup> substituting de novo appellate review for *Koon's* abuse-of-discretion standard.<sup>7</sup> It also bars district courts whose departures have been reversed on appeal from giving a new reason to depart again on remand.<sup>8</sup>

**Reporting requirements.** The amendment requires the Sentencing Commission to collect and report more data on departures, and it requires the Department of Justice to report its efforts to oppose unwarranted departures.<sup>9</sup>

**Prosecutorial control over departures.** The amendment makes a prosecutorial motion a prerequisite for a three-level reduction for acceptance of responsibility.<sup>10</sup> It also instructs the Sentencing Commission to authorize four-level "fast-track" downward departures in illegal-reentry immigration cases upon motion of the prosecutor.<sup>11</sup>

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<sup>2</sup> H. Amend. 19 to H.R. 1104, 108th Cong. (2003).

<sup>3</sup> See NACDL, *Save Downward Departures*, available at <http://www.nacdl.org/departures> (last visited Feb. 3, 2004) (collecting correspondence).

<sup>4</sup> PROTECT Act, Pub. L. No. 108-21, § 401(a), (b), 117 Stat. 650, 667-68 (2003) (codified as amended at scattered statutes of 18 U.S.C.A. & 28 U.S.C.A.) (limiting departures to those recognized in chapter 5K and so excluding departures listed only in chapter 5H).

<sup>5</sup> *Id.* § 401(i), 117 Stat. at 672-73.

<sup>6</sup> 518 U.S. 81, 96-99 (1996).

<sup>7</sup> PROTECT Act § 401(d), 117 Stat. at 670-71. The amendment does, however, retain deferential review of the extent of departures that are otherwise justified. *Id.*

<sup>8</sup> *Id.* § 401(e), 117 Stat. at 671.

<sup>9</sup> *Id.* § 401(h), (l), 117 Stat. at 672, 674.

<sup>10</sup> *Id.* § 401(g), 117 Stat. at 671.

<sup>11</sup> *Id.* § 401(m)(2)(B), 117 Stat. at 675.

*Directions to the Sentencing Commission to reduce downward departures.* More generally, the amendment instructs the Sentencing Commission to amend the Guidelines within 180 days “to ensure that the incidence of downward departures are [sic] substantially reduced.”<sup>12</sup> It forbids the Sentencing Commission ever to amend the acceptance-of-responsibility provision above or to reduce the increased penalties for child pornography and child sex abuse.<sup>13</sup> It imposes a two-year moratorium on Guideline amendments that create new downward departure grounds or loosen the amendment’s restrictions on grounds for departure.<sup>14</sup> It makes its amendments effective immediately, regardless of whether the Sentencing Commission has yet issued conforming amendments.<sup>15</sup> Finally, the amendment caps the number of federal judges on the Sentencing Commission at three.<sup>16</sup>

The first thing to note about these amendments is their scope. Congress has cut back significantly on the changes envisioned in the original Feeney Amendment. Nonetheless, this package of changes affects everything from the structure of the Sentencing Commission to the standard of review to the roles of prosecutors to the acceptable grounds for departures. Though Congress packaged the amendment as part of a child-protection bill, its reach and import are far broader.

## II. SHIFTING POWER FROM DISTRICT JUDGES TO PROSECUTORS

The second important point to note is the target of the amendment: unilateral judicial downward departures. Many of its provisions apply asymmetrically to restrict downward but not upward departures. For example, the amendment eliminates downward departures for child crimes and sex offenses based on unenumerated grounds (except for cooperators) but preserves upward departures on unenumerated grounds.<sup>17</sup> It places a two-year moratorium on the creation of new downward-departure grounds but not upward-departure grounds.<sup>18</sup> It allows the Sentencing Commission to amend the new child-pornography and child-sex-abuse guidelines so long as it never lowers sentences for these crimes.<sup>19</sup> It specifically requires the

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<sup>12</sup> *Id.* § 401(m)(2)(A), 117 Stat. at 675.

<sup>13</sup> *Id.* § 401(j)(3), (4), 117 Stat. at 673.

<sup>14</sup> *Id.* § 401(j)(2), 117 Stat. at 673.

<sup>15</sup> *Id.* § 401(j)(1), (5), 117 Stat. at 673-74.

