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FEATURED COLUMN: GRID & BEAR IT: FIGHTING THE FEENEY FEAR FACTOR: THE FEDERAL COURTS STRIKE BACK

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TEXT:

[*46] *The judicial branch should not be timid nor fearful of inflicting an occasional whiplash or, where necessary, even imposing chronic pain when constitutional rights are threatened or the balance of powers is jeopardized.*

--*Chief Judge Marilyn Hall Patel, United States v. Mellert, F. Supp. 2d , 2003 WL 22025007* (N.D. Cal. July 30, 2003).

Since the PROTECT Act of 2003 n1 was signed into law last spring, we have witnessed, and continue to witness, fundamental changes in federal sentencing law, policy and practice. From the Act's clear purpose to delimit the downward departure authority of federal judges, to the Department of Justice's charging and sentencing policies issued in response to the Act, the Federal Sentencing Guidelines now are beginning to look *a lot less* like guidelines, and much more like mandatory minimums. n2

n1 Pub. L. 108-21.

n2 See sidebar to Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion May Undermine a Generation of Reform,* CHAMPION, June 2003.

As is becoming more evident, however, the premise underlying the Act -- that federal judges too often are inappropriately departing downward below otherwise applicable minimum guideline ranges -- is woefully inaccurate and simply without evidentiary support. As the United States Sentencing Commission found in a recently published report to Congress issued in response to the Act, while sentences within the guidelines range have decreased from 80.7 percent in 1991 to 63.9 percent in 2001, it is the *government* and not judges who are responsible. n3 "When substantial assistance departures are combined with ... other government initiated downward departures [such as fast-track departures] ..., *the government accounts for over two-thirds* (69.3 percent) *of all departures.*" n4

n3 *See* UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 67 (Oct. 2003), available http://www.ussc.gov/departrpt03/departrpt03.pdf.

n4 *Id.* at 67-68 (emphasis added).

Likewise, a recent Government Accounting Office report titled *Federal Drug Offenses: Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1991-2001,* found that "Downward sentencing departures were more frequently due to prosecutors' substantial assistance motions (28 percent) than for any other reasons (16 percent)." n5 While finding variations in sentencing practice in terms of departures, the GAO nevertheless concluded that "these variations did not necessarily indicate unwarranted sentencing departures or misapplication of the guidelines because data were not available to fully compare the offenders and offenses for which they were convicted." n6

n5 GAO, *Highlights*, FEDERAL DRUG OFFENSES: DEPARTURES FROM SENTENCING GUIDELINES AND MANDATORY MINIMUM SENTENCES, FISCAL YEARS 1991-2001 (Oct. 24, 2003), available at www.gao.gov.

n6 *Id.*

In short, there is no evidence to suggest that there exists "an accelerated rate of downward departures *by judges*" warranting congressional legislation "limiting the judge's discretion, forcing the judge to explain what he has done, and providing an opportunity for the prosecutors to appeal if the judge has been completely *unfaithful*" all while having prosecutors systematically collect and report to Congress those judges who depart against prosecutors' wishes. n7

n7 14 Cong. Rec. H3061 (daily ed. Apr. 10, 2003) (Rep. Tom Feeney (R-Fla.)).

Not surprisingly, such suggestions of unfaithfulness, especially those based upon misleading and incomplete data coupled with Orwellian reporting requirements, has raised the ire of the federal judiciary. Soon after the PROTECT Act was enacted, Chief Judge Marilyn Hall Patel of the U.S. District Court for the Northern District of California wrote in *United States v. Mellert* n8 that:

> Under this new regime not only will the government determine the charges to be filed, whether the indictments will undercharge or overcharge the criminal conduct, or, whether it will engage in pre-indictment or post-indictment maneuvering to bring about the government's desired result, but it also will be the only voice heard when adopting statutory sentences and Sentencing Guidelines with less and less discretion afforded to the courts and the Sentencing Commission. To put it more bluntly, the wisdom of the years and breadth of experience accumulated by judges and the Sentencing Commission in adjudicating criminal cases and sentencing defendants is shucked for the inexperience of young prosecutors and the equally young think-tank policy makers in the legislative and executive branches.

n8 *F. Supp. 2d , 2003 WL 22025007* (N.D.Cal. July 30, 2003).

