A SPECIAL REPORT

WHO'S AFRAID OF THE FEDERAL JUDICIARY?

Why Congress' fear of judicial sentencing discretion may undermine a generation of reform

By Mark H. Allenbaugh

The great object of my fear is the federal judiciary. That body, like gravity, ever acting with noiseless foot & unalarming advance, [is] gaining ground step by step. . . . Let the eye of vigilance never be closed.

— Thomas Jefferson in a letter to Spencer Roane, Mar. 9, 1821, as quoted in James F. Simon, WHAT KIND OF NATION 9 (2002).

If the hundreds of American judges who sit on criminal cases were polled as to what was the most trying facet of their jobs, the vast majority would almost certainly answer "Sentencing." In no other judicial function is the judge more alone; no other act of his carries greater potentialities for good or evil than the determination of how society will treat its transgressors.

— Hon. Irving R. Kaufman, United States District Court Judge for the Southern District of New York, "Sentencing: The Judge's Problem," in *The Atlantic Monthly* (Jan. 1960).

In 1951, Judge Kaufman sentenced Julius and Ethel Rosenberg to death for espionage, which were the first and only peacetime death sentences for espionage in the history of the United States.

With respect to sentencing law, policy and practice, March certainly came in like a lion, but it hardly went out like a lamb; indeed, the lion's roar became deafening in April. On March 4, 2003, the United States Supreme Court issued four opinions regarding the constitutionality of two contemporary but controversial legislative developments in sentencing and crime prevention, namely, three-strikes-and-you're-out recidivism statutes and Megan's Laws. As discussed below, these opinions indicate that the Supreme Court believes that the Constitution provides exceedingly little limitation on the discretion of legislatures when those bodies determine the severity of criminal penalties and establish means for preventing future crimes.

Unfortunately for the Court — indeed, for the entire federal judiciary — the United States Congress quickly has taken advantage of this presumably boundless sentencing and crime prevention authority, but in an unexpected and deeply troubling way. The hastily enacted Amber Alert[1] legislation — formally known as Prosecuting Remedies and Tools Against Exploitation of Children Today (PROTECT) Act of 2003[2] — fundamentally has changed the role of judges and the United States Sentencing Commission (hereinafter "the Commission") in formulating sentencing law and policy by largely removing those actors from the sentencing process. By this legislation, Congress has moved to greatly curtail and even eliminate in some areas judicial discretion at sentencing, and likewise has bypassed the Commission entirely by taking upon itself the task of re-writing the Federal Sentencing Guidelines (hereinafter "the Guidelines") directly.

As a result, any check the judiciary may have had on the legislature's power with respect to sentencing law, and any ability the Commission — an expert sentencing agency created (ironically) by Congress[3] — had to shape evolving federal sentencing policy into a coherent, effective and just structure, now appears to have been thwarted completely by this less than well-thought-out legislation. Indeed, the very discretion judges exercised at sentencing — and to which that branch of government rightly and jealously has guarded — has been diminished greatly, and the very relevance of the Commission and its tireless efforts at reviewing and revising the Guidelines, as required by statute,[4] now remains in doubt.

The ghost of Jefferson, however, may not have the last word. For, as argued below, the more Congress invades on the sentencing province of the judiciary, *i.e.*, the more it "looks . . . with ill will at an *independent* judiciary,"[5] the more difficult it may become for the Executive Branch to prosecute and thereby obtain those sentences that the Legislative Branch desires. In this 200th anniversary year of *Marbury v. Madison*,[6] the spirit of Justice Marshall may yet prevail again.

The lion awakens: the Court's decisions granting legislatures seemingly unbridled sentencing discretion

In *Lockyer v. Andrade*[7] and *Ewing v. California*,[8] a divided Court refused to review the constitutionality of California's three-strikes-and-you're-out statute. In both instances, the Court avoided determining whether the three-strikes statute meted out grossly disproportionate sentences when compared to the seriousness of the offense, which is prohibited by the Eight Amendment.[9] The same can be said for *Ewing*.

