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SENTENCING REFORM LESSONS: FROM THE SENTENCING REFORM ACT OF 1984 TO THE FEENEY AMENDMENT

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I. INTRODUCTION

For more than two decades, Congress has been on a mission to obtain uniformity in the federal sentencing system. What began with the Sentencing Reform Act of 1984 ("SRA"), and was soon followed by the Sentencing Guidelines, has been continually criticized by both the judiciary and the legislature.¹ In the spring of 2003, in what caught many interested parties off guard, Congress abruptly responded to the perceived inadequacies of the federal sentencing system by enacting the Feeney Amendment to the PROTECT Act ("The Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003"), signed into law by President Bush on April 30, 2003.² The Act implemented sweeping reforms focused on eliminating trial judges' discretion to deviate from congressionally mandated sentences.³

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¹ Pub. L. No. 98-473, 98 Stat. 2019 (1987) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

² Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18 U.S.C.); Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 8, 2003, at B1.

³ On June 24, 2004 the Supreme Court issued a significant decision which may affect the constitutionality of the Federal Sentencing Guideline system. In *Blakely v. Washington*, the Court overturned the sentence of a Washington state defendant on the grounds that the facts the judge used to impose a sentence above the prescribed sentencing range were not proven beyond a reasonable doubt to a jury. 124 S. Ct. 2531 (2004). In doing so, the Court read *Apprendi v. New Jersey* broadly. 530 U.S. 466 (2000); Stephanos Bibas, *Blakely's Federal Aftermath*, 16 FED. SENTENCING REP. 331 (2004). *Apprendi* held that every fact that raises a defendant's sentence above the statutory maximum is an element of the crime. 530 U.S. at 490. Therefore prosecutors must charge them in indictments and prove them to juries

The goal and structure of the SRA was to achieve uniformity in federal sentencing.⁴ However, the PROTECT Act was enacted as a response to growing congressional sentiment in opposition to the post-SRA sentencing system. This sentiment was based on anecdotal case evidence of post-SRA sentencing disparity, political pressure to be tough on crime, and analyses of sentencing statistics.⁵ Disparity and inequality in sentencing was often blamed on trial judges since they hold the ultimate authority to determine each defendant's sentence.⁶ Thus, disparity amongst different defendants' sentences for similar crimes was perceived as resulting from judicial leniency.⁷ Congress accumulated information suggesting that judges—particularly at the trial level—were not consistently following the congressionally mandated sentencing ranges; Congress reacted by

beyond a reasonable doubt. *Id.* In *Blakely*, the Court held that *Apprendi* applies to any finding of fact that is required to increase a sentence beyond what it would otherwise be. 124 S. Ct. at 2537. While the *Blakely* decision “did not explicitly invalidate the [Federal] Guidelines, that is its unmistakable implication.” Marc Fernich, *Blakely v. Washington: A Selective User's Guide*, MOUTHPIECE, at 6-7 (forthcoming Sept.), available at <http://www.ussguide.com/members/BulletinBoard/Blakely/Articles/Fernich.pdf>; *Blakely*, 124 S. Ct. at 2538 n.9. *Blakely* currently does not impact district court judges' ability to depart downwards. However, if upward adjustments, upward departures and relevant conduct are determined not to be severable then the Guidelines may be struck down entirely. *Bibas*, *supra*, at 331. Given the confusion in the wake of the *Blakely* decision, the Court set a hearing for Oct. 4, 2004 to review two Justice Department appeals in order to clarify its impact on federal sentencing. Lyle Denniston, *Justices Agree to Consider Sentencing*, N.Y. TIMES, August 3, 2004, at A14. This comment is focused primarily on downward departures and therefore is unlikely to be significantly affected by *Blakely*.

⁴ William J. Wilkins, Jr. et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 364-65 (1991).

⁵ Douglas A. Berman, *Deciphering a Rosetta Stone of Sentencing Reform*, 15 FED. SENTENCING REP. 307, 308 (June 2003) (“significant and often varied role that both general statistics and case-specific anecdotes play in discussions of departure authority”); Brent Kendall, *Senator Urges Congress to Rethink Feeney Amendment*, L.A. DAILY J., Jan. 23, 2004, available at http://www.nacdl.org/public.nsf/legislation/ci_03_59?OpenDocument; Linda Satter, *Judges in a Stew on Federal Sentences: Guidelines Seen as Too Rigid, Unfair*, ARK. DEMOCRAT-GAZETTE, Sept. 1, 2003, at A1; Andrew R. Strauss, Comment, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1591-92 (2002).

⁶ Max Schanzenbach, *Have Sentencing Practices Really Changed? A Brief Analysis of the Feeney Amendment's Real Concerns*, 16 FED. SENTENCING REP. 257, 257 (2004); Edward Lazarus, *Why the Pending Bill That Would Limit Judges' Sentencing Discretion Even More Should Not Be Passed*, FINDLAW, Apr. 3, 2003, available at <http://writ.corporate.findlaw.com/lazarus/20030403.html>.

⁷ See Schanzenbach, *supra* note 6, at 257.

instituting substantial changes to the sentencing structure through the PROTECT Act aimed at compelling uniformity.⁸

The PROTECT Act creates substantial debate as to whether unwarranted disparity existed in the federal sentencing system, whether the reforms will prove effective, and whether the reforms themselves will create new problems of greater magnitude in the sentencing system. While all of these questions raise very serious concerns regarding the PROTECT Act reforms, it is equally important to fully understand how and why the PROTECT Act became law and what, if anything, could have been done to prevent it. The SRA removed most sentencing discretion from trial judges.⁹ The PROTECT Act took another giant step by effectively removing what little discretion remained. It also served to greatly marginalize the judiciary's input into federal sentencing policymaking. Therefore, without a firm understanding as to why Congress felt compelled to reinforce and expand upon the SRA via the PROTECT Act, the judiciary faces the possibility of losing what scraps of sentencing discretion and policy input still remain.

II. THE SENTENCING REFORM ACT OF 1984

The United States Constitution does not explicitly assign exclusive jurisdiction for federal sentencing to any one of the three branches of government.¹⁰ The Legislative Branch has the power to define federal crimes and establishes the method and degree of punishment.¹¹ The Judicial Branch tries offenses and imposes punishments within the limits set by the legislature.¹² Finally the Executive Branch determines "where offenders will serve their time . . . and supervise[s] them upon their release."¹³

⁸ Berman, *supra* note 5, at 308; 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch) (Sen. Hatch believes the sentencing statistics show some judges are increasingly undermining the Guidelines).

⁹ See Kate Stith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1264-65 (1997).

¹⁰ *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

¹¹ See U.S. CONST. art. I, § 8, cl. 10; *Ex parte United States*, 242 U.S. 27, 42 (1916).

¹² See *Ex parte United States*, 242 U.S. at 41-42.

¹³ Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion May Undermine a Generation of Reform*, THE CHAMPION, June 2003, at 6, available at <http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/cc80eaafc20ebe0e85256e540074c155?OpenDocument&Highlight=0,allenbaugh> [hereinafter *Who's Afraid of the Federal Judiciary?*].

For almost a century, Congress maintained a minor and indirect role in federal sentencing.¹⁴ Congress delegated virtually “unfettered discretion to the sentencing judge to determine what the sentence should be” within a typically wide range of potential sentences as prescribed by statute.¹⁵ Therefore, the judge controlled the “various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence.”¹⁶ Judicial sentences which fell within the prescribed range “were virtually unreviewable on appeal.”¹⁷ The overarching rationale of the sentencing system was predicated on “coercive rehabilitation.”¹⁸ Therefore, sentences were based on the judge ordering a long sentence and the parole board granting release based on sufficient rehabilitation.¹⁹

By the 1970s, “there was a broad and rising level of concern in the Congress . . . regarding the pervasive, serious problems of sentencing disparity.”²⁰ In 1984, after evaluating the sentencing system, “Congress concluded that the entire system was outmoded and in need of reform.”²¹ Congress determined that the “system lacked the certainty necessary to inspire public confidence” and therefore could not appropriately serve as a deterrent to crime.²² The sentencing system’s deficiencies were deemed the direct result of unwarranted disparity and inconsistency in sentencing application by the judiciary.²³ Congress sought to reduce this wide sentencing disparity by enacting the Sentencing Reform Act of 1984.²⁴

¹⁴ Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 186 (1993).

¹⁵ *Mistretta*, 488 U.S. at 364.

¹⁶ U.S. SENTENCING COMM’N, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES, i, B-1 (2003) [hereinafter *USSC Report*] (quoting U.S. SENTENCING COMM’N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCES, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING, VOL. I, at 9 (Dec. 1991)).

¹⁷ *Mistretta*, 488 U.S. at 363; Hatch, *supra* note 14, at 186.

¹⁸ *Mistretta*, 488 U.S. at 363; Hatch, *supra* note 14, at 187.

¹⁹ Hatch, *supra* note 14, at 187.

²⁰ Wilkins, Jr. et al., *supra* note 4, at 362; S. REP. NO. 98-225, at 38 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3221.

²¹ Hatch, *supra* note 14, at 187.

²² *Id.*

²³ *Id.* In making its evaluation of the federal sentencing system, Congress relied upon statistical studies demonstrating broad disparity of sentences for a given crime and anecdotal evidence of individual cases. One of the sentencing commissioners testified that “the region in which the defendant is convicted is likely to change the length of time served from approximately six months more if one is sentenced in the South to twelve months less if one

The SRA introduced a new comprehensive scheme for structuring judicial sentencing discretion that drastically altered sentencing in the federal criminal justice system.²⁵ The SRA's principle goal was to eliminate unwarranted sentencing disparity.²⁶ In doing so, Congress specifically rejected the notion of rehabilitation as a primary sentencing objective.²⁷ Instead, the SRA stated that punishment should serve retributive, educational, deterrent, and incapacitative goals.²⁸ The SRA included the following:

- 1) A clear, concise statement of the federal law of sentencing, including the kinds and lengths of sentences . . . and a statement of permissible sentencing purposes;
- 2) A comprehensive set of sentencing guidelines to structure and limit the exercise of judicial sentencing discretion within permissible sentencing ranges, consistent with the authorized sentencing limits and the enunciated sentencing objectives;
- 3) An allowance for departures from the sentencing ranges where necessary in atypical cases to ensure fairness;
- 4) A requirement that the sentencing judge specifically state on the record the reasons for the sentence imposed and, if the judge [departs] from the guideline range, the reasons for the departure;
- 5) An allowance for appellate review of sentences imposed to ensure correctness of guidelines application and reasonableness of departures from the guidelines ranges;
- 6) Abolition of parole²⁹

is sentenced in Central California [F]emale bank robbers are likely to serve six months less than their similarly situated male counterparts . . . [and] black [bank robbery] defendants convicted . . . in the South are likely to actually serve approximately thirteen months longer than similarly situated bank robbers convicted . . . in other regions." *Hearings on Sentencing Guidelines Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong. 554, 676-77 (1987) (testimony of Commissioner Ilene H. Nagel); S. REP. NO. 98-225, at 38 (1983) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221.