<sup>16</sup> *Id.* § 401(n)(1), 117 Stat. at 676.

<sup>17</sup> *Id.* § 401(a)(2), 117 Stat. at 667.

<sup>18</sup> *Id.* § 401(j)(2), 117 Stat. at 673.

<sup>19</sup> *Id.* § 401(j)(3), 117 Stat. at 673.

Attorney General to report unsupported downward departures.<sup>20</sup> It requires the Sentencing Commission to amend the Guidelines so as to “substantially reduc[e]” the frequency of downward departures.<sup>21</sup> And it restricts departures for aberrant behavior, family responsibilities, community ties, and diminished capacity, all of which would serve only to mitigate sentences.<sup>22</sup>

This one-way skew is not necessarily bad. Congress was simply responding to the huge number of downward departures, as compared with a minuscule number of upward departures. In fiscal year 2001, only sixty-four percent of defendants were sentenced within the applicable range. 17.1% received downward departures for substantial assistance, and 18.3% received other downward departures. In contrast, only 0.6% received upward departures.<sup>23</sup>

Some of this judicial skew toward leniency may be an illusion created by the structure of the Guidelines. Chapter Three of the Guidelines contains a series of general adjustments to offense levels. This chapter creates upward adjustments for vulnerable victims, hate crimes, official victims, restraint of victims, terrorism, large role in the offense, abuse of position of trust, use of special skill, use of a minor to commit a crime, obstruction of justice, and reckless endangerment during flight.<sup>24</sup> The chapter contains only two downward adjustments, namely reductions for a minor role in the offense and acceptance of responsibility.<sup>25</sup> In other words, many aggravating factors are adjustments that are built into the applicable guideline range, whereas most mitigating factors are left to the departure process. This asymmetry partially explains why downward departures are more common.

Nevertheless, it is fair to say that judges stretch much more often in favor of leniency. Many judges believe the Sentencing Guidelines are too harsh and want to soften penalties they dislike. In addition to judicial preferences, systemic forces discourage upward departures and encourage downward departures. Judges fear that if they depart upwards, defendants will almost certainly appeal the departure (using their right to free appointed counsel on appeal). But if they depart downward, Assistant U.S.

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<sup>20</sup> *Id.* § 401(l), 117 Stat. at 674.

<sup>21</sup> *Id.* § 401(m)(2)(A), 117 Stat. at 675.

<sup>22</sup> *Id.* § 401(b)(2), 117 Stat. at 668.

<sup>23</sup> U.S. SENTENCING COMM’N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Figure G (2002) [hereinafter FEDERAL SENTENCING STATISTICS].

<sup>24</sup> U.S. SENTENCING GUIDELINES MANUAL §§ 3A1.1-4, 3B1.1, 3B1.3-4, 3C1.1-2 (2002) [hereinafter GUIDELINES MANUAL].

<sup>25</sup> *Id.* §§ 3B1.2, 3E1.1. I am grateful to Doug Berman for the point made in the text.

Attorneys may be too busy to bother writing appellate briefs, particularly if the departure is modest.<sup>26</sup> Defendants have incentives to fight for the lowest possible sentence, whereas prosecutors may be pushing not to maximize sentences but rather to dispose of their dockets efficiently. Thus, prosecutors may acquiesce in (or at least not vigorously oppose) many departures simply to get rid of cases by plea bargain, without the burden of a trial.<sup>27</sup> In other words, the adversary system gives defense counsel strong incentives to police upward departures, so district courts risk appellate reversal if they dare to depart upward. But because prosecutors have no personal stake in stiff sentences and can lessen their workloads by agreeing to lighter dispositions, they have less incentive to police downward departures. District judges, knowing this, are less wary of departing downward than upward, leading to the massive asymmetry described above. It is no surprise, then, that Congress is stepping in to counteract these structural forces and to trump judicial leniency by policing downward but not upward departures. One can dispute the merits of Congress's policy, but its desire to regulate departures is at least understandable.