In *Andrade*, the defendant struck out twice under California's three-strikes law and was sentenced to 50 years to life for two petty thefts of video tapes — each counting as a third strike. The majority in *Andrade* did not reach any proportionality analysis because it held the Ninth Circuit erred when it reversed a California court of appeal's decision upholding the three-strikes statute. Under the Antiterrorism and Effective Death Penalty Act of 1996,[10] in order for the Ninth Circuit to have properly exercised jurisdiction over the case so as to decide whether the three-strikes statute violated the Eight Amendment, the circuit court would first have to have found that the three-strikes statute was contrary to the Supreme Court's established proportionality jurisprudence, which, of course, is precisely what the Ninth Circuit found. And that precisely is where the Ninth Circuit erred, according to the Court, because, ironically, "[o]ur cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality."[11] In other words, the Court reasoned that because the Court's own jurisprudence was unclear, then it could not say that the California court of appeal's interpretation of that precedent was to the contrary. Hence, the Ninth Circuit had no authority to hear the case and decide the proportionality issue.

In *Ewing*, the defendant was a bit more lucky as he was sentenced "only" to 25 years to life for stealing three golf clubs. There, a plurality of the Court also refused to engage in proportionality review. According to the Court, "[t]hough three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding."[12] In light of the Court's evasion of proportionality review by deferring to the legislature, an exasperated Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, stated in dissent in *Andrade* that "[i]f Andrade's sentencing is not grossly disproportionate, the principle has no meaning."[13]

In *Connecticut v. Doe*[14] and *Smith v. Doe*,[15] the Court upheld, respectively, the constitutionality of Connecticut's and Alaska's "Megan's Law" statutes, which require convicted sex offenders to register with local authorities upon their release from incarceration. In *Connecticut*, the Court held that a sex offender does not have a due process right to prove that he no longer is a danger to society in order to avoid having information about him posted on a sex offender Web site. And in *Smith*, the majority held that because sex offender registries were not punitive in nature, retroactive application of Alaska's version of "Megan's Law" did not violate the *Ex Post Facto* Clause.

Tellingly, in *Smith*, as in *Ewing*, the Court again deferred to the legislature, but this time to determine whether the statute in fact was punitive. According to the Court, "[b]ecause we ordinarily defer to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[16] Thus, according to the Court, whether a sanction even is considered punitive or remedial in nature — a finding that necessarily determines how much process is due — simply is a matter of legislative drafting, and the burden is on the defendant to prove otherwise.

Apparently, the Court has great faith in the politics of punishment no matter the severity of the sanction for the offense, and likewise is untroubled by *ipse dixit* legislative labels that necessarily eliminate important due process protections. Ultimately, one could read these decisions to indicate that a majority of the Court is content to provide legislatures with discretion, effectively unfettered by the Eight Amendment, to promulgate even the most draconian of sentencing schemes. Indeed, at least two of the Justices — Scalia and Thomas — believe that the Eighth Amendment applies only to the *mode* of imposing a sanction, not to its *severity*: "In [our] view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle."[17]

Still, although decided in the era prior to mandatory minimum penalties and the advent of the Guidelines, *Solem v. Helm*,[18] which held that the Eighth Amendment "prohibits . . . sentences that are disproportionate to the crime committed," and that the "constitutional principle of proportionality has been recognized explicitly in this Court for almost a century,"[19] remains good law. Given the recent

and extraordinarily controversial legislative development discussed below, the Court undoubtedly will have the opportunity to once again address and clarify the limits imposed by the Eight Amendment on Congress' power to promulgate increasingly mandatory disproportionate penalties, which necessarily invade perhaps the most important province of the judiciary: the exercise of sentencing discretion.

The lion roars: a legislative *coup d'etat* for sentencing power

Less than three weeks after the opinions reviewed above were decided, and much to the chagrin of the federal judiciary, the United States Congress coincidentally engaged in a *coup d'etat* for sentencing power by seizing on much of the sentencing discretion traditionally delegated to the judiciary.

Historically, sentencing power has been shared more or less equally by the three Branches of government with the Legislative Branch defining crimes and setting minimum and maximum penalties thereto, the Judicial Branch actually imposing the sentence within the limits set by the legislature, and the Executive Branch deciding where offenders will serve their time, for how long, and supervising them upon their release.[20] Today, however, that relationship has changed dramatically.