²⁴ Sentencing Reform Act of 1984, Pub. L. No. 100-182, § 2, 101 Stat. 1266 (1984) (the Sentencing Reform Act of 1984 was held in abeyance pending the drafting of the sentencing guidelines and therefore did not become applicable until November 1, 1987); *see also* Frank O. Bowman III, *When Sentences Don't Make Sense*, WASH. POST, Aug. 15, 2003, at A27.

²⁵ Wilkins, Jr. et al., *supra* note 4, at 364.

²⁶ Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 928 (1990).

²⁷ Hatch, *supra* note 14, at 188.

²⁸ 18 U.S.C. § 3553(a)(2) (West Supp. 2003).

²⁹ Wilkins, Jr. et al., *supra* note 4, at 364-65.

A. THE UNITED STATES SENTENCING COMMISSION AND THE SENTENCING GUIDELINES

One of Congress's most revolutionary remedies to the sentencing disparity problem was its creation of the United States Sentencing Commission (the "Commission").³⁰ The Commission is an independent agency within the judicial branch "charged with producing a sentencing guidelines system that would further the [Sentencing Reform Act's] objectives by curtailing unwarranted sentencing disparity, ensuring certainty, and providing just punishment."³¹ The Commission consists of seven members and prior to the PROTECT Act included at least three federal judges.³² The members of the Commission are appointed by the President and confirmed by the Senate.³³ The Commission was charged with drafting sentencing guidelines, which went into effect six months after the SRA was enacted.³⁴ Since 1987, federal sentencing has been governed by the Federal Sentencing Guidelines, which are annually amended, by the U.S. Sentencing Commission.³⁵

The Federal Sentencing Guidelines were created partly in reaction to a perception that the previous system produced unjustifiable sentencing disparities by giving too much discretion to district judges.³⁶ The Guideline system sought to constrain judicial sentencing discretion by the use of a grid that set presumptive sentences according to the seriousness of the offense and the defendant's criminal history.³⁷ The goal behind the Guidelines was to:

provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.³⁸

However, the architects of the Guidelines recognized that some measure of judicial discretion was necessary, since no set of national rules could

³⁰ Sentencing Reform Act of 1984, Pub. L. No. 100-182, § 2, 101 Stat. 1266 (1984); 28 U.S.C. § 991(a) (2004).

³¹ Hatch, *supra* note 14, at 189.

³² 28 U.S.C. § 991(a) (2000).

³³ *Id.*

³⁴ Wilkins, Jr. et al., *supra* note 4, at 365.

³⁵ § 991(a).

³⁶ See Hatch, *supra* note 14, at 187; Wilkins, Jr. et al., *supra* note 4, at 362.

³⁷ See Wilkins, Jr. et al., *supra* note 4, at 367-70.

³⁸ 28 U.S.C. § 991(b)(1)(2004).

prescribe the “correct” sentence for every defendant.³⁹ Thus, each position on the grid covers a range of sentences, stated in months.⁴⁰ The district judge finds the facts necessary to apply the guidelines, but also has the legal power to either sentence the defendant anywhere within the range or to “depart.”⁴¹ Departure results in a sentence above or below the guideline range if the judge finds certain aggravating or mitigating factors.⁴² Under the Federal Sentencing Guidelines, departures would be relatively rare. The United States Code prescribes:

[T]he court shall impose a sentence of the kind, and within the range . . . unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.⁴³

In effect, under the SRA, the Guidelines were intended to be mandatory except in significantly atypical cases.⁴⁴

B. APPELLATE REVIEW AND REPORTING REQUIREMENTS

Crucial to preventing unwarranted disparity was the SRA’s requirement that the sentencing judge who determines that a departure from the guideline range is warranted must provide an explanation for the departure which is subject to a potential appeal.⁴⁵ Prior to the SRA, sentencing judges could base their decisions on a wide variety of reasons, or no reason at all.⁴⁶ The SRA required that the judge state on the record her reasons for the sentence imposed and the “specific reason for the imposition of the sentence different from that described [by the Guidelines].”⁴⁷ Without such a reporting requirement, there was concern that “invidious factors” would be permitted to enter into sentencing decisions.⁴⁸

Furthermore, the SRA authorized appellate review of sentencing decisions upon the initiative of the government or the defendant.⁴⁹ Prior to

³⁹ *Koon v. United States*, 518 U.S. 81, 113 (1996).

⁴⁰ U.S. SENTENCING COMM’N, *FEDERAL SENTENCING GUIDELINES MANUAL* ch. 1 (2003) [hereinafter USSG]; Lazarus, *supra* note 6.

⁴¹ Wilkins, Jr. et al., *supra* note 4, at 372.

⁴² 18 U.S.C. § 3553(b)(1) (1988).

⁴³ *Id.*; USSG, *supra* note 40, at Ch. 1, pt. A.

⁴⁴ Wilkins, Jr. et al., *supra* note 4, at 369.

⁴⁵ *Id.* at 372.

⁴⁶ *Id.*

⁴⁷ § 3553(c)(2).

⁴⁸ Wilkins, Jr. et al., *supra* note 4, at 372.

⁴⁹ See 18 U.S.C. § 3742 (1988).

the SRA, the trial judge had broad sentencing discretion and sentences imposed within the statutory limits could not be reviewed on appeal absent contravention of statutory commands or constitutional limits.⁵⁰ In addition to sentencing errors of law, the SRA authorized review of the correctness of guideline application, and the reasonableness of sentences falling outside of the proscribed range.⁵¹ The SRA's implementation of reporting obligations in conjunction with increased appellate review of sentencing decisions falling outside of the prescribed guideline range was meant to serve as an effective check on trial judges, and thus eliminate unwarranted disparity in federal sentencing.

III. CONGRESS POINTS TO DOWNWARD DEPARTURES AS EVIDENCE THAT THE SENTENCING REFORM ACT OF 1984 IS "INADEQUATE"

The recent enactment of the sentencing reforms contained in the PROTECT Act are proof that Congress believes the Sentencing Reform Act of 1984 was unsuccessful. The SRA was created with the express purpose of achieving uniformity in federal sentencing, and Congress determined that uniformity had not been achieved under the SRA system.⁵²

The congressional basis for determining that the Guidelines and the Sentencing Reform Act mandates have been unsuccessful is primarily driven by statistical analysis of the downward departure rate.⁵³ The downward departure rate has arguably become the sole figure upon which Congress and the Department of Justice bases its determination of whether or not the sentencing system is working.⁵⁴ Typical of the sentiment regarding the sentencing system, Senator Strom Thurmond, a member of the Senate Judiciary Committee stated:

[T]he purpose of the Guidelines is being threatened by the increasing trend of sentencing criminals below the range established in the Guidelines Although we would expect [downward departures] to be more rare as the Commission has reformed the Guidelines, just the opposite is occurring. Just in the past eight years, the number of downward departures has increased steadily from twenty percent to about thirty-five percent of cases, which is more than one out of three. If the trend continues much

⁵⁰ Wilkins, Jr. et al., *supra* note 4, at 373.

⁵¹ *Id.*

⁵² *Id.* at 364.

⁵³ See, e.g., Rep. Tom Feeney, *Getting Sentences Right*, WASH. POST, April 16, 2003, at A26; Kendall, *supra* note 5.

⁵⁴ See, e.g., H.R. REP. NO. 108-66, at 58-59 (2003); 149 Cong. Rec. H3059, H3066 (daily ed. April 10, 2003) (statement of Rep. Sensenbrenner).

longer, we will see more criminals being sentenced below the Guidelines than within them.⁵⁵

The difficulty in relying on a downward departure figure is that there are several different reasons a departure can occur. Some departures are left solely to the discretion of the trial judge, such as departures based on aberrant behavior or a minor role in the offense.⁵⁶ However, most downward departures are the result of either a governmental motion, such as substantial assistance to the government, or efficiency constraints, such as immigration cases, on particular courts.⁵⁷ Therefore, when someone like Senator Thurmond states that thirty-five percent of cases result in downward departures, there is little way for the public or Congress to fully understand what that means with regard to the frequency of judges exercising their discretion to unilaterally depart downward.

The primary statistic on which Congress based its rationale for implementing the PROTECT Act is the fact that the downward departure rate has increased from 5.8% in 1991 to 18.1% in 2001.⁵⁸ In addition, in 2001, only 63.9% of defendants were sentenced within the applicable range, as compared to 80.6% in 1991.⁵⁹ In 2001, 17.4% of defendants received substantial assistance downward departures initiated by the government,⁶⁰ and 18.1% received downward departures absent a required government motion.⁶¹ Only, 0.6% of defendants received upward departures.⁶² These statistics are often used to suggest that judges tend towards leniency, since upward departures are so rare.

⁵⁵ *Oversight of the United States Sentencing Commission: Are the Guidelines Being Followed? Hearing before the Criminal Judicial Oversight Subcommittee*, 106th Cong. (Oct. 13, 2000) (statement of Sen. Strom Thurmond, Member, Sen. Comm. on the Judiciary), reprinted in 15 FED. SENTENCING REP. 317 (2003).

⁵⁶ 18 U.S.C.A. § 3553(b) (1988).

⁵⁷ *Id.* § 3553(e) ("upon motion of the Government, the court shall have the authority [to depart] to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense"); USSC Report, *supra* note 16, at i, iv-v.