But Congress did not try to regulate all downward departures. If Congress were seriously concerned about policing the systemic skew toward leniency, it would also have addressed the single largest class of downward departures: substantial assistance to the government under section 5K1.1.<sup>28</sup> As noted above, substantial-assistance departures account for almost half of all departures and occur in more than one-sixth of all sentences.<sup>29</sup> In several districts, the rate exceeds forty percent of all sentences.<sup>30</sup> Though these departures are powerful tools for cracking criminal organizations' codes of silence, they carry serious costs: undercutting deserved punishment, producing inequality and disparities, and sometimes inducing perjury.<sup>31</sup> It is hard to believe that these departures are essential in anywhere near one-sixth of all sentences.<sup>32</sup> Yet the Feeney

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<sup>26</sup> When I was a prosecutor in the U.S. Attorney's Office for the Southern District of New York, I nicknamed this common practice "flying under the [Second Circuit's] radar."

<sup>27</sup> See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. (forthcoming June 2004).

<sup>28</sup> GUIDELINES MANUAL, *supra* note 24, § 5K1.1.

<sup>29</sup> See *supra* text accompanying note 23.

<sup>30</sup> FEDERAL SENTENCING STATISTICS, *supra* note 23, at 53-55 tbl.26.

<sup>31</sup> See Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENTENCING REP. 292 (1996).

<sup>32</sup> See *id.* at 293-94 (discussing prosecutors' incentives to "overbuy" cooperation to buttress cases); Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 613-15 (1999) (noting that cooperation benefits do not seem proportioned to assistance rendered, but are used by prosecutors to moderate sentences and achieve other aims).

Amendment leaves these untouched. The Sentencing Commission might address substantial-assistance departures as part of reducing departure rates, but that is not the focus of the amendment.

The amendment's aim is not so much to limit departures overall as it is to limit judges' unilateral discretion to depart. Departures on motion of the prosecutor are privileged, while departures on the judge's own initiative are discouraged. For example, substantial-assistance departures on the prosecutor's motion are exempt from the ban on unenumerated departures and from the required reports to Congress.<sup>33</sup> Prosecutors' motions are now prerequisites for the third level of reduction for acceptance of responsibility.<sup>34</sup> And a prosecutorial motion pursuant to a Department of Justice program is explicitly a prerequisite for fast-track departures in illegal-reentry immigration cases.<sup>35</sup> True, fast-track departures now require the U.S. Attorney and the Attorney General to implement and approve a program of departures. This supervisory involvement and promulgation of policies should guide and constrain line prosecutors somewhat, ensuring more consistency. Nevertheless, the power remains in prosecutors' hands.

Congress should do more than tackle only one half of the departure problem. The criminal justice system operates like a toothpaste tube, and departures that are squeezed out of the judge's end of the tube will wind up in the prosecutor's domain. This hydraulic pressure means that departures will still exist, but they will now occur more often on prosecutors' terms. It used to be that defendants could try to strike bargains with judges and prosecutors. If prosecutors were amenable to dealing, defendants would enter plea bargains with them. If prosecutors insisted on overly harsh sentences, however, judges had the power to undercut them. Defendants could plead guilty without plea agreements and judges could signal that they would give more reasonable sentences than prosecutors would. This judicial power tempered and balanced prosecutors' power. Knowing that judges could moderate excessive sentences, prosecutors had strong incentives to strike reasonable deals. Judges could check and balance prosecutors, limiting their bargaining power. Prosecutors thus struck reasonable plea bargains in the shadow of the outcome that judges would have reached had there been no plea bargain.<sup>36</sup>

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<sup>33</sup> PROTECT Act, Pub. L. No. 108-21, § 401(a)(2), (l)(2)(A), 117 Stat. 650, 667, 674 (2003).

<sup>34</sup> *Id.* § 401(g), 117 Stat. at 671.

<sup>35</sup> *Id.* § 401(m)(2)(B), 117 Stat. at 675.

<sup>36</sup> See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1155-56, 1158-60 (2001).

More and more, judges have less power to deal and prosecutors have more.<sup>37</sup> The Feeney Amendment is the latest step in this trend. The real effect of the Feeney Amendment is not to get rid of departures but to raise the price of them. Departures will still happen with prosecutors' connivance: If a prosecutor acquiesces, or opposes a departure with a nod and a wink to a judge, the judge can depart downward confident that there will be no appeal to stop him. The same is true if a prosecutor authorizes a substantial-assistance or fast-track departure. And the same is true if the prosecutor and defense counsel connive to shade the facts to conceal their evasion of the Guidelines; probation officers may or may not check this subterfuge. But if a prosecutor opposes a departure, the judge now has much less room to maneuver and much more fear of appellate reversal. In fairness, I must note that the Feeney Amendment does try to check prosecutorial leniency through Department of Justice procedures and improved reporting of departures.<sup>38</sup> But this is a hopeless task, because prosecutors are imperfect guardians of Congress's desire for stiff sentences. And the price of stiff sentences is less discretion to tailor punishment to crime and criminal, and all of that discretion now in the hands of one actor rather than two. The potential for arbitrariness and unfairness is greater because the checks and balances are weaker.