With the advent of the Guidelines, a new actor was added to the mix: the United States Sentencing Commission.[21] Congress still sets minimum and maximum penalties, of course, but now the Commission, through its Guidelines, regulates how judges exercise their discretion, within these limits, during sentencing. Although parole has been abolished at the federal level, the Executive Branch still has an important role in determining where an offender is to serve his or her sentence. And perhaps more importantly, the Executive branch actually now has more sentencing power than it did in the pre-Guidelines era inasmuch as what offenses are charged by prosecutors, and what facts are stipulated, often is determinative of the resulting sentencing. Given that over 90 percent of federal criminal sentences are the result of plea agreements, the plea negotiation process essentially has become a sentencing negotiation.

Congress, however, greatly has upset this balance of power. Troubled by the number of times federal judges had been departing downward from the Guidelines,[22] among other things, the legislature decided to assert its authority. March 25, 2003, Rep. Tom Feeney (R-Fla.) introduced a surprise amendment to the politically popular Amber Alert legislation then under consideration by the House and previously passed by the Senate.[23]

Such a drastic re-write of federal sentencing law has not been seen since the Sentencing Reform Act of 1984, the legislation that created the United States Sentencing Commission and delegated to it the power to promulgate and amend the Guidelines.[24] Among other things, the so-called "Feeney Amendment"[25] essentially eliminates judges' discretion to depart below the Guidelines in all cases, and thereby over-ruled *United States v. Koon*[26] and a significant amount of case law by requiring departures to be reviewed *de novo* rather than under an abuse of discretion standard, removed "aberrant behavior" and "family ties" as possible grounds for a downward departure, made clear that the Guidelines must be consistent with mandatory minimum penalties (a penalty scheme that the United States Sentencing Commission,[27] and the federal judiciary long have opposed[28]), precluded the United States Sentencing Commission from modifying any changes to the Guidelines made by the legislation, and required the Commission to make available to Congress data identifying the sentencing patterns of individual judges.[29]

According to Rep. Feeney, "[t]his amendment is an essential component of legislation to fight against child pornography and abductions. Legislative efforts to fight against child abduction and child pornography will be a fruitless gesture if at the end of the day judges give offenders, particularly sex offenders, a slap on the wrist. And a slap on the wrist is exactly what is happening today, with increasing frequency."[30]

Given the unprecedented scope of the legislation, coupled with the fact that it was rammed through the legislature without any public hearings and virtually no debate regarding its effects on sentencing law, policy, and practice, it was not surprising that groups both inside and outside the government, and from across the political spectrum, voiced alarm and pleaded for Congress not to pass the legislation.

The American Bar Association wrote that "to the extent the amendment would give prosecutors a unique and absolute power to check the discretion of sentencing judges, it would have an unsettling effect on the constitutional balance of power."[31] The National Association of Criminal Defense Lawyers noted that "[w]ithout the discretionary authority to depart, all crimes regardless of the circumstances would have to be sentenced exactly the same; one size must fit all. . . . The Sentencing Guidelines will become little more than mandatory minimum sentencing laws, which cause rampant injustice and unwarranted racial disparity."[32] The Judicial Conference of the United States, through the Chief Justice himself, opined 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 courts to impose just and responsible sentences."[33]

And, of course, those who actually do impose sentences weighed in on the matter. In a letter to Senator John Warner (R-Va) and Senator George Allen (R-Va), Judge Gerald Bruce Lee of the United States District Court for the Eastern District of Virginia stated that "the Feeney Amendment is an over-reaction to a non-existent problem and an unwarranted restriction on sound judicial decision-making."

Finally, the five current voting Sentencing Commissioners themselves, in a letter to Senators Orrin Hatch (R-Utah) and Pat Leahy (D-VT) asked as an alternative to the Amendment, that Congress instead "direct the Commission to review departures, recommend changes where appropriate, and then report back to Congress within 180 days."[34] After all, "[t]he Commission is uniquely qualified to serve Congress by conducting such studies dues to its ability to analyze its vast database, obtain the views and comments of the federal criminal justice community, review the academic literature, and report to Congress in a timely manner."[35]

To be sure, the Feeney Amendment was not all that was controversial about the legislation. The PROTECT Act itself created a two-strikes-and-you're-out penalty structure for certain sex offenders, eliminated the statute of limitations for child abduction and sex crimes retroactively — the constitutionality of which currently is before the Court,[36] and created a mandatory minimum sentence of 20 years for kidnapping.