⁵⁸ USSC Report, *supra* note 16, at 31; Gary Fields & Jess Bravin, *Federal Judges Aren't as Lenient as Lawmakers Say, Studies Show*, WALL ST. J., October 30, 2003, at A4.

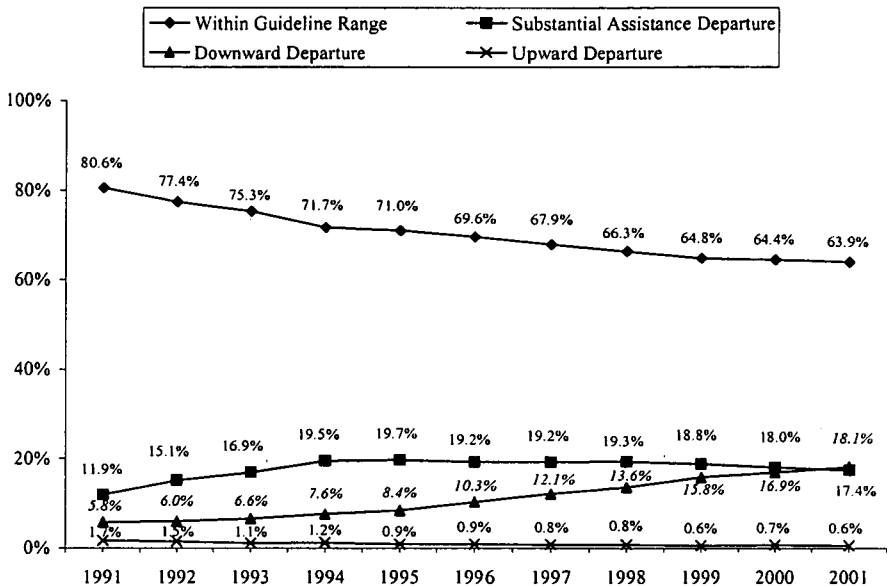
⁵⁹ USSC Report, *supra* note 16, at 31.

⁶⁰ Section 5k1.1 of the Guidelines provides "[u]pon motion of the government that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." USSG, *supra* note 40, § 5K1.1.

⁶¹ USSC Report, *supra* note 16, at 32.

⁶² *Id.*

Graph 1
Sentencing Statistics



Source: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY 1991-NEWUSSCFY2001

As illustrated in the above chart, these statistics seem to indicate a legitimate concern that the Sentencing Guidelines and the SRA by themselves have been unsuccessful in achieving uniformity, and could in fact be growing increasingly ineffective. However, the figures commonly referenced by members of Congress and the Department of Justice do not fully portray the state of the sentencing system, and therefore skew the magnitude of the disparity problem.⁶³

Given that the sentencing reforms were aimed at reducing judicial discretion, government initiated downward departures cannot be seen as an abuse of judicial discretion. Downward departures for an offender's substantial assistance to the government can only be granted upon a motion by the government.⁶⁴ Therefore, the determination of the severity of the downward departure "problem" should be confined to non-substantial

⁶³ See Jonathan Groner, *Sentencing Commission Panel Readies for Battle*, 230 N.Y. L.J. 1, 1 (2003); Kendall, *supra* note 5; Schanzenbach, *supra* note 6, at 257-58.

⁶⁴ USSG, *supra* note 40, § 5K1.1, at 382.

assistance downward departures.⁶⁵ However, the exclusion of substantial assistance downward departures does not in itself provide an accurate statistic, because the government also initiates a significant amount of the non-substantial assistance downward departures, such as an early plea, waiver of indictment or other benefit to the government.⁶⁶ For example, in 2001, the government initiated approximately 40% of the non-substantial assistance downward departures that were granted.⁶⁷ Thus, the true downward departure rate is closer to 11%, rather than the 18.1% rate which includes all government initiated departures often quoted by members of Congress.⁶⁸ An “acceptable” downward departure rate, although not explicitly defined, is considered between five and ten percent.⁶⁹

Another concern expressed by Congress was the disparity in downward departure rates between judicial districts.⁷⁰ For example, in 2001 the districts with the highest non-substantial assistance downward departure rates were the District of Arizona (62.6%), the Eastern District of Washington (51.5%), and the Southern District of California (50.1%).⁷¹ The districts with the lowest downward departure rates were the Eastern District of Kentucky (1.4%), the District of South Carolina (1.7%), and the Western District of Virginia (1.8%).⁷² Such wide disparity gives the impression that there is a lack of uniformity in sentencing. However, the downward departure rates are often directly related to particular crimes disproportionately affecting certain districts.

Certain districts rely on early disposition policies to deal with particular types of crimes, or with types of criminals appearing in high volumes in certain judicial districts.⁷³ For example, southern border states face extremely high volumes of drug trafficking and illegal re-entry cases; “fast track” policies are necessary in order to effectively and efficiently deal

⁶⁵ This methodology is utilized by the U.S. Sentencing Commission and is recognized in the GAO’s Congressional Report.

⁶⁶ Bowman, *supra* note 24, at A27; USSC Report, *supra* note 16, at 45.

⁶⁷ USSC Report, *supra* note 16, at 59 (this figure is likely a conservative estimate since there is incomplete data regarding the government position in almost half of the cases reviewed).

⁶⁸ See Charles Lane, *Rehnquist Decries Sentencing Law: In His Year-End Report, Chief Justice is Critical of Congress*, WASH. POST, Jan. 1, 2004, at A02; Groner, *supra* note 63, at 1; Patricia Manson, *Panel Issues Get Tough Sentencing*, CHI. DAILY L. BULL., Oct. 23, 2003.

⁶⁹ Sentencing Commission Hears Testimony on PROTECT Act Downward Departure Mandate, 73 CRIM. L. REP. 21 (2003) [hereinafter *Sentencing Commission Hears*].

⁷⁰ See *id.*; Fields and Bravin, *supra* note 58, at A4.

⁷¹ USSC Report, *supra* note 16, at 35.

⁷² *Id.* at 36.

⁷³ *Id.* at 37.

with these cases.⁷⁴ "Fast track" programs provide prosecutors with the initiative to grant alien defendants lighter drug sentences to expedite deportation.⁷⁵ Fast tracking was responsible for 7.8% of all downward departures in 2001.⁷⁶ That same year, 5.1% of all downward departures stated deportation as the basis.⁷⁷ Congress supports both fast track and deportation programs and acknowledged their value by including them in the PROTECT Act.⁷⁸ Not surprisingly, the Southern District of California has one of the highest downward departure rates: it accounted for 92.4% of fast track departures in 2001.⁷⁹ Similarly, the districts of Arizona and Eastern Washington granted 72.7% of deportation departures.⁸⁰ These districts need high downward departure rates in order to prevent the courts from becoming congested with drug trafficking offenses and lengthy deportation proceedings.

A more in-depth look into the district departure rate disparities shows a more narrow range of departure rates among districts.⁸¹ Nevertheless, significant disparities among the judicial districts remain that cannot be explained by early disposition programs or a particularly high concentration of a certain type of crime or offender which is unique to the particular district.

IV. SHARING BLAME: THE JUDICIARY, THE SENTENCING COMMISSION AND CONGRESS

While the downward departure rate is not as bad as some of the statistics articulated by members of Congress indicate, the fact is that the Sentencing Reform Act and the Sentencing Commission's Guidelines have not achieved the clearly articulated goal of eliminating unwarranted

⁷⁴ *Id.* at 44.

⁷⁵ Gen. Acct. Off. Rep. to Cong. Requesters, *Federal Drug Offenses: Departures From Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2001*, GAO-04-105 at 26 (2003); Fields & Bravin, *supra* note 58.

⁷⁶ USSC Report, *supra* note 16, at 42.

⁷⁷ *Id.*

⁷⁸ PROTECT ACT, Pub. L. No. 108-21, §401 (m)(2)(B), 117 Stat. 650 (2003); Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENTENCING REP. 310 (2003); *Sentencing Commission Hears*, *supra* note 69.

⁷⁹ USSC Report, *supra* note 16, at 44.

⁸⁰ *Id.* at 45.

⁸¹ Manson, *supra* note 68 (quoting U.S. District Court Judge and U.S. Sentencing Commissioner, "I have seen . . . no evidence of any national pattern of abuse . . . with regard to downward departures"); Vinegrad, *supra* note 78, at 314 ("[S]tatistics support one overall conclusion . . . downward departures are infrequent and appellate remedies exist to correct unwarranted departures.").

sentencing disparity.⁸² At best, the non-substantial assistance downward departure rate is around ten percent, which is at the highest point of the range deemed "acceptable."⁸³ Strong arguments can be made as to what the goals and structure of the federal sentencing system ought to be, but there is little doubt that if the primary goal is consistency in sentencing among similar crimes and offenders, then the pre-PROTECT Act system had flaws. Congress and the Department of Justice may have exaggerated the magnitude of the system's failings, but if perfection is measured by a national downward departure rate below ten percent and consistency across all districts, then something went wrong.⁸⁴ Congress, through the PROTECT Act, implicitly lays the blame squarely on the shoulders of the trial court judges and the Sentencing Commission. However, the reality is that Congress, the Judiciary, and the Sentencing Commission combined to contribute to the perception that the sentencing system and the guidelines were either not working or being ignored.

A. THE JUDICIARY

Federal judges have been seen as part of the sentencing problem and have played a relatively minor role in the fashioning of sentencing policy.⁸⁵ Judges are themselves largely to blame for their absence from a central role in developing sentencing policy.⁸⁶ In addition to their consistent refusal to acknowledge that unwarranted sentencing disparities are real and unjust, they vigorously oppose sentencing reform efforts.⁸⁷ Judges bear the brunt of the blame for the high downward departure rate and the perception that different districts and judges are working around the guidelines.⁸⁸ Some of

⁸² See Kendall, *supra* note 5 ("Rep. Bob Goodlatte, R-Va. . . . said that he, like other members of Congress, had seen statistics that indicated that judge-initiated downward departures were too high.").

⁸³ *Sentencing Commission Hears*, *supra* note 69.

⁸⁴ Groner, *supra* note 63.