Interestingly, the one bright spot in this picture is the much-maligned Attorney General. On July 28, 2003, Attorney General John Ashcroft circulated a memorandum to all federal prosecutors on complying with the Feeney Amendment. The media have blamed Ashcroft for ordering prosecutors to report certain adverse sentencing decisions to the Department of Justice in Washington.<sup>39</sup> This reporting, however, is required by the Feeney Amendment, and Ashcroft is simply preparing to comply with the statute.<sup>40</sup> The media have largely ignored the other half of Ashcroft's memorandum, which clamps down on prosecutorial manipulation of facts and acquiescence in departures.<sup>41</sup> And the many critics of Ashcroft's new restrictions on plea bargaining fail to see how they actually improve the

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<sup>37</sup> See Stephanos Bibas, *How Apprendi Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465, 470-74 (2002).

<sup>38</sup> PROTECT Act, Pub. L. No. 108-21, § 401(l), 117 Stat. 650, 674 (2003).

<sup>39</sup> See, e.g., *Justice Kennedy Speaks Out*, N.Y. TIMES, Aug. 12, 2003, at A16 (editorial) ("Attorney General John Ashcroft has announced plans to track individual judges' sentencing records, an intimidating move that critics are calling a judicial blacklist.").

<sup>40</sup> S. 151, 108th Cong., § 401(l) (2003) (enacted).

<sup>41</sup> Memorandum from Attorney General John Ashcroft to All Federal Prosecutors, *Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals* (July 28, 2003), available at [http://www.nacdl.org/public.nsf/legislation/ci\\_03\\_32?OpenDocument](http://www.nacdl.org/public.nsf/legislation/ci_03_32?OpenDocument) (last visited Feb. 16, 2004).



balance of power.<sup>42</sup> By limiting charge bargaining, he is limiting line prosecutors' arbitrariness and partially offsetting the Feeney Amendment's lopsidedness.

Under the Feeney Amendment, trial judges also lose power relative to appellate courts. By abrogating *Koon*,<sup>43</sup> Congress has authorized more searching appellate review of aberrant trial-court rulings. This may not be a bad thing: appellate courts are better positioned to ensure consistency, and other areas of federal law use de novo review for the application of law to fact.<sup>44</sup> Though there are arguments for trial-court discretion, Congress may not trust district judges given their high departure rates and hostility to the Guidelines. The net result is that trial judges are constrained by fear that prosecutors and appellate courts will combine to reverse downward departures.

One can question how much the standard of review matters in practice. Though *Koon* purported to loosen the standard of review, there is conflicting evidence about whether the result has been many more departures.<sup>45</sup> Perhaps, a legal realist might say, the wording of the review

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<sup>42</sup> Memorandum from Attorney General John Ashcroft to All Federal Prosecutors, *Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing* (Sept. 22, 2003), available at <http://news.findlaw.com/hdocs/docs/doj/ashcroft92203chrghmem.pdf>. This memorandum does not, however, restrict fast-track or substantial-assistance departures, and it allows some charge bargaining over statutory enhancements such as 21 U.S.C. § 851 (prior felony information in drug cases) and 18 U.S.C. § 924(c) (using or carrying a firearm during and in relation to a violent crime or drug trafficking).

<sup>43</sup> *Koon v. United States*, 518 U.S. 81 (1996).