After a conference committee hearing during which Senator Orrin Hatch introduced a "compromise" version of the "Feeney Amendment," a slightly modified version of the Amendment overwhelmingly passed both houses of Congress on April 10, 2003 — 400-25 in the House, 98-0 in the Senate — which, coincidentally, was during National Crime Victims' Rights Week.[37] The version of the legislation that finally passed did "compromise" on an important issue: rather than limiting judges' discretion to depart below the Guidelines in all cases, the limitation now only applies to certain child crimes and sex offenses. Although all the other aspects of the legislation remained, it could have been much worse had this compromise not been reached. Still, the compromise legislation actually included an interesting and quite telling addition; whereas it currently is required by statute that at least three of the seven voting Commissioners on the Sentencing Commission be federal judges, the comprise legislation limits the number of federal judges on the Commission to *no more than three*. In other words, despite the fact that "judges [are] uniquely qualified on the subject of sentencing,"[38] no Sentencing Commissioners need be federal judges.

The President signed the PROTECT Act into law on April 30, 2003.[39]

Caging the lion: the coup may crumble in the courts

Despite Congress' best efforts to usurp the sentencing power of the federal judiciary, it still is limited by the Constitution. After all, it still remains the province of the judiciary "to say what the law is."[40]

Like their state counterparts, the Federal Sentencing Guidelines were developed in order to regulate the discretion of judges, *i.e.*, to try to bring some rationality and coherence to the sentencing process while still allowing for individualized sentences where circumstances warrant.[41] They were not designed, like mandatory minimum penalties, to dictate or eliminate that discretion.

By precluding departures for certain crimes against children and sex offenses, Congress in effect has made the resulting Guidelines sentence a mandatory minimum. Currently, at least two circuits — the Second and the Ninth — have ruled that in light of *Apprendi v. New Jersey*, factors that trigger a mandatory minimum sentence must be treated as an element of the offense. The result, ironically, is that it now could be significantly more difficult to obtain the legislatively desired Guidelines sentence

in these cases; at the very least, it will be far more difficult for prosecutors to enter into plea bargains given the inability of the sentencing judge to depart downward even on recommendation from the prosecutor.

In all events, given that Congress has picked a needless fight with the Judiciary, there may be more surprises ahead. Although many circuit courts have ruled that *Apprendi* does not apply to the Guidelines, the Court itself has yet to rule on that issue. By holding that *Apprendi* is applicable to at least some Guidelines determinations, the Court may be able to regain some of the sentencing power it effectively relinquished to Congress.

Still, the Courts do retain their discretion to depart in cases not involving crimes against children or sex offenses. Furthermore, a *de novo* review of all departures, although manifestly a difficult undertaking given the fact-driven nature of decisions to depart, may actually work well to further develop and refine the current departure case law. Appellate courts now will be forced to provide district court judges with more certain guidance on when and to what degree departures are warranted. Consequently, *de novo* review actually may work to liberate judges rather than constrain them when they decide to depart.[42]

Taming the lion: educating Congress on the purpose of departures

Around the time that Jefferson and Marshall were debating the role of the federal judiciary, the influential Prussian philosopher Immanuel Kant wrote:

What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality . . . . Only the Law of retribution (*jus talionis*) can determine exactly the kind and degree of punishment; it must be well understood, however, that this determination [must be made] in the chambers of a court of justice (and not in your private judgment). All other standards fluctuate back and forth and, because extraneous considerations are mixed with them, they cannot be compatible with the principle of pure and strict legal justice.[43]

The Feeney Amendment is based on extraneous political considerations as well as a fundamental misunderstanding of the nature and purpose of the Guidelines, which is not surprising given the surreptitious manner in which it was enacted. Contrary to what even some opponents of the Feeney Amendment believe, downward departures are not granted out of mercy.[44] Rather, a departure below the Guideline sentence *only* is warranted when the severity of the Guidelines sentence is more severe than the seriousness of the offense. In other words, a judge should depart below the Guidelines only when the Guideline sentence calls for more than what is deserved. Sentencing an offender only to what is deserved, no more nor less, is what the Guidelines are all about, after all.