⁸⁵ Michael Tonry, *Judges and Sentencing Policy—The American Experience*, in SENTENCING, JUDICIAL DISCRETION AND TRAINING 137 (C. Munro and M. Wasik eds., 1992).

⁸⁶ *Id.* at 138.

⁸⁷ Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755, 1758-60, 1767 (1992); Lazarus, *supra* note 6.

⁸⁸ Stith & Cabranes, *supra* note 9, at 1265; Margaret Graham Tebo, *Questions on Sentences: Changes to Guidelines Become a Separation-of-Powers Dispute*, 89 A.B.A. J. 13 (2003) ("some members of Congress [are] outraged at what they see as frivolously light sentences meted out by U.S. district judges"); Ian Urbina, *supra* note 2 ("Federal judges have exploited loopholes in the sentencing guidelines . . . when a predator commits a crime, no matter where in the country it occurs, he does the same amount of hard time.").

this criticism is unfounded.⁸⁹ As discussed above, the departure rates are not as bad as Congress portrays them to be since the vast majority of departures are driven by the government, or by district-specific problems.

Nevertheless, judges often do tend towards leniency.⁹⁰ Many judges believe the Guidelines are too rigid and make efforts to reduce penalties they perceive as unfair.⁹¹ Some high profile judges such as Justice Kennedy have been outspoken about the harshness of sentences and believe that sentences should be generally shorter across the board.⁹² The downward departure and uniformity in sentencing debate cannot be evaluated without considering these issues. Too many downward departures may be interpreted as an expression of leniency, and therefore may be seen as a subversive attempt by the judiciary to lower sentences.⁹³ This rationale is supported by the departure statistics. While the downward departure rate lies somewhere in the teens and has been rising over the last several years, the upward departure rate resides below one percent, and has been trending downwards since 1991.⁹⁴ Certainly, few in Congress have complaints about the upward departure rate, and probably would not see a higher upward departure rate as indicative of a flawed sentencing system. Furthermore, certain judges do in fact work around the Guidelines and have high downward departure rates.⁹⁵ Such individual sentencing practices have a significant impact on the number of downward departures and disparity in sentencing, and create a more generalized perception that judges are working around the Guidelines.⁹⁶

⁸⁹ See Fields and Bravin, *supra* note 58; Groner, *supra* note 63, at 1 (There was a "misperception created by the Department of Justice in Congress that there is an epidemic of leniency" and the DOJ provided "misleading statistics" in order to facilitate the Feeney Amendment's passage.).

⁹⁰ Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 298 (2004).

⁹¹ *Id.*

⁹² Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/\\$FILE/Justice_Kennedy_ABA_Speech.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/Justice_Kennedy_ABA_Speech.pdf).

⁹³ Lazarus, *supra* note 6.

⁹⁴ USSC Report, *supra* note 16, at 32.

⁹⁵ Panel III: *Accomplishing the Purpose of Sentencing-the Role of Courts and the Commission*, 15 FED. SENTENCING REP. 179 (2003) (notes from symposium); Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 357, 365 (1992) (quoting an unnamed judge in the Eastern District of New York: "[T]he Guidelines . . . have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and ignoring the law in an effort to achieve a just result.").

⁹⁶ Bibas, *supra* note 90, at 298-99; Weinstein, *supra* note 95, at 365.

By the time Congress passed the SRA, it was adamant that disparity posed a serious threat to the proper function of sentencing. Prior to the SRA, the judiciary knew there were sentencing disparity problems; however, the judiciary as an institution did little to achieve positive change.⁹⁷ In effect, because sentencing was historically a judicial function, the judiciary “thought that no one would ever have the audacity to deprive them of sentencing discretion.”⁹⁸ Therefore, the judiciary “essentially ignored the problem until Congress enacted the Sentencing Reform Act.”⁹⁹ When Congress finally chose to act to rectify the perceived disparity problems, the judiciary failed to take a leadership role in determining the course of reform legislation.¹⁰⁰ By the time the SRA passed, the judiciary had lost significant power to shape the scope and nature of the reform.¹⁰¹ Subsequent to the SRA, “over 200 district judges held the SRA unconstitutional” which furthered Congressional disdain for district judges’ sentencing tendencies.¹⁰²

Similar to their pre-SRA actions, the judiciary was aware of sentencing disparity concerns prior to the PROTECT Act’s introduction, but took few meaningful steps to enact change.¹⁰³ By failing to be proactive, the judiciary ceded control to Congress. Senator Orrin Hatch expressed the congressional disdain for district court sentencing discretion by stating the PROTECT Act was Congress’ way of saying “we are sick of this, judges.”¹⁰⁴

B. THE SENTENCING COMMISSION

Much like the judiciary, the United States Sentencing Commission knew that sentencing disparity existed, and that it was of concern to the legislature.¹⁰⁵ But it too did little to substantively remedy the problem. The

⁹⁷ Berman, *supra* note 5, at 308 (“[T]he Feeney Amendment’s effort to restrict downward departures was not an entirely abrupt or unforeseeable development. Various members of Congress and various representatives of the Department of Justice expressed in various forums significant concerns about increased rates of downward departures in the wake of the *Koon* decision.”); see also Susan Schmidt, *Judge Accused of Misleading House Panel: Republicans on Subcommittee Say Testimony on Drug Sentencing was Inaccurate*, WASH. POST, Nov. 6, 2002, at A18.

⁹⁸ Lay, *supra* note 87, at 1757.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1758-59.

¹⁰² *Id.* at 1767; U.S. SENTENCING COMM’N, ANN. REP. 11 (1989).

¹⁰³ See sources cited *supra* note 78.

¹⁰⁴ Vinegrad, *supra* note 78, at 315.

¹⁰⁵ See sources cited *supra* note 78.

Commission's primary purpose was to create the Guidelines and make adjustments and policy recommendations to further the SRA's objectives by curtailing unwarranted sentencing disparity.¹⁰⁶ Given that the PROTECT Act is a reaction to the congressional perception that downward departures are too high, it is difficult not to point a finger of blame at the Sentencing Commission.

The SRA mandated that district judges report on the record their reasons for sentencing and, in particular, their rationale for any departure from the Guidelines.¹⁰⁷ This data was to be collected and analyzed by the Commission.¹⁰⁸ One of the least disputed problems affecting the evaluation of the federal sentencing system is the fact that the sentencing data is flawed.¹⁰⁹ In 2001, there were 4,849 cases in which the sentencing judge did not send a copy of the sentencing report to the Commission.¹¹⁰ The Commission's own findings state that it is:

acutely aware of the need for greater specificity and standardization in departure documentation . . . historically [the Commission] has not received a significant percentage of sentencing documents from a handful of judicial districts . . . often [courts] provide only general categorical reasons for departure [] with insufficient specificity to enable the Commission to understand fully the sentencing court's underlying substantive reason for departure.¹¹¹

This conclusion was made *after* the enactment of the PROTECT Act.¹¹² The fact that it took over fifteen years, and a major congressional sentencing reform, for the Commission to determine it was not receiving sufficient data by which to evaluate the extent of the unwarranted sentencing disparity demonstrates a serious problem with the

¹⁰⁶ See generally 28 U.S.C. § 994 (West Supp. 2003) (Duties of the Commission); 28 U.S.C. § 995(a)(20) (2004); 28 U.S.C. §§ 995(a)(8), (9), (12)(A), (13)-(16), (20), (21) (2004).

¹⁰⁷ § 994(w)(1)(B); Wilkins, Jr. et al., *supra* note 4, at 365.

¹⁰⁸ See generally §§ 994, 995(a)(8), (9), (12)(A), (13)-(16), (21).

¹⁰⁹ USSC Report, *supra* note 16, at iv.; G.A.O. Report to Congress, *Federal Drug Offenses: Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999 - 2001*, GAO-04-105, 4 (2003); William W. Mercer, *Assessing Compliance with the U.S. Sentencing Guidelines: The Significance of Improved Data Collection and Reporting*, 16 FED. SENTENCING REP. 43, 43 (2003); *Sentencing Commission Hears*, *supra* note 69.

¹¹⁰ Roundtable Discussion of the Feeney Amendment: Federal Judicial Discretion, in NAT'L L.J., Dec. 15, 2003, available at http://www.nacdl.org/public.nsf/legislation/ci_03_53?OpenDocument [hereinafter Roundtable] (statement by John Steer, United States Sentencing Comm'n).

¹¹¹ USSC Report, *supra* note 16, at iv.

¹¹² *Id.*

Commission.¹¹³ It is especially disturbing given the fact that the Commission was mandated to curtail unwarranted disparity, and monitor the effectiveness of the Guidelines on a continuous basis.¹¹⁴ Without knowing exactly why judges were departing, and why certain districts had higher downward departure rates than others, the Commission could hardly work intelligently to remedy disparity problems. The Commission's shortcoming as the supervisory agency of the federal sentencing system allowed Congress to justify its need to take control over the system they perceived to be failing.¹¹⁵ Without solid statistical proof to the contrary, or steps taken on behalf of the Commission or the judiciary to rectify or clarify the disparity issues, Congress was able to react to whatever information they chose to rely on.

C. CONGRESS

Finally, members of Congress recognize that getting tough on crime gets them elected.¹¹⁶ Any legislation with regards to sentencing is apt to favor tougher sentences, less loopholes, and lower crime rates.¹¹⁷ Congress has determined that downward departures are the equivalent of offenders getting off easy.¹¹⁸ Therefore, Congressional oversight is fixated on the departure rate, and compelling the judiciary to get that number within a palatable range. In its quest to eliminate disparity, Congress reacted quickly and without much debate or input from the judiciary or practitioners.¹¹⁹

The inaction of the judiciary and the Sentencing Commission in response to the perceived sentencing disparity problem allowed Congress to usurp all control over sentencing and led to the reforms dictated in the

¹¹³ *Id.*

¹¹⁴ 28 U.S.C. §§ 995(a)(8), (9), (12)(A), (13)-(16), (21) (2003); 28 U.S.C.A. § 991(b)(1) (2003).

¹¹⁵ Kendall, *supra* note 5 ("[S]tudying downward departures had not been at the top of the commission's agenda . . . and Congress took matters into its own hands.").