<sup>44</sup> See *United States v. Bajakajian*, 524 U.S. 321, 336-37 n.10 (1998) (prescribing de novo review of the application of the Excessive Fines Clause's gross-disproportionality test to the facts); *Ornelas v. United States*, 517 U.S. 690, 696-97, 699 (1996) (prescribing de novo review of the application of the Fourth Amendment's standards for reasonable suspicion and probable cause to the facts); see also *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 501 n.17 (1984) (prescribing "independent judgment" of appellate court in reviewing the application of defamation law's actual-malice test to the facts); *Lumber & Wood Prods., Inc. v. New Hampshire Ins. Co.*, 807 F.2d 916, 918 (11th Cir. 1987) (prescribing de novo review of the construction and application of an insurance policy to the facts); *Mayors v. Comm'r of Internal Revenue*, 785 F.2d 757, 759 (9th Cir. 1986) (prescribing de novo review of application of tax law to the facts).

<sup>45</sup> One study found that departures did not increase significantly in the year after *Koon* was decided. Paul J. Hofer et al., *Departure Rates and Reasons after Koon v. United States*, 9 FED. SENTENCING REP. 284, 285 fig. 1 (1997). On the other hand, since then individual districts have displayed marked jumps in their rates of non-substantial-assistance departures after *Koon*. The District of Connecticut's departure rate rose from 29.8% to 33.8%. The Eastern District of New York's departure rate rose from 24.7% to 28.4%. The District of Vermont's departure rate increased from 11.0% to 23.4%. The Eastern District of Washington's departure rate jumped from 16.8% to 51.8%. Finally, the Eastern District of Oklahoma's departure rate skyrocketed from 5.0% to 20.4%. Compare U.S. SENTENCING

standard matters little. Perhaps appellate courts, having become accustomed to scrutinizing departures closely, will continue that habit regardless of the standard-of-review label. In the end, it is impossible to know for sure how much this change will matter in practice.

### III. CONGRESS'S DIRECTIVES TO THE SENTENCING COMMISSION

When Congress passed the Sentencing Reform Act of 1984, it established the Sentencing Commission and gave it authority to promulgate sentencing guidelines.<sup>46</sup> Congress initially gave the Commission a few specific instructions. For example, the Guidelines were to be neutral as to race, sex, national origin, creed, and socioeconomic status.<sup>47</sup> They were also to set penalties near the statutory maximum for three-time violent or drug offenders.<sup>48</sup> By and large, however, the Sentencing Reform Act left it to the Commission to craft specific guidelines language. The Commission thereafter regularly proposed amendments to the Guidelines, and Congress rejected a proposed amendment on only one occasion.<sup>49</sup> The point of the system was to draw on the wisdom of federal judges and other Commissioners. Congress usually deferred to their expertise while still retaining ultimate political control and accountability.

Congress appears to have lost trust and patience with this process, perhaps reflecting a loss of confidence in the Commission. Congress is no longer leaving room for the Commission's expertise in drafting Guideline language. The Feeny Amendment directly amends the following sections of the Guidelines: 2G2.2 (child pornography), 2G2.4 (same), 3E1.1 (acceptance of responsibility), 4B1.5 (repeat sex offenders against minors), 5H1.6 (community and family ties and responsibilities), 5K2.0 (unenumerated departures), 5K2.13 (diminished capacity), and 5K2.20 (aberrant behavior).<sup>50</sup> The Feeny Amendment also inserts an entirely new

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COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, CIRCUIT & DISTRICT, OCTOBER 1, 1994, THROUGH SEPTEMBER 30, 1995, tbl.8, *available at* <http://www.uscc.gov/judpack/JP1995.htm>, *with* U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, CIRCUIT & DISTRICT, OCTOBER 1, 2000 THROUGH SEPTEMBER 30, 2001, tbl.8, *available at* <http://www.uscc.gov/judpack/JP2001.htm>.

<sup>46</sup> Pub. L. No. 98-473, tit. II, § 217(a), 98 Stat. 2019 (codified as amended at 28 U.S.C. § 994 (2003)).

<sup>47</sup> *Id.* § 217(a), 98 Stat. 2019 (codified as amended at 28 U.S.C. § 994(d), (h)).

<sup>48</sup> *Id.*

<sup>49</sup> That was the proposed amendment to eliminate the sentencing disparity between crack and powder cocaine. See David Yellen, *Reforming Cocaine Sentencing: The New Commission Speaks*, 8 FED. SENTENCING REP. 54, 54 (1995).