As noted by Judge Guido Calabresi, a judge of the United States Court of Appeals for the Second Circuit and a law professor and former law school dean, "An independent judiciary which applies rules of law ... is a pain in the neck to any government that wants to get things done." n9

n9 *Id.* (citing Hon. Guido Calabresi, *The Current, Subtle- and Not So Subtle -- Rejection of an Independent Judiciary, 4 U. PA. J. CONST. L. 637 (2002)).*

In a similar vein, Judge Paul Magnuson of the U.S. District Court of Minnesota recently wrote in *United States v. Kirsch*, n10 that:

> This reporting requirement system accomplishes its goal: the Court is intimidated, and the Court is scared to depart. The reporting requirement has another, more invidious effect. Although the Court

> has a high [*47] regard for the Assistant U.S. Attorney who prosecuted this matter, there will be other cases in which the prosecutor will misuse his or her authority. Due to the requirement of reporting departures that is now in place, Courts are no longer able to stop that abuse of power. The reporting requirements will have a devastating effect on our system of justice which, for more than 200 years, has protected the rights of the citizens of this country as set forth in the Constitution. Our justice system depends on a fair and impartial judiciary that is free from intimidation from the other branches of government. The departure reporting requirements constitute an unwarranted intimidation of the judiciary.

n10 *F. Supp. 2d , 2003 WL 22384760* (D.Minn. Oct. 17, 2003).

Judge Roger P. Patterson, Jr., of the U.S. District Court for the Southern District of New York was even more direct in *United States v. Kim,* n11 where he wrote:

> In their latest attack on the third branch of the government, Congress not only attempted to restrict the ability of trial judges to impose fair sentences based on the particular facts presented in each case, but also ... also required that the Department of Justice report to Congress all cases in which the trial judge departs from the guidelines in non-cooperation cases. Evidently, 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.
>
> The requirement that such departures be reported to Congress overlooks the obvious fact that trial judges are more qualified to determine a proper sentence than the assistant U.S. attorneys making the reports. U.S. attorneys already have immense power in the criminal justice process under the Sentencing Guidelines. In plea agreements, prosecutors determine what offenses are charged and what facts are stipulated. "Given that over 90 percent of federal criminal cases are the result of plea agreements, the plea negotiation process essentially has become a sentencing negotiation."
>
> Trial judges have many more years of experience in sentencing, both under the United States Sentencing Guidelines and prior thereto, than the Assistant U.S. Attorneys (AUSA). Each trial judge sentences far more defendants in a year, than an individual AUSA prosecutes. Thus, the report on departures required by Congress are by a party less competent, less familiar with, and less involved in, the difficult decisions which the sentencing judge must make under the guidelines to perform the traditional role of an independent, fair and just arbiter. If, as a result of Congress' increasing pressure to eliminate any departures from the Guidelines, trial judges' sentencing decisions do not comply with the basic tenets of fairness and justice, the confidence of our citizens that the courts play an independent and fair role in the dispensation of justice will be diminished or lost. Then our system of justice will be regarded as subservient to the other branches of government -- the system that prevailed for so many years behind the Iron Curtain.

n11 *F. Supp. 2d , 2003 WL 22391190* (S.D.N.Y.Oct.20, 2003) (citations omitted).

Judge Rodney S. Webb of the U.S. District Court for North Dakota waxed philosophically in *United States v. Dyck,* n12 when he stated that

> ... The pendulum for sentencing within the criminal justice system has moved too far to the right in favor of harsh sentences. We must adopt sentencing goals beyond retribution and deterrence. Our current system costs too much and we are in danger of losing a substantial portion of a whole generation of young men to drugs as their futures rot within our prisons. A society can be tough on crime without being vindictive, [*48] unjust or cruel. We must encourage flexible and innovative sentencing such as drug courts, drug treatment and supervised probation as an alternative to prison. Change is hard, but change is not impossible. Judges and others involved in the criminal justice system must speak out against unjust and unwise mechanisms of justice such as strict guidelines and mandatory minimum sentences. The Feeney Amendment can be changed by appealing to our congressional delegation. Perhaps this opinion, as an appeal for a restoration of individualized

sentencing, will provoke some thoughtful discussion on these important issues and help restore the traditional sentencing discretion of the district courts usurped by the legislative and executive branches of our government.

n12 *F. Supp. 2d , 2003 WL 22383486* (D.N.D. Oct. 16, 2003).