¹¹⁶ Stuart Taylor, Jr., *Ashcroft and Congress are Pandering to Punitive Instincts*, NAT'L J., Jan. 24, 2004; Strauss, *supra* note 5, at 1590-91.

¹¹⁷ See, e.g., Penalties for White Collar Crime Offenses: Are We Really Getting Tough on Crime?: Hearing on Penalties for White Collar Crime Before the S. Comm. on the Judiciary, Subcomm. on Crime and Drugs, 107th Cong. 1-17 (2002), available at 15 FED. SENTENCING REP. 234, 236 (2003); Douglas O. Linder, *Journey Through the Valley of Evil*, 71 N.C. L. REV. 1111, 1118-22, 1128-33 (1993).

¹¹⁸ Tebo, *supra* note 88.

¹¹⁹ See Schanzenbach, *supra* note 6, at 257; Statement of Senator Edward Kennedy regarding S. 151, available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/\\$FILE/kennedy_stmt.wpd](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/kennedy_stmt.wpd).

PROTECT Act. Legislators rarely, if ever, campaign in support of shorter sentences, or a justice system which better accommodates the individual needs of offenders. Elections dictate that leniency and the appearance of being soft on crime is politically risky.¹²⁰ Therefore, the judiciary, and the Commission in particular, should have been proactive in remedying the sentencing system. Similar pre-SRA inaction led to a congressional reaction in the form of sweeping sentencing reforms and significantly reduced judicial discretion in sentencing. Over fifteen years later, the judiciary made no changes to alleviate concern over unwarranted disparity, and it too has resulted in the sweeping congressional reform mandated by the PROTECT Act.

IV. THE PROTECT ACT

A. FROM THE FEENEY AMENDMENT TO THE PROTECT ACT

The PROTECT Act is best known for its “AMBER (America’s Missing Broadcast Emergency Response) Alert” provision, which strengthened the federal and state procedures and penalties for investigating and prosecuting the kidnapping and sexual exploitation of children.¹²¹ The AMBER Alert bill was introduced January 9, 2003¹²²; it received wide Senate support and passed with little controversy.¹²³ On March 27, 2003, Representative Tom Feeney (R-Florida) introduced an amendment to the House of Representatives version of the “AMBER Alert” bill, known as the Feeney Amendment.¹²⁴ This amendment was written largely by the Justice Department.¹²⁵ The Feeney Amendment proposed far-reaching reforms to the federal sentencing system. The amendment sought to:

- 1) eliminate specific grounds of departures (aberrant behavior; family ties and responsibilities and community ties; military, civic, charitable or public service, employment-related contributions or similar goods works),

¹²⁰ See Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 28 (2003); Satter, *supra* note 5; Strauss, *supra* note 5, at 1590-91; Taylor, *supra* note 116.

¹²¹ PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18 U.S.C. § 401(h) (1)).

¹²² PROTECT Act, Bill Summary and Status for the 108th Congress, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN00151:@@@D&summ2=m&> (as of Apr. 30, 2003).

¹²³ *Id.*

¹²⁴ 140 Cong. Rec. H 2420 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney); *An Ominous Attack on Judges*, N.Y. TIMES, April 7, 2003, at A18.

¹²⁵ Kendall, *supra* note 5.

- 2) prohibit downward departures based on non-specified grounds,
- 3) require congressional oversight of downward departures,
- 4) increase appellate review of departures,
- 5) limit downward departures on remand,
- 6) prohibit future downward departure guidelines until 2005, and
- 7) increase authority to prosecutors (e.g., through "early disposition" programs and acceptance of responsibility).¹²⁶

The Feeney Amendment provoked outrage from most judges and many special interest groups.¹²⁷ It marked an unprecedented attempt by Congress to re-write the Sentencing Guidelines without input from the Sentencing Commission or judiciary.¹²⁸ Due to this opposition, and the work of the Conference Committee of House and Senate representatives, the enacted version of the Feeney Amendment is substantially narrower than the original House proposal.¹²⁹ Despite these changes, however, the fact that the Feeney Amendment took only thirty days from proposal to passage, and was subject to very limited debate, outraged many interested parties outside of Congress.¹³⁰ The final version of the Feeney Amendment as contained in the PROTECT Act included the following reforms:

- 1) Eliminated or restricted the use of several bases for downward departures
- 2) Instituted de novo appellate review
- 3) Required increased reporting of sentencing decisions
- 4) Increased prosecutorial controls on some downward departures
- 5) Directed the Sentencing Commission to reduce downward departures, and

¹²⁶ See H. Amdt. 19 to H.R. 1104, 108th Cong. (2003), available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/\\$FILE/feeney.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/feeney.pdf) [hereinafter Feeney Amendment as Introduced].

¹²⁷ These include: present and former members of the Sentencing Commission, Judicial Conference of the United States, seventy law professors, Leadership Conference on Civil Rights, National Association of Criminal Defense Lawyers, National Legal Aid and Defender Association, Families Against Mandatory Minimums, American Civil Liberties Union, American Bar Association, NAACP, National Petroleum Refiners Association, Cato Institute, Chief Justice William Rehnquist.

¹²⁸ Douglas A. Berman, *Taking Stock of the Feeney Amendment's Many Facets*, 16 FED. SENTENCING REP. 93, 93 (2003).

¹²⁹ See Berman, *supra* note 5, at 309.

¹³⁰ See, e.g., Lane, *supra* note 68 at A02; *Who's Afraid of the Federal Judiciary?*, *supra* note 13.

- 6) Changed the membership structure of the Sentencing Commission¹³¹

Although significant concessions were made, the PROTECT Act still marked a significant reform of the federal sentencing system, and included unprecedented restrictions on the judiciary's influence on sentencing and sentencing policy. Furthermore, the United States Sentencing Commission's mandate from Congress to reduce downward departures subsequently resulted in a sentencing system much like the original Feeney Amendment proposal.¹³²

B. THE PROTECT ACT AS FEDERAL SENTENCING REFORM

In reaction to the perceived unwarranted disparity generated by the federal sentencing system, Congress and President Bush enacted the PROTECT Act (the "Act") and through it instituted a wide range of reforms aimed at compelling uniform sentencing.¹³³ The Act contains several different types of reform, but the purpose and message the Act carries is clear.¹³⁴ Taken in the aggregate, the Act makes a clear statement that the judiciary and the Sentencing Commission are part of the problem and will not play a significant role in crafting a solution to the sentencing system.¹³⁵ Through the PROTECT Act, Congress sent the message that it distrusts the trial judges and sees limited value in the Sentencing Commission as it was originally constructed under the Sentencing Reform Act of 1984.¹³⁶ While the Act is focused on reducing unwarranted disparity in sentencing, three of the Act's reforms are particularly blunt. The Act's mandate for heightened appellate review, reconstitution of the Sentencing Commission, and increased reporting requirements offer clear indications as to what Congress blames for the sentencing system's lack of success in the post-SRA era.

1. De Novo Review

Under a properly functioning sentencing system, the courts of appeals, and not Congress or the Commission, are best positioned to determine the

¹³¹ Final Version of the Feeney Amendment, Pub. L. No. 108-21 Title IV, 117 Stat. 650 (2003), available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/\\$FILE/final_feeney.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/final_feeney.pdf).

¹³² See Press Release, U.S. Sentencing Comm'n, Sentencing Commission Acts to Reduce Number of Sentences Below the Guidelines (Oct. 8, 2003), available at <http://www.ussc.gov/PRESS/rel100803a.htm> [hereinafter USSC Press Release].

¹³³ USSC Report, *supra* note 16, at i-iii.

¹³⁴ *Id.*

¹³⁵ Vinegrad, *supra* note 78, at 314-15.

¹³⁶ See *Who's Afraid of the Federal Judiciary?*, *supra* note 13.

appropriateness of departures in particular cases.¹³⁷ Under the SRA, Congress granted the appellate courts the initial responsibility to ensure that the district courts adhere to the guideline system.¹³⁸ The PROTECT Act enhanced the appellate review responsibility for departure decisions by changing from the previous abuse of discretion standard to a de novo review of district court sentencing decisions.¹³⁹ In doing so, Congress effectively overturned the Supreme Court's decision in *Koon v. United States*, which limited the review by appellate courts of district court sentencing decisions to the abuse of discretion standard.¹⁴⁰

The Supreme Court unanimously decided *Koon v. United States* in 1996, holding that departure decisions by district courts were entitled to deference on appeal and reviewable only for abuse of discretion.¹⁴¹ The Court stated that Congress "did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions."¹⁴² In particular, the court cited the SRA's provision that "[t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous."¹⁴³ Further, the Court noted that in 1988 the SRA was specifically amended to require appellate courts to "give due deference to the district court's application of the guidelines to the facts."¹⁴⁴ The Court went on to observe that district courts have an "institutional advantage" in making the factual findings necessary to making departure decisions, "especially as they see so many more Guidelines cases than appellate courts do."¹⁴⁵

Koon reinforced the standard by which district courts determine whether a particular factor is a permissible basis for departure:

[A] federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer is no . . . the sentencing

¹³⁷ See, e.g., Statement of Sen. Kennedy, *supra* note 119.

¹³⁸ Michael Goldsmith & Marcus Porter, *Lake Wobegon and the U.S. Sentencing Guidelines: The Problem of Disparate Departures*, 69 GEO. WASH. L. REV. 57, 66 (2000).

¹³⁹ 18 U.S.C. § 3553 (2004).

¹⁴⁰ *Koon v. United States*, 518 U.S. 81 (1996).

¹⁴¹ *Id.* at 91.

¹⁴² *Id.* at 97.

¹⁴³ *Id.* (quoting 18 U.S.C. § 3742(e)(4) (1988)).

¹⁴⁴ *Id.* (quoting § 3742(e)(4)).