<sup>50</sup> PROTECT Act, Pub. L. No. 108-21, § 401(b)(3)-(5), (g), (i), 117 Stat. 650, 668 (2003).

section 5K2.22 into the Guidelines, which limits departures based on age, physical impairment, and addiction.<sup>51</sup> It makes all of these amendments effective immediately, regardless of whether the Sentencing Commission has taken further steps to implement them.<sup>52</sup> It forbids the Commission ever to amend the acceptance-of-responsibility provision above or to reduce the increased penalties for child pornography and child sex abuse.<sup>53</sup> And, for the next two years, the amendment bars the Commission from creating new departures or changing the amendment's restrictions on existing grounds for departure.<sup>54</sup> Perhaps the biggest token of mistrust is that while Congress used to require a minimum of three judges on the Commission, it has changed that minimum to the maximum.<sup>55</sup> Overall, what had been a delegation of sentencing power to a trusted body of judicial experts has now become a much shorter leash. The political branches certainly can exercise this level of oversight, and oversight allays the concerns about excessive delegation that cast doubt on the Guidelines' constitutionality.<sup>56</sup> Nonetheless, this sudden micromanagement suggests a breakdown in Congress's working relationship with the Commission. Populist politics, it seems, has lost patience with technocratic expertise and perceives it as too soft on crime.

Congress will continue to use the Commission, but it seems intent on giving more specific direction to achieve particular results. One provision of the amendment in particular promises to have far-reaching consequences. Section 401(m) directs the Commission to amend the Guidelines within 180 days "to ensure that the incidence of downward departures are [sic] substantially reduced."<sup>57</sup> Though many of the other provisions are limited to crimes involving sex or children, this one promises to affect all sentencing.

One can only speculate about how the Commission will respond. To substantially reduce departure rates, the most logical approach would include taking on substantial-assistance departures. As noted, these departures have substantial costs as well as benefits and are used in over one-sixth of cases. Line prosecutors have incentives to overuse

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<sup>51</sup> *Id.* § 401(b)(2), 117 Stat. at 668. This provision appears to be redundant, as it does no more than reiterate the Guidelines' existing limitations on these departures.

<sup>52</sup> *Id.* § 401(j)(1), (5), 117 Stat. at 673-74.

<sup>53</sup> *Id.* § 401(j)(3), (4), 117 Stat. at 673.

<sup>54</sup> *Id.* § 401(j)(2), 117 Stat. at 673.

<sup>55</sup> Compare § 401(n)(1), 117 Stat. at 676 (maximum of three), with 28 U.S.C. § 991(a) (2001) (former minimum of three).

<sup>56</sup> See *Mistretta v. United States*, 488 U.S. 361, 372-79 (1989) (upholding the Guidelines against a challenge under the non-delegation doctrine).

<sup>57</sup> § 401(m), 117 Stat. at 675.

cooperators, because prosecutors internalize the benefits of agreements (more convictions) while externalizing the costs (reduced deterrence and retribution, inequity, and possible perjury). Though cooperation agreements are essential tools for the prosecution, guideline amendments could rein in their overuse. One possibility is to require supervisory approval of cooperation agreements, because supervisors are better able to see the systemic impact of individual prosecutorial decisions. Internal prosecutorial regulations and procedures could also guide and constrain the decision to sign up cooperators. A more innovative proposal is to budget for each prosecutor's office a fixed number or percentage of defendants for whom it can offer substantial-assistance agreements. This would force prosecutors to limit agreements to the cases where they need them the most.<sup>58</sup> Unfortunately, these proposals are probably beyond the Commission's power and would require Department of Justice action. But the Commission could amend section 5K1.1 to require factual findings about the need for and value of cooperation as prerequisites for sentence reductions. Probation officers could also compare the value of a defendant's assistance with that of other defendants, insuring more sentencing equity and counterbalancing prosecutors' dominant role in valuing assistance.

The next most common reason for departures is "pursuant to plea agreement." These departures account for 17.6% of non-substantial-assistance downward departures, which is about 3.2% of all sentences.<sup>59</sup> Some of these departures are departures on other grounds to which prosecutors have agreed. Others are pursuant to Rule 11(c)(1)(C) plea agreements, which bind the court to impose a specific stipulated sentence.<sup>60</sup> Courts are currently split on whether this rule binds sentencing courts even when it calls for sentences outside of the Guidelines range.<sup>61</sup> Congress

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<sup>58</sup> See Weinstein, *supra* note 32 (advancing this proposal).