And finally, in what the *New York Times* has called "perhaps the boldest criticism of the [Feeney Amendment]" yet, Judge Sterling Johnson, Jr., of the Eastern District of New York and former Commissioner to the U.S. Sentencing Commission, "recently issued a wide-ranging order that directly contradicts the [Feeney Amendment's] provision granting Congress more direct access, without the need for judicial permission, to a variety of case documents. Judge Johnson placed a blanket seal on all such [sentencing] documents in cases before him, forbidding Congress to examine these materials without his approval." n13 According to Judge Johnson, "at some point you have to take a stand. If Congress wants to make a deck of cards for the judges like they did for the bad guys in Iraq, then make me the ace of spades." n14

n13 Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. Times, Dec. 8, 2003.

n14 *Id.*

Recently, the United States Supreme Court granted *certiorari* to two sentencing cases -- *Blakely v. Washington*, n15 and *Schiro v. Summerlin* n16 -- that may signal the first major counter-attack by the Judiciary on Congress' and the Executive's campaign to limit and in some cases eliminate judicial sentencing discretion. Pursuant to a plea agreement, the defendant in *Blakely* pleaded guilty to one count of second degree domestic violence kidnapping, with a deadly weapon enhancement, and one count of second-degree domestic violence assault. In exchange for the plea, the prosecutor agreed to recommend a sentence at the high end of the 49 - 53 month sentencing range under Washington's sentencing guidelines. The court, however, rejected the prosecutor's recommendation and instead imposed an "exceptional" sentence on Blakely of 90 months imprisonment based upon the deliberate cruelty of the offense and the fact that the defendant committed the offense in the presence of a minor.

n15 *47 P.3d 149 (Wash. App. 2002), cert. granted 124 S.Ct. 429* (Oct. 20, 2003).

n16 *341 F.3d 1082 (9th Cir. 2003), cert. granted in part by S.Ct. , 2003 WL 22327207, 72 USLW 3282* (Dec. 1, 2003).

At issue in *Blakely* is whether a court may sentence an offender above the maximum term established by the otherwise-applicable sentencing guidelines, as opposed to the maximum term established by statute. Should the court rule that facts triggering so-called upward departures must be treated as elements of an aggravated form of the offense, the impact on sentencing guidelines jurisprudence could result in fundamental, but needed reform.

To be sure, whether a fact may be used to sentence an offender above an applicable statutory maximum penalty was settled three years ago in *Apprendi v. New Jersey*. n17 There, the court demarcated the constitutional limits to be imposed on legislatures when drafting penalties for criminal offenses, when it held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

n17 *530 U.S. 466 (2000)*.

Unfortunately, in attempting to clarify its holding in *Apprendi*, the Court utilized rather ambiguous language when it elaborated that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the *prescribed range* of penalties to which a criminal defendant is exposed." The question that hundreds of state and federal courts, practitioners, academics, and most certainly defendants, have been grappling with since the *Apprendi* decision is how to interpret "prescribed range." Read literally, it would seem that *Apprendi* would apply to facts used to depart upward from an otherwise applicable sentencing guidelines range. After all, in such a situation, the prescribed range of penalties is increased.

If the Court holds that facts triggering upward departures must be treated as elements, then it is a short step to arguing that facts enhancing a sentence under sentencing guidelines also should be treated as elements. After all, an

upward departure simply is premised on an aggravating factor not otherwise [*49] taken into account by the sentencing guidelines, whereas an enhancement just is factor that has been taken into account by the sentencing guidelines. For purposes of *Apprendi*, the difference appears immaterial.

In *Summerlin*, the issue there is whether the Court's holding in *Ring v. Arizona*, n18 that facts triggering the imposition of the death penalty must be treated as elements of an offense, should be applied retroactively. As *Ring* was based on *Apprendi*, a possible implication is that *Apprendi* would have retroactive effect if the Court affirmed the Ninth Circuit. In combination, therefore, *Blakely* and *Summerlin* potentially could mean that upward departures as well as adjustments should be treated as elements of offenses, and that those sentenced under prior regimes wherein upward departures or adjustments were not treated as elements may now be entitled to re-sentencings. Congress should be quaking in its boots.

n18 *536 U.S. 584 (2002)*.

The Feeney Amendment has sparked outrage in virtually every facet of our federal criminal justice system. Indeed, it has even been reported that some prosecutors have resigned in part because of it. n19 The Court now stands ready to mount a Constitutional counter-attack against the baseless idea implicit in the Feeney Amendment: that prosecutors and not judges should be imposing sentences. However the Court decides these cases, the political fallout will remain. In a nation that incarcerates 1 out of 4 of the entire world's prison population, it is far past time for us to rein in the Legislative and Executive Branches pre-occupied with long terms of incarceration, while encouraging and supporting our Judicial Branch to exercise its sound and *independent* discretion to impose just sentences.

n19 Marisa Taylor, Prosecutors Flying the Coop: U.S. Attorneys Office Loses 27 of 122 on Staff, San Diego Union-Tribune, Dec. 1, 2003.

Legal Topics:

For related research and practice materials, see the following legal topics:
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