¹⁴⁵ *Id.* at 98.

court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline.¹⁴⁶

Likewise, *Koon* approved district court judges' ability to depart from the prescribed guideline sentencing range based on a factor not mentioned in the Guidelines.¹⁴⁷ The Court determined that any factor not explicitly disapproved by the Sentencing Commission may serve as a basis for departure, as long as the overall sentence is in accordance with one of the statutory goals of sentencing.¹⁴⁸

Koon returned some discretion to the federal sentencing process. It effectively became a "safety valve" for the trial judge who was required to apply the Guidelines, but still desired to craft a sentence around the unique circumstances of the crime and the defendant.¹⁴⁹ It gave a judge facing an unusual case the opportunity to alter the sentence proscribed by the Guideline.¹⁵⁰

By providing for de novo review of sentencing decisions, and thus effectively overturning *Koon*, the PROTECT Act provides a significant deterrent to downward departures by trial court judges. Like the downward departure rate itself, it is unclear whether the pre-PROTECT Act appellate review process was flawed. In 2001, the circuit courts of appeals reversed downward departures in seventy-six percent of those cases in which the government challenged a departure decision on appeal.¹⁵¹ Furthermore, the Justice Department found only twenty five departure sentences worthy of appeal in 2001.¹⁵² In contrast, 340 cases were appealed by the defense and only 4.5% succeeded on appeal.¹⁵³

Nevertheless, the PROTECT Act ensures that appellate courts—through de novo review—now have the ability to reverse sentencing decisions with which they simply disagree.¹⁵⁴ Appellate courts no longer need to give deference to the trial courts' sentencing experience and familiarity with the facts of particular cases. Instead, sentencing decisions can be altered outside of the context of the circumstances present at trial and during sentencing. Sentencing is often a highly emotional experience

¹⁴⁶ *Id.* at 109.

¹⁴⁷ *Id.* at 92-96.

¹⁴⁸ *Id.* at 95-96.

¹⁴⁹ Lazarus, *supra* note 6.

¹⁵⁰ *Id.*

¹⁵¹ See USSC Report, *supra* note 16, at 56.

¹⁵² *Id.*

¹⁵³ U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 109 tbl.57 (2002).

¹⁵⁴ Vinegrad, *supra* note 78, at 312.

with victims, the offender and families present.¹⁵⁵ Reviewing the transcript or documentary sentencing materials on appeal presents a significantly different experience.¹⁵⁶ De novo review should lead to more sentences within the guideline range since the determination can be made outside the context of the trial. In addition, trial judges may simply be less likely to tailor a sentence to the individual's circumstances apparent at trial or during sentencing since they understand that their decisions will be subject to de novo appellate review.

The PROTECT Act reinforces the Congressional assertion that judges should have little role in sentencing apart from mechanically applying the Guidelines to the offenders convicted in their courtrooms.¹⁵⁷ This is most clearly demonstrated by the Act's overruling of *Koon*. *Koon* represented the judiciary's conception of sentencing within the Guideline system. It supported the notion that flexibility is an important component to the sentencing system and district courts have an advantage in their proximity to the facts of each case.¹⁵⁸

Trial court judges need discretion because it is impossible to legislate for every offender and every set of circumstances.¹⁵⁹ Therefore, departures serve a vital role in sentencing structure to ensure that offenders receive appropriate sentences given the circumstances of the offense and the history of the offenders. Discretion also serves an important role in checking overzealous or unscrupulous prosecutors.¹⁶⁰ Without any room for departures, prosecutors hold significant power since they are the only party to a trial with the power to meaningfully alter sentences.¹⁶¹ Under the *Koon* system, sentencing decisions are afforded significant weight because sentencing decisions occur in highly emotional circumstances and often rely on confidential information and potentially valuable testimony regarding the offender. Only clear errors in sentencing are corrected by the appellate courts.¹⁶²

¹⁵⁵ Michelle Lore, *Amendment Limiting Judicial Discretion in Sentencing Receives Cool Reception from Judges*, 7 MINN. LAW. 1, 16 (2003).

¹⁵⁶ *Id.*

¹⁵⁷ See Lane, *supra* note 68, at A02.

¹⁵⁸ *Koon v. United States*, 518 U.S. 81, 98 (1996).

¹⁵⁹ *Id.* at 92-96.

¹⁶⁰ See Letter from the Leadership Conference on Civil Rights, et al., to Congressional Representative (Mar. 26, 2003), available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/\\$FILE/Feeney_Amdt_NACDL_letter.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/Feeney_Amdt_NACDL_letter.pdf) (letter in opposition to the Feeney Amendment).

¹⁶¹ *United States v. Kim*, No. 03 CR. 413(RPP), 2003 U.S. Dist. LEXIS 18637, at *21-22 (S.D.N.Y. Oct. 20, 2003).

¹⁶² *Koon*, 518 U.S. at 100.

Although the PROTECT Act is still in its infancy, already the results of the change in appellate review are showing.¹⁶³ For example, the Court of Appeals for the Seventh Circuit overturned an Illinois District judge's decision to grant a downward departure based on an offender's diminished capacity, prior conduct as a model citizen and deportable alien status.¹⁶⁴ As more and more downward departures are overturned by the appellate courts, there will be increasing pressure on district court judges to limit departure discretion for risk of being overturned. Therefore, de novo appellate review of sentencing decisions will continue to be an important deterrent to downward departures.

2. *The United States Sentencing Commission Mandate*

Perhaps the most overt attack on the judiciary came in the form of a congressional mandate to restructure the United States Sentencing Commission.¹⁶⁵ The Commission was established as part of the Sentencing Reform Act of 1984 as an independent agency within the Judiciary.¹⁶⁶ Prior to the PROTECT Act, the Commission was comprised of seven voting members, "[a]t least three" of whom had to be federal judges.¹⁶⁷ The PROTECT Act now provides that the commission consist of "[n]ot more than 3" federal judges.¹⁶⁸ Therefore the three-judge minimum was transformed into a three-judge maximum, and could conceivably lead to a Commission without any judicial representation at all.¹⁶⁹ The restructuring of the Commission sends an overt signal as to Congress's opinion that little judicial input is needed in sentencing policy.¹⁷⁰ While much of the PROTECT Act seeks to eliminate judicial discretion at the trial level, this reform indicates that judicial input is similarly unappreciated in determining the basic sentencing structure or rules of application.

¹⁶³ See, e.g., *United States v. Thurston*, 358 F.3d 51, 69-83 (1st Cir. 2003).

¹⁶⁴ *United States v. Mallon*, 345 F.3d 943 (7th Cir. 2003); see also Press Release, Rep. Tom Feeney, Feeney Amendment Protects Children: U.S. Court of Appeals Enforces Full Sentence for Child Predator (Oct. 10, 2003), available at www.house.gov/apps/list/press/fl24_feeney/USCourtFeney.html.

¹⁶⁵ See Berman, *supra* note 5, at part II; Groner, *supra* note 63.

¹⁶⁶ 28 U.S.C. § 991(a) (2003) (no more than four members of the Commission can be members of the same political party).

¹⁶⁷ *Id.*

¹⁶⁸ 28 U.S.C. § 991(a) (2004).

¹⁶⁹ Vinegrad, *supra* note 78, at 314.

¹⁷⁰ Berman, *supra* note 5, at Part II; Groner, *supra* note 63; Roundtable, *supra* note 110 (Statement by John S. Martin, Jr. former U.S. District Court Judge for the Southern District of New York).

In *Mistretta v. United States*, the Supreme Court upheld the constitutionality of the Sentencing Commission as it was initially constructed in the Sentencing Reform Act of 1984.¹⁷¹ In particular the Court determined that Congress did not delegate excessive legislative power to the Commission, nor did it violate the separation of powers principle by placing the Commission in the Judicial Branch and requiring federal judges to serve on the Commission.¹⁷² The Commission's placement in the judiciary and the requirement of federal judges on the Commission are justified acknowledgements as to the "role that the Judiciary has always played, and continues to play in sentencing."¹⁷³ The Commission's composition and placement within the judiciary was due to the "judiciary's special knowledge and expertise."¹⁷⁴ Judicial participation ensures that "judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch's own business—that of passing sentence on every criminal defendant."¹⁷⁵

The PROTECT Act's reform of the composition of the Sentencing Commission seriously damages the *Mistretta* rationale for incorporating the Commission within the judiciary. Should the Commission wind up without any judicial members there could well be potential separation of powers issues regarding the Commission's placement within the Judiciary. The Commission, in effect, would allow a political agency to "cloak their work in the neutral colors of judicial action."¹⁷⁶ Such a concern was articulated by the *Mistretta* Court and would be of even greater concern without any judicial representation on the Commission.¹⁷⁷

While drafting the Federal Sentencing Guidelines as mandated by Congress through the SRA, the Commission relied on two principles. First, in establishing categories and particular sentencing ranges, the Commission generally followed "typical past practice, determined by an analysis of 10,000 actual cases."¹⁷⁸ Second, the Commission operated under the assumption that it was a permanent body that would continuously revise the Guidelines over time.¹⁷⁹ The Commission constructed the Guidelines with

¹⁷¹ *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

¹⁷² *Id.*

¹⁷³ *Id.* at 390.

¹⁷⁴ *Id.* at 396.

¹⁷⁵ *Id.* at 408.

¹⁷⁶ *Id.* at 407.

¹⁷⁷ *Id.*

¹⁷⁸ Judge Stephen Breyer, *The Key Compromises of the Federal Sentencing Guidelines*, in *SENTENCING, JUDICIAL DISCRETION AND TRAINING*, 105, 109 (Colin Munro & Martin Wasik eds., 1992).

¹⁷⁹ See 28 U.S.C. § 994(o)-(p) (Supp. IV 1986) (2003).

the understanding that they would adapt and evolve over time as the Commission analyzed the results of their practical application. The Commission was meant to “continuously, dispassionately and scientifically evaluate sentencing trends, and do so transparently, not privately, with input from the public, and proceed to adjust what naturally must be considered an evolving body of law.”¹⁸⁰

The PROTECT Act operates to rebuke and marginalize the Sentencing Commission. Congress adopted sweeping sentencing reform without so much as consulting the Commission, until the substance of the legislation was established.¹⁸¹ In doing so, Congress bypassed the guideline amendment process which it created twenty years ago.¹⁸² In addition, the Act requires the Sentencing Commission to reduce the frequency of downward departures regardless of the Commission’s view on the necessity of such change.¹⁸³ In response, on October 8, 2003, the Commission issued five amendments to the sentencing guidelines, the Commission:

- 1) prohibited departures based solely on the existence of a plea agreement
- 2) prohibited a number of existing grounds for downward departures (acceptance of responsibility, minor role in offense, gambling addiction, and legally required restitution)
- 3) limited the availability of a departure based on family ties and responsibilities; aberrant behavior; and similar circumstances
- 4) significantly limited both the availability and the extent of departures for certain offenders with substantial criminal history
- 5) implemented a directive authorizing limited departures pursuant to early disposition (fast track) programs authorized by the Attorney General and the U.S. Attorney¹⁸⁴

These amendments bear a striking resemblance to the Feeney Amendment as originally introduced in the House.¹⁸⁵ It appears that several of the compromises made in response to the outrage by a wide range of judges, special interest groups, and lawyers to the proposed Feeney Amendment have now reappeared under the guise of the Sentencing Commission’s amendments to reduce disparity. Irrespective of whose face is on the changes, the prohibition of certain grounds for downward departure, such as acceptance of responsibility and minor role in the

¹⁸⁰ *Who’s Afraid of the Federal Judiciary?*, *supra* note 13, at 12.

¹⁸¹ Vinegrad, *supra* note 78, at 313.

¹⁸² Sentencing Act of 1987, Pub. L. No. 100-182, § 2, 101 Stat. 1266 (1987).

¹⁸³ Vinegrad, *supra* note 78, at 315.

¹⁸⁴ USSC Press Release, *supra* note 132.

¹⁸⁵ *Compare with Feeney Amendment as Introduced*, *supra* note 126.

offense, demonstrate that Congress is in control. The Commission can no longer credibly stand for an independent agency that writes, evaluates and amends the sentencing system in response to the ebb and flow of the system, when it is now clear that Congressional mandates can (and have) overridden their independence and purpose.¹⁸⁶ Finally, to further reinforce this point the PROTECT Act tacked on a two-year prohibition to the Commission from promulgating any new downward departure guidelines.¹⁸⁷ In one fell swoop, Congress removed the requirement that judges serve on the Commission, required the Commission to act in specific accordance with its wishes to reduce departures, and paralyzed the Commission by prohibiting any changes which may lead to new downward departures for at least two years.¹⁸⁸

3. The Reporting Requirements

The PROTECT Act amended the sentencing system to require the court to include specific written reasons for departures.¹⁸⁹ In addition, the Act requires the Chief Judge of each district court to ensure that, within 30 days following entry of judgment, that the court's statement of reasons for sentencing is submitted to the Sentencing Commission.¹⁹⁰ Without permission from the presiding judge, Congress can access the report and the supporting documents.¹⁹¹ Congressional access to certain confidential documents utilized in the sentencing process raise serious privacy concerns since sentencing materials are often very personal, detailed and involve third parties.¹⁹² Additionally, there are legitimate concerns regarding the protection of information provided by informants or others who provide substantial assistance to the government.¹⁹³

The reporting requirements established by the PROTECT Act operate to grant Congress greater supervisory control over the judiciary.¹⁹⁴ Like much of the Act's reforms, the reporting requirement serves as a rebuke to

¹⁸⁶ See Groner, *supra* note 63.

¹⁸⁷ Final Version of the Feeney Amendment, *supra* note 131.

¹⁸⁸ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 659 (2003).

¹⁸⁹ 18 U.S.C. § 3553(c) (2004).

¹⁹⁰ 28 U.S.C. § 994(w)(2) (2004).

¹⁹¹ Urbina, *supra* note 2.

¹⁹² *Id.*

¹⁹³ Roundtable, *supra* note 110 (John Steer, U.S. Sentencing Comm'n).

¹⁹⁴ PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18 U.S.C. § 401(h) (1)).

the Sentencing Commission and usurps its function as originally proscribed by Congress in the SRA.

The greatest concern with the new reporting requirements mandated by the PROTECT Act is that it will create a "judicial blacklist."¹⁹⁵ Congress now has the ability to review specific judges' sentencing orders.¹⁹⁶ Such scrutiny is likely most effective against judges seeking appointments to appellate courts, although most judges would not be appreciative of being called before Congress to justify their decisions.¹⁹⁷ Any judges hoping to gain appointment to appellate courts have tremendous incentive not to downward depart since their future promotion will require Congressional confirmation.¹⁹⁸ The increased reporting requirements are premised on the need for greater and more accurate sentencing data, however the names of individual judges should not really be necessary for a workable dataset. Requiring the names of individual judges contributes to the suspicions of congressional blacklisting.¹⁹⁹

Judge Paul Magnuson summarized the concerns aptly in a post-Feeney Statement of Reasons for Imposing Sentence:

The Court believes that the day of the downward departure is past. Congress and the Attorney General have instituted policies designed to intimidate and threaten judges into refusing to depart downward, and those policies are working . . . This reporting requirement system accomplishes its goal: the Court is intimidated, and the Court is scared to depart.²⁰⁰

Another judge responded to the reporting system by saying "If Congress wants to make a deck of cards for the judges like they did for the bad guys in Iraq, then make me the ace of spades."²⁰¹

It is unclear what effect the new reporting requirements will have on downward departures. If nothing else, the anecdotal evidence regarding judicial reactions to the reporting requirements suggests that judges are certainly conscious of the intent of Congress to eliminate downward departures. The real question is whether Congress will in fact require judges who have high downward departure rates to justify their decisions.

¹⁹⁵ Urbina, *supra* note 2.

¹⁹⁶ *Id.*

¹⁹⁷ United States v. Kim, No. 03 CR. 413(RPP), 2003 U.S. Dist. LEXIS 18637, at *21 (S.D.N.Y. Oct. 20, 2003).

¹⁹⁸ Urbina, *supra* note 2.

¹⁹⁹ Roundtable, *supra* note 110 (Statement of Gerald Lefcourt).

²⁰⁰ United States v. Kirsch, 287 F. Supp. 2d 1005, 1006-07 (D. Minn. 2003) (statement of reasons for imposing sentence).

²⁰¹ Urbina, *supra* note 2 (quoting Judge Sterling Johnson, Jr.).

It is clear that one of the reasons why the sentencing system is subject to attack by Congress is because the data collected by the Sentencing Commission is flawed and incomplete.²⁰² Therefore, better reporting is necessary in order to determine whether there is an unwarranted disparity problem and thus the extent of the problem.²⁰³ The PROTECT Act assures greater detail and consistency in the reporting of sentencing data, however the need for Congressional supervision is not justified if the Commission were operating properly.

C. LIFE AFTER THE PROTECT ACT

After proposing the Feeney Amendment, Representative Tom Feeney responded to criticism of the proposed reforms by writing that "I am perplexed as to why an amendment that seeks to enforce the intent of the Sentencing Reform Act of 1984, is so controversial . . . the intent of the Sentencing Reform Act is not being carried out."²⁰⁴ On its face, the sentencing reforms implemented by the PROTECT Act do in fact seek to enforce predictability and uniformity in sentencing. The SRA intended that downward departures would be rare and established several safeguards to ensure that the federal sentencing system provided a substantial measure of predictability based on uniformity.²⁰⁵ The SRA relied on the Guidelines, the Commission, reporting requirements that each sentencing judge provide reasons for a given sentence, and the appellate courts to achieve uniformity.²⁰⁶ Like the SRA, the PROTECT Act relies on a similar strategy for enforcing uniformity in federal sentencing.²⁰⁷ The PROTECT Act, while retaining the basic guideline system, reinforced the supplemental measures to ensure uniformity such as increased appellate review, stricter reporting requirements and a reconstitution of the Sentencing Commission.²⁰⁸ Proponents of the PROTECT Act reforms simply see the Act as a necessary reaffirmation and stronger enforcement of the principles which were articulated by the SRA.²⁰⁹ There is little argument that the

²⁰² USSC Report, *supra* note 16, at iv; Mercer, *supra* note 109.

²⁰³ Mercer, *supra* note 109.

²⁰⁴ Feeney, *supra* note 53.

²⁰⁵ See *supra* Section II.

²⁰⁶ 18 U.S.C. § 3553(c)(2) (1988).

²⁰⁷ *Id.* § 3553.

²⁰⁸ *Id.*

²⁰⁹ Lane, *supra* note 68, at A02 (Rep. Sensenbrenner: "[The PROTECT Act] reestablishes Congress's original intent for fair and equal sentencing justice throughout the federal judiciary"); Roundtable, *supra* note 110 (statement by Roslynn Mauskopf, U.S. Attorney for the Eastern District of New York).

PROTECT Act will in fact reduce judicial discretion to depart downward and therefore will result in fewer offenders being sentenced below the legislated guideline range. As a result, the federal sentencing system should see significant increases in predictability and uniformity among individual judges and across districts.

While some believe that the Feeney Amendment represents a natural evolution of the federal criminal justice system, others see the new reforms as a solution in search of a problem. Any reform to the Federal Sentencing System is unlikely to receive much judicial support since it is effectively a criticism of judges.²¹⁰ Thus, there is an inherent tension in any sentencing reform initiative. Few judges will support reform aimed at restricting their discretion.²¹¹ However, any policy change affecting sentencing necessarily requires judges to implement the reforms on a daily basis in their courtrooms. This tension and the dysfunctional relationship between Congress, the Department of Justice and the Judiciary bears much of the blame for the perceived shortcomings of the SRA and thus the strong reactions both in support of, and in opposition to, the reforms contained in the PROTECT Act.²¹²

The early returns from the PROTECT Act are unsurprising. The reaction by the judiciary mirrors much of the criticism that was lodged against the Sentencing Reform Act of 1984.²¹³ The similarity in criticism is understandable because both the SRA and the PROTECT Act seek to achieve the same objective in similar ways.²¹⁴ Both sentencing reforms are based on eliminating unwarranted sentencing disparity, and achieving this goal through the reduction of downward departures. In particular, the two acts function to seriously curtail unilateral judicial downward departures. The sentencing uniformity message was clear in the SRA and it is equally clear in the PROTECT ACT.

The primary difference in the two sentencing reform acts is in the treatment and perception of the judiciary and the United States Sentencing Commission. Both acts are premised on uniformity and predictability.²¹⁵ Both seek to achieve these goals through the guideline system in

²¹⁰ Tebo, *supra* note 88.

²¹¹ See Lazarus, *supra* note 6.

²¹² Tebo, *supra* note 88.

²¹³ Hatch, *supra* note 14, at 192; Lay, *supra* note 87, at 1760, 1767; Wilkins, Jr. et al., *supra* note 4, at 379-80.

²¹⁴ Compare PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) with Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, § 217(a), 98 Stat. 2019 (1984), codified as amended at 28 U.S.C. § 994 (1984).

²¹⁵ See Pub. L. No. 108-21; Pub. L. No. 100-182 (1987).

conjunction with appellate review, statistical analysis of sentences, and monitoring and adaptation of the sentencing system by the Commission. However, The PROTECT Act suggests that the SRA relied too heavily on the Commission and that the Commission failed in its execution and supervision of the sentencing system. It appears some members of Congress stopped trusting judges during the last several years.²¹⁶ But through the SRA, Congress was willing to preserve minimal judicial discretion as long as it remained effectively checked. By Spring 2003, the introduction of the Feeney Amendment signaled that some members of Congress considered the system flawed and pointed the finger of blame squarely in the direction of the judiciary and the Sentencing Commission.

While the Commission is subject to Congressional mandates and therefore has little flexibility to oppose the PROTECT Act reforms, much of the judiciary is fighting back. Many judges have been outspoken in their opposition.²¹⁷ For example, in response to the Act, District Court Judge John S. Martin published an Op Ed piece in *The New York Times* announcing that he was resigning to protest the unjust nature of the sentencing process and the PROTECT Act.²¹⁸ Chief Justice William H. Rehnquist criticized the PROTECT Act reforms in his annual year-end report on the state of the federal judiciary.²¹⁹ One New York District Court Judge recently issued a blanket seal on sentencing related documents before him, forbidding Congress from examining the materials without his permission.²²⁰ A California District Court Judge recently published an order stating that the PROTECT Act's reporting requirements were unconstitutional.²²¹ Finally, in reference to the PROTECT Act reforms, one

²¹⁶ See Bowman, *supra* note 24, at A27 ("[T]he PROTECT Act . . . implicitly [assert], that only members of Congress and functionaries at the Justice Department . . . are wise enough to set sentencing policy."); Lore, *supra* note 155.

²¹⁷ Hon. John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 ("Every sentence imposed affects a human life For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American justice system.").

²¹⁸ Urbina, *supra* note 2; Mark H. Allenbaugh, *The PROTECT Act's Sentencing Provisions, and the Attorney General's Controversial Memo: An Assault Against the Federal Courts*, FINDLAW, Aug. 13, 2003, at <http://writ.news.findlaw.com/allenbaugh/20030813.html>.

²¹⁹ See William Rehnquist, 2003 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2004), reprinted at 16 FED. SENTENCING REP. 143 (2004); Lane, *supra* note 68, at A02.

²²⁰ Urbina, *supra* note 2.

²²¹ United States v. Mendoza, 2004 WL 1191118 (C.D. Cal. Jan. 12, 2004) (Order Declaring Title IV of Section 401(l)(1)(2)&(3) Report of the Attorney General of the PROTECT Act and Feeney Amendment Unconstitutional).

judge suggested that “[t]he judicial branch should not be timid nor fearful of inflicting an occasional whiplash or, where necessary, even imposing chronic pain when Constitutional rights are threatened or the balance of powers is jeopardized.”²²²

In addition to the substantial judicial opposition, there is currently legislation pending in both houses of Congress to repeal the Feeney Amendment.²²³ Similar to the uproar created by the Feeney Amendment, the Sentencing Reform Act of 1984 also met substantial opposition after its introduction in 1987.²²⁴ Only time will tell whether the opposition to the Feeney Amendment will have any affect this time around.

V. THE FUTURE OF FEDERAL SENTENCING POLICY

Whether or not the PROTECT Act reforms can be successfully repealed, it is important to understand how the federal sentencing system got to this point in the first place in order to prevent such sweeping congressional reforms in the future. The PROTECT Act is the direct result of the failures of the Commission and the judiciary in not alleviating congressional concerns about sentencing disparity.²²⁵ For over twenty years Congress has focused on the downward departure rate and anecdotal case evidence of offenders “getting off easy.”²²⁶ This concentration on uniformity has never been a secret.²²⁷ Therefore given Congress’s concerns and its actions through the SRA, the judiciary and the Commission should have taken steps to prevent a reaction like the Feeney Amendment which should have appeared inevitable for the last several years.

Instead the judiciary and the Sentencing Commission are reacting after the amendment already had steam and could be supported by incomplete and flawed data—the only kind available. Disparity does exist and it exists

²²² Allenbaugh, *supra* note 218 (quoting Chief Judge Marilyn Hall Patel).

²²³ Kendall, *supra* note 5; Lane, *supra* note 68, at A02; Vinegrad, *supra* note 78:

‘Judicial Use of Discretion to Guarantee Equity in Sentencing Act of 2003’ . . . this statute would eliminate all provisions of the new sentencing statute other than those related to child-victim, sexual abuse and obscenity crimes and instead require the Sentencing Commission to perform a comprehensive study of downward departures and report to Congress within 180 days on the results of its work.

Id. at 316.

²²⁴ Hatch, *supra* note 14, at 190; Lay, *supra* note 87, at 1760, 1767.

²²⁵ Berman, *supra* note 5, at 308.

²²⁶ *Id.*; *Who’s Afraid of the Federal Judiciary?*, *supra* note 13, at 8 (Rep. Feeney: “[L]egislative efforts . . . will be a fruitless gesture if at the end of the day judges give offenders . . . a slap on the wrist . . . [which] is exactly what is happening today, with increasing frequency.”).

²²⁷ Berman, *supra* note 5, at 308.

on several levels. Without an explanation as to why there is disparity in the system, how much disparity exists, and a justification for its existence, the sentencing system remains a sitting duck for congressional reform hell-bent on achieving uniformity. Judicial blacklists, expulsion of the judiciary from sentencing policymaking, and heightened appellate review represent a congressional reaction to what appeared to be a failure of the SRA. It is unlikely Congress would take the blame for the system's shortcomings, so it should have been obvious to the Commission and the judiciary that the only other place to lay blame was at their feet.

A closer look at the rationale for the Feeney Amendment and its incorporation into the PROTECT Act raise several questions as to the extent of the sentencing disparity problem. The value of the SRA and the PROTECT Act are dependent on the evaluation of the need (or desire) for departures from the guidelines. Departures of any kind are meant to be rare. However, the definition of "rare" still remains unclear. Furthermore, critics of the federal sentencing system see the current downward departure rates as evidence of a flawed system, while others utilize the same statistics as proof of a healthy and properly functioning system.

Currently there is considerable uncertainty stemming from the Supreme Court's decision in *Blakely v. Washington* which could drastically alter the federal sentencing guidelines and the role judges play within the system.²²⁸ In addition, there exists a possibility that the current inability of judges to depart downward as mandated by the PROTECT Act could actually lead to a return of sentencing discretion to judges in the future. Without judicial input any failures in the post-PROTECT Act system will be exclusively attributable to Congress and the Guidelines. If incarceration rates, length of sentences, and cases of perceived over-punishment increase under the new system, concerned citizens and taxpayers may begin demanding a more flexible sentencing system, or increased emphasis on rehabilitation.²²⁹ Should this occur, little blame remains to lodge with the judiciary. Thus, the pendulum could swing back towards more discretion for sentencing judges and a greater role for the judiciary in sentencing policy.

However, any such substantial reallocation of sentencing discretion from Congress to the judiciary is quite unlikely in the foreseeable future, given the prevailing views on crime with the voting public. Therefore, the Sentencing Commission and the judiciary must develop a strategy to exist within the current guideline system. In order to coexist with Congress and

²²⁸ See *supra* note 3.

²²⁹ See Allenbaugh, *supra* note 218; Lazarus, *supra* note 6; Satter, *supra* note 5.

justify its participation in sentencing policymaking, the Commission and the judiciary must develop a body of evidence explaining the role downward departures should play in the system, a rationale for what percentage of departures represents a properly functioning system, and finally, a satisfactory body of statistical data supporting the fact that the current system requires enhanced judicial discretion to depart. Like judicial distaste for the constraints of the Sentencing Guidelines, the judiciary is unlikely to embrace strict statistical evaluations of a well functioning sentencing system as dictated by the Commission. However, given the trend of Congressional usurpation of the traditional role of the federal judiciary in sentencing, the PROTECT Act signals that the judiciary no longer has a meaningful choice.²³⁰

Until the Sentencing Commission and the judiciary are able to appease Congress, legislative erosion of judicial discretion in federal sentencing policy will continue. The PROTECT Act blindsided the judiciary and the Sentencing Commission, striking a substantial blow to their discretion during sentencing and their role in developing sentencing policy.²³¹ They must now act to ensure that in the future they are better prepared to stave off such efforts if they wish to preserve what minimal role in federal sentencing that they now retain.

VI. CONCLUSION

The PROTECT Act's "reform" of the federal sentencing system was the result of the congressional perception that the sentencing system established by the Sentencing Reform Act of 1984 was not achieving its stated goal of uniformity. This perception was predicated on anecdotal evidence and flawed downward departure statistics. Such evidence was at best incomplete, and in the case of sentencing policy it is potentially misleading. Despite the flawed evidence, the United States Sentencing Commission and the judiciary were aware of the congressional concern regarding downward departures prior to the introduction of the Feeney Amendment and did little to deal with this concern. When confronted with the reforms contained in the Feeney Amendment, the Sentencing Commission and the judiciary were unable to adequately refute the perception that unwarranted disparity existed within the system. The PROTECT Act removes substantial discretion from trial court judges during the sentencing process and effectively removes the judiciary from

²³⁰ See Lane, *supra* note 68, at A02 (the "traditional interchange between the Congress and the Judiciary broke down").

²³¹ See *id.*

having meaningful input into future federal sentencing policy. In order to prevent such a reaction by Congress in the future, the Sentencing Commission and the judiciary must develop meaningful sentencing statistics justifying the role of departures within the system and proving that judges are not working around the system. Without such evidence the trend of Congress usurping the traditional role of the judiciary in federal sentencing will continue.