<sup>59</sup> See FEDERAL SENTENCING STATISTICS, *supra* note 23, at tbl.25 (17.6% of non-substantial-assistance downward departures in fiscal year 2001); *id.* at fig.G (non-substantial-assistance downward departures were present in 18.3% of all sentences in fiscal year 2001).

<sup>60</sup> FED. R. CRIM. P. 11(c)(1)(C) (formerly Rule 11(e)(1)(C)).

<sup>61</sup> Compare *United States v. Carrozza*, 4 F.3d 70, 87-90 (1st Cir. 1993) (finding that the Guidelines take precedence over a stipulated-sentence plea agreement, though on the facts the error was not plain), *Fields v. United States*, 963 F.2d 105, 107-08 (6th Cir. 1992) (finding that Guidelines take precedence over stipulated-sentence plea agreement), and *United States v. Kemper*, 908 F.2d 33, 36-37 (6th Cir. 1990) (same), with *United States v. Goodall*, 236 F.3d 700, 704-06 (D.C. Cir. 2001) (finding that a stipulated-sentence plea agreement takes precedence over the Guidelines), *United States v. Barnes*, 83 F.3d 934, 940-41 (7th Cir. 1996) (same), *United States v. Mukai*, 26 F.3d 953, 955-56 (9th Cir. 1994) (same), *United States v. Cunavelis*, 969 F.2d 1419, 1422-23 (2d Cir. 1992) (same), *United*

could reduce these departures by clarifying that the Guidelines take precedence over plea agreements.<sup>62</sup> Alternatively, the Commission could clarify that judges are not to accept these pleas until after they receive presentence reports and verify that they are compatible with the Guidelines. Right now, Guideline section 6B1.2 allows stipulated-sentence pleas that “depart[] from the applicable guideline range for justifiable reasons.”<sup>63</sup> The Commission needs to make clear that “justifiable reasons” equal reasons that would legally support a departure under the Guidelines.

The thrust of the Feeney Amendment, however, is directed at unilateral judicial departures, not plea agreements or substantial assistance. The Commission will probably take this hint, though it may address these other topics as well. But no one ground predominates in unilateral judicial departures. Instead, we have a few grounds that occur in about one to two percent of all sentences: criminal history overrepresenting the defendant’s involvement, aberrant act, fast-track, and deportation.<sup>64</sup> The latter two grounds will probably be subsumed within the new fast-track provision that the Commission will draft. After this come a slew of reasons that occur in fewer than one percent of all sentences each: family ties and responsibilities, physical condition, diminished capacity, rehabilitation, conduct outside the heartland of the Guideline, mental and emotional condition, coercion, duress, age, et cetera.<sup>65</sup> It is hard to know what the Commission will do with these departures. Outright abolition would probably be too crude. Tightening up on the standard of review, which the Feeney Amendment already does, might have an impact. Apart from this, expect a series of amendments that react to the departure case law and set higher thresholds for departure. For example, the current family-circumstances guideline gives little guidance and so has resulted in a

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States v. Ruch, 906 F. Supp. 261, 263-64 (E.D. Pa. 1995) (same), and United States v. Aguilar, 884 F. Supp. 88, 89 (E.D.N.Y. 1995) (same, stating: “This case concerns one of a large class of federal criminal prosecutions to which the Guidelines do not, as a practical matter, apply—those disposed of by [stipulated-sentence] plea agreement.”).

<sup>62</sup> See John M. Dick, Note, *Allowing Sentence Bargains to Fall Outside of the Guidelines Without Valid Departures: It Is Time for the Commission to Act*, 48 HASTINGS L.J. 1017 (1997) (making this argument).

<sup>63</sup> GUIDELINES MANUAL, *supra* note 24, § 6B1.2(c)(2).

<sup>64</sup> See FEDERAL SENTENCING STATISTICS, *supra* note 23 (reporting that criminal history overrepresentation accounted for 11.9% of non-substantial-assistance downward departures, isolated incident accounted for 7.9%, fast-track accounted for 7.7%, and deportation accounted for 4.9% of these departures).

<sup>65</sup> See *id.* (noting that each of the grounds in the text accounted for fewer than four percent of all non-substantial-assistance downward departures).

hodgepodge of inconsistent departure rulings.<sup>66</sup> A revised guideline might spell out that the mere presence of school-age children at home with a single parent is not grounds for departure. Departures might still be allowed for single parents who care for an infant or disabled child, where no other relative is available as a substitute.