Some may wonder, then, why the Guidelines would ever call for a sentence greater than that which is deserved. As the Commission stated in its initial formulation of the Guidelines, there are two reasons for the departure policy: "First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. . . . Second, the Commission believes that despite the courts' legal freedom to depart from the Guidelines, they will not do so very often. This is because the Guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice."[45]

The problem, then, with curtailing or eliminating discretion to depart downward in such a heavy-handed way, as the many critiques of the Feeney Amendment have articulated, is that doing so is to proceed from an obviously false premise, namely, that one need not consider any other factors when imposing a sentence; either that, or one does not care if a defendant receives a sentence greater than what is deserved. The former premise is dangerously naïve, the latter is tyrannical.

Ironically, even Senator Hatch recognized this in a law review article he authored not too long ago:

Many of the Guidelines' problems, including their perceived rigidity and their facilitation of hidden bargaining and increased prosecutorial leverage, can be traced to their compulsory nature. Congress must review whether these problems can be appropriately remedied within a compulsory Guidelines system. If not, Congress . . . may need to examine whether the most effective way of addressing these problems is to return a greater degree of flexibility to the judiciary.[46]

As Senator Hatch recognized, sentencing, like the human condition, manifestly is complex. The Guidelines, of course, recognize that. They also recognize that the human condition is not static;

things change.[47] After all, "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[48] Indeed, Congress itself required the Commission to draft the Guidelines in order to "maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[49]

In recognition of this, the Commission — with all its judges, lawyers, academicians, probation officers, statisticians, criminologists, technicians, and yes, philosophers — constantly revises the Guidelines in order to take into account new factors or modify how the Guidelines treat old factors. Given this, it is not surprising that departure rates may reach 20 percent or more at times. In such instances, it just may be the case that there are one, two, or a plethora of factors that the Commission has not yet had the opportunity to consider or otherwise incorporate into the Guidelines. And this should not be cause for legislative alarm; there simply must be recognized an inevitable sphere of factors that for one reason or another the Guidelines cannot or should not take into account.[50] If we are to avoid naï veté or tyranny, and if we are to maintain a coherent federal sentencing system, there must remain room for departures.

As Judge Marvin E. Frankel — in many respects the "Godfather of the Guidelines" — observed, "legislative action tends to be sporadic and impassioned, responding in haste to momentary crises, lapsing then into the accustomed state of inattention."[51] In contrast, an expert sentencing body such as the Commission can continuously, dispassionately and scientifically evaluate sentencing trends, and do so *transparently*, not privately, with input from the public, and proceed to adjust what naturally must be considered an evolving body of law.

Congress' fear of the federal judiciary simply is misplaced; its usurpation of that body's sentencing discretion is tragic (but fortunately remediable). To paraphrase Justice Marshall, "[e]very check on the wild impulse of the moment is a check on [Congress'] own power, and [it] is unfriendly to the source from which it flows,"[52] namely, an independent judiciary. In retrospect, given that "[s]entencing is probably the most difficult task faced by a federal district judge,"[53] and imposing a sentence "probably the single most important duty,"[54] perhaps the Court let go just a little too much sentencing power in *Andrade*, *Ewing*, *Doe*, and *Smith*. But it now stands ready to take back that power as it should, and provide a clear check on the sporadic and impassioned political whimsy of legislatures, and their sometimes ill-conceived and unconstitutional sentencing schemes.

Notes

1. The "AMBER Alert" system was created in 1996 and stands for "America's Missing: Broadcast Emergency Response." The system, now implemented in several states, is designed to quickly coordinate information with local authorities and the public about missing children. The AMBER Alert system is named after 9-year-old Amber Hagerman who was kidnaped while riding her bicycle in her Arlington, Texas neighborhood. Her body was found four days later. For more information, see www.missingkids.com.

2. Pub.L. 108-21 (2003).

3. *See* Pub. L. 98-473, Title II, § 217(a), Oct. 12, 1984, 98 Stat. 2017, and amended Pub. L. 99-22, § 1(1), Apr. 15, 1985, 99 Stat. 46; 28 U.S.C. § 991, et seq.

4. *See* 28 U.S.C. § 994(o) (requiring the Commission to "periodically . . . review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and exercising its powers, the Commission [shall] consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system.").

5. Letter from Justice John Marshall to Joseph Story, Aug. 13, 1821, reproduced in James F. Simon, WHAT KIND OF NATION 9 (2002) (emphasis added). Here, Justice Marshall was speaking of Jefferson