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January 2004

## The War within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion

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### Recommended Citation

David M. Zlotnick, *The War within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211 (2004)

<https://scholar.smu.edu/smulr/vol57/iss1/9>

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# THE WAR WITHIN THE WAR ON CRIME: THE CONGRESSIONAL ASSAULT ON JUDICIAL SENTENCING DISCRETION

David M. Zlotnick\*

“‘The judges need to be intimidated’ . . . [and] if they don’t behave, we’re going to go after them in a big way.’”<sup>1</sup>

## I. INTRODUCTION

**I**N the last twenty-five years, the federal war on drugs has transformed the landscape of the nation’s criminal justice system. This country now incarcerates its citizens at a higher rate than any other nation in the world,<sup>2</sup> and for the first time, the federal prison population now exceeds that of any individual state.<sup>3</sup> The racial and gender impact of the drug war has also been well publicized and equally decried.<sup>4</sup> Less well known is that another, concurrent battle has been raging, not between

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\* Visiting Professor, Washington College of Law, American University, Associate Professor, Roger Williams University School of Law, J.D., Harvard Law School. For the past year and a half, I have been a Senior Justice Fellow with the Open Society Institute. As part of my research, I interviewed over fifty district judges about their sentencing philosophy and views on the Guidelines and mandatory penalties. To ensure a frank discussion, many interviewees requested anonymity. I also collected transcripts and other documents from federal cases in which the judge felt the sentence required by the law was too harsh but they imposed it nevertheless. I am indebted to a prisoner rights group, Families Against Mandatory Minimums, for access to their files. The opinions expressed herein are solely those of the author and not of the Open Society Institute. Many thanks to Peter Margulies, Steven Chanenson, and Diana Hassel for their comments and to Kyle Zambarano for his superb research and editing assistance.

1. Joan Biskupic, *Hill Republicans Target ‘Judicial Activism,’* WASH. POST, Sept. 14, 1997, at A1, available at 1997 WL 12886568 (quoting House Majority Whip Tom Delay).

2. See, e.g., Molly Ivins, *Will the Accountants Be Held Accountable?*, BALT. SUN, Mar. 22, 2002, at 15A, available at 2002 WL 6953605. One of every thirty-two Americans (3.1%) were in prison or jails or on probation or parole as of December 2002. See <http://www.ojp.usdoj.gov/bjs/preview/previewpr.htm> (last visited Feb. 9, 2004).

3. E.g., Kevin Johnson, *Federal Prison Population Nears 165,000; Number Surpasses States’ Systems*, USA TODAY, Jan. 23, 2003, at A21, available at 2003 WL 5303980.

4. As noted in a recent study, if recent trends continue, a black male in the United States would have about a 1 in 3 chance of going to prison in his lifetime. For a Hispanic male, it’s 1 in 6, for a white male, 1 in 17. The dramatic increase in the rate of African-Americans in prison is largely the result of incarceration for drug offenses. The same is true for women who have been incarcerated nearly double the rate in 1980. One in three women in prison are serving sentences for drug related crimes.

See CHRISTIAN SCI. MONITOR, Aug. 18, 2003, available at <http://www.csmonitor.com/2003/0818/p02s01-usju.html>.

law enforcement and the drug culture, but between Congress and federal judiciary—and the judiciary has been losing badly.

Since 1984, traditional notions of judicial sentencing discretion have been virtually eliminated by legislation requiring mandatory minimum penalties for drug and gun crimes as well as through the creation of the Sentencing Guidelines. Although the central features of these changes have been deplored by federal judges at every level and across the political spectrum,<sup>5</sup> Congress continues to pass legislation that judges claim transforms them into mere automatons, permitted only to apply a mathematical formula that reduces offenders to a box on the Sentencing Guideline grid or a one-size-fits-all mandatory minimum.<sup>6</sup> While some of the grossest sentencing disparities of the pre-Guidelines era may have been reduced,<sup>7</sup> most commentators believe the larger consequences, particularly of mandatory minimums, have been devastating.<sup>8</sup> Low-level and marginally culpable drug defendants with no information to trade have received very harsh sentences based upon broad definitions of conspiracy and weight-based penalty schemes.<sup>9</sup> More serious drug dealers, certainly deserving of some punishment, regularly are meted sentences equivalent or greater than state court sentences for rapists and robbers.<sup>10</sup> Nor have disparity and discretion, the targets of these reforms, been eliminated. Rather, these irremovable features of the criminal justice system have simply been transferred to the police and prosecutors where they are

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5. See, e.g., Anne Gearan, *Supreme Court Justice Says 2 Million Behind Bars Too Many*, DULUTH NEWS TRIB., Apr. 10, 2003, available at 2003 WL 18613878 (reporting on the critical remarks by fellow conservative Supreme Court Justice Anthony M. Kennedy).

6. "Judges apply the rules mechanically . . . [which] is an uncomfortable form of judging, from which many have rebelled, particularly when the sentence required by the Guidelines conflicts with judge's own sentence of justice." Paul J. Hofer & Mark A. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 21 (2003).

7. "I believe that the Sentencing Guidelines promote a more deliberate, fair, and rational sentencing process that exist at the state level, or in pre-Guideline federal sentencing." Hon. Patti B. Saris, *Below the Radar Screens; Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1029 (1997); see also William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 521 (1990) (arguing that a guideline system can best balance uniformity with concerns of individual fairness).

8. See, e.g., Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87 (2003) (asserting the primary result of mandatory minimums has been longer prison sentences); Karen Lutjen, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 388, 424-25 (1996) (criticizing both the sentencing guidelines and mandatory minimums for failing to adopt the principle of proportionality).

9. Hofer & Allenbaugh, *supra* note 6, at 71.

10. The average sentence for a federal drug felony in 2001 was seventy-four months, U.S. Department of Justice, Federal Justice Statistics, at <http://www.ojp.usdoj.gov/bjs/fed.htm#Sentencing> (last visited Jan. 23, 2004), while the average sentence for a state violent crime felony in 2000 was only sixty-six months, Department of Justice, Criminal Sentencing Statistics, at <http://www.ojp.usdoj.gov/bjs/sent.htm> (last visited Jan. 23, 2004).

largely hidden and unreviewable.<sup>11</sup>

This article discusses the most recent restrictions on federal judicial discretion, the 2003 Feeney Amendment, passed as part of the Amber Alert bill, which together became the PROTECT Act of 2003.<sup>12</sup> The Feeney Amendment provisions have the potential to gut downward departures,<sup>13</sup> one of the few remaining tools in the judges' arsenal, while other provisions, such as the "depart and tell" reporting requirements seek to intimidate the federal judiciary into conformity.<sup>14</sup> As background, Part II covers three subjects—it briefly discusses my background and perspective on the battle over judicial versus prosecutorial discretion, it explains the recent history of federal sentencing law and the shift towards mandatory sentencing, and finally it chronicles the reaction of the federal judiciary to these developments. Part III explains the genesis and provisions of the 2003 Feeney Amendment. Part IV broadens the inquiry to a discussion of the root causes of Congress's war on judicial discretion. Part V gathers evidence that conditions are ripening for a reevaluation of sentencing policy but recognizes that neither a critical mass has been reached, nor has tide towards restrictions on discretion yet been stemmed. The Conclusion suggests how the federal bench can contribute to restoring balance in federal sentencing without overstepping the proper limitations on judicial participation in political discourse.

## II. BRIEF HISTORY OF FEDERAL SENTENCING DISCRETION

### A. THE AUTHOR'S PERSPECTIVE

This article begins with two premises shared by most academics and federal judges. First, that in the past twenty-five years, federal sentences, especially for drug offenses, have become too harsh. Second, that too much of the power to determine sentences has been shifted from judges to law enforcement officers and federal prosecutors. Therefore, although this Part cites numerous sources for these two points, this Article focuses on the "why questions" at the root of judicial and academic dissatisfaction: Why have the statutory sentences for the drug and gun crimes, which dominate the federal docket, come to defy the law of gravity? Additionally, why has Congress continually cut back on judicial sentencing discretion? In the interests of full disclosure, however, I first briefly lay out my experiences, first as a federal prosecutor and now as an academic

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11. For an interesting discussion of unreviewable prosecutorial discretion in state juvenile criminal cases, see Cassandra S. Shaffer, Comment, *Inequality Within the United States Sentencing Guidelines: The Use of Sentences Given to Juveniles by Adult Criminal Court as Predicate Offenses for the Career Offender Provision*, 8 ROGER WILLIAMS U. L. REV. 163, 181 (2002).

12. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21 § 401, 117 Stat. 650.

13. See, e.g., Siobhan Roth, *Bench Bristles at New Sentencing Law: Measure Seeks to Curb Downward Departures*, CONN. L. TRIB., May 12, 2003, at 12 (arguing that the bill "interferes with judicial independence [and] wrongly suggests that judges aren't doing their jobs properly").

14. Weinstein, *supra* note 8, at 93.

and public interest advocate,<sup>15</sup> that have influenced my opinions on these issues.

During the heart of the crack epidemic,<sup>16</sup> I served as an Assistant United States Attorney in the District of Columbia.<sup>17</sup> My colleagues and I were the primary dispensers of justice in the nation's capital. Because the vast majority of criminal cases were brought in D.C. Superior Court, most new federal prosecutors spent several years there before moving up to U.S. District Court. At this stage, we were more like big city district attorneys than federal prosecutors in other jurisdictions; we had heavy case loads and only a few supervisors. Thus, we had a large say in who to prosecute and what plea offers to make, and if defendants rolled the dice with a jury, we usually won.<sup>18</sup> Thus, the real issue was usually the proper sentence.<sup>19</sup>

At sentencing, however, our role was only advisory. This made sense. While we were well-intentioned civil servants, we were also generally young and always human. Some prosecutors were also more partisan in orientation. Occasionally, when a crime particularly offended us, or less commendably, defense counsel made our lives difficult, our plea offer or sentencing recommendation might be harsher than the courthouse average. Frequently, in those instances, it was the experience and objectivity of the presiding judge that ensured that some rough equivalent of equal justice was done. This is not to say that there were not outlier judges whose bias was well known and whose sentences provoked outrage in our office (or conversely at the public defender). But few believed that the solution was to transfer sentencing discretion to the prosecution and police by instituting rigid mandatory sentencing provisions.<sup>20</sup> Rather, most

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15. In 1995-96, I took a leave from teaching to be the first Litigation Director for Families Against Mandatory Minimums ("FAMM"), and I remain a member of their Litigation Advisory Board.

16. See, e.g., Beverly Xaviera Watkins & Mindy Thompson Fullilove, *The Crack Epidemic and the Failure of the Epidemic Response*, 10 TEMP. POL. & CIV. RTS. L. REV. 371, 371-73 (2001) ("Commentators on the decade of the 1980s named 'crack' as an unparalleled destructive force, undermining safety, stability, and health in inner city communities.").

17. The D.C. United States Attorney's Office is unique because it prosecutes criminal offenses under both the U.S. Code in U.S. District Court and the D.C. Code in D.C. Superior Court.

18. We won because we had the resources of various police departments at our disposal and because an overwhelming percentage of defendants were guilty of the charges against them. But see Teresa Roberts, *Wrongful Conviction Reason Enough to Care About DNA*, S. BEND TRIB., Dec. 8, 2002, available at 2002 WL 103678826 (though it is difficult to estimate exactly how many innocents are wrongfully convicted, over 112 prisoners have been exonerated through DNA evidence in the United States).

19. While there was a significant motions practice, the "counter revolution" in criminal procedure under the Burger and Rehnquist Courts meant we rarely lost a suppression hearing.

20. There were some mandatory minimums under the D.C. Code for drug crimes but those could be and generally were avoided in one of two ways. First, by allowing the vast majority of defendants to plead to an "attempt" crime which did not carry a mandatory minimum. Even after a trial, if the judge found at sentencing that the defendant committed the crime because of drug addiction, probation and treatment were allowed in lieu of the mandatory sentence.

recognized that a system where prosecutors chose the charges and plea offers, defense counsel attempted to keep the system honest, and judges sentenced was the best and most balanced attempt to achieve justice.<sup>21</sup>

The impact of tampering with this longstanding division of sentencing labor became immediately apparent to me when I was transferred to the federal narcotics section in U.S. District Court. In my first federal drug trial, a multi-defendant search warrant case, the presiding judge, a revered, one-armed WWII veteran, did everything he could to sabotage my case. He even granted one defendant's motion for judgment of acquittal despite uncontradicted testimony that moments after the police broke down the door, a large amount of crack cocaine had been thrown from the window of the room in which this defendant had been the sole occupant.<sup>22</sup> After the other defendants were convicted and sentenced to terms of fifteen years or more, the judge called me up to the bench where he had a few kind words for me and then delivered an anguished lecture about the harshness of the mandatory drug laws. Even while still a prosecutor, I soon came to agree with him. Mandatory minimums, and at times, the Federal Sentencing Guidelines, have disabled federal judges from doing the difficult job of determining the punishment that best fits each particular crime, and even more importantly, each unique offender.

#### B. THE FEDERAL SENTENCING GUIDELINES AND MANDATORY MINIMUMS

This section traces the transformation of federal sentencing policy with a focus on: (a) the Federal Sentencing Guidelines, which govern all federal criminal cases, and (b) the mandatory minimum drug and gun cases that dominate the federal criminal docket.

In early American history, criminal penalties followed the English model with specific terms for each crime.<sup>23</sup> The nineteenth and twentieth centuries saw this system quickly give way in both federal and state courts to reliance on the combination of statutory ranges, judicial discretion, and

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21. A system of presumptive guidelines, or even mandatory guidelines, with some form of appellate review, is fully consistent with this division of labor and in fact is the preference of many judges I interviewed, including those who were former prosecutors. Presumptive guidelines and some appellate review function to reduce egregious disparities without creating the kinds of injustice that flow from rigid systems that aggregate power in one party's hands.

22. Unlike efforts by sentencing judges to reduce the impact of a conviction, which have endured harsh criticism from Congress and prompted the Feeney Amendment, mid-trial dismissals of minor drug cases rarely receive press and therefore have flown below the radar of Congress and press. This judge, already on senior status, soon thereafter refused to take any more drug cases.

23. Though initially most criminal sentences resulted in the death of the defendant, eventually "prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional." *Solem v. Helm*, 463 U.S. 277, 285 (1983); see Renee C. Harrison, Note, *Do the Crime, Do the Time, but the Punishment Should Fit the Crime: Does Mississippi Need Sentencing Guidelines*, 21 MISS. C. L. REV. 121, 124 (2001) (identifying the principle of proportionality in both American and English jurisprudence).

the advent of regularized parole.<sup>24</sup> Under this power sharing scheme, legislatures defined crimes and prescribed a range of years, judges generally had unfettered discretion to impose any term up to the statutory maximum (or even probation), and the executive, through the parole board, had the power to release the inmate before the expiration of that term based upon a prisoner's rehabilitative efforts.<sup>25</sup> While customs within jurisdictions tended to guide the decisions of sentencing judges and parole boards, a broad bipartisan consensus began to form in the 1960s and 1970s that there was too much disparity in federal sentencing.<sup>26</sup> In fact, it was liberals, such as Judge Marvin Frankel, who initially pushed for sentencing reform, arguing that racial minorities and the socio-economically disadvantaged received harsher sentences than other defendants.<sup>27</sup>

Numerous bills failed until the passage of the Sentencing Reform Act of 1984 ("SRA"), which created the United States Sentencing Commission ("Sentencing Commission") and mandated the creation of a mandatory guideline system.<sup>28</sup> The SRA also abolished parole, requiring prisoners to serve at least 85% of the sentence.<sup>29</sup> Three tortuous years

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24. See, e.g., Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 25 (2000) (describing sentencing during this period as "vast and virtually unlimited discretion").

25. For a few years during the 1950s, Congress did pass the first mandatory drug sentences, but they were viewed as a failure and repealed. Jane L. Froyd, Comment, *Safety Valve Failure, Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. REV. 1471, 1484-85 (2000).

26. Recent studies now dispute the extent of the pre-Guidelines disparity problem or whether the Guidelines have had an appreciable impact. See Michael A. Simons, *Departing Ways: Uniformity, Disparity, and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921, 926 n.24 (2002) (comparing alternate opinions on inter-judge variation in sentencing prior to the institution of the guidelines); Nancy Gertner, *Federal Sentencing Guidelines*, 29 HUM. RTS. 6, 8 (2002) (claiming the problems of disparity endure under the modern guidelines). The problem with any pre- and post-Guideline comparison is the Guidelines push disparity into the investigation and charging phase where it is difficult to detect and measure.

27. KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 35-37 (1998). Ironically, the Sentencing Guidelines and mandatory minimums have increased the percentage of African-Americans and women in prison and increased their sentences at a higher rate than whites as well.

28. See Ilene H. Nagel, *Structuring Sentences Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 884 (1990) (citing 28 U.S.C. § 992 (1984)).

29. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1) (2002). By statute, reduction for good time is limited to 15% of the total sentence. *Id.* ch. 1, pt. A(6). After release, instead of parole, released prisoners serve a statutory term of "supervised release." See 18 U.S.C. § 3583 (2000). Violation of supervised release can result in a return to prison to serve an additional period over and above the original term. *Id.* § 3583(e)(3). Many of the states have also abolished parole and implemented sentencing guidelines. However, most state guidelines are voluntary or employ presumptive ranges. Some states have experimented with mandatory minimums as well, but with a few exceptions, the federal drug laws generally result in longer sentences. One well known exception are New York's "Rockefeller" drug laws. Spiros A. Tsimbinos, *Is It Time to Change the Rockefeller Drug Laws?*, 13 ST. JOHN'S J. LEGAL COMMENT. 613, 613-14 (1999). Michigan also had very severe mandatory penalties but repealed them last year. Gary Heinlein, *Michigan Eases Drug Sentences*, DETROIT NEWS, Dec. 29, 2002, at 1, available at 2002 WL 102339705.

later, the Sentencing Commission released the first version of the Sentencing Guidelines, applicable to all crimes after that date.<sup>30</sup>

The Guidelines are based upon a two axis grid. The vertical axis is the offense level.<sup>31</sup> Based upon existing sentencing data, every offense in the U.S. Code was given a base offense level<sup>32</sup> that correlated to a specific punishment range.<sup>33</sup> The Sentencing Commission then identified additional factors that would raise or lower the base offense level such as role in the offense or amount of financial harm.<sup>34</sup> The horizontal axis is the criminal history level.<sup>35</sup> Points are assigned for prior convictions depending on seriousness, remoteness, or other factors such as whether committed while on parole or probation.<sup>36</sup> Based on the total criminal history points, a defendant is placed in one of six criminal history categories.<sup>37</sup> Using the adjusted offense level and criminal history category, the sentencing judge finds the sentencing range on the grid.<sup>38</sup> By congressional mandate, each grid box prescribes a range with a high end generally not more than twenty-five percent higher than the low.<sup>39</sup> For example, a defendant with a criminal history category of I and an offense level of twenty-six is subject to a sentence that falls between sixty-three and seventy-eight months.<sup>40</sup>

The Sentencing Commission did make provisions for exceptions called “departures.” Judges could go above or below the guidelines range if the judge found that the case fell outside “the heartland” of circumstances and factors considered by the Sentencing Commission.<sup>41</sup> Some departure grounds were suggested in the Sentencing Guidelines and others, such as age, socio-economic background, gender, and substance addiction were forbidden.<sup>42</sup> Judges also retained discretion to depart if they considered a combination of factors unique to a particular case.<sup>43</sup> All departures, how-

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30. The labyrinthian debates and tribulations of the first Commission have been well documented. See, e.g., Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1701-03 (1992) (discussing the “parsimonious” basic principle of the guidelines and labeling the early guidelines as “a long process of trial and error”).

31. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl.

32. For example, second degree murder has a base offense level of 33. *Id.* § 2A1.1.

33. The punishment for second degree murder ranges from 135 months to 293 months. *Id.* ch. 5, pt. A, sentencing tbl.

34. *Id.* § 1B1.1(b)-(c).

35. *Id.* ch. 1, pt. A, sentencing tbl.

36. *Id.* § 4A1.1.

37. *Id.* ch. 5, pt. A, sentencing tbl.

38. *See id.*

39. “If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.” 28 U.S.C. § 994(b)(2) (2000).

40. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl.

41. *Id.* § 1A4.(b).

42. *Id.*

43. *Id.*



ever, and in fact all calculations, were made subject to judicial review.<sup>44</sup>

The other significant change was the Sentencing Commission's decision to move a modified "real offense" sentencing regime. Under this system, a sentencing judge is required to look at the real offense conduct and all related "relevant conduct" rather than just the offense of conviction to determine the Guideline range.<sup>45</sup> Thus, a defendant who is convicted by a jury of just one count of possession with intent to distribute or conspiracy to distribute narcotics based upon a single sale or seizure can nevertheless be sentenced up to the statutory maximum based upon all related "relevant conduct" that was known or reasonably foreseeable to the defendant.<sup>46</sup> Thus, a defendant who goes to trial on a single act for a relatively small amount can nevertheless face a very high guideline sentence because the statutory maximum for most drug crimes start at twenty years and quickly escalate to forty.<sup>47</sup> Worse yet for defendants, the government's burden of proof at sentencing is only a preponderance rather than beyond a reasonable doubt.<sup>48</sup>

### C. MANDATORY MINIMUMS FOR NARCOTICS AND THE GUIDELINES

In 1986, before the first Sentencing Commission finished its work, college basketball star and Boston Celtic draft pick Len Bias died from a cocaine overdose.<sup>49</sup> This event spiked a growing national hysteria over crack cocaine and Congress fell into an anti-drug frenzy.<sup>50</sup> The result was the Anti-Drug Abuse Act of 1986.<sup>51</sup> Passed without any hearings,

44. 18 U.S.C. § 3742(a)-(b) (2000). Before the SRA, sentencing decisions, in the absence of illegality, were virtually unreviewable. A sentence within the applicable range and decision not to depart, however, remain discretionary and unreviewable decisions (so long as a court makes clear that its decision is discretionary rather than a perceived absence of grounds for a departure). *See, e.g.*, *United States v. Khan*, 920 F.2d 1100 (2d Cir. 1990).

45. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3. The compromise of a modified real offense system reflected a deeper flaw according to some commentators—the failure of Congress and then the first Commission to articulate a uniform philosophy to be followed. Hofer & Allenbaugh, *supra* note 6, at 21. Instead, the SRA directs the Commission to consider all the traditional, and sometimes conflicting justifications for punishment: retribution, deterrence, rehabilitation, and incapacitation. *See id.* at 54-68. Today, however, most commentators believe that the current Guidelines reflect primarily a retributive, just desserts approach. *See, e.g., id.* at 54 (labeling the philosophy the "modified just desert [sic]" approach).

46. *See* Hofer & Allenbaugh, *supra* note 6, at 54.

47. 21 U.S.C. § 841(b)(1)(A)-(B).

48. *United States v. Watts*, 117 S. Ct. 633 (1997) (holding that even conduct for which the defendant was acquitted can be used for sentencing enhancements when it can be proved by the preponderance of the evidence).

49. *See, e.g.*, Phil Taylor, *86ed*, SPORTS ILLUSTRATED, Jan. 8, 1996, at 64 (reporting that Len Bias died within 48 hours of being drafted by the Boston Celtics). While the media reported that Len Bias died of a crack cocaine overdose, later investigations suggest that he and his friends were using powder cocaine. Nevertheless, the initial reports largely fused the image of Len Bias, a black athlete, with the abuse of crack cocaine. Lisa Wiehl, "Sounding Black" in the Courtroom: Court-Sanctioned Racial Stereotyping, 18 HARV. BLACK LETTER L.J. 185, 206-07 (2000).

50. *See, e.g.*, William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1249 (1996) (describing Bias' death a significant motivation for the change in drug laws).

51. 21 U.S.C. § 841 (2000); *see also* Spade, *supra* note 50, at 1233.

with no input from the judiciary, and very little input from even law enforcement agencies,<sup>52</sup> this bill instituted weight-based mandatory minimums for a wide range of illegal narcotics with penalties far harsher than existing federal law.<sup>53</sup> For example, five grams of crack cocaine, the weight of two packets of sugar, now drew five years in prison,<sup>54</sup> with doubling and then life penalties for recidivists.<sup>55</sup> These new mandatory minimum drug laws were problematic for the Sentencing Commission, which had been using past sentencing data to set penalties.<sup>56</sup> Ultimately, the Sentencing Commission decided that the mandatory minimums, like five years for five grams of crack, would be used to set the floor, or base offense level, for most drug offenses under the guidelines.<sup>57</sup> Furthermore, each drug guideline range could then be increased based upon other sentencing factors such as leadership role or possession of a weapon.<sup>58</sup> With this decision, the Sentencing Commission guaranteed that most Guidelines drug sentences would be even higher than the new mandatory minimums.<sup>59</sup>

The mandatory minimum for drugs also “trumped” the Guidelines. If the Guidelines called for a sentence of seventy to eighty-seven months but the statutory mandatory minimum called for ten years (120 months), the Guideline sentence has to be adjusted to 120 months.<sup>60</sup> Also, unlike the a Guidelines sentence, judges cannot decide on their own to depart below a mandatory minimum.<sup>61</sup> The only exception initially provided by Congress was if the defendant cooperated in the investigation and prose-

52. See, e.g., Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 408 (1996) (claiming “the careful, deliberate procedures of Congress were set aside in order to expedite passage of the bill”).

53. *Id.* at 409 (identifying the primary factor in the determination of quantity thresholds as an “individual member’s perceptions of what quantity of drugs constituted an important drug case in their jurisdiction”).

54. The 1986 Act required distribution or possession with intent to distribute to draw the five years. In 1988, Congress made simple possession of five grams of crack a five year mandatory offense. No other drug carries a federal mandatory minimum for simple possession. See 21 U.S.C. § 844(a) (2000).

55. *Id.* § 841(b)(1)(A).

56. The U.S. Sentencing Commission had determined sentencing lengths based “upon an analysis of 10,000 actual cases” before the mandatory minimums altered those findings. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 18 (1988). The mandatory minimums “severely constrained the Commission’s approach” because they conflicted with “the finer-grained calibrations of the Guidelines.” Hofer & Allenbaugh, *supra* note 6, at 34.

57. See Jessica R.F. Grassley, Comment, *Federal Sentencing Policy Following the Cocaine 1995 Report: Issues of Fairness and Just Punishment*, 21 HAMLINE L. REV. 347, 392 (1998).

58. See U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(b)(1), 3B1.1(a).

59. There are also factors that can reduce the Guideline range, such as acceptance of responsibility and minor or minimal role adjustments. See *id.* §§ 3B1.2(a), 3E1.1.

60. *Id.* § 5G1.1. This situation actually occurs more frequently now as the Sentencing Commission moved in a few instances to decouple the baseline offense from the mandatory minimum leaving Guideline ranges for some LSD cases frequently below the statutory minimums. *Id.* app. C, amend. 488.

61. See, e.g., *United States v. Harris*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring) (arguing “statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency”).

cution of another offender.<sup>62</sup> This key, however, was given to the prosecutor, not the judge.<sup>63</sup> Without a “substantial assistance” motion by the U.S. Attorney’s Office, judges were powerless to sentence below the mandatory minimum even if the judge felt the defendant had made a good faith effort to cooperate.<sup>64</sup> Unfortunately, low-level offenders, like couriers or the girlfriends and wives of dealers, often had no one to “rat out,”<sup>65</sup> or they waited too long to come forward out of ignorance, loyalty, or fear. In these cases, judges have been forced to impose mandatory minimum terms on these defendants, while higher-ups in the same drug network cooperated in exchange for lesser sentences.<sup>66</sup>

#### D. JUDICIAL REACTION TO THE GUIDELINES AND DRUG MANDATORY MINIMUMS

Disentangling the judicial reaction to the Guidelines as opposed to the mandatory minimums requires some care. Because both the Guidelines and drug mandatory minimum penalties became effective within a two-year period, many judges referred to them interchangeably (although their specific complaints can actually be assigned to one or the other). Regardless, judicial reaction to both was overwhelmingly negative.<sup>67</sup> At first, the loudest shouting seemed to be about the Guidelines. In the past, judges broadly pondered what combination of rehabilitation, “just deserts,” deterrence, and incapacitation best fit the case and their own philosophical preferences, and then picked a number.<sup>68</sup> Now, judges were

62. 18 U.S.C. § 3551(e); 2002 U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

63. 18 U.S.C. § 3551(e); 2002 U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

64. See *United States v. Wade*, 504 U.S. 181, 183-84 (1992) (agreeing with the district court’s interpretation of the Sentencing Guidelines mandate that a court retained “no power to go beneath the minimum” without a “substantial assistance” motion from the prosecution).

65. See Maria Limbert, *Problems Associated With Prosecutorial Control Over Filing Substantial Assistance Motions and a Proposal for a Substantial Assistance Pre-Sentence Hearing*, 27 J. LEGIS. 251, 258 (2001).

66. In a May 2002 report to Congress, the U.S. Sentencing Commission delineated three primary findings regarding offender characteristic trends in federal drug sentencing: (1) “The majority of federal cocaine offenders generally perform lower level functions”; (2) “[t]he concentration of offenders at lower levels has increased since 1995”; and (3) “[t]he dominance of lower level offenders is particularly pronounced among crack cocaine offenders, two-thirds of whom were street-level dealers in 2000.” United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy, May 2002, ch. 4, at 36, available at [http://www.ussc.gov/r\\_congress/02crack/Ch4.pdf](http://www.ussc.gov/r_congress/02crack/Ch4.pdf) (last visited July 7, 2003); see also Froyd, *supra* note 25, at 1471-72 (claiming “the combination of mandatory minimums for low-level offenders and the substantial assistance downward departure for high-level offenders has led to disparity in sentencing between offenders with varying levels of culpability”); Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 588-90 (1998) (comparing the percentage of substantial departures in the districts of Connecticut and Massachusetts).

67. See, e.g., Tracey Thompson, *Applying a Formula to Justice; Sentencing Rules Limit Judges’ Discretion*, WASH. POST, June 12, 1989, at A1, available at 1989 WL 2050174 (reporting sentencing reform “drew immediate opposition from judges, who saw it as an intrusion by the executive branch into the judicial domain”).

68. See *supra* note 45 (discussing the Commission’s failure to announce a sentencing philosophy).

severely restricted in the sentences they could impose, and for the first time, they had to justify their sentencing decisions to the appellate courts.<sup>69</sup> The Guidelines also require complex calculations<sup>70</sup> and frequent post-trial hearings.<sup>71</sup> In addition, Guidelines litigation created an entirely new body of appellate case law that district judges had to learn along with yearly Sentencing Commission amendments, which now total over six hundred and have resulted in an appendix longer than the original Guidelines.<sup>72</sup> Judges rebelled against this combination of more work, less authority, and appellate oversight, and many held that the Sentencing Guidelines were a violation of the separation of powers doctrine.<sup>73</sup> The Supreme Court disagreed, however, in *Mistretta v. United States*.<sup>74</sup>

Separately, a significant number of judges were also distressed by the consequences of the mandatory minimums created by the 1986 Act. Mandatory minimums create arbitrary sentencing cliffs; one tenth of one gram could put the defendant into a higher statutory mandatory minimum.<sup>75</sup> This seemed irrational to judges who were used to making nuanced sentencing decisions.

A “drug warrior” mentality during the Reagan and Bush I years also led federal prosecutors to bring many more drug cases in federal court to take advantage of the new penalties.<sup>76</sup> As a result, drug cases as a percentage of the federal docket rose as did the overall caseload of the federal courts.<sup>77</sup> In a few districts, the U.S. Attorney decided to prosecute virtually every qualifying case in federal court, ignoring considerations of federalism and judicial resources that in the past directed small or local

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69. See *supra* note 44 and accompanying text; see also Cynthia K.Y. Lee, *A New “Sliding Scale of Deference” Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 3 (1997).

70. See *supra* notes 31-40 and accompanying text.

71. Kim Dayton, *Judicial Vacancies and Delay in the Federal Courts: An Empirical Evaluation*, 67 ST. JOHN’S L. REV. 757, 763 (1993) (claiming the Federal Sentencing Guidelines have greatly complicated the sentencing process and consumed more judicial resources).

72. See U.S. SENTENCING GUIDELINES MANUAL app. C (2002).

73. See, e.g., *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1257 (9th Cir. 1988), *overruled by* *Mistretta v. United States*, 488 U.S. 361 (1989). Prior to *Mistretta*, “200 judges declared the guidelines unconstitutional.” Gertner, *supra* note 26, at 6.

74. 488 U.S. 361 (1989) (holding the sentencing guidelines did not violate non-delegation principle of the separation of powers doctrine).

75. See Froyd, *supra* note 25, at 1490-91 (claiming the “cliff effect” rejects “graduated, proportional increases in sentence severity for additional misconduct or prior conviction”).

76. See, e.g., Amy Dockser Marcus & Arthur S. Hayes, *State Courts in ‘89 Got 100 Million New Cases as Tort Suits Rose 7.6%*, WALL ST. J., May 7, 1991, at B4, available at 1991 WL-WSJ 609342 (reporting drug related prosecutions were “overwhelming the federal court system”); Sara Sun Beale, *Get Drug Cases Out of the Federal Courts*, WALL ST. J., Feb. 8, 1990, at A16, available at 1990 WL-WSJ 589385 (reporting drug prosecutions in the federal courts have risen by 229% and are accelerating).

77. See Beale, *supra* note 76 (reporting drug cases constitute approximately 40% of the federal docket and “account for 44% of criminal trials and roughly 50% of criminal appeals”). Symptomatic of this problem, in the year of 1989, the federal prison population experienced its largest annual growth in sixty-five years. Lutjen, *supra* note 8, at 418 n.156.

drug cases to state courts.<sup>78</sup> The resulting slew of petty, small time dealers being charged in federal court particularly outraged some judges who felt federal court should be reserved for weighty matters of national concern.<sup>79</sup> Other judges voiced concerns about the increase in "dry conspiracies" where no drugs were ever seized by the police and the conviction and sentence depended entirely on the dubious testimony of cooperating witnesses, even when many of these had been higher up in the chain than the defendant on trial.<sup>80</sup> The most agonizing cases for the judges, however, were the ones that resulted in lengthy sentences for minor players in drug conspiracies, especially for low-level offenders like couriers or the girlfriends and wives of dealers.<sup>81</sup> In transcript after transcript, judges essentially apologized to defendants and their families and blamed Congress for tying their hands.<sup>82</sup>

The federal bench attempted to make its voice heard through formal policy making channels.<sup>83</sup> The Federal Judicial Center wrote a report highly critical of mandatory minimums in 1994,<sup>84</sup> and Chief Justice Rehnquist and other Supreme Court Justices and circuit judges have routinely criticized these laws as well.<sup>85</sup> The best and most politically neutral argu-

78. Jay Stephens, the United States Attorney for the District of Columbia from 1988 to 1993, required his prosecutors to bring virtually every drug case that met the minimum weight requirement for a mandatory minimum to be charged in federal court.

79. See, e.g., William H. Rehnquist, *Congress is Crippling Federal Courts*, ST. LOUIS POST-DISPATCH, Feb. 19, 1992, at 3B, available at 1992 WL 3514530 (claiming the 33% rise in criminal appeals in the first year of the sentencing guidelines is symptomatic of an overburdened federal court system).

80. In 1998, a Tenth Circuit panel held the testimony of a co-conspirator must be suppressed when the witness obtained a benefit, usually a promise of leniency, in exchange for that testimony. *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), vacated by 165 F.3d 1297 (10th Cir. 1999) (en banc); see, e.g., David W. Gleicher, 'Singleton' Goes Down for the Count, CHI. DAILY L. BULL., Jan. 20, 1999, at 5 (comparing a promise of leniency in exchange for testimony against a co-defendant, to a promise to "get your mother a job so she can pay her mortgage").

81. For example, Federal District Court Judge Stanley Marshall publicly stated "I've always been considered a fairly harsh sentencer, but it is killing me that I am sending so many low-level offenders away for all this time." Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 458 n.84 (1999) (two of the three authors of this article are themselves judges).

82. See *infra* notes 320-21.

83. A minority of judges have been willing to speak with media on this issue. See John Marzulli & Bill Hutchinson, *Killer Gets Life, With Regrets*, N.Y. DAILY NEWS, Dec. 18, 2002, available at 2002 WL 102193371 (labeling U.S. District Court Judge Jack Weinstein an "outspoken judge. . . [who] has been a longtime critic of the federal sentencing guidelines" after he apologized to a convicted murderer for giving him a life sentence, the first such sentence given by the judge during his thirty-five years on the bench); Robert Moran, *War on Drugs Is a Lost Battle, Judges Say*, PHILA. INQUIRER, Apr. 9, 2002, available at 2002 WL 14968432 (reporting on a panel discussion at Temple University where two U.S. District Court judges, Judge John T. Curtin of New York and Judge John Kane of Colorado, openly criticized the federal sentencing guidelines).

84. BARBARA S. VINCENT & PAUL J. HOFER, FEDERAL JUDICIAL CENTER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS (1994).

85. Michael Brennan, *A Case for Discretion; Are Mandatory Minimums Destroying Our Sense of Justice and Compassion*, NEWSWEEK, Nov. 13, 1995, at 18, available at 1995

ment has been that mandatory minimums are unnecessary because the Guidelines and the appellate review provisions of the SRA are sufficient to police unwarranted judicial disparity.<sup>86</sup> This position has been endorsed, not only by the bench but by virtually all commentators.<sup>87</sup> Unfortunately, these voices of reason have been discounted and ignored by Congress. Through the 1990s, Congress, seemingly addicted itself, adopted new mandatory minimums, and increased the punishment for existing ones in response to publicity about drugs such as ecstasy and methamphetamine. While this period saw a few statutory and Guideline changes that minimally reduced sentences for the lowest-level non-violent offenders,<sup>88</sup> major efforts by the Sentencing Commission and the judiciary to address the most egregious penalty provisions such as the disparity between sentences relating to crack and powder cocaine<sup>89</sup> and to roll back prosecutorial control over substantial assistance departures, were either rejected outright or otherwise garnered no Congressional audience.<sup>90</sup>

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WL 14647063 (reporting Rehnquist's claim that mandatory minimums were "a good example of the law of unintended consequences").

86. The argument posits "the guidelines are superior to mandatory minimums because . . . [the] Commission not only has developed relatively narrow ranges within which a judge is to sentence an offender, but it has also provided a limited opportunity for departure." Lutjen, *supra* note 8, at 441. Moreover, the vast prosecutorial discretion which accompanies mandatorys actually frustrate the Guidelines' efforts to ensure uniformity. *Id.* at 441-42.

87. See, e.g., Jonathan P. Caulkins et al., *Drug Policy Research Ctr., RAND, Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?*, available at <http://www.rand.org/publications/MR/MR827/> (last visited July 14, 2003). For a list of individuals and organizations that oppose mandatory minimums, see the Families Against Mandatory Minimums (FAMM) website, at [http://www.famm.org/si\\_against\\_mandatory.htm](http://www.famm.org/si_against_mandatory.htm) (last visited July 14, 2003).

88. 18 U.S.C. § 3553(f) (enacting "safety valve" legislation); 2002 U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c), amend. 488 (amending the manner in which LSD is weighed for sentencing purposes); *id.* § 2D1.1(c), amend. 516 (amending the manner in which marijuana plants are counted).

89. Crack cocaine is punished 100 times more severely than powder cocaine although cocaine is imported to this country in powder form. Five grams of crack carries a five year mandatory. It takes 500 grams of powder for the same sentence. See 21 U.S.C. § 841(b)(1)(B)(ii)(II). Moreover, it takes little more than baking soda, water, and a microwave to convert powder to crack. See Spade, *supra* note 50, at 1273-74 (documenting a case where the supplier of powder cocaine received a punishment far less than the two defendants who cooked that powder and created crack cocaine). Although there was initially thought to be a difference in addiction and its effect on pregnant women, recent studies show little difference. See United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 54 (1995) available at <http://www.uscc.gov/crack/chap1-4.pdf> (last visited Jan. 5, 2004). Nevertheless, Congress rejected a 1995 Commission amendment to equalize punishment for these two forms of cocaine.

90. Interestingly, despite increases in statutory penalties, federal drug sentences have actually decreased slightly over the past ten years. Frank Bowman and Michael Heise assert this has been a joint project of local federal judges and prosecutors who have endeavored to bring some rationality and fairness case-by-case. Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043 (2001) [hereinafter Bowman & Heise, *Quiet Rebellion?*]; Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data From the District Level*, 87 IOWA L. REV. 477 (2002).

Nevertheless, prior to the Feeney Amendment in 2003, judicial opposition to the Guidelines appeared to be more muted in recent years. A variety of reasons have been offered. The addition of the "safety-valve" in 1996 provided a mechanism for sentencing below the mandatory minimums for the lowest-level non-violent offenders.<sup>91</sup> Judges have also discovered ways to work with counsel to alleviate harsh sentences in some cases,<sup>92</sup> and as appellate case law developed to guide them, judges felt less out on a limb when departing downward. During the Clinton presidency, Attorney General Janet Reno also rolled back the strict charging and plea policies of the previous administrations,<sup>93</sup> thus allowing greater flexibility for prosecutors. In addition, as the judicial confirmation process in the second Clinton presidency became more contentious, his nominees tended to hew more to the center and many had prosecutorial backgrounds. These judges tended to be less offended by long sentences and structured decision-making required by the Guidelines. Finally, the majority of sitting federal judges have experienced only the Guidelines and hence there was no golden era to which they harkened back.<sup>94</sup> Still, Congress was not finished dismantling judicial discretion. For the past two years, it has focused on the one remaining contentious area—downward departures.

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91. See *supra* note 83. The safety valve, however, "does not successfully exempt all low-level drug offenders from severe sentences." Froyd, *supra* note 25, at 1472.

92. Fact and charge bargaining, whereby the parties and the judge allow the defendant to plead and be sentenced for lesser conduct, were the primary mechanism, followed by cooperation agreements for very little cooperation and departures that stretched the meaning of the chosen grounds. "The 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. All under the banner of truth in sentencing!" STITH & CABRANES, *supra* note 27, at 90 (quoting an anonymous federal judge).

93. In the Bush I administration, the Justice Department's stated policy was for federal prosecutors to "charge the most serious, readily provable offense." Memorandum from Attorney General Richard Thornburgh, to United States Federal Prosecutors, entitled Plea Bargaining Under the Sentencing Reform Act (March 13, 1989) (commonly known as "the Thornburgh Memo"), reprinted in THOMAS W. HUTCHINSON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE 622 app. 12 (1989 supp.). Janet Reno softened this policy, authorizing that plea agreements should be based on "an individualized assessment of the extent to which particular charges fit the specific circumstances of the cases." Memorandum from Attorney General Janet Reno, to United States Attorney's and Litigating Divisions, entitled Principles of Federal Prosecution (Oct. 12, 1993) (on file with author) (more commonly known as the Reno Blue Sheet). Note that the Bush II Justice Department has now returned to the Thornburgh principles as part of its response to the Feeney Amendment. See *infra*, notes 174-99 and accompanying text.

94. As of July 2003, 748 federal judges have been commissioned since the end of 1987. History of the Federal Judiciary, Website for the Federal Judiciary, Washington D.C., available at <http://www.fjc.gov/newweb/jnetweb.nsf/hisj> (last visited July 18, 2003) (search for federal judges commissioned after January 1, 1988).

### III. DEPARTURES AND THE FEENEY AMENDMENT

#### A. DEPARTURE RATES AND THE JUDGE ROSENBAUM DEBACLE

It is critical to remember that there are two basic types of departures. First, departures based upon cooperation allow a judge to go below a mandatory minimum but require a government motion.<sup>95</sup> About fifty percent of all departures are for such substantial assistance. Downward departures under the Guidelines are at a judge's discretion but are trumped by any applicable mandatory minimum.<sup>96</sup> Since 1984, the overall downward departure rate has slowly crept upwards, though the rate and type of departure have varied by jurisdiction.<sup>97</sup>

At least in some circuits, judicial departures were given a boost by the Supreme Court in *Koon v. United States*, which held that departures should be reviewed only for abuse of discretion and that judges were not limited to departures specified by the Sentencing Commission.<sup>98</sup> However, at least half of the increase in downward departure rates can be attributed to prosecutor-sanctioned departures initiated to ease court congestion,<sup>99</sup> especially in the border states where illegal immigration and

95. See *supra* notes 61-64 and accompanying text.

96. The only exception is the so-called "safety-valve" provision. See *supra* note 60 and accompanying text.

97. For example, see United States Sentencing Commission, Federal Sentencing Statistics by State, District and Circuit, Table 9 for the years 1998-2001, which indicates that the national rate of federal departures, other than substantial assistance departures, has risen steadily each of the last four fiscal years, from 13.6% in 1998 to 18.3% in 2001. See <http://www.ussc.gov/LINKTOJP.HTM> (last visited July 16, 2003). The Sentencing Commission's recent report to Congress contains the best data and analysis of departure rates. See United States Sentencing Commission, Report to Congress: Downward Departures From the Federal Sentencing Guidelines 10 (October 2003) [hereinafter Downward Departure Report].

98. 518 U.S. 81, 99 (1996). Prior to *Koon*, in "some circuits, the trial courts' discretion was limited to merely proposing bright-line rules to the circuit court which, if adopted, became standards for future operation—the equivalent of judicial amendments to the Guidelines." Carlos M. Pelayo, *Give Me A Break! I Couldn't Help Myself: Rejecting Volitional Impairment as a Basis for Departure Under Federal Sentencing Guidelines Section 5K2.13*, 147 U. PA. L. REV. 729, 738 (1999). As noted by Marc Miller and Ronald White, Justice Kennedy's opinion in *Koon* sets out a framework for analyzing departure factors:

If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. If a factor is unmentioned in the Guidelines, the court must, after considering the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," decide whether it is sufficient to take the case out of the Guideline's heartland.

Marc L. Miller & Ronald F. White, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 780-81 (1999) (citing *United States v. Koon*, 518 U.S. 81, 95-96 (1996)).

99. Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 346-47 (2000) (discussing the Southern District of California's "fast track" departure plan for illegal immigrants).



drug cases have overwhelmed the court system.<sup>100</sup> In other jurisdictions, commentators suggest that sympathetic prosecutors have been making cooperation agreements based upon minimal cooperation to alleviate what would be otherwise harsh mandatory sentences for low-level offenders.<sup>101</sup> Admittedly, there are some judges who grant more than the national average of downward departures based upon their view that the otherwise proscribed Guideline sentences are too harsh. Moreover, these judges assert the sentences are overly severe either for non-mandatory minimum offenses like white collar crimes or for drug dealers for whom they believe the required mandatory minimum is more than sufficient. Curiously, only a small percentage of downward departures have been appealed by the local U.S. Attorney's Offices.<sup>102</sup> Some suggest this is because local prosecutors are in silent agreement with many of these departures.<sup>103</sup> Others believe that, prior to Ashcroft's Justice Department, sentencing appeals were historically low because local offices devoted the majority of their resources to investigations and active cases rather than to appeals. In addition, the Solicitor General's Office was stingy in approving sentencing appeals. To the extent these reasons account for the increasing downward departure rate, these explanations reflect the criminal justice system's attempts to maintain flexibility and fairness much more so than just a judicial effort to evade congressional dictates to increase drug sentences.<sup>104</sup>

Nevertheless, during the last two years, John Ashcroft's Justice Department and conservatives on the Hill began to articulate the sentiment that the growing departure rate was primarily the result of pockets of "liberal" judges who were soft on crime.<sup>105</sup> They argued that these judges were undermining the Guidelines and mandatory minimum drug penalties and

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100. *Id.*

101. For example, in the Eastern District of Pennsylvania during 2001, substantial assistance motions were made in 40.3% of drug cases, whereas the rate for the entire Ninth Circuit is 10.7% and the national average is 17.1%. United States Sentencing Commission, Federal Sentencing Statistics by State, District and Circuit 2001, Table 8, 11-13, available at <http://www.ussc.gov/JUDPACK/2001/pa01.pdf> (last visited July 19, 2003).

102. "Of the more than 230,000 sentences handed down from 1999 through 2002, prosecutors appealed only 282 of them." Jess Bravin & Gary Fields, *House Panel to Probe U.S. Judge*, WALL ST. J., Mar. 12, 2003, at A2, available at 2003 WL-WSJ 3961643. The defendants also appealed 138 of those 282. *Id.*

103. Laurie P. Cohen & Gary Fields, *Ashcroft Intensifies Campaign Against Soft Sentences by Judges*, WALL ST. J., Aug. 6, 2003 ("[S]o few departures are appealed because 'most assistant U.S. attorneys recognize they're appropriate,' though they may argue otherwise." (statement of Judge John Martin)).

104. See Bowman & Heise, *Quiet Rebellion?*, *supra* note 90.

105. See Laurie Cohen & Gary Fields, *Ashcroft Intensifies Campaign Against Soft Sentences by Judges*, WALL ST. J., Aug. 6, 2003 (noting that the House Judiciary Committee has tangled with several judges who have imposed sentences below mandatory minimums); John R. Steer, Sentencing Commission Review, Cong. Testimony, Oct. 13, 2000, available at 2000 WL 23833583 (testifying before the Congressional Sub-Committee on Judicial Oversight on the increase in departure rates in the post-Koon era and ultimately finding "some reason for concern, particularly if the trends continue unabated, while also seeing a guideline sentencing scheme that remains fundamentally sound").

that legislation was needed to reign them in.<sup>106</sup> Adding fuel to this fire was the Judge Rosenbaum debacle, which may have been the tipping event that led to the introduction and passage of the Feeney Amendment.

In May 2002, Chief Judge James M. Rosenbaum of the Minnesota District Court voluntarily appeared before the House Committee on the Judiciary to testify against a bill that sought to rollback a recent Guideline amendment that capped offense levels for drug defendants judged to have a "minimal role" in the overall distribution network.<sup>107</sup> Judge Rosenbaum was the former U.S. Attorney for Minnesota and a Reagan appointee.<sup>108</sup> He began his testimony by explaining that he was "no bleeding heart."<sup>109</sup> Nevertheless, he supported the amendment and opposed the bill arguing that capping drug guidelines for minimal participants properly shifted the focus of sentencing back to the culpability of the perpetrator and away from the scope of the conspiracy.<sup>110</sup> He argued this was fairer because these individuals rarely made much money and they exerted no real control over the operation.<sup>111</sup> Using initials rather than names, he provided about a dozen short profiles of defendants in Minnesota who he felt illustrated the need for sentencing relief for low-level offenders.<sup>112</sup> Judge Rosenbaum's status and conservative credentials helped defeat the bill, but the reaction of the conservatives on the House Judiciary Committee was swift.

Under the guidance of Chairman Sensenbrenner, the Committee on the Judiciary demanded that Judge Rosenbaum turn over documentation to support his case examples.<sup>113</sup> When he balked, they threatened him

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106. See sources cited *supra* note 105.

107. Tony Mauro, *Judiciary Committee to Debate Disparity in Drug Sentences*, LEGAL INTELLIGENCER, May 21, 2002, at 4. Before this amendment, if the scope of the conspiracy of which was foreseeable to a minimal participant such as a drug courier, he was subject to liability for the entire quantity of drugs in the network. *Id.* Commission amendments take effect unless Congress affirmatively rejects them. H.R. 4689 was introduced to reject the Commission's proposal. H.R. Rep. No. 107- 4689 (2002).

108. Greg Gordon, *Judge Sits in the Middle of Capitol Struggle; Congress and the Federal Bench are at Odds over James Rosenbaum's Drug Sentences*, STAR TRIB., Mar. 15, 2003, at 1B, available at 2003 WL 5530871.

109. Hon. James M. Rosenbaum, Testimony Before the United States House Committee on the Judiciary 3 (May 14, 2002) (transcript on file with author).

110. *Id.* Rosenbaum compared low-level drug offenders to "minnows," and contended the sentencing guidelines should impose the harsh penalties on the "sharks" or the "major players" in the drug trade. *Id.* at 3; see also Gordon, *supra* note 108, at 1B; Peter Margulies, *Battered Bargaining: Domestic Violence and the Plea Negotiation in the Criminal Justice System*, 11 S. CAL. REV. L. & WOMEN'S STUD. 153 (2001).

111. "The present sentencing system sentences minor and minimal participants who do a day's work, in an admittedly evil enterprise, the same way it sentences the planner and enterprise-operator who set the evil plan in motion and who figures to take its profits." Rosenbaum, *supra* note 109, at 3; see also Mauro, *supra* note 107, at 4 (quoting Hon. James M. Rosenbaum).

112. Susan Schmidt, *Judge Accused of Misleading House Panel: Republicans on Subcommittee Say Testimony on Drug Sentencing Was Inaccurate*, WASH POST, Nov. 6, 2002, at A2, available at 2002 WL 102569652.

113. Jason Hoppin, *Drug Sentencing Probe Worries Bench*, LEGAL INTELLIGENCER, Mar. 24, 2003, at 4.

with a congressional subpoena.<sup>114</sup> Through counsel, the judge provided some records while the Committee staff traced the rest on their own.<sup>115</sup> Based on their research, the Committee then wrote a scathing report that accused Judge Rosenbaum of a litany of misconduct including the following: (1) claiming that he had suggested that defendants were being convicted based upon legally insufficient evidence; (2) providing false and inaccurate information about these case profiles; (3) generally being hostile to the Guidelines; and (4) perhaps unlawfully closing a sentencing hearing.<sup>116</sup> Specifically bothersome to the Committee was that in a number of his examples, Judge Rosenbaum (or another Minnesota judge), had actually departed below the presumptive Guideline sentence that Judge Rosenbaum referenced in his testimony about these cases.<sup>117</sup> As a result, the Committee felt that on this point his testimony was false and misleading.<sup>118</sup>

These unmentioned departures were nevertheless legitimate and defensible. Either the government itself had moved for a substantial assistance departure, or the sentencing judge had discovered another legitimate ground—such as the “safety-valve”—on which to base the departure.<sup>119</sup> But the Committee report claimed that at least two, and perhaps three, of Judge Rosenbaum’s departures had been illegal under the Guidelines.<sup>120</sup> In the next session, a larger “fix” for controlling “independent judges” like Judge Rosenbaum was then proposed—the Feeney Amendment. As discussed below, some believe that the controversy surrounding Judge Rosenbaum’s departures was a key factor in the drafting and ultimate passage of this legislation.

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114. The subpoena would have forced Rosenbaum to produce “records from his cases since Jan. 1, 1999, identifying drug-related cases in which he departed from sentencing guidelines . . . [and] sentencing transcripts, the status of appeals, copies of all decisions and the names of any court personnel who helped in his testimony before Congress.” Rob Hotakainen & Pam Louwagie, *State’s Chief U.S. Judge Might Face Subpoena; House Panel Investigating Sentencings in Drug Case*, STAR TRIB., Mar. 13, 2003, at 1A, available at 2003 WL 5530675. There was substantial opposition to issuing the subpoena from both inside and outside the Congress. See, e.g., Gordon, *supra* note 108, at 1B (reporting Rep. Jim Ramstad’s belief that this judge “would not run a stop sign”); Hotakainen & Louwagie, *supra*, at 1A (reporting University of Minnesota law Professor Barry Feld considered the subpoena an act of “intimidation”); Bravin & Fields, *supra* note 102, at A2 (reporting Rep. Bobby Scott’s belief that the subpoena was a “bizarre overreaction”).

115. *Fairness in Sentencing Act of 2002: Hearing on H.R. 4689 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 107th Cong. 9-10 (2002).

116. *Id.* at 9 (2002). The Committee also asked the Eighth Circuit to discipline the judge, and it refused to do so. Gordon, *supra* note 108, at 1B.

117. *Fairness in Sentencing Act of 2002: Hearing on H.R. 4689 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 107th Cong. 29-30 (2002).

118. *Id.* at 13-20.

119. *Id.* at 14, 16.

120. *Id.* at 29-30.

## B. THE 2003 FEENEY AMENDMENT

In late March 2003, prodded by Chairman Sensenbrenner and the Department of Justice, a freshman representative from Florida, Tom Feeney, introduced a sentencing reform bill as an amendment to the popular Amber Alert legislation.<sup>121</sup> An admitted “bomb thrower” in the Florida legislature, Feeney was once labeled by the governor as “the David Duke of Florida politics.”<sup>122</sup> Some commentators such as ABA President Alfred Carlton, Jr. saw a direct link between the Feeney Amendment and the Judge Rosenbaum controversy.<sup>123</sup> “I think it was a result of the powers-that-be recognizing that the subpoena route wasn’t going to be very fruitful . . . . Better to go ahead and just legislate—and that’s what they did.”<sup>124</sup>

The bill was attached as a rider just before the House voted on the Amber Alert Bill. Thus, it reached the House floor absent a hearing before the House Judiciary Committee and without formal input from the Sentencing Commission. To this end, it passed after minimal floor debate, in a manner reminiscent of the 1986 drug penalty changes.<sup>125</sup> As one commentator put it: “While America was focused on the opening weeks of the war in Iraq, the US. Justice Department had another target in its sights—a sneak attack on the independence of the 665 federal district judges to determine fair and responsible sentences for people convicted of federal crimes.”<sup>126</sup> Moreover, the decision to attach these mostly unrelated sentencing provisions to a bill on child sex crimes made it difficult for members to vote against the bill.<sup>127</sup>

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121. See, e.g., Jason Hoppin, *Bill Would Curb Judicial Discretion*, LEGAL INTELLIGENCER, Apr. 9, 2003, at 4. The formal name of the bill that passed is the “Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003” or the “PROTECT Act.” Mike Martindale, *Amber Alert Will Now Protect All Children*, DETROIT NEWS, May 1, 2003, at 2, available at 2003 WL 17888237. Feeney claimed that federal judges were giving sex offenders no more than a “slap on the wrist” and with “increasing frequency.” Mark H. Allenbaugh, *Who’s Afraid of the Federal Judiciary*, CHAMPION, June 2003, at 8. Representative Feeney later stated that he “was simply the ‘messenger’ of the amendment bearing his name, which was drafted by two Justice Department officials, Associate Deputy Attorney General Daniel Collins and Jay Apperson, counsel to the House Judiciary Committee [and former Assistant U.S. Attorney in Virginia].” Laurie P. Cohen & Gary Fields, *Ashcroft Intensifies Campaign Against Judge’s Soft Sentences*, WALL ST. J., Aug. 6, 2003.

122. Tamara Lytle, *Feeney Makes an Impression as Freshman on Capitol Hill*, ORLANDO SENTINEL, Apr. 28, 2003, at A1, available at 2003 WL 18420211 (reporting on the personal notoriety garnered by Feeney in response to his sponsorship of the sentencing amendment).

123. Rob Hotakainen, *Sentencing Leeway—or Leniency?*, STAR TRIB., May 8, 2003, at 16A, available at 2003 WL 5535030.

124. *Id.*

125. Allenbaugh, *supra* note 121; see *supra* notes 50-52 and accompanying text.

126. James K. Jenkins, *Give Federal Judges Sentencing Discretion Back*, ATLANTA J. CONST., June 9, 2003, at A9, available at 2003 WL 56079739.

127. For example, the senior Democrat on the Judiciary Committee, Sen. Edward M. Kennedy, “expressed ‘deep concern’” about the Feeney Amendment, but ultimately voted for the Amber Alert Bill. Dan Christensen, *Stealth Bomber*, MIAMI DAILY BUS. REV., Apr. 15, 2003, at 1.

In the form passed by the House of Representatives,<sup>128</sup> the Feeney Amendment would have dramatically limited judicial departures by inter alia: a) eliminating departures grounds such as aberrant behavior, family ties, and military service (which are a popular grounds judges have used to lower sentences where the otherwise required punishment seems disproportionate),<sup>129</sup> and b) prohibiting downward departures to only those few factors specifically identified by the Sentencing Commission.<sup>130</sup> Specifically, the last provision in particular would have gutted the very heart of the departure concept. That is, allowing judges to depart in unusual circumstances was a recognition by the original Sentencing Commission that it could not anticipate every circumstance that might warrant adjustments to the ordinary results of the offense and criminal history guidelines.<sup>131</sup> The first version of the Feeney Amendment eliminated this residual judicial discretion and made departures no different than any Guideline amendment (which is subject to congressional oversight). In other words, by eliminating all non-Guideline specified departures, Congress would ensure that there would be no departures on any grounds other than those written by the Sentencing Commission and reviewed by Congress.

In the two week period before the conference committee meetings, a concerted lobbying effort limited these two changes to just sex crimes, but the bill that passed still contained additional provisions that affect all sentencing in important ways.<sup>132</sup> The key immediate changes included: (a) requiring de novo appellate review of all departures (overruling *Koon v. United States*);<sup>133</sup> (b) prohibiting downward departures based on new grounds on remand;<sup>134</sup> (c) requiring a government motion to grant the

128. This bill was passed by the House on March 27, 2003. Ralph Grunewald, *NACDL's Fight to Save Judicial Discretion*, CHAMPION, June 2003, at 7.

129. See, Allenbaugh, *supra* note 121, at 8.

130. See *id.* at 9.

131. U.S. SENTENCING GUIDELINES MANUAL § 1.A4(b) (2002).

132. Letters of opposition were sent by the Chief Justice, the Secretary of the Judicial Conference, the Sentencing Commission, the ABA, the Cato Institute, the Washington Legal Foundation, and over 70 law professors. Grunewald, *supra* note 128. The *New York Times*, *Washington Post*, and other papers also wrote editorials opposing the bill. See, e.g., John S. Martin Jr., Editorial, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31; Editorial, *House Without Mercy*, WASH. POST, Apr. 4, 2003, at A20, available at 2003 WL 17425634. Academics also contributed. See Steven L. Chanenson, *The Return of Hammurabi*, 26 PENN. L. WKLY. 14 (2003), WL 4/7/2003 PLW 12.

133. PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 670 (2003).

134. PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 671 (2003). It reads, concerning an imposition of a sentence upon remand:

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

*Id.* One of the unintended consequences of this provision may likely be increasingly long sentencing hearings, even where the judge grants a requested departure. To protect additional grounds, should the appellate courts overturn the departure granted, “defense coun-

extra one level reduction for extraordinary acceptance of responsibility;<sup>135</sup> and (d) reducing the number of federal judges on the Sentencing Commission from at least three of the seven to no more than three.<sup>136</sup>

Each of these changes is significant for its own reasons; but the overruling of *Koon* may prove to be the most important in reducing judicial sentencing discretion. I say may, because the Sentencing Commission's post-Feeney report asserts that the effect of *Koon* on increasing departure rates was actually unclear. Its data suggests that "although the rate of increase in the departure rate generally is higher post-*Koon* than pre-*Koon*, the rate of increase actually began to accelerate in 1994, almost two years prior to *Koon*, and has been relatively consistent thereafter."<sup>137</sup> Nevertheless, the switch from an abuse of discretion standard to de novo review is likely to reduce downward departures for at least three reasons. First, the increasingly conservative appointees on the Courts of Appeals are less likely to agree with district court judges in close cases (with the experience of the Fourth Circuit as the best existing example).<sup>138</sup> Second, those judges who were pushing the envelope with aggressive departures before Feeney may now be deterred, knowing it will be easier for the government to obtain reversals on appeal.<sup>139</sup> Third, although the government rarely appealed downward departures before the Feeney Amendment,<sup>140</sup> the more favorable standard of review may encourage appeals.<sup>141</sup>

Consequently, the Feeney Amendment's micro-management of the sex offense guidelines will clearly only affect a narrow slice of cases. Nevertheless, these changes are symbolically important because they illustrate

sel must now find a way to insist politely but firmly that the initial sentencing court rule on every alternative basis for departure and that it include those accepted bases in the written statement of reasons for the departure in the judgment and commitment order." Lisa A. Cahill & Kevin F. Clines, *Outside Counsel: Waiver Dangers Under the PROTECT Act*, N.Y.L.J., Aug. 25, 2003, at 5-6.

135. PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 671 (2003).

136. PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 676 (2003).

137. Downward Departure Report, *supra* note 97, at 54. However, the pre-*Koon* increase could easily be explained by an increase in the number of lower courts implementing the deferential stance approved in *Koon* in advance of the decision. Moreover, despite *Koon*, conservative circuits, such as the Fourth Circuit, continued their restrictive approach to departures after the decision in *Koon*, thereby limiting the expected post-*Koon* increase.

138. See *supra* note 137.

139. In both scenarios, at least in circuits that took *Koon* at its word, careful judges had been able to protect their departures by relying on factual findings to insulate their decisions. See, e.g., *United States v. Galante*, 111 F.3d 1029, 1036 (2d Cir. 1997) (affirming downward departure based upon the district court's finding of extraordinary family circumstances); see also Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion: Koon's Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, 530-49 (1999) (providing a circuit-by-circuit analysis of downward departure jurisprudence post-*Koon*).

140. See Downward Departure Report, *supra* note 97, at 54-55.

141. In addition, the new appeals policy instituted by the Department in response to directives in Feeney, is designed to increase appeals of departures and arguably, to deter certain classes of departures by putting judges on notice that such departures will receive close scrutiny at Main Justice. See *infra* notes 166-67 and accompanying text.

just how Congress has abandoned its original conception of the Sentencing Commission.<sup>142</sup> Originally, the Sentencing Commission was supposed to be an expert body of judges and academics who would make sentencing policy and eliminate disparity away from the heat of politics. While the Sentencing Commission's influence had fallen considerably since its inception for a variety of reasons,<sup>143</sup> the Feeney Amendment was the first time that Congress actually wrote Guidelines language itself, bypassing the Sentencing Commission entirely.<sup>144</sup> The gutting of judicial representation on the Sentencing Commission was also largely a symbolic act that demonstrated Congress's distrust of the judicial branch. Now, although officially housed in the judicial branch, the Sentencing Commission is statutorily prevented from ever having its judicial members constituting a voting majority. Nevertheless, given the Sentencing Commission's already weak political position and cautiousness in recent years, it is not clear the new non-judicial majority will result in significant policy changes.<sup>145</sup>

The "depart and tell" provision, on the other hand, had both symbolic import as well as the potential for influencing sentencing decisions. This provision requires that detailed information about every criminal case, by judge (and including any departure grounds), be sent to the Sentencing Commission and made available to the Department of Justice for study.<sup>146</sup> Thus, Congress will have access to the necessary information to

142. See PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 667-69 (2003). This precedent bodes poorly for the future of the Commission's independence as a policy making body.

143. Key events in this regard include the override of the Commission's crack amendment, see Jon M. Sands, *Crime and Politics: Big Government's Erratic Campaign for Law and Order*, 49 FED. LAW. 52 (2002) (book review), at WL 49-JUL FEDLAW 52, and the failure of President Clinton to nominate new Commissioners when their terms expired, see Dep't of Justice, Quick Clinton Appointments Key to 1993 Changes, DOJ Alert, Feb. 1993, at WL 3 No. 2 DOJALT 2, as well as other examples of Congress ignoring the Commission's advice, see Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Judicial Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 100-02 (1999); The Sentencing Commission and Its Critics, 2 FED. SENTENCING REP. 205-52 (1990); Miller & Wright, *supra* note 98, at 729-35; see also Testimony of Julie Stewart before the U.S. Sentencing Comm'n (Mar. 18, 1997), reprinted in 9 FED. SENTENCING REP. 317, 318 (1997) (lamenting the fact that the Commission has "let Congress kick you around"); Deanell Reece Tacha, *Serving this Time: Examining the Federal Sentencing Guidelines After a Decade of Experience*, 62 MO. L. REV. 471, 479 (1997) (criticizing the Commission for "primarily responding to the specific, ad hoc concerns of Congress" instead of being "more proactive in setting its own agenda").

144. Other bills directed the Commission to implement policy goals but stayed away from mandating offense levels and writing specific language for the Commission to incorporate.

145. On the other hand, one perhaps could argue that the Court should revisit *Mistretta* and the separation of powers issue, as Congress has not even maintained the pretense that the Commission is a judicial entity.

146. The PROTECT Act reads:

(h) IMPROVED DATA COLLECTION.—Section 994(w) of title 28, United States Code, is amended to read as follows:

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission a written report of the

perform the kind of case-by-case analysis to which Judge Rosenbaum's examples were subjected. In evaluating the import of this provision, one cannot really argue that Congress should be forbidden from collecting this information. Judicial sentences are public information. Thus there is no reason that policymakers, the press, and academics should not have access to this data, even in a judge-by-judge format.<sup>147</sup>

However, in the current climate of congressional hostility, federal judges are rightly alarmed that this provision is not a harmless data collection device or a failsafe mechanism. Rather it exists as a tool for intimidation. It is this latter concern that has been heard most frequently before and after passage. For example, Senator Kennedy argued that this provision would result in a "judicial blacklist."<sup>148</sup> Similarly, in a speech to the Federal Judges Association, Chief Justice Rehnquist discussed both the Judge Rosenbaum controversy and the new Feeney reporting requirements.<sup>149</sup> He recognized that while Congress has a right to data upon which to base legislation, inquiries that "target the judicial decisions of individual federal judges, could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties."<sup>150</sup>

District Court judges were more direct in their comments.<sup>151</sup> Judge

sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

- (A) the judgment and commitment order;
- (B) the statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range);
- (C) any plea agreement;
- (D) the indictment or other charging document;
- (E) the presentence report; and
- (F) any other information as the Commission finds appropriate.

PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 672 (2003).

147. Moreover, providing Main Justice with this data might occasionally be necessary to thwart a renegade judge who continually departed, but who is considered too powerful for local federal prosecutors to challenge on their own. *But see* Order Declaring Title IV of the Section 401(h)(1)(2) & (3) Report of the Attorney General of the Protect Act and Feeney Amendment Unconstitutional, *United States v. Robert Mendoza*, Case No. 03-730, at 12 (C.D. Cal. Jan. 12, 2004); *PROTECT Act's Reporting Requirements Usurp Judicial Power*, *District Court Says*, 74 CRIM. L. REP. 293 (Feb. 4, 2004).

148. *See Influential Judges' Group Urges Repeal of Tough Sentencing Guidelines*, L.A. TIMES, Sept. 24, 2003, available at 2003 WL 2436701.

149. Chief Justice William H. Rehnquist, Remarks of the Chief Justice at the Federal Judges Association Board of Directors Meeting (May 5, 2003) available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_05-05-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html) (last visited July 28, 2003). Interestingly, Attorney General Ashcroft's letter to federal prosecutors quotes from this speech at length to support the notion of congressional supremacy over sentencing, but without noting the Chief Justice's concerns about the potential threat to judicial independence.

150. *Id.* at 7. In opposing the original bill, Chief Justice Rehnquist added that, "this legislation, if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of the federal court to impose fair and responsible sentences." Allenbaugh, *supra* note 121, at 10.

151. In January 2004, the chief judges of the Ninth Circuit condemned the Feeney Amendment at their annual meeting. In addition to the substantive provisions of the bill,



Gerald Bruce Lee of the Eastern District of Virginia stated that “the Feeney Amendment is an overreaction to a nonexistent problem and an unwarranted restriction on sound judicial decision-making.”<sup>152</sup> Judge Martin, long an outspoken critic of congressional sentencing policy, finally had enough and announced his resignation from the bench and intention to return to private practice.<sup>153</sup>

In the post-Feeney period, several district court judges have gone so far as to state on record that the Feeney Amendment’s reporting provision deterred them from departing in cases they felt were otherwise appropriate for a lower sentence.<sup>154</sup> For example, Minnesota’s Judge Paul Magnuson decided not to depart in a white collar case that led to a four year sentence. He stated: “This reporting system accomplishes its goal: the Court is intimidated, and the Court is scared to depart.”<sup>155</sup> In another case from Montana, Judge Donald Molloy felt he could not depart in the case of a Chinese immigrant who was convicted of harboring illegal aliens. The defendant himself had been homeless upon his arrival in this country many years ago and the judge believed he had acted as a good Samaritan and nothing more. This judge stated at sentencing:

I believe that this case is one that the Feeney amendment, in seeking to strip federal judges of their judgment, will lead to more unjust sentences and that what we will end up with is a third branch of administrators heeding the beck and call of those who have a sense

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these judges objected to failure to consult with the judiciary or heed the Sentencing Commission’s views before passing the bill. Paul Chavez, *Western Judges Rip New Law Limiting Sentencing Discretion*, at <http://www.azcentral.com/news/articles/0127districtjudges-ON.html> (last visited Feb. 8, 2004).

152. Allenbaugh, *supra* note 121, at 10; see also Adam Liptak, *Opposition Rises to Crime Bill’s Curb on Judicial Power in Sentencing*, N.Y. TIMES, Apr. 18, 2003, at A10 (“I’m a Republican, but I don’t think this is good legislation . . . I don’t know of any federal judge who thinks it’s a good idea.” (statement of United States District Judge John F. Kennan)); Thanassis Cambanis, *Sentencing Law Targets US Judges in Massachusetts*, BOSTON GLOBE, May 30, 2003, at A1 (“It turns me into a bureaucrat, and I do not believe for a moment that the public wants that . . .” (statement of Judge Nancy Gertner)).

153. See Martin, *supra* note 132; Edward A. Adams, *Federal Judges Scores Mandatory Sentences for Dealing in Drugs*, N.Y. L.J., Aug. 26, 1993, at 1. On February 2, 2004, Judge Robert Cindrich (W.D. - Pa.) stepped down from the bench to take a job in the private sector. He said that the sentencing policies of Attorney General Ashcroft were “‘morally wrong’ and have disproportionately affected minorities and poor people.” He also added that the current system has transformed federal judges into “‘little more than functionaries’ and that the system perversely punishes low level criminals with no information harshly while “‘big time pushers and violent criminals can get reduced sentences if they give information to prosecutors.” Associated Press, *Federal Judge Rips Sentencing Guidelines as He Steps Down*, Feb. 2, 2004, at WL 2/2/04 APWIREs 07:23:34.

154. Judge Jack Weinstein, (S.D.N.Y.) announced his plans to tape all sentencing hearings. He stated that since the Feeney Amendment essentially allows the Courts of Appeal to re-sentence, those judges should see and hear the defendant for themselves. Judge Weinstein “is among several federal judges who have openly accused Congress of trying to bully them into imposing harsher sentences.” Tom Hays, Associated Press, Jan. 29, 2004, at <http://www.newsday.com/news/local/crime/nyc-sex0130,0,2231592.story?coll=nyc-manheadlines-crime> (last visited Feb. 4, 2004).

155. Steve Karnowski, *Federal Judge Claims Sentencing Pressure*, AP WIRE, Oct. 22, 2003, at WL 10/22/03 APWIREs 08:40:28.

of justice reflected in the old testament.<sup>156</sup>

In January 2004, district Judge Dickran Tevrizian did not just complain about the Feeney Amendment, he ruled that the reporting requirements were unconstitutional. He wrote that the statute's requirement for reports on individual judges who grant downward departures from the Sentencing Guidelines "chills and stifles judicial independence to the extent that it is constitutionally prohibited."<sup>157</sup> The judge's memorandum order notes that while the law does not on its face give the Executive or Legislative branch and power over the Judiciary, the "threat, real or apparent, is blatantly present."<sup>158</sup> He found no legitimate purpose was served by reporting individual judicial performance to Congress and there held that the Feeney Amendment was "a power grab by branch of the government over another branch, which is prohibited by Congress"<sup>159</sup>—in technical terms—that it violated the separation of powers principle. A district court judge in Hawaii, however, came to opposite conclusion in an order issued the very next day,<sup>160</sup> hence this issue will have to be resolved by the Ninth Circuit and perhaps the Supreme Court. Nevertheless, the statements and rulings of Judge Tevrizian and other judges<sup>161</sup> about the

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156. Sent. Tr. at 26, *United States v. Chang Gou You*, Cr. 02-15-H-DWM (D. Mon. Sept. 11, 2003). Other judges have continued to depart but fear reversal under Feeney. See Mark Hamlett, *Judge Takes Aim at Congress in Sentencing U.N. Shooter*, N.Y. L.J., Oct. 22, 2003, available at <http://www.law.com/jsp/article.jsp?id=1066605411059> (last visited Dec. 20, 2003) (discussing Judge Robert Patterson's (S.D.N.Y.) decision to depart downward in case where a man harmlessly shot a gun at the United Nations as a political statement). The judge called the Feeney Amendment Congress's "latest attack on the third branch of government" and claimed that "Congress sought to deter any departures by the implicit threat to trial judges that, if they are considered for appellate positions, they will be subjected to the type of demeaning and unseemly treatment which nominees to the courts of appeals have undergone at the hands of Congress in recent years." *Id.* As this article goes to the press, it does appear that there has been an increase in government appeals and reversals. See also Mike Schneider, *Federal Appeals Panel Applies Anti-Crime Amendment Retroactively*, available at [http://www.miami.com/mld/miamiherald/news/breaking\\_news/7818615.htm](http://www.miami.com/mld/miamiherald/news/breaking_news/7818615.htm) (reporting that the Eleventh Circuit had reversed a sentence of Judge Gregory Presnell (M.D. Fl.), applying the provisions of the Feeney Amendment retroactively). But see Pamela Manson, *Judge Asserts His Right to Stray from Guidelines*, SALT LAKE CITY TRIB., July 28, 2003 (reporting on an opinion and decision to depart by recent Bush appointee Judge Paul Cassell (D. Utah) that the judge released to dispel the "hyperbolic claims" that judges have no authority in any case to reduce sentences").

157. Order Declaring Title IV of the Section 401(h)(1)(2) & (3) Report of the Attorney General of the Protect Act and Feeney Amendment Unconstitutional, *United States v. Robert Mendoza*, Case No. 03-730, at 12 (C.D. Cal. Jan. 12, 2004).

158. *Id.*

159. *Id.* at 13. The court denied challenges to other sections of the Act and found the reporting provision severable, thus the defendant was entitled to no specific relief in his case from this victory and stayed the order pending appeal. *Id.* at 14.

160. See Order Denying Defendant's Motion to Impose Sentence Without Reference to the Sentencing Guidelines, *United States v. Thomas M. Schnepfer*, Cr. N. 02-62 (D. Ha. Jan. 13, 2004) (Judge Alan C. Kay) (rejecting various challenges to Feeney Amendment including separation of powers attack on the reporting provisions).

161. Another Southern District Judge, Sterling Johnson, decided to place a blanket seal on all documents required by the Feeney Amendment that would forbid Congress from reviewing these materials without his approval. Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 7, 2003, at B1, available at <http://www.november.org/dissentingopinions/NYJudges.html> (also quoting anti-Feeney Amend-

reporting requirement and other sections of the Feeney Amendment have rekindled judicial opposition to limits on their sentencing discretion in a way not seen since the Guidelines and mandatory minimums were first passed.

The Feeney Amendment also contained prospective provisions and directives to the Sentencing Commission and the Department of Justice. It forbade the Sentencing Commission from adding any new departure grounds for two years, instructed the Sentencing Commission to amend the guidelines and policy statements to substantially reduce the incidence of downward departures, and lastly, directed the Department of Justice to assist in this endeavor.<sup>162</sup> As discussed in the next section, the implementation of these directives by the Department of Justice and the Sentencing Commission, may in the long run, have the most significant impact on sentencing discretion.

### C. IMPLEMENTATION OF THE FEENEY AMENDMENT

#### 1. *Implementation by the Department of Justice*

The Feeney Amendment's directives to the Department of Justice resulted in several policy changes during the summer and fall of 2003 that "may significantly impact departure practices," according to a recent Sentencing Commission report.<sup>163</sup> Most pertinently, Feeney directed that the Department of Justice adopt policies and procedures to: a) ensure that the Department of Justice Attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law; and b) delineate objective criteria, specified by the Attorney General, as to which cases may warrant consideration of an appeal, either because of the nature or magnitude of the sentencing error, its prevalence in the district, or its prevalence with respect to a particular judge.<sup>164</sup>

The Department of Justice responded quickly to the Feeney directives, first with a July 28, 2003 memorandum to all federal prosecutors, which implemented a new departure reporting and appeal process and amended the United States Attorneys Manual (the "Ashcroft Appeals Memo").<sup>165</sup>

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ment remarks by Judges Thomas C. Platt, Robert P. Patterson, Jr., and Guido Calabresi, and Roger J. Miner).

162. See PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650 (2003); see *infra* note 164 and accompanying text.

163. Downward Departure Report, *supra* note 97, at 10.

164. PROTECT Act, § 401(1). Additional directives required the DOJ to ensure that the Department of Justice attorneys in such cases make a sufficient record so as to permit the possibility of an appeal; ensure that the Department of Justice attorneys promptly notify the designated Department of Justice component in Washington concerning such adverse sentencing decisions; and ensure vigorous pursuit of appropriate and meritorious appeals of such adverse decisions. *Id.*

165. The DOJ acted quickly in order to avoid more onerous reporting provision in the bill that would take effect if the Department did not institute policies within ninety days. That provision would have required the Attorney General, within fifteen days after a district court's grant of a nonsubstantial assistance departure in any case, to submit a report to the House and Senate Judiciary Committees identifying the case, the facts involved, the identity of the district court judge, the district court's stated reasons, whether the district

The Ashcroft Appeals Memo sets forth a number of adverse decisions that prosecutors must report to Main Justice within fourteen days of the judgment, including, *inter alia*: departures that reduce the sentencing zone to one that requires no term of imprisonment; departures of two or more criminal history categories based upon an over-representation of the seriousness of the defendant's record; departures of three or more offense levels based upon a "discouraged" factor, an "unmentioned" factor, or a combination of factors where no single factor justifies departure, or an impermissible factor<sup>166</sup> for an offense which, prior to the departure, resulted in an offense level of level 16; and departures in cases where that basis for "departure has become prevalent in the district or with a particular judge."<sup>167</sup> If these conditions are met, the local prosecutor must file a notice of appeal to preserve the government's right to appeal, and in all cases where an appeal is authorized, the Ashcroft Appeals Memo requires prosecutors to "vigorously and professionally pursue the appeal."<sup>168</sup>

Parsing this language, the Ashcroft Appeals Memo actually does not require prosecutors to report and appeal every downward departure. This choice could be interpreted two ways. One possibility is that the Department of Justice did not fully agree with the anti-downward departure spirit of the Feeney Amendment. The other choice is that in an effort to preserve resources, the Department of Justice decided to pick its downward departure appeal battles carefully. Two pieces of evidence suggest the latter is more likely. First, in the letter that accompanied the Ashcroft Appeals Memo, Attorney General Ashcroft added that, "Department attorneys must ensure that the Sentencing Guidelines are applied as Congress and the Sentencing Commission intended them to be applied, regardless of whether an individual prosecutor agrees with that policy decision."<sup>169</sup> With these words, Ashcroft acknowledged that local federal prosecutors have contributed to the increase in departure rates by

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court provided the government with advance notice of its intent to depart, the position of the parties with respect to the downward departure, and whether the government filed or intended to file a motion for reconsideration. PROTECT Act § 401(i)(2). The Attorney General then had another five days to file a report on the Solicitor General's decision regarding authorization of an appeal.

166. As defined by 18 U.S.C. § 3742(j)(2).

167. Memorandum from John Ashcroft, Attorney General, United States Department of Justice, to All Federal Prosecutors app. at 1-2 (July 28, 2003) [hereinafter Ashcroft Appeals Memo] (regarding Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals). Other categories include departures in sex offense cases and departures on remand that do not comply with the Feeney Amendment directive on that issue. *Id.*

168. *Id.* at 4. The intermediate step required by the memorandum is that the Solicitor General must review the case to determine whether an appeal would be appropriate and meritorious if either the Department of Justice or local United States Attorney recommends an appeal. *Id.*

169. *Id.* at 2. Similarly, in a detailed letter, the Department explained that these procedures were necessary to prevent the more onerous provisions in the bill from taking effect. This letter also denied that the new policy represents "a novel centralization of appellate decision-making in Washington" or that the reporting requirements represent an effort to establish "a blacklist of judges." Letter from Robert McCallum, Jr., Associate Attorney

acquiescing to judicial departures. But, he declares, Department of Justice policy is now that departures are no longer acceptable simply because they seem fair to the prosecutor on the case. The Department's desire to limit the discretion of the line federal prosecutors around the country closest to the case became even clearer in Ashcroft's second post-Feeney policy memorandum.

This second memorandum, released on September 22, 2003 (the "Charging Memo"), addresses both departures and charging policy.<sup>170</sup> The charging policy changes in particular are likely to exert substantial upward pressure on federal sentences if fully implemented across the country. With regard to non-substantial assistance departures, the Charging Memo instructs that "the circumstances in which federal prosecutors will request or accede to downward departures in the future will be 'properly circumscribed' and 'rare' and directs prosecutors to 'affirmatively oppose downward adjustments that are not supported by the facts and the law,' and not 'stand silent' with respect to such departures."<sup>171</sup> The Charging Memo also reiterates the existing policy that prosecutors must identify to the court instances where they have agreed to depart so there can be both a record and judicial review.<sup>172</sup>

In the charging policy section of the Charging Memo, Attorney General Ashcroft wrote

The fairness Congress sought to achieve by the Sentencing Reform Act and the PROTECT Act can be attained only if there are fair and reasonably consistent policies with respect to the Department's decisions concerning what charges to bring and how cases should be disposed. Just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case.<sup>173</sup>

However, the means that Ashcroft chose to achieve uniformity is telling. The new policy requires prosecutors to charge and pursue "the most serious, readily provable offense or offenses that are supported by the facts."<sup>174</sup> Moreover, the "most serious offense or offenses are those that generate the most substantial sentence under the sentencing guidelines or mandatory minimums."<sup>175</sup> The only time a lesser charge is permissible is

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General, United States Department of Justice, to Leonidas Ralph Meecham, Director, Administrative Office of the United States Courts 3 (Aug. 7, 2003) (copy on file with author).

170. Memorandum from John Ashcroft, Attorney General, United States Department of Justice, to All Federal Prosecutors (Sept. 22, 2003) [hereinafter Ashcroft Charging Memo] (regarding Department Policy Concerning Criminal Offenses, Disposition of Charges, and Sentencing).

171. Downward Departure Report, *supra* note 97, at 12-13 (quoting Ashcroft Charging Memo, *supra* note 170, at 7).

172. Ashcroft Charging Memo, *supra* note 170, at 7.

173. *Id.* at 2.

174. *Id.* at 2.

175. Downward Departure Report, *supra* note 97, at 13-14 (summarizing Ashcroft Charging Memo, *supra* note 170).

when a higher charge is not “readily provable” because the prosecutor has a good faith doubt, for legal or evidentiary reasons, as to the government’s ability to prove a charge at trial.<sup>176</sup> In other words, the Charging Memo seeks to end the long standing practice of what has been called “charge” or “fact bargaining,” wherein the prosecutor and defense agree to a factual proffer that minimizes the criminal conduct so that a lesser Guideline or mandatory minimum statute will apply. This section of the Charging Memo signals a return to the Thornburgh Memorandum policy from the Bush I Administration, which had been substantially loosened by the Reno Bluesheet.<sup>177</sup>

However, the Thornburgh Memo policies were honored more often in the breach in many districts. Because local U.S. Attorneys offices historically had substantial autonomy in charging and plea decisions, many were resistant to taking directions from Washington. Currently, the Feeney reporting requirements and better data collection suggest that the Department of Justice may actually have the tools to identify prosecutors and districts that are not complying with this Main Justice directive. What steps the Department of Justice takes to bring those offices in line will determine how effective this reborn policy will be. Clearly, though, both of Ashcroft’s post-Feeney memos demonstrate that President Bush’s Justice Department is committed to work hand-in-glove with Congress’s efforts both to restrict judicial discretion and to increase sentences, even to the extent of trying to exert unprecedented control over the decisions of local United States Attorney’s Offices. As one critic of this aspect of the Justice Department’s new policy put it, “John Ashcroft seems to think Washington, D.C. can better determine a fair sentence than a judge who heard the case or the prosecutor who tried it.”<sup>178</sup>

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176. Ashcroft Charging Memo, *supra* note 170, at 5.

177. See *supra* note 93.

178. Cohen & Fields, *supra*, note 121 (quoting Rep. John Conyers (D. - Michigan)). Although beyond the scope of this article, critics argue that PROTECT Act and Justice Department’s endorsement of the so-called “fast track” prosecution programs largely undermines their purported commitment to reducing disparity. Frank O. Bowman, III, Only Suckers Pay the Sticker Price: The Effect of “Fast Track” Programs on the Future of the Sentencing Guidelines as a Principled Sentencing System, Statement Before the United States Sentencing Commission 1 (Sept. 23, 2003) (copy on file with author); see PROTECT Act § 401(m)(2)(B). When authorized by the Justice Department and local U.S. Attorney, the fast track program allows for reduced sentences for defendants who enter an early plea in judicial districts facing an exceptional number of a specific class of cases. (For additional criteria and procedures, see Ashcroft Charging Memo, *supra* note 170, at 1-2.) Prior to this congressional authorization, a precursor fast-track program had been used in the southwest border states to deal with a deluge of immigration and drug smuggling cases. In fact, the Commission’s Downward Departure Report suggests that more than half the increase in the departure rate since 1980 can be attributed to these government sanctioned departures. Downward Departure Report, *supra* note 97, at iv-v. Now given statutory permanence, an alien smuggler caught in Tijuana will now be entitled to receive a lower sentence than the exact same offender arrested in San Francisco. As noted by Frank Bowman, the fast track program abandons the Guidelines *raison d’être*, to ensure that similarly situated offenders receive the same sentence regardless of where in the federal system they are convicted. See Bowman, *supra*, at 4. As he put it in his testimony before the Commission, “The fast-track provision of the PROTECT Act and the Department’s plea bargaining policies

## 2. Implementation by the Sentencing Commission

The Feeny Amendment also required the Sentencing Commission to take a number of steps to substantially reduce the incidence of downward departures.<sup>179</sup> The Sentencing Commission's response was its October 2003 emergency amendment and report.<sup>180</sup> In this amendment, the Sentencing Commission identified several new grounds that cannot be used as a basis for departure, including: the defendant's acceptance of responsibility for the offense; the defendant's aggravating or mitigating role in the offense; the defendant's decision, by itself, to plead guilty to the offense or to enter into a plea agreement with respect to the offense; the defendant's fulfillment of restitution obligations only to the extent required by law, including the guidelines; and the defendant's addiction to gambling.<sup>181</sup> The Sentencing Commission also imposed serious hurdles for aberrant behavior departures<sup>182</sup> and departures based on the over-representation of the defendant's criminal history.<sup>183</sup> In addition, the Sentencing Commission added new restrictions for departures based upon multiple circumstances (previously referred to as a combination of

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are what happens when ideological purity and political posturing collide with facts on the ground." *Id.* at 4. He added:

And all this from an Administration whose public position is that public safety demands there can be no retreat from the current lengthy sentences for federal crimes, particularly drug crimes. . . . And anyone, particularly any judge, who has the temerity to exercise discretion to reduce a sentence for a federal felon is a lawbreaker himself who must be chastised, or according to some in Congress, impeached.

*Id.* at 3.

179. The Commission report notes that it conducted an empirical study, solicited comments, reviewed the literature, and held hearings before taking action. Downward Departure Report, *supra* note 97, at 18. The GOA reached a similar conclusion in its October 2003 report. U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS: DEPARTURES FROM SENTENCING AND MANDATORY MINIMUM SENTENCES, FISCAL YEARS 1999-2001 (Oct. 2003).

180. Downward Departure Report, *supra* note 97, at 18. The Commission Report also contains a section describing the Commission's efforts and actions to address the departure issue before the Feeny Amendment. *Id.* at 16-17. These included amendments to prohibit departures at re-sentencing for post-sentencing rehabilitation and additional restrictions on departures for aberrant behavior. *Id.* The Commission also implemented the changes in the sex offense Guidelines as required by the PROTECT Act. *Id.* at 18.

181. *Id.* at 74-75.

182. *Id.* at 76-77. Aberrant behavior departures are no longer permitted if the defendant has any significant prior criminal behavior, even if the prior conduct did not result in a federal or state felony conviction and when the defendant is subject to a mandatory term of imprisonment of five years or more for a drug-trafficking offense, regardless of whether the defendant meets the criteria for the safety-valve. *Id.* at 77.

A departure based on aberrant behavior may be warranted only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represented a marked deviation by the defendant from an otherwise law-abiding life.

*Id.* For additional discussion of the new limits on this departure grounds, see *id.* at 76-78.

183. The Commission substantially restructured section 4A.1.3. See *id.* at 77-78. Among other changes, departures based upon over-representation of criminal history are no longer permitted if the defendant is an armed career criminal within the meaning of section 4B1.4 or if the defendant is a repeat or dangerous sex offender against minors within the meaning of section 4B1.5. For additional commentary, see *id.* at 78-79.

factors),<sup>184</sup> the defendant's family ties,<sup>185</sup> victim's conduct,<sup>186</sup> coercion and duress, and diminished capacity.<sup>187</sup> To further implement Feeney's message, the Sentencing Commission restructured the departure guideline and added policy language<sup>188</sup> that requires greater specificity and additional documentation from judges when they depart.<sup>189</sup> Finally, the accompanying Sentencing Commission report noted that its work on departures would be ongoing and cited additional future refinements to criminal history and the elimination of the aberrant behavior departure as possible future steps.<sup>190</sup>

Voluminous in nature, the Sentencing Commission staff appears to have attempted to faithfully execute the dictates of the Feeney Amendment, while leaving the essential structure of the departure guidelines and most existing grounds for departure intact.<sup>191</sup> The key problem for judges and defense attorneys seeking downward departures is that the Sentencing Commission added a host of new requirements and conditions to several frequently used grounds, such as overrepresentation of criminal history and aberrant behavior. These changes will likely disqualify some cases from these categories, and in conjunction with the new standard of review, provide more opportunities for government appeals and appellate reversals. Together, the changes wrought by the Feeney Amendment, the Sentencing Commission's new guidelines, and the Jus-

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184. Departures based on multiple circumstances (where no one factor merited a departure), only when all the factors under consideration are already identified in the Guidelines as permissible grounds for departure. *Id.* at 74. In addition, each offender characteristic or other circumstance "must be present individually to a substantial degree and must make the case exceptional when considered together." *Id.* This type of departure, the Commission added, should be "extremely rare." *Id.* at 75.

185. The Commission limited factors including, *inter alia*, whether the offense presented any danger to family members to distinguish these cases from those that involved "hardship or suffering that is ordinarily incident to incarceration." *Id.* at 75-76.

186. "In addition to five previously existing factors, the court now should consider the proportionality and reasonableness of the defendant's response to the victim's provocation." *Id.* at 76.

187. The new guideline requires that the diminished capacity "now must have substantially contributed to the commission of the offense" and that the departure should "reflect the extent to which the reduced mental capacity contributed to the commission of the offense." *Id.* at 76.

188. The Commission restated that departures in general should be rare. *Id.* at 74. Departures are only permitted if, in addition to the court finding "that there exists an aggravating or mitigating factor of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission," the court also finds that the departure will advance the objectives set forth in the Sentencing Reform Act. *Id.*

189. *Id.* at 73.

190. *Id.* at 21. The Commission identified its current priority to be immigration offenses because they accounted for one third of all departures in 2001. *Id.*

191. "To its credit, the Commission has reaffirmed the basic principle that Congress established in the legislation that created the Sentencing Guidelines, that [d]epartures . . . perform an integral function in the sentencing guideline system." Analysis by NACDL's Federal Sentencing Guidelines Committee, at [www.nacdl.org/downwarddepartures](http://www.nacdl.org/downwarddepartures) (last visited Jan. 21, 2004). *But see* Stuart Taylor, Jr, *Ashcroft and Congress are Pandering to Punitive Instincts*, ATLANTIC MONTHLY, at <http://www.theatlantic.com/politics/nj/taylor2004-01-28.htm> (noting that an Ashcroft subordinate complained that the Sentencing Commission "had not gone far enough and threatened to go back to Congress").



tice Department's new charging and appeals policies, move the federal system closer to one where once charged with an offense, a defendant is likely to receive roughly the same Guideline sentence as every other defendant charged with a similar crime. Moreover, this similarity will exist regardless of whether those closest to the case agree that this person does really not need the substantial incarceration called for; where his or her role in the offense was minimal; or where addiction, desperation, or personal relationships motivated their conduct more than greed or anti-social animus. It is these kinds of cases that have most distressed the federal bench and it is this category that is most likely to increase in the wake of the Feeney Amendment.<sup>192</sup> But beyond Feeney, the question remains as to why Congress aggressively attacked a federal bench that by now largely mirrors the conservative background and temperament of Congress itself.

#### IV. THE DYNAMICS OF FEDERAL SENTENCING POLITICS

*The real reasons for the Feeney Amendment, I suspect, were political opportunism and the unreasonably punitive philosophies of Ashcroft and his allies.*<sup>193</sup>

##### A. THE POLITICS OF CRIME LEGISLATION

This section attempts to identify and analyze the political forces at work on this Article's two questions: First, why do federal criminal sentences continue to defy the laws of gravity despite ample evidence that they are not fair or cost effective? Second, why has the judicial branch lost discretion in virtually every significant piece of sentencing reform legislation since 1984? The answers lie in a multifaceted mix of the politics of criminal justice combined with certain institutional incentives of the legislative and executive branches versus disabilities of the judicial branch.<sup>194</sup>

Arguably, the simplest explanation could be that public opinion has simply shifted to the right on drugs and crime. Thus, penalties are increasing because Congress and the Justice Department are reacting to what the country wants. When life-tenured judges appointed in a different era attempt to use their discretion to undermine this policy, the political branches respond by including restraints on judges as part of their crime control platform. However, this view is probably too simplistic and contrary to public opinion polls and other evidence.<sup>195</sup> Rather, if there is

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192. See *supra* notes 155-56.

193. Taylor, *supra* note 191.

194. This is a key dynamic because there are only relatively weak groups in society that are arrayed against harsh criminal justice policies (such as criminal defense attorneys and prisoner's rights groups).

195. "Public opinion polls suggest that most Americans are fully capable of understanding that prevention is as important as punishment, and that not all drug users deserve to spend 10 years in prison, but politicians refuse to trust them." Susan Estrich, *Willie Horton*, R.I.P., DENV. POST, Aug. 26, 1999, at B11, available at 1999 WL 7892545. In addition,

a simple answer, at least to the first question about drug penalties, it is that as crime has become more and more politicized, elected officials on either side of the aisle believe it is political suicide to vote to lower sentences. Raising penalties, on the other hand, is an easy way to score toughness points with the electorate.

In contrast to these reductionist approaches, theorists such as Jonathan Simon believe that the underlying issue is much more complex and more important. He argues that crime has evolved into a major platform for reconstructing liberal governance. While not inevitable, this association has roots in American culture, the vicissitudes of crime rates, and memories in the generational pattern of American society.<sup>196</sup>

Bringing together a diverse body of literature within political science, criminology, and sociology, Simon argues that the nation has shifted to “governing through crime” across a broad range of issues in a misguided attempt to shore up perceptions of a disintegration of community.<sup>197</sup> Others describe this underlying societal shift as a movement towards a “culture of fear,” driven by both real crime in the streets and mass hysteria fed by popular culture.<sup>198</sup>

While these broad theories generate an important perspective, the new work of political scientist Naomi Murakawa best explains how specific features of criminal justice politics account for why sentencing laws are more resistant to the natural pendulum of other policy debates.<sup>199</sup> She contends that the root of sentencing policy asymmetry lies in three specific ways criminal justice issues play out in the public arena.<sup>200</sup> First, she notes that “single criminal incidents” dominate the public debate over

the vast majority of federal judges are either Republican appointees or fairly middle of the road Clinton nominees. *Id.*

196. Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 *LAW & SOC. INQUIRY* 1111, 1113 (2000).

197. *See generally id.* Simon believes governing through crime has also led to growth in the managerial function of government and a likely exacerbation of racism, inequality, and “the least defensible features of the old regime (patronage driven by large public unions and election contributions.”). *Id.* at 1143-44.

198. BARRY GLASSNER, *THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS* (1990); Lawrence M. Friedman & Issachar Rosen-Zvi, *Illegal Fictions: Mystery Novels and the Popular Image of Crime*, 48 *UCLA L. REV.* 1411, 1426 (2001); Tonya L. Brito, *Paranoid Parents, Phantom Menaces, and the Culture of Fear*, 2000 *WIS. L. REV.* 519, 519-20.

199. Murakawa found that for non-criminal issues, there is often an increase in substantive legislative activity in months before an election. Naomi Murakawa, *Electing to Punish: Congress, Race, and the Rise of the American Criminal Justice State* ch. 3, at 32 (2003) (unpublished dissertation, Yale University (copy on file with author)). The post-election period, however, often sees a legislative retreat, outright repeal, or if not, a counter cycle in the next election. *Id.* Crime legislation on the other hand, never seems to have a de-escalation or repeal phase, which functions “as a kind of criminal justice electoral staircase.” *Id.* ch. 3, at 33.

200. *Id.* ch. 3, at 24 (labeling the perceptible effects of crime policy as “asymmetrical traceability” for crime policy).

criminal justice policy.<sup>201</sup> Len Bias,<sup>202</sup> Willie Horton,<sup>203</sup> and Amber Hagerman<sup>204</sup> are compelling and powerful stories. Mass media fuels this imbalance because television and daily newspapers are better suited to reporting about individual crimes than providing in-depth analysis on the root causes of crime.<sup>205</sup> Further, politicians find it much easier to link specific crime stories to specific legislative solutions:<sup>206</sup> if Willie Horton had not been given a furlough, that woman would not have been raped;<sup>207</sup> if there had been a sex offender registry, Amber's family would have known that a child molester lived in the neighborhood.<sup>208</sup> On the other hand, it is much more difficult to explain that if there was more drug treatment, more daycare, or better inner-city schools, fewer criminals would be created.<sup>209</sup> And when offenders are not sent to prison (or are released after serving time), but do not commit a new crime, there is no immediate story to tell.<sup>210</sup> Rather, their lives are just another example of the day-to-day struggles of working-class life.

Second, the harm that flows from lenient crime policy usually elicits more public anger than stories about the harm caused by overly punitive crime policy.<sup>211</sup> While this equation is driven in part by a lack of sympathy for criminals in general, it is also quite clear that a third element is in play—that punitive sentencing policies overwhelmingly target disfavored

201. *Id.* ch. 3, at 26. A cause of the domination of “singular criminal incidents” in public debate may be the increase in the prevalence of the news magazine television programs, such as *48 Hours*, *Dateline*, and *60 Minutes*. Kenneth D. Tunnell, *Reflections on Crime, Criminals, and Control in Newsmagazine Television Programs*, in *POPULAR CULTURE, CRIME, & JUSTICE*, 111, 112-13 (Frankie Bailey & Donna Hale, eds. 1998). Featured on these shows are “high-profile crimes and criminals . . . [of a] sensational variety.” *Id.* at 113.

202. *See supra* notes 46-51, and accompanying text.

203. *See* Murakawa, *supra* note 199, ch. 3, at 12.

204. Amber Hagerman was 9-years-old when she was abducted and murdered near her home in Arlington, Texas in 1996. Patty Henetz, *After Smart Case, A New Response to Abductions*, *PHILA. INQUIRER*, June 5, 2003, at A2, available at 2003 WL 57564336. The Amber Alert bill was named for her. *Id.*

205. *See* Murakawa, *supra* note 199, ch. 3, at 13.

206. *Id.*

207. *Id.* ch. 3, at 12. “The making of Willie Horton as a symbol that outlived the campaign and its promises is one of the more telling tales about the way our presidential politics really works. It was a visual symbol . . . [that] was disseminated nationally” depicting “every suburban mother’s greatest fear.” Martin Schram, *The Making of Willie Horton*, *NEW REPUBLIC*, May 28, 1990, at 17.

208. *See* Murakawa, *supra* note 199, ch. 3, at 12 (using an earlier example of Meagan Kanka).

209. *Id.* ch. 3, at 26 (claiming “asymmetrical traceability tilts the decision calculus towards less procedural protection and more capital crimes, less drug treatment and more drug mandatory minimums”).

210. *Id.* ch. 3, at 24 (contending “[f]alling crime can be told only as story of rates; it is impossible to tell a single incident story of a crime that did not occur”).

211. *Id.* ch. 3, at 25. Murakawa recognizes that there has been some favorable media coverage for sympathetic victims of the drug war (such as women who became involved because of boyfriends) and that wrongful convictions have recently emerged as a counter story that has generated substantial public sympathy and some efforts at reform. *Id.*; *see also* Andrew E. Taslitz, *Wrongful Rights*, 18 *CRIM. JUST.* 4 (2003).

minorities.<sup>212</sup> This should be no surprise. It has been said many times that criminal justice and race are deeply intertwined.<sup>213</sup> As noted by Dorothy Roberts, the social meaning of crime is closely tied in America to stereotypes of racial minorities.<sup>214</sup> The crack penalties that have disproportionately incarcerated African-Americans involved in the cocaine trade are just the most recent example of this phenomenon.<sup>215</sup>

This combination of powerful crime stories and racially tinged debates are difficult obstacles to overcome. Moreover, there are no powerful allies for less punitive policies. While criminal defense organizations, prisoner rights, and social justice groups have done some local, grassroots organizing on these issues,<sup>216</sup> little headway has been made in garnering sufficient mainstream and national support to reverse the dominant trends.

## B. CONGRESS'S MOTIVES TO RESTRICT JUDICIAL DISCRETION

While the preceding section offers some explanations for the upward, political pressure on criminal sentences, it does not answer why judicial discretion has suffered as well. For that question, institutional incentives must be examined.

One perspective is to see the attack on judicial discretion as a by-product of the disjunction between the rhetoric and the reality of the war on drugs. Many, if not most participants in the criminal justice system now recognize that reliance on harsh criminal penalties will not solve the

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212. Over 80% of those convicted for crack cocaine trafficking in the 1990s were black, according to the U.S. Sentencing Commission. Spade, *supra* note 50, at 1268.

213. See, e.g., DJ Siltan, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53 (2002) (contending “[i]nstead of responding to the rising prison population by questioning the severity of criminal penalties, the political atmosphere has been dominated by an enforcement-hungry policy discourse that ignores the roots of the problem”).

214. Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999); see also Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Disorder in the Inner City*, 32 L. & SOC'Y REV. 805 (1998).

215. While there was some early evidence that crack was more dangerous than powder cocaine, commentators have made powerful arguments that resistance to lowering the 100:1 ratio is still very much a story about the stereotyping of dangerous ghetto blacks. See Spade, *supra* note 50.

216. Examples include FAMM, which played a significant role in the legislation repealing the mandatory minimums in Michigan and the NAACP Defense Fund which was instrumental in the release of thirty eight wrongfully convicted prisoners in Tulia, Texas. William J. Milliken, *Michigan Must Reform Harsh Drug Sentences*, DETROIT NEWS, Sept. 20, 2002, at 11, available at 2002 WL 25291631. See also Deborah Hastings, *How a Lying Cop Convicted 38 of Drug Crimes; Undercover Agent Had History of Deceit, But His Word Was All Court Needed*, CHIC. SUN-TIMES, June 22, 2003, at 31, available at 2003 WL 9558085. In addition, Jeremy Travis at the Urban Institute has done much to raise public awareness on programs designed to promote successful inmate “re-entry” into society. Robert Moran, *New Programs Aim to Give Ex-Inmates a Better Chance of Staying Out of Prison: Facing Life on the Outside*, PHILA. INQUIRER, June 16, 2003, at A1, available at 2003 WL 23096407.

nation's drug problem.<sup>217</sup> However, having whipped the voting public into a war mentality over the issue, national politicians are desperate for evidence that their primary solutions—more federal enforcement and harsher sentences—will eventually work.<sup>218</sup> Thus, when the judiciary, the Sentencing Commission, or others suggests lowering drug sentences,<sup>219</sup> Congress engages in defensive finger-pointing.<sup>220</sup> The war hasn't been won because there are still those who are not tough enough. The war on drugs metaphor also provides cover for these inter-branch attacks. As we have seen with the post-September 11 restrictions on civil liberties, governmental excesses are tolerated to a greater extent during "wartime."<sup>221</sup> Thus, following the adage that if you are not with us, you are against us, judges have been adjudged the enemy in the war on drugs and therefore can justifiably be attacked.

One interesting take on the linkage between failure of the war on drugs and attacks on the judiciary is Collin O'Connor Udell's use of Jungian

217. See Linda Cargill, *Audience Unloads on Youth Crime Bill*, PORTLAND SKANNER, Mar. 1, 1995, at 1, available at 1995 WL 15470756 (citing survey in which a majority of prison wardens favored prevention programs over an increase in mandatory minimums for drug crimes). In 1999, the executive director of the Law Enforcement Alliance of America, Jim Fortis, concurred when he claimed "I believe today that we have too many people incarcerated under these minimum-maximum sentences or maximum-minimum sentencing objectives, and that we should give a little bit more discretion back to the judges." Audio Tape: Talk to the Nation: What Happened to Rehabilitating America's Prisoners (NPR radio broadcast, Sept. 21, 1999), transcript available at 1999 WL 32908790; see also Alexandara Marks, *In Drug War, Treatment is Back: California Credits Treatment with its First Drop in Prison Inmates in Two Decades*, CHRISTIAN SCI. MON., July 14, 2000, at 1, available at 2000 WL 4429491 (noting that the policy shift from incarceration to treatment in California was driven by "a wide range of social, religious and judicial leaders"). Recent public opinion polls report a majority of Americans believe the war on drugs is a failure and that drug use should be treated as a disease. Drug War Report, The Pew Research Center for People and the Press, Washington, D.C., Mar. 21, 2001, at <http://peoplepress.org/reports/display.php3?reportid=16> (last visited May 3, 2003). *Traffic*, the award winning film, is the most prominent example of this contention within popular culture. *TRAFFIC* (USA Films 2000). The film is filled with "acute observations about America's hypocritical, unwinnable and generally corrupt 'drug war.'" Bob Ross, "*Traffic*" *Tops 10 Best of '01*, TAMPA TRIB., Dec., 29, 2000, at 4, available at 2000 WL 24608328; see also David Simpson, *Departing DA Pulls No Punches*, ATLANTA J.-CONST., at <http://www.ajc.com/metro/content/metro/dekalb/0104/25morgan.html> (quoting a retiring county prosecutor with twenty-one years experience in Georgia as saying "I think our whole war on drugs needs to be looked at . . . Juries are telling us that prosecution is not the answer.").

218. See Robert Charles, *New Drug Czar's Mission*, WASH. TIMES, May 14, 2001, at A15, available at 2001 WL 4153160.

219. Some prominent politicians, such as Gov. Gary Johnson of New Mexico, former secretary of state George Schultz, and Baltimore mayor Kurt Schmoke, have advocated for drug legalization. John J. Miller, *The New Mexico Maverick*, NAT. REV., Nov. 8, 1999, at 28, available at 1999 WL 11342427. Federal drug czar Barry McCaffery claimed that the republican governor of New Mexico was "an embarrassment." *Id.* at 28. Mayor Schmoke suffered similar criticism in the late 1980s. See, e.g., Catherine Fry, *Editorial, Drug Legalization Is a Scary Idea*, WASH. POST, May 19, 1988, at A24, available at 1988 WL 2052085.

220. See Catherine G. Patsos, Note, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y.L. SCH. L. REV. 205, 254 (1998) (quoting then Senator Bob Dole as accusing liberal judges appointed by President Clinton of being "the root causes of the crime explosion").

221. See Peter Margulies, *Uncertain Arrivals: Immigration, Terror and Democracy After September 11*, 2002 UTAH L. REV. 481.

psychology.<sup>222</sup> Central to Jungian psychology is the notion of archetypes—patterns deep in our collective unconscious through which we channel and categorize our experiences.<sup>223</sup> The shadow archetype contains “those aspects of ourselves that we have repressed from consciousness because we have deemed them unacceptable.”<sup>224</sup> When a person “campaigns vigorously, even fanatically, against what he regards as sin and immorality [he is said to be] fighting his own shadow.”<sup>225</sup> According to Jung, projecting the shadow outward in this way is ultimately self-destructive.<sup>226</sup> It generates an attitude of moral superiority, rigidity, and a loss of creativity.<sup>227</sup>

Jung’s theory of projection is relevant because projection of the shadow is also a social phenomenon.<sup>228</sup> Thus, Udell argues that modern legislators have been “influenced by the pull of archetypes . . . because they function as the voice of the collective.”<sup>229</sup> While the criminal law generally “provides fertile soil for the projection of the shadow archetype,”<sup>230</sup> Udell believes that the modern war on crime has cast those branded as criminals even more deeply in the psycho-social role of the “shadow” archetype—with profound policy implications.<sup>231</sup> Instead of simply deeming certain behavior unacceptable and worthy of proportional punishment, the social projection of the criminal as “the monster” generates continuous energy for harsher and harsher sentences. The related dehumanization process also provides the rationale for one-size-fits-all mandatory minimums.<sup>232</sup>

Udell also argues that this shadow animosity has increasingly spilled over towards federal judges who are sometimes required by their “representation-reinforcement role” to reject the harshest of these measures.<sup>233</sup> Rather than recognize the legitimate role of judges as a proper counter-majoritarian force, Congress has extended the projection and targeted

222. Collin O’Connor Udell, *Parading the Saurian Tail: Projection, Jung, and the Law*, 42 ARIZ. L. REV. 731 (2000).

223. *Id.* at 738.

224. *Id.* at 744-45.

225. *Id.*

226. *See id.* at 745.

227. *Id.* at 744.

228. *Id.* at 745.

229. *Id.* at 757. Udell analyzes jurisdiction-stripping legislation in post-conviction and alien removal proceedings as well as the Sentencing Guidelines. *Id.* at 757-58, 768-74.

230. *See id.* at 750-51. “A central quest of the law is to capture, contain, and segregate the unacceptable, to draw definitive boundaries that separate us from the ‘other.’ The status of ‘criminal,’ is therefore “reserved for one who has crossed the boundary, is an external manifestation or reflection of standards we carry within our own psyches.” *Id.*

231. *Id.* at 751.

232. *See id.* Udell concludes that modern culture is “driven by the urge to punish, segregate and rigidly control those to be sentenced, who represent to us those uncontrollable impulses we all carry within us but deny.” *Id.* at 773. Udell does not attempt to explain why the collective legislative and societal fear of crime has increased. Other theorists have suggested a variety of factors that have led to a greater culture of fear. *See* Friedman & Rosen-Zvi, *supra* note 198.

233. Udell, *supra* note 222, at 759.

judges for sanctions as well.<sup>234</sup> As evidence, Udell cites statistics that reflect that as the punishment wave gathered momentum from 1965 to 1988, "the percentage of persons who believed that the courts were 'too lenient' rose from 48% to 82%."<sup>235</sup> Thus, he argues that the Sentencing Guidelines were but one of several jurisdiction-stripping and discretion-reducing prophylactic measures by Congress in the service of shadow repression.<sup>236</sup> Ultimately, Udell recognizes, that while the shadow archetype provides a provocative model for understanding the relationship between criminal sanctions and judicial discretion, it is difficult to talk to lawyers and legislators about Jungian theory and less likely that such talk would lead to reform.<sup>237</sup> Thus, I turn to more traditional modes of analysis to provide tools to those that seek to both understand and change the dynamic of federal sentencing policy.

The institutional dynamics of inter-branch relations, for example, provide a more accessible theoretical framework. Legislators almost never deal with live defendants. At most, they select anecdotal stories to demonstrate the need for new or higher penalties.<sup>238</sup> Legislators also generally have the worst possible offender in mind when writing criminal code and punishment provisions.<sup>239</sup> However, the actual persons charged sometimes bear little resemblance to this archetypal worst actor in the legislator's mind. This seems particularly true in narcotics cases. While in 1986, Congress talked about kingpins and mid-level dealers,<sup>240</sup> the majority of federal inmates serving drug sentences are low-level offenders such as couriers and street-level dealers.<sup>241</sup> In contrast, judges must sentence the individuals who appear before them and they are institutionally required to listen to their representatives and formally respond to their arguments. These experiences may sensitize judges to factors that legislators have not considered.<sup>242</sup> Thus, to Congress, downward departing judges may appear to be soft on crime rather than seeking a just response to the disjunction between those targeted by the laws and those charged.

Of course, Congress could hold the executive branch responsible for charging the "wrong" offenders, rather than the judiciary for not handing

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234. *Id.* at 770-71.

235. *Id.* at 770.

236. *Id.* at 771-74. Udell concludes that these efforts have weakened the pivotal role judges were meant to play as the "Constitution's counterweight to the imperious threat of the collective will." *Id.* at 774.

237. *See id.* at 775-76.

238. *See supra* note 49-53 (identifying Len Bias' death as the major impetus to the Anti-Drug Abuse Act of 1986).

239. For example, Representative Feeney discussed his amendment in terms of child-sex offenders, while the law itself effected a much wider range of criminal activities. *See* Allenbaugh, *supra* note 121, at 9.

240. *See* Sterling, *supra* note 52, at 411 (arguing that contrary to the subcommittee's original intent, mandatory minimums for small quantities of drugs have encouraged law enforcement agencies to prosecute relatively easy targets—low-level dealers—the most easily replaced component of the drug hierarchy).

241. *See supra* note 62.

242. *See* STITH & CABRANES, *supra* note 27, at 81-82.

down harsh sentences. Federal prosecutors have deflected the blame by claiming that harsh sentencing laws must apply to all drug defendants to coerce cooperation, to send a message of deterrence to the criminal class, and as a bulwark against “liberal judges.”<sup>243</sup> Congress never seems to challenge these explanations for the Justice Department’s prosecutorial priorities, not because they are convincing, but because they have no political reason to do so. William Stuntz argues on this point that criminal justice policymaking should not be understood as a traditional right versus left phenomenon.<sup>244</sup> Rather, he believes that the executive and legislative branches have forged a mutually beneficial alliance that shuts the judiciary out of criminal justice policy.<sup>245</sup> He calls this the “pathological politics of criminal law.”<sup>246</sup> Legislators and prosecutors share the goal of ensuring that the criminals the public wants convicted will be found guilty and subject to harsh punishment, particularly for offenses that outrage the public or during a period of increasing crime.<sup>247</sup> Thus, these branches benefit politically from increasing the scope of the criminal law together with the broadest definition for each crime and the fewest barriers to conviction.<sup>248</sup> Moreover, the higher the potential punishment for a crime, the higher the plea and conviction rate. Under this view, the judiciary simply has no place at the table. Thus, when either prosecutors or Congress are unhappy with any subset of sentencing decisions (or even a single case), either can easily obtain a legislative remedy (which of late, has been both increased penalties and limits on judicial discretion).<sup>249</sup>

Stuntz’s view makes a lot of sense and has a certain amount of explanatory power. Certainly, competition between the branches for power was contemplated by the Framers, as was the possibility that two branches might gang up on a third for a period of time. Moreover, Stuntz’s alliance theory manifests in an institutional dimension as well. For several years now, prosecutors from Main Justice Department and various U.S. Attorneys Offices have regularly been assigned (or “detailed” in the parlance of the executive branch) as staffers to congressional committees, most notably the House and Senate Judiciary committees.<sup>250</sup> On the Hill, knowledgeable legislative assistants are the primary drafters of legislation

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243. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509-10 (2001).

244. *Id.* at 510 (“[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefit from more and broader crimes, and the growing marginalization of judges . . .”).

245. *Id.*

246. *Id.* at 505.

247. *See id.* at 529-40. “Legislators are better off when prosecutors are better off.” *Id.* at 510.

248. *See id.* at 512-23. The fact that criminal law is at once both “broad and deep” results in a “shift [in] lawmaking from courts to law enforcers,” “gives the prosecutors the power to adjudicate,” and “the use of the criminal justice system not primarily to make and carry out laws, but to send signals.” *Id.* at 512, 519-20.

249. The politics of crime “have become increasingly nationalized, with an ever greater focus on federal law-making.” *Id.* at 533.

250. Telephone Interview with anonymous criminal defense lobbyist (July 24, 2003).



and in the sentencing arena, and no one knows where pockets of judicial discretion yet reside better than prosecutors fresh from the courtroom. The increasing sophistication and specificity with which provisions of the Feeney Amendment and the draft version of the 2003 Victory Act<sup>251</sup> have cut back on judicial discretion can likely be ascribed at least in part to these shared personnel.<sup>252</sup>

Nevertheless, Stuntz's institutional analysis does not really help explain the vitriol of the current congressional rhetoric on judicial discretion. Rather, this component of the debate can only be understood through the political lens. During the Warren Court and into the early Burger years, conservatives directed extraordinarily harsh rhetoric at the federal courts in response to decisions such as *Miranda v. Arizona*<sup>253</sup> and *Roe v. Wade*,<sup>254</sup> asserting apocalyptic visions of judicial usurpation of democratic governance.<sup>255</sup> Even after the roll-back of the Warren Court revolution in criminal procedure,<sup>256</sup> this anti-judicial rhetoric remained part of the conservative lexicon. In this light, congressional hostility to judicial sentencing discretion is part and parcel of this larger political viewpoint. Thus, House Majority Whip Tom Delay's claims that federal "judges need to be intimidated. . . . 'They need to uphold the Constitution.' If they don't behave, 'we're going to go after them in a big way,'" could as easily be part of the conservative commentary about judicial decisions about abortion, school busing, or prison litigation.<sup>257</sup>

This link can also be better seen if one stands in the shoes of thirty years of the far right's view of America. This group sees a seamless web

251. The Vital Interdiction of Criminal Terrorist Organizations Act of 2003 [hereinafter "VICTORY Act"] has not been introduced yet but a draft has been circulated by the sponsor, Senator Orin Hatch (copy on file with author). See *infra* note 281 and accompanying text for further discussion of this bill.

252. Because the Justice Department still pays their salaries, this detailing arrangement arguably violates the spirit, if not the principle, of the separation of powers. In any event, the result is that the interests of the judiciary and the defense bar are shut out from this critical, first stage of the legislative process.

253. See 384 U.S. 436 (1966).

254. See 410 U.S. 113 (1973).

255. See Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807, 809 (1973) (noting that many claimed *Roe v. Wade*, 410 U.S. 113 (1973), was "an opinion replete with error and fraught with dangerous implications . . . in the worst tradition of a tragic judicial aberration that periodically wounds American jurisprudence"). Even some twenty years after the decision, Attorney General Edwin Meese III launched a vigorous attack on *Miranda v. Arizona*, 384 U.S. 436 (1966), in 1985, claiming the case was an example of "inventing new law." Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 *OHIO ST. L.J.* 733, 740-41 (1987).

256. See, e.g., *California v. Acevedo*, 500 U.S. 565 (1991) (overruling Warren Court era decision on searches of container in vehicles); *United States v. Leon*, 468 U.S. 897 (1984) (creating good faith exception to exclusionary rule by ignoring Warren Court's reliance on judicial integrity rationale); *Illinois v. Gates*, 462 U.S. 213 (1981) (overruling restrictive Warren Court case law on the use of informants' tips in probable cause determinations).

257. Biskupic, *supra* note 1, at A1. Justice Scalia seems to agree with some of this critique, placing "the blame for judicial abuse of the Constitution squarely on mainstream legal culture—the so-called 'law-trained elites' he rails against in his public speeches and in some opinions." David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 *EMORY L.J.* 1377, 1386 (1999).

of related problems that are undermining society. They are against abortion, welfare, homosexuals, plaintiffs lawyers, feminists, East Coast intellectuals, decadent Hollywood, and illegal drug use.<sup>258</sup> From their perspective, the judiciary's liberal rulings, from the *Miranda* decision to the recent case overturning the Texas sodomy statute,<sup>259</sup> has allowed America's moral fabric to decay and has interfered with their electoral efforts to reverse the process.<sup>260</sup>

Conservative legal theorists therefore have asserted a profoundly narrow view of judicial power. Their basic position is unremarkable—that unelected courts should not make policy in a democratic society. However, when the courts interpret the Constitution in ways that violate their value system or when judges fail to use the judicial doctrines of restraint they favor, such as the doctrines of originalism, strict constructionism, and legislative intent in sentencing, these theorists argue that the elected branches must respond by limiting or revoking judicial powers. Thus, while liberals joined the early critique of sentencing disparity,<sup>261</sup> a legacy of conservative hostility to the federal courts may be the high-octane fuel that continues to feed the battle between Congress and the judiciary and the obstacle to a bipartisan approach founded on data and reason.<sup>262</sup>

Further, this drive shows no signs of abating. In July 2003, House Republicans announced a new task force “to scour the output of federal judges for evidence of what they call ‘judicial abuse.’”<sup>263</sup> The leader of this group, Texas Representative Lamar Smith stated: “Many subscribe to the notion that judges are above it all, that the judiciary is sacred and should be left alone. We say: wrong. Shining a spotlight on the abuses

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258. Some claims are both patently absurd and offensive, such as Jerry Falwell's statement that “liberal civil-rights groups, homosexuals and abortion-rights supporters” were partly responsible for the 9/11 attacks. John F. Harris, *Falwell Apologizes for Remarks*, WASH. POST, Sept. 18, 2001, at C4, available at 2001 WL 27733158; see also Leonard Pitts, *Dear Lord, We Need a Little Help*, CHARLOTTE OBSERVER, July 28, 2003, at A13, available at 2003 WL 60051035 (noting that Pat Robertson called for the removal of three unnamed Supreme Court justices after the Court overturned a state law criminalizing gay sodomy).

259. See *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

260. On the later case, consider Senator Rick Santorum on the subject: “If the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.” Susan Campbell, *Full Rights for Same Sex Couples*, HARTFORD COURANT, July 8, 2003, at D2, available at 2003 WL 59290982.

261. See STITH & CABRANES, *supra* note 27, at 104. Statistically, however, minorities have suffered the greatest percentage change in sentence length since 1986. *Id.* at 124-25.

262. With the exception of the Judge Baer case, more mainstream Republicans and Democrats have not engaged in the same kind of judge bashing. When it came to passing more punitive sentencing laws, however, Clintonian Democrats, unwilling to be outflanked on criminal justice policy, have been equal players in the upward ratcheting process. See, e.g., V. Dion Haynes & John O'Brien, *Bad Blast from the Past Back Again: Methamphetamine a Growing Problem*, CHI. TRIB., Oct. 8, 1996, at 1, available at 1996 WL 2714889. This political gridlock also helps explain why the Sentencing Commission has continually lost influence, essentially since its creation.

263. Todd Gillman, *GOP Group Plans to Turn Up Scrutiny on Federal Judges*, DALLAS MORNING NEWS, July 27, 2003, available at [http://www.dallasnews.com/images/gbl\\_logo.gif](http://www.dallasnews.com/images/gbl_logo.gif) (last visited July 28, 2003) (on file with author).

will go a long way to correcting them. . . . This is the beginning of many steps, many news conferences and many reports.”<sup>264</sup>

### C. WHY THE JUDICIAL VIEWPOINT CANNOT GAIN TRACTION IN THE DEBATE

The next question is why the judicial response to these attacks has, so far, been fairly ineffective. Life-tenured federal judges are usually not considered a powerless group. Drawn from the legal and political elite, most would presume that this branch is capable of defending its interests. However, a variety of institutional factors aside from the politics of criminal justice have rendered judges weak political actors.

Before their nomination, most federal judges had either a direct connection to the recommending senator or senator's party or were visible figures in some aspect of the public bar.<sup>265</sup> However, after taking the bench, whatever influence may have flowed from such associations seems to quickly diminish. Cynically, some judges contend that they are no longer of any use to their senators because they cannot raise money or make endorsements.<sup>266</sup> Other judges believe that institutional jealousies undermine the prior relationships. For example, one anonymous judge claimed that elected officials, pressed to raise money and constantly campaign, are resentful of the federal judge's life tenure and geographic stability.<sup>267</sup> Less personally, some judges claim they hear from legislators that their arguments about fairness and discretion should be discounted because they do not have to face voters outraged about crime.<sup>268</sup>

Personal tensions aside, judges are institutionally unsuited for the role of lobbyists. To some extent, judges are muzzled by the Judicial Code of Ethics. For example, the Code of Conduct for United States Judges states in pertinent part:

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264. *Id.* This group has also recently turned to the appropriations power in its war on the judicial independence. In August 2003, attached to a House appropriations measure, were two amendments to “block federal funds from being used to enforce [two federal] court decisions[; one] that found the use of ‘under God’ in the Pledge of Allegiance [to be] unconstitutional[, and the other that] ordered the Chief Justice of the Alabama Supreme Court to remove the Ten Commandments from the Courthouse.” Editorial, *Attack on Judges*, WASH. POST Aug. 5, 2003, at A14 (statement of John N. Hostettler (R-Ind.)), available at 2003 WL 56510566. The United States Supreme Court has granted certiorari in one of these cases to resolve this issue. *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2002), cert. granted, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 384 (2003).

265. SHELDON GOLDMAN, PICKING FEDERAL JUDGES 10 (1997). The long tradition has been for the Senator of the President's party to have substantial input on open federal judgeships in their state. *Id.* Some presidents virtually allowed senators to designate the nominee, while others allowed input from other sources. *Id.* In modern era, some Senators have created advisory panels to make recommendations, which has opened up judgeships to a wider range of lawyers who are well respected, but less politically active. *Id.* at 210-11.

266. Interview with anonymous federal judge (Sept. 6, 2002) (notes on file with author).

267. Interview with anonymous federal judge (Sept. 4, 2002) (notes on file with author).

268. Interview with anonymous federal judge (Sept. 11, 2002) (notes on file with author).

[A] judge should avoid public comment on the merits of a pending or impending action. . . . This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.<sup>269</sup>

While comments that a sentence required by law is too harsh might not constitute "comment on the merits," many judges believe the Code of Conduct requires them to maintain a scrupulous aura of impartiality so that litigants before them do not question the motivation for an adverse ruling.<sup>270</sup> Because the Justice Department is a constant party before the federal courts, many judges therefore believe it is inappropriate to publicly disagree with the drug laws or prosecutorial charging policies.<sup>271</sup>

Some reticence, however, seems to be as much temperamental as it is formally required. Federal judges have largely retreated from the conflict inherent in practice and politics. For public officials, they lead a somewhat cloistered life. They are given domain over a patch of earth known as their courtroom and all who enter must obey. This sheltered but powerful existence is quite at odds with the role of supplicant/advocate/deal maker, in which lobbyists live before Congress. In addition, most judges are leery of speaking to the press. They feel that reporters are in search of sound bites, and are not interested in or capable of conveying the complexity of fact and law that judges must consider in rendering a decision. Thus, they fear that the headline might read, "Judge Releases Child Molester," when the underlying story is in fact very different.

While these factors may make individual judges ineffective lobbyists, the modern federal judiciary has a variety of official organs at its disposal, and in fact, prior to the Feeney Amendment, the Judicial Conference<sup>272</sup> and the Federal Judicial Center<sup>273</sup> had taken positions against mandatory minimums. But, arguably, neither of these bodies have been particularly effective or aggressive on sentencing issues. Certainly, the organized judiciary must proceed cautiously. Given the institutional role of the judici-

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269. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(6) (1973). The commentary states this admonition should hold until the completion of the appellate process. *Id.* Canon 3(A)(6) cmt. Some judges are hesitant to comment on criminal cases even after the direct appeal is concluded because many defendants then file post-conviction petitions that are assigned back to the sentencing judge. *Id.*

270. "A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards, so that the integrity and independence of the judiciary will be preserved." *Id.* Canon 1. "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. *Id.* Canon 2(A). "A judge should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism." *Id.* Canon 3(A)(2).

271. Interview with anonymous federal judge (Dec. 18, 2002) (notes on file with author).

272. The Judicial Conference "serves as the principal policymaking body concerned with the administration of the United States courts." See <http://www.uscourts.gov/jud-conf.html> (last visited Aug. 6, 2003).

273. The Federal Judicial Center is "the education and research agency of the federal courts." See Federal Judicial Center, <http://www.fjc.gov/> (last visited Aug. 6, 2003).

ary as the arbiter of disputes, its official representatives should rightly show tremendous restraint before taking policy positions.<sup>274</sup> Moreover, in light of the diversity and changing membership of the federal bench due to appointments and retirements, it is difficult to garner a consensus on any issue. Also, it remains dangerous to announce a position what might change in just a few years. On the issue of sentencing discretion, judicial complaints about loss of discretion could also too easily sound like carping about their loss of power, or worse, loss of power to impose personal philosophical sentencing preferences. Moreover, while there is powerful evidence that discretion has not disappeared from sentencing, but rather has been transferred to the prosecution and police,<sup>275</sup> these arguments might appear less persuasive coming from the branch seeking to regain what it has lost.

Conversely, it is also probably true that the organized bench's voice, prior to the Feeney Amendment, has been more muted on sentencing than it needed. Some judges believe that the bench had become too cynical and too disheartened after years of congressional attacks to fight back.<sup>276</sup> Certainly, there is a perception that more judges have been retiring early or returning to private practice. However, to some extent, the judiciary has been reserving its political capital for issues of more direct self-interest, such as judicial salaries.<sup>277</sup> Further, it cannot be ignored that Judicial Conference committees and the Federal Judicial Center are controlled by Chief Justice Rehnquist.<sup>278</sup> While this Chief Justice has consistently voiced opposition to mandatory sentencing,<sup>279</sup> prior to the Feeney Amendment, he has not been particularly critical of the Guidelines or harsh sentences for drug offenders. In fact, it seems fairly clear that he largely agrees with the crime control and social policy agenda of

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274. See generally Judith Resnick, *The Programmatic Judiciary: Lobbying, Judging, Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 277 (2000) (cautioning that the shift of the federal judiciary from a posture of hesitancy about playing much of an institutional role in suggesting what federal rights Congress should create (or abolish) to the current posture of being a 'programmatic judiciary,' regularly advising Congress not to authorize access to the federal courts for certain sets of potential rights holders" is ill-advised).

275. See notes 248 and accompanying text.

276. Sentencing is also not the sole function of the federal courts. Civil cases and trials consume much of a judge's time, thus sentencing is not necessarily a daily discouragement. See Dayton, *supra* note 71, at 762-63. Moreover, those judges most upset by sentencing have the option of returning to practice or retiring and not hearing any more criminal cases. See Martin, *supra* note 132, at A31.

277. In private meetings with judges who feel strongly about sentencing issues, several noted that pay and facilities comes up in meetings with their local representatives far more than sentencing. Interviews with anonymous federal judges (notes on file with author). Judicial salaries in particular have been a sore issue since Congress tied its pay to judicial pay. See Martin, *supra* note 132, at A31. Some commentators and lobbyists have privately suggested that judicial reaction to the Feeney Amendment was initially muted because the issue of a judicial pay raise was before Congress again. *Id.*

278. The Federal Judges Association, an independent organization open to all Article III Judges, has been more outspoken on sentencing issues. See Federal Judges Association, <http://federaljudgesassoc.org/about.html> (Last visited Aug. 6, 2003).

279. See *supra* note 79.

the conservative wing of the Republican Party. Thus, his disagreement with the federalization of crime and mandatory minimums is more about their adverse impact on the workload of the federal bench than distress over limits on judicial power or increasing incarceration rates. As a result, judges who have expressed more radical views on drugs and discretion have not been appointed to powerful positions on these bodies.<sup>280</sup> As such, the judicial perspective on federal sentencing has had minimal public or legislative influence. The final issue is whether the Feeney Amendment was sufficiently radically jarring to prompt a real change in judicial behavior.

## V. THE PROSPECT FOR RETURNING SENTENCING DISCRETION TO THE COURTS

The previous sections painted a bleak picture of the current trends in sentencing policy and the impact of judicial voice on the debate. Nevertheless, there is some evidence that conditions are changing, albeit slowly, offering some hope for bringing balance back to federal criminal justice policy over the next few years.<sup>281</sup>

First, at the state level, there is significant activity and some real sentencing reform. The weak economy has put states under severe budgetary pressure, and they are looking for cuts in areas that were previously off limits, such as prisons. Thus, in 2003, a number of states granted emergency paroles for non-violent offenders as a cost-saving measure.<sup>282</sup> Others are considering prison-building moratoriums,<sup>283</sup> and a few have rethought or are rethinking their drug laws. The leading example of the latter is Michigan repealing its infamous “650 lifer” law,<sup>284</sup> which had

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280. Interview with anonymous federal judge (Dec. 11, 2002) (notes on file with author).

281. On the other hand, things may get worse before they get better. In the summer of 2003, Senator Hatch circulated a draft copy of the VICTORY Act which contains a section on sentencing. Vital Interdiction of Criminal Terrorist Organizations Act 2003, S., 108th Cong. §§ 103, 305, 506 (draft June 27, 2003) (on file with author). If passed as drafted, the VICTORY Act would repeal or limit many of the steps taken by the Sentencing Commission over the past few years to ameliorate the sentences of low-level offenders. *Id.* § 305. For example, the bill *inter alia* removes the cap amendment for which Judge Rosenbaum testified, removes the two point guideline reduction for the safety valve, eliminates the safety valve entirely for defendants with any criminal history points, requires government certification before the court can grant the safety valve, and extends the relevant conduct provisions to events that predate the defendants entry into the conspiracy if the defendant was aware of the previous activity. *Id.* §§ 303, 305, 307. This last provision is particularly significant. For example, a defendant who joined a pre-existing conspiracy knowing it distributed hundreds of pounds of marijuana but only himself distributes one ounce before his arrest would nevertheless be subject to a Guideline sentence for the entire amount distributed by the group to that point. *Id.*

282. *See, e.g.,* James Jefferson, *Per Routine, Prison Lets Inmates Out Early*, COM. APPEAL, May 29, 2003, at B6, available at 2003 WL 18427436 (reporting the state of Tennessee has let over 500 inmates out early since 1998).

283. *See Green Party Candidate Seeks State Senate Seat; Treen Grandson Joins Race Against Boissiere*, TIMES PICAYUNE, Aug. 12, 2003, at 01, available at 2003 WL 60058576.

284. *See Michigan v. Harmelin*, 501 U.S. 957 (1991) (holding Michigan’s harsh mandatory minimums for drug offenses did not constitute cruel and unusual punishment).

vied for title as the harshest drug penalty in the nation.<sup>285</sup> A coalition of fiscal conservatives, including an original sponsor of the bill, and public interest groups, convinced the Michigan legislature that this law was both too costly and unnecessarily harsh.<sup>286</sup> As a result, many inmates who had served substantial terms were released.<sup>287</sup>

In the not too distant past, the federal budget deficit was a viable national political issue. While federal red ink is again flowing, it is unlikely that a pure economic argument that sets prison costs against public safety will appeal to a jittery public. Rather, sentencing reform advocates must show that a more selective use of prison sentences is both smarter, i.e., safer criminal justice policy, as well as less costly.<sup>288</sup> There is some evidence the public may be more receptive to this message than in the past. Recent popular movies and television shows, such as *Traffic*,<sup>289</sup> *The West Wing*,<sup>290</sup> and *Court TV's Guilt by Association*<sup>291</sup> reflect a growing awareness and cynicism about the drug war. In addition, there has been more sympathetic news coverage on issues related to over-incarceration. For example, President Clinton's final pardons included a number of women who had received harsh sentences for their minor participation in a conspiracy run by their boyfriends or husbands.<sup>292</sup> In addition, the consequences of popular three-strikes provisions are now becoming apparent in stories about the "graying" of the prison population.<sup>293</sup> Thus, much like the financial analysts who believed that the internet boom constituted a new market paradigm, it may be that theorists such as Stuntz and Murakawa are wrong that criminal justice policy is qualitatively different.

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285. Stacey Range, *Repeal of Drug Laws Frees Felons*, LANSING ST. J., Mar. 2, 2003, at 1, available at 2003 WL 6805880.

286. Heinlein, *supra* note 29, at 1.

287. The repeal of these drug laws will result in the release of over 1,250 nonviolent drug offenders. See Range, *supra* note 285, at 1.

288. Nevertheless, changing federal sentencing policy will be much harder than reform in the states. The size of the federal government, and its control over the printing presses, makes it less susceptible to budgetary pressures. Moreover, the political appeal of tough on crime rhetoric is hard to combat.

289. *TRAFFIC* (USA Films 2000); see also *supra* note 217.

290. On January 14, 2004, *The West Wing* episode showed President Bartlett, just before the State of the Union Address, deciding whether to veto a popular piece of legislation because it contains an amendment limiting judicial discretion in sentencing. He decries the "War on Judges" being waged by some in Congress. As a signal of the seriousness of his purpose in opposing long mandatory sentences, he also considers commuting the sentences of a number of drug offenders (as recommended by the Justice Department). The episode includes a scene in which the President talks to the President of FAMM, whose sister is serving a mandatory minimum drug sentence. It also includes a scene in which the President discusses the Justice Department's clemency recommendations with the Pardon Attorney.

291. See Kevin McDonough, 'Guilt' Focuses on Justice Run Amok, CHARLESTON GAZETTE, May 13, 2002, at 5D, available at 2002 WL 5187412.

292. See, e.g., Andrew Cain & Jeremy Seper, *Clinton Pardons Rostenkowski: Ex-Lawyer Pleaded Guilty to Two Counts of Mail Fraud*, WASH. TIMES, Dec. 23, 2000, at A1, available at 2000 WL 4712552 (reporting the pardons of Kemba Smith and Dorothy Gaines).

293. Jeff S. Erger & Randall R. Berger, *Geriatric Nursing in Prisons is a Growing Concern*, CORRS. TODAY, Dec. 1, 2002, at 122, available at 2002 WL 22633164.

In fact, it may turn out that the criminal justice pendulum swings too—just that when it swung to the right this time, it went farther and stayed longer than ever before.

There is also scientific support that there is a shift in public opinion occurring. A polling study commissioned by the Open Society Institute in 2002 suggests that Americans are arriving at a fundamentally different view of the nation's crime problem than in the anti-crime heyday of the 1980s and 1990s.<sup>294</sup> Conducted by the Peter D. Hart group, the study's three conclusions are as follows:

- (1) that the public now believes we should be addressing the underlying causes of crime rather than the symptoms;
- (2) prevention rather than punishment or enforcement seems to be the public's top priority; and
- (3) Americans are reconsidering the wisdom of harsh sentences as the centerpiece of the nation's crime strategy, especially for non-violent offenders.<sup>295</sup>

Some of the change in public opinion may also be the result of a better focus to the dollars directed towards criminal justice reform. For example, the success of California Proposition 36 in 2000, which requires drug treatment rather than incarceration for first-time offenders arrested for drug possession, has been attributed, in part, to the substantial out-of-state funding sources that enabled its proponents to mount an effective publicity campaign.<sup>296</sup> The same may be true of the Michigan reform legislation that benefited from staffing from a national public interest group.<sup>297</sup> New, powerful voices have entered the debate as well. Hip-hop musicians, such as Russell Simmons, Jay-Z, and P. Diddy, played a well publicized role this past year in the perennial efforts to reform New York's Rockefeller drug laws.<sup>298</sup>

But as shown by the reform drive in Michigan, broad coalitions beyond the usual suspects are required for success. That reality seems to be sinking into the criminal justice public interest community. Criminal justice reform groups, the long isolated beacons of the left, have begun to recognize the need to work across the political spectrum and seek unlikely alli-

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294. Peter D. Hart Research Associates, *The New Politics of Criminal Justice; A Research and Messaging Report for the Open Soc'y Inst.*, Feb. 2002 (on file with author).

295. Peter D. Hart Research Associates, *The New Politics of Criminal Justice; Summary of Findings*, Jan. 2002, at 1 (on file with author).

296. Three wealthy activists, George Soros, Peter Lewis, and John Sperling, funded the political campaign in California and have spent money for similar reforms in Ohio, Florida, and Michigan. David Bank, *Counterattack: Soros, Two Rich Allies Fund a Growing War on the War on Drugs*, WALL ST. J., May 30, 2001, at A1, available at 2001 WL-WSJ 2864952.

297. FAMM "lead a long grass roots effort to bring about the change" in the mandatory minimums. See Heinlein, *supra* note 29, at 1. Not all of these efforts are as successful. See Joe Burchell, *Prop 202 Alive; 200, 201 Aren't*, ARIZ. DAILY STAR, Nov. 6, 2002, at A1, available at 2002 WL 12828571 (reporting the defeat of a medical marijuana initiative in Arizona after similar initiatives in both 1996 and 1998 had been approved by Arizona voters).

298. See Johnnie L. Roberts, *Beyond Definition*, NEWSWEEK, July 28, 2003, at 40, available at 2003 WL 8639505.



ances. At the federal level, the best example are efforts to assist released inmates acclimate to freedom. Grouped under the umbrella of “re-entry” programs, a variety of initiatives have gathered support from conservatives and religious groups, as well as some federal funding.<sup>299</sup>

What is still missing at this point, however, is a compelling refocusing of the debate and a political leader. For federal reform to succeed, the issue must first be recast as something other than about “liberal” judges and public safety. One simple truth that could make a difference is that federal law enforcement actually has no discernable impact on local crime rates. This is because most crime, especially most drug crimes, are still prosecuted in state courts.<sup>300</sup> Unfortunately, years of national politicians campaigning on law and order issues has resulted in a lack of differentiation between state and federal prosecutorial authority (except that a “federal” case seems more serious). Second, the issue could use a national spokesperson, preferably one with impeccable conservative or crime-fighting credentials. What I envision is a John McCain-like figure who could explain how, once again, the inside-the-Beltway politicians have misled the public—in this instance, about effectiveness of their over-incarceration strategy, while wasting billions of dollars in the process.<sup>301</sup>

But the sentencing reform movement also needs a positive and creative dimension. One obvious linkage is to the re-entry movement which has been generating positive attention across the political spectrum. A focus on re-entry forces legislators and citizens to recognize that virtually all drug offenders will ultimately be released back into the community. The point that could be made more strongly, however, is that the longer a prisoner is incarcerated, the more difficult it becomes for him or her to re-acclimate to society upon release. Thus, shorter sentences may actually be more cost effective in the long run.

There may also be opportunities for linkage outside the criminal justice arena. Moreover, even ideas that at first glance might be offensive to some constituencies could be used to stimulate reconsideration of estab-

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299. A recent bill to fund housing for released inmates was cosponsored by conservative congressman and supported by Jack Kemp. *Kemp Urges Congress to Address Ex-offender Re-Entry Crisis*, U.S. NEWSPAPER, May 19, 2003, available at 2003 WL 55657804. For more information on the re-entry movement, see *supra* note 216. The Justice Department granted \$100 million in federal funds last year to state reentry projects. Laurie Robinson, *Gazing into the Legislative Crystal Ball*, CORRS. TODAY, Dec. 1, 2002, at 62, available at 2002 WL 22633149.

300. Opponents might counter that federal policies matter because they set the tone for state policies by imitation or incentives. For example, many states have adopted the federal truth in sentencing approach, which abolishes parole, in part, because of financial incentives offered by the federal government. See Susan Turner et al., *The Impact of Trust and Sentencing and Three Strikes Legislation: Prison Populations, State Budgets and Crime Rates*, 11 STAN. L. & POL. REV. 75, 76 (1999).

301. One newspaper has called for Bill Clinton to play this role, noting that since leaving office, he has moved left on a variety of issues including the federal sentencing guidelines. Zev Chafetz Editorial, *Wrapping Up Bill: A Future as New Voice of Liberals*, N.Y. DAILY NEWS, Jan. 18, 2001, available at 2001 WL 4674117. Additionally, “Free to speak his mind, Clinton is poised to provide U.S. liberalism with what it has lacked since the deaths of the Rev. Martin Luther King and Robert Kennedy—a truly effective spokesman.” *Id.*

lished views. One example of this kind of idea would be a proposal to form a "Nisei brigade"<sup>302</sup> made up of federal drug offenders. To appeal to conservatives, one could argue that the war on terrorism requires that we resolve festering domestic issues such as the drug war. Moreover, the brigade would take only federal drug offenders who can demonstrate through their rehabilitative efforts that they are ready and able to complete a period of time in military service in exchange for commutation of their sentences.<sup>303</sup> In addition, rather than simple pardons or wholesale releases, such prisoners would be required to perform a service to obtain release. To appease liberals, the program could not be a modern version of Lee Marvin's Dirty Dozen, with dangerous prisoners being chosen for suicide missions in exchange for their freedom. Rather, the value of these drug offender brigades could be realized in, for example, rebuilding roads in Afghanistan and serving as peace-keeping troops rather than fighting in Baghdad.<sup>304</sup> A successful drug offender brigade, like Nisei units in WWII, might help undo the scourge stereotype of drug offenders and thus advance the prospects for meaningful reform. My point is regardless of whether this particular idea is viewed favorably (or whether it is even feasible), sentencing reformers need fresh ideas to recapture the debate and a leader to promote these ideas. Unlike in Michigan, however, no well-known legislative proponents of mandatory minimums or similarly credentialed current or former office holder has stepped forward in a mea culpa or with a breakthrough program for reform. Without either, the near term prospects for significant federal, as opposed to state reform, remains weak.

## VI. CONCLUSION: WHAT CAN THE JUDICIARY DO?

This article began with two premises shared by the large majority of federal judges and academic commentators. First, that Congress has taken too much sentencing discretion from federal judges. Second, that

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302. During WWII, the United States military formed special units of Japanese-Americans that included many men who had been imprisoned in the internment camps. The heroism of the all-Nisei military units, the 442nd Regimental Combat Team and its predecessor, the 100 Infantry Battalion from Hawaii is renowned. Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 *ASIAN L.J.* 1, 5 (2001). "These were, per capita, the most decorated units in World War II, distinguishing themselves by, among other acts, saving the 'lost battalion' of Texas Rangers, and being the first to reach the Nazi concentration camp at Dachau." *Id.*

303. There are credible reasons to believe a drug offender brigade could succeed. For starters, most of those swept into prison by the war on drugs were not hardened criminals, but marginal participants in an extensive underground economy. Others troubled by addiction, have nevertheless made real progress during their lengthy incarceration through education and drug treatment and are ready to be released.

304. These would be a highly motivated group of soldiers, with keen awareness that any failure, such as a single positive drug test, would send them back to prison. Moreover, the military is a perfect re-entry program, providing a job, a home, and a structured environment with which prisoners are already familiar. Most importantly, it would return to them the community and self respect that is essential to avoiding recidivism. Some might find it ironic to take non-violent drug offenders and train them to kill for the country that imprisoned them. But when all other means of persuasion fail, irony has a certain power.

sentences for many drug crimes are longer than necessary to accomplish any penological purpose, particularly for the low-level offenders that constitute more than half the federal prison population. As a result, since 1986, judges have regularly been required to impose sentences they believe are unnecessarily harsh yet they are powerless to alter. The body of the article then offered explanations for these developments and discussed the combination of conditions that are likely required for a paradigm shift.

This Conclusion attempts to answer one final question: Can federal judges have a greater impact on sentencing policy? Certainly, given the institutional restraints on the judiciary branch, federal judges cannot take the point position in this debate. Federal judges, however, are well-situated to contribute to two critical and related tasks necessary for sentencing reform. First, they can help to lay the foundation for the reeducation of the public about federal criminal justice policy. Second, through their institutional and individual voices, they can provide political cover for a politician brave and unconventional enough to take on this issue.

While for many years a vocal minority of judges have doggedly undertaken these tasks, the Feeney Amendment seems to have crossed a line in the sand for many members of the judiciary. Prior to passage, the Executive Committee of the Judicial Conference, Chief Justice Rehnquist,<sup>305</sup> the Federal Judges Association, the current and past chairs of the Sentencing Commission, and the voting members of the Sentencing Commission all wrote separate letters opposing the bill's restrictions on judicial discretion as well as the reporting requirements.<sup>306</sup> In September 2003, the full Judicial Conference took up the issue and formally voted to ask Congress to repeal the bill.<sup>307</sup>

The most prominent example of the post-Feeney Amendment judicial response, however, was Supreme Court Justice Anthony Kennedy's keynote address at the American Bar Association Annual Meeting in August 2003. Kennedy, a conservative Reagan appointee, spoke in detail about the consequences of over-incarceration and concluded that, "[o]ur resources are misspent, our punishments too severe, our sentences too

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305. Rehnquist has continued to criticize the Feeney Amendment. "In unusually pointed terms," he condemned the provisions that place judges under special scrutiny when they lower sentences, stating that the act "could appear to be an unwarranted and ill-considered effort to intimidate individual judges in the performance of their duties." Linda Greenhouse, *Chief Justice Attacks a Law as Infringing on Judges*, N.Y. TIMES, Jan. 1, 2004, at A14, available at <http://nytimes.com/2004/01/01/politics/01SCOT.html>.

306. Letters on file with author and available at [www.nacd.org](http://www.nacd.org).

307. News Release, Administrative Office of the U.S. Courts, Judicial Conference Seeks Restoration of Judges' Sentencing Authority (Sept. 23, 2003), available at [www.uscourts.gov/Press\\_Releases/jc903.pdf](http://www.uscourts.gov/Press_Releases/jc903.pdf) (last visited Jan. 10, 2004); see also Mark Hamblett, *Federal Judges Attack Sentencing Restrictions Judicial Conference Calls for Repeal of the Feeney Amendment*, N.Y. L.J., Sept. 24, 2003, available at <http://www.law.com/jjsp/article?id=1063212079768>. They also indicated their support for pending bills that repealed many of Feeney's provisions. See The Judicial Use of Discretion to Guarantee Equity in Sentencing Act of 2003 ("JUDGES Act"), S. 1086, H.R. 2213, 108th Cong. (2003).

long.”<sup>308</sup> While he agreed that federal sentencing guidelines are necessary, he argued that they should be revised downward, but in too many cases, mandatory minimum sentences simply “are unwise and unjust.”<sup>309</sup> Lastly, he called the transfer of sentencing discretion from judges to federal prosecutors misguided and noted that these prosecutors are often not much older than the defendants.<sup>310</sup> The trial judge “is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutor.”<sup>311</sup> Justice Kennedy concluded with a request that the ABA study the matter and then ask Congress to repeal mandatory minimums and the President to reinvigorate the pardon process so that some already serving these sentences might be released.<sup>312</sup>

Statements by Supreme Court Justices,<sup>313</sup> the organized judiciary, and prominent judicial associations garner the most press and therefore are

308. Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting 4 (Aug. 9, 2003), at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-09-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html) (last visited Feb. 10, 2004).

309. *Id.*

310. *Id.* at 5.

311. *Id.* Certainly, between entirely hidden discretion exercised in the prosecutor’s office and the exercise of the pre-Guidelines, unfettered discretion of a sentencing judge, the latter is still more transparent. However, under the Guidelines, the judge’s sentencing decisions are even more transparent. That is why many sentencing reformers still believe in some type of guidelines system but believe the current one is flawed first by the distorting presence of mandatory minimums and by a misguided attempt to continue to squeeze departures out of a system that still needs them to ensure fairness. See Miller & Wright, *supra* note 98.

312. *Id.* The ABA established the Commission, which held hearings in Washington, D.C. in November 2003. See *Federal Sentencing Issues Discussed at ABA Hearings*, CRIM. L. REP., Nov. 19, 2003, at 127. Some commentators find hope that a prominent conservative jurist like Justice Kennedy is willing to speak out on this issue. As noted by Frank Bowman:

The PROTECT Act and the Ashcroft memo are the creations of politicians who want to transform the guidelines into a one-way ratchet, raising, but never lowering, sentences. They see partisan advantage in posturing as “tough on crime” and so, like children with their fingers stuck in their ears chanting, “I can’t hear you,” they refuse to listen to those who know the American criminal justice system best. One can only hope that voices like Justice Kennedy will at last grab their attention.

Frank O. Bowman, III, *Ensuring the Punishment Fits the Crime*, WASH. TIMES, Aug. 31, 2003, available at 2003 WL 7718269.

Less widely covered but in the same month, the International Commission of Jurists wrote to President Bush to complain about the Justice Department’s implementation of the Feeney Amendment. The letter states that the Commission is “extremely concerned that the Attorney General’s directive to federal prosecutors to compile for the Justice Department, in effect a ‘blacklist’ of lenient judges and jurisdictions constitutes a serious infringement on the independence of the judiciary and the rule of law.” Letter from International Commission of Jurists, to President George W. Bush 2 (Aug. 18, 2003) (issued as a press release, copy on file with author).

313. Not long after Justice Kennedy’s speech, Justice Breyer also criticized mandatory minimums in a speech at Harvard’s Kennedy School. He stated that “There has to be oil in the gears. . . . There has to be room for the unusual or exceptional case.” Martin Finucane, *Supreme Court Justice Says Judges Need More Flexibility*, WASH. POST Sept. 22, 2003, available at [www.washingtonpost.com/wp-dyn/articles/A46137-2003Sept.html](http://www.washingtonpost.com/wp-dyn/articles/A46137-2003Sept.html). Justice Breyer, as a member of the first Sentencing Commission, is considered the Justice with the deepest expertise in sentencing issues.

likely to have the greatest impact. In comparison, lower federal court judges, however, have also been making important but less publicized efforts over the past two years. In May 2002, twenty-eight former United States Attorneys,<sup>314</sup> now federal circuit and district court judges signed a joint letter addressed to the Sentencing Commission asserting their belief that “the current disparity between powder cocaine and crack cocaine, in both the mandatory minimum statutes and the guidelines, cannot be justified and results in sentences that are unjust and do not serve society’s interest.”<sup>315</sup> The letter states that the solution was not to raise penalties for powder because such punishment is already “severe and should not be increased.”<sup>316</sup> These judges were appointed by every President between Nixon and Clinton and included a significant number of Reagan appointees.<sup>317</sup> Bastions of their legal communities with unimpeachable crime fighting credentials before their appointment, there could not be a more credible group to speak on this issue. While the existence of this joint letter is known in policy circles, it received no discernable press coverage.<sup>318</sup>

With better press coverage, this kind of letter is a potentially effective and safe avenue for judges seeking to amplify their collective voices. Particularly in the aftermath of the Judge Rosenbaum debacle, individual federal judges may be even more reticent to testify before Congress. However, as in all political ventures, there is safety in numbers. None of these twenty-eight judges were threatened with congressional subpoenas for signing the letter.<sup>319</sup> Moreover, the crack letter was addressed to the

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314. These judges included, like Judge Rosenbaum, the chief federal prosecutor for a federal district who are appointed by the President. There are also numerous district court judges who served as Assistant U.S. Attorneys. Letter from Judge Raymond J. Dearie, United States District Judge, to Diana E. Murphy, Chairperson, United States Sentencing Commission (Apr. 15, 2002) (citing opposition of twenty eight former United States Attorneys to the crack/powder cocaine disparity); see also Carl Tobias, 33 WM. & MARY L. REV. 429, 456 (“[M]any federal judges actually are former United States Attorneys or worked in the Offices as assistant prosecutors . . .”). Tobias notes that “[o]f the 774 federal district judges currently on the bench, 175 have worked as United States Attorneys or Assistant United States Attorneys.” Tobias, *supra*, at 456 n.149.

315. Statement to the United States Sentencing Commission Concerning the Penalties for Powder and Crack Cocaine Violations Submitted by Certain United States Circuit Court of Appeals and District Court Judges Who Previously Served as United States Attorneys 1 (Apr. 15, 2002) [hereinafter Letter from Circuit and District Court Judges] (on file with author).

316. *Id.* at 2.

317. The judges who signed the letter are as follows: Michael Daly Hawkins, Boyce F. Martin, Jr. Gilbert S. Merritt, Jon. O. Newman, Raymond L. Acosta, Sarah Evans Barker, Walter E. Black, Jr., Catherine C. Blake, Clarence A. Brimmer, Robert J. Cindrich, John T. Curtin, Glen H. Davidson, Raymond J. Dearie, Gustave Diamond, Peter C. Dorsey, John Hannah, Jr. William W. Justice, William C. Lee, William T. Moore, Frederick J. Motz, Alan H. Nevas, Manuel L. Real, James M. Rosenbaum, Barefoot Sanders, Fred J. Scullin, Jr., Donald E. Walter, Rodney S. Webb, George E. Woods. *Id.* at 3-4.

318. A Westlaw search conducted in various databases resulted in no article about this letter although a similar letter written in 1997 by many of the same judges was reported in one paper. Deborah Pines, *Judges Seek Equity in Cocaine Sentences*, N.Y. L.J., Sept. 24, 1997, at 1.

319. Judge Rosenbaum, however, was a signatory of this letter. Letter from Circuit and District Court Judges, *supra* note 315, at 4.

Sentencing Commission, an entity housed in the judicial branch, and therefore, arguably these judges were still operating within institutional channels.

The other lesson that emerges from a comparison of the judges' crack/powder letter with Judge Rosenbaum's experience is to keep the message simple. Rather than provide individual crack cases, which House staffers might then pick apart, these former U.S. Attorneys simply made broad policy arguments that relied on their years of experience and credibility as former prosecutors. Judges, used to dealing with individual cases, need to recognize that the debate sometimes needs to take place at a higher level of generality. One way for this to happen is for groups of judges with similar backgrounds to write similarly constructed letters on sentencing issues to the Sentencing Commission or Congress. For example, there are a significant number of federal judges who were either state judges, state legislators, or partners in a law firm. Each of these groups might have their own opinion regarding judicial discretion or over-incarceration of drug offenders. Former state legislators may be inclined to view the drug issue as an issue of federalism, while former civil litigation law practitioners may be more troubled by the clogging of the federal courts with minor narcotics cases. If joint action is to be taken, however, then federal judges must counter their normal inclination to work and speak alone.

For those judges not comfortable with joining a public letter, however, there is another forum in which individual judges have been articulating their opposition to the current sentencing regime—their own courtrooms. In hundreds of sentencings since 1986, judges have stated on the record that if they had the discretion, they would have imposed a sentence less than the one required by the Guidelines or mandatory minimum statute. These statements vary from judicial outrage at the draconian sentence required<sup>320</sup> to what sounds like a civics lesson for the audience, directing

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320. For example:

I believe, that there is no question that this is an unjust, unfair sentence . . . I think it is shameful that we've come to this. It is simply a product, in my estimation, of a form of mass hysteria and the—it's also very interesting that it's a product of the desire to make everything perfect and fair to defendants because judges apparently couldn't do that using their own judgment. . . . And there has to be a way where judges can—when something is terribly wrong, terribly wrong and this is an instance where I think it is terribly wrong for whatever its worth. There has to be a way to set aside the computer and the numbers game and all the little categories and way what is right. And this case cries out for something of that sort.

Sentencing Tr. at 297-98, *United States v. Billy Thornton Langston*, Cr. 93-209-Kn (Aug. 29, 1994, C.D. Cal.) (statement of Judge David V. Kenyon). During

The judges in this system no longer actually impose sentences that have anything to do with what one might call traditional concepts of individualized justice, but have to deal with what Congress orders us to do, and Congress has the power to write the checks and Congress has the power to tell us what to do and they have told us what to do and I've got to follow the law. . . . There is no way I would sentence you to 180 months in prison. That is well beyond the pale.

Sentencing Tr. at 17-18, *United States v. Horne*, S-00-0113 (Aug. 30, 2000, D. Md.) (statement of District Judge Frederick Smalkin).

the families of the defendant to articulate their displeasure with Congress, the President, and in the voting booth.<sup>321</sup> While some of these comments are reported in the press, most are heard just by the defendant (for whom they offer little solace), or the families, who are usually too busy coping with the difficulties of an incarcerated family member to become political activists. Nevertheless, these statements are also potentially potent tools for reformers or a politician looking for cover for several reasons.

First, like the signatories of the crack letter, many of these judges have impeccable conservative credentials that insulate them from an assertion that their desire to impose a lesser sentence in a particular case equates with being soft on crime. In addition, even more so than the crack letter, these statements were made during the performance of the judge's duties to pronounce and explain the sentence. Third, these statements are about individuals whose personal stories are often sympathetic accounts of women drawn into their partners' drug business or addicts who turned to petty dealing to supply their habits. As importantly, they are rarely the rapacious, violent kingpins for whom these laws were supposedly passed. Fourth, unlike Judge Rosenbaum's cases, there is no question that these judges obeyed the law and imposed the sentence that Congress wants despite their unhappiness with the result. Thus, these cases are also a good counter to the recent claims by Attorney General Ashcroft and the House Republicans that "soft on crime" judges are undermining enforcement of the drug laws. Rather, these transcripts demonstrate that day in and day out, federal judges follow the law, even when they think it is wrong and unfair.

Finally, there is the sheer power of the statements themselves. Unlike the dry legalese of most courtroom proceedings, the anguish and anger of many judges forced to sentence low-level offenders to disproportionate terms is often poignant and moving.<sup>322</sup> This use of the judicial soapbox, however, is not without its critics. Some judges and prosecutors believe that such statements breed a disrespect for the law or constitute a cop out on the judge's part.<sup>323</sup> More broadly, some commentators (and a few

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321. Some judges address the families of the defendants before imposing a sentence in an attempt to explain their decision:

Before I impose sentence I just want Mr. Vasquez and any members of his family who are here to know that I agree with the consensus of almost everyone that the sentenc[ing] guidelines are horrendous. However, it is driven by the amount of drugs. . . . It's sad that a man with no previous record is facing this sentence. I hope the family realizes that I cannot depart from these guidelines except under special circumstances [not applicable to this case]. . . . Any objection to the sentencing guidelines has to be raised with the Sentencing Commission and Congress.

Sentencing Tr. at 23, *United States v. Alex Vazquez*, Cr. 98-086-01 (Oct. 7, 1999, M.D. Pa.) (statement of District Court Judge Sylvia Rambo).

322. See *supra* notes 320-21.

323. Interview with two anonymous federal judges (Oct. 15, 2002) (notes on file with author); Interview with anonymous current federal prosecutor (Jan. 20, 2003) (notes on file with author).

judges) argue that urging judges to comment on sentencing policy in any context opens a Pandora's box to judicial lobbying on abortion, school vouchers, gay marriage, and a host of other contentious social issues.<sup>324</sup> The impartiality of the bench would become suspect and respect for the courts would decline as judges would be viewed as just another stripe of politician.

While these fears are legitimate, sentencing policy is arguably different. Judges are the government officials who perform this act and therefore have the most direct experience of the three branches to determine whether the current system is fair. Moreover, judicial discretion is close to the core of judicial independence and the separation of powers principle. If sentencing were truly reduced to a mathematical calculation with no human judgment, the judicial branch's long historical role as the primary actor in sentencing would be over. As the system has begun to approach that level, the judicial branch has the right of self-defense.

More broadly, critics of judicial speech should also take note that there is a venerable American tradition of judges voicing their moral distaste for the results of the laws passed by Congress. Robert Cover's book, *Justice Accused: Antislavery and the Judicial Process*, is a powerful analysis of the federal judiciary's reaction to its role in enforcing the Fugitive Slave Act and other slavery related litigation.<sup>325</sup> Cover argues that the rhetoric of the anti-slavery judges in these cases was "strategically important" and a critical component of public debate over slavery.<sup>326</sup> While not over-drawing the parallel, there are similarities in the rhetoric of the antebellum judges' struggle between "the demands of role and the voice of conscience"<sup>327</sup> and modern day sentencing transcripts. From this vantage point, although the majority has spoken through the legislative process, judges may continue the debate so long as they maintain role fidelity and enforce the law regardless of how unpleasant it may be for them to do so.

This perspective makes sense if one conceives of policymaking as a broad and fluid dialogue. Barry Friedman is perhaps the best proponent of this view. He argues that all federal policy, and not just constitutional interpretation, is a complex conversation among and between Congress, the Executive Branch, the courts, state and local government, and the People.<sup>328</sup> This dialogue occurs along a variety of levels of formality and informality, directness and indirectness. At the most formal level, Congress legislates and the President vetoes or the Court holds legislation unconstitutional. However, political elites interact in other ways. Judges, legislators, presidents, and lobbyists have informal meetings and personal friendships never reported in the *Congressional Quarterly*. But the

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324. See Resnick, *supra* note 274, at 283-93.

325. ROBERT M. COVER, *JUSTICE ACCUSED; ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

326. *Id.* at 237-38.

327. *Id.* at 6.

328. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 597, 580-81 (1993).



branches also interact in fluid ways that defy easy categorization as formal or informal. For example, when a branch loses in one area, the battle can continue elsewhere. Specifically, a president may alter the impact of legislation using the executive's discretionary spending power, to which Congress might respond by holding oversight hearings. The same process occurs with regard to the judicial branch. Judges make countless rulings in court proceedings and trials that can frustrate the intent of Congress or prosecutorial strategy.<sup>329</sup> In this context, the Feeney Amendment represents a return to the formal stage because the legislative branch (arguably wrongly) believed its official mandate was being voided.

However, Friedman maintains that an essential part of this dialogue of democracy in a system of separated powers must include the People.<sup>330</sup> Particularly when two branches encroach upon the third, there must be redress to the citizenry.<sup>331</sup> In this context, the judiciary should rethink its reticence toward speaking directly to the public. Thus, for those judges not comfortable speaking with the press or writing letters to Congress and the Sentencing Commission (or even making comments in their courtroom), there is still their own backyard. There is no formal bar to a federal judge accepting invitations from citizens groups such as the Rotary Club, the Elks, or the League of Women Voters. In such venues, judges could explain what they do and how they see their jobs, in complete conformity with the Judicial Code of Conduct. If even half of the sitting federal bench committed to just a few of these speaking engagements a year, such an effort would greatly assist in reeducating the public, which has been badly misled about the nature and practice of the judicial function during the course of many years of political campaigns.

Moreover, judges, as beleaguered as they feel in the current climate, should have some hope that the public is willing to listen to them at this local level. Their ability to influence and persuade, while perhaps not extending to the halls of Congress, does go beyond the confines of their courtrooms. While social conservatives may find federal judges a suspect class, Main Street America is still likely to give some weight to the opinion of a local federal judge who they know of, and who has been part of their community for many years. Moreover, the robe and judicial office carry a certain dignity and credibility above that of politicians for most citizens. Finally, given the long Anglo-American tradition of judicial sentencing discretion, a conversation about their personal struggles to fairly sentence criminals and how they now lack the ability to do justice in an individual case is likely to be in accord with the average citizen's understanding of what judging is supposed to be about.

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329. My personal example was the judge who granted a motion for judgment of acquittal in the case discussed in Part II.A. I later speculated that the judge's decision was influenced by testimony that this defendant had served in the military and received an honorable discharge more than the facts of the case.

330. *Id.* at 585.

331. *Id.*

With some or all of these efforts, the judiciary could help improve the public's understanding of the judicial function and set the table for sentencing reform by the political branches.<sup>332</sup> In the end, as with all policy debates, the pendulum will swing back again—the critical question is when. Judicial voice can matter. The issue for the judiciary is only whether more of them will try.

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332. Another example of a judicial effort of this sort was the announcement in October, 2003, that the Ninth Circuit will sponsor a task force to study the federal sentencing guidelines. Speaking on its prospective goals, Chief Judge Mary M. Schroeder stated: "With luck, we can get a few things fixed in the short run . . . but more importantly, for the long run we can educate Congress and the general public about the importance of rethinking our whole federal sentencing system." Clair Johnson, *New Law Limits Judges' Discretion for Sentencing*, BILLINGS GAZETTE, Oct. 5, 2003, at <http://www.billingsgazette.com/index.php?display=rednews/2003/10/05/build/state/30-sentencing.inc> (last visited Jan. 25, 2004).



# Essay