Perhaps a better solution is to codify these factors as downward adjustments built into the Guidelines, as opposed to departures from the Guidelines. For the Guidelines' first decade, open-ended departure provisions allowed judges to develop law case by case. This gradual accretion of sentencing common law has had time to resolve the most common sentencing situations. As a result, the Commission is now better placed to codify the rules that have developed. The Commission seems to have envisioned this eventual codification of common law.<sup>67</sup> As the introduction to the Guidelines states: "By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted."<sup>68</sup> This codification will reduce the downward departure rate by regularizing adjustments. Indeed, the conversion of fast-track departures into downward adjustments will by itself have a dramatic effect on departure rates, cutting them nearly in half.<sup>69</sup> This conversion may look like an accounting gimmick, but converting departures into adjustments will do some good. It will even out disparities due to defense counsel's creativity and knowledge, the trial judge's idiosyncratic willingness to depart, and the appellate court's stringency of review. Published, codified adjustments have these advantages, though the downside is that codified adjustments are more rigid and less nuanced than departures.

In the end, though, the Feeney Amendment is a blunderbuss solution to a narrower problem. The temperaments of a subset of judges still very much affect sentences. Judge Jack Weinstein, for example, has written: "[T]he Guidelines . . . have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and

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<sup>66</sup> Douglas A. Berman, *Addressing Why: Developing Principled Rationales for Family-Based Departures*, 13 FED. SENTENCING REP. 274 (2001).

<sup>67</sup> On the need for common-law development of sentencing, see Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 110 (1999).

<sup>68</sup> GUIDELINES MANUAL, *supra* note 24, at § 1A.4(b).

<sup>69</sup> When one excludes the border districts that use fast-track departures, the non-substantial-assistance departure rate drops from 18.3% to 10.2%. See 149 CONG. REC. S5121 (daily ed. Apr. 10, 2003) (letter from U.S. Sentencing Commission).

ignoring *the law* in an effort to achieve a just result.”<sup>70</sup> This statement is more true of certain judges, such as Judge Weinstein, than others. Stunning disparities result from judges’ differing proclivities “to achieve a just result” by “twisting, distorting and ignoring *the law*.”<sup>71</sup> By thumbing their noses at the law, these willful judges provoke prosecutors to seek more restrictions. The problem, though, is that the new restrictions apply just as much to the faithful judges as they do to the willful. Searching appellate review is a measured way of keeping wayward judges in line, but the elimination of departures altogether will constrain good judges more than bad. Judges who conscientiously follow the law will have even less discretion after Feeney, but these are the judges who least need to be reined in. Judges who admit to “bending and twisting, distorting and ignoring the law” will probably distort the facts to get around the Feeney Amendment. The law can only do so much to check judges who are bent on finding ways to depart. In short, those who most need to be constrained are the most difficult to constrain. Where there is a will, there is often a way to sentencing disparity. Feeney may put a dent in this disparity but will not eliminate it.

#### IV. CONCLUSION

The Feeney Amendment marks a dramatic break from the past. Up until now, the Commission has used its expertise to formulate sentencing rules and leave room for judges to develop a body of departure jurisprudence. Now, Congress has lost faith in the Commission. It has decided to rein in its delegation of power on a much shorter leash and to cabin and codify departures. The politics of being tough on crime trumps the Commission’s technocratic expertise. The obvious result is more rules and fewer unilateral judicial departures. The less obvious result is a transfer of even more plea-bargaining power from judges to prosecutors, resulting in higher sentences on prosecutors’ terms. Departures will still happen when prosecutors agree to them, as there is no way to stop them when no party will appeal. The big question mark is how the Commission will go about fulfilling Congress’s mandate to reduce downward departures substantially. I hope that the Commission will check prosecutors as well as judges, say by tightening up on substantial-assistance motions and stipulated-sentence plea agreements. If instead it restricts only trial judges’ discretion while leaving prosecutors alone, it will skew the already lopsided balance of power even more.

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<sup>70</sup> Jack B. Weinstein, *A Trial Judge’s Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 365 (1992).

<sup>71</sup> *Id.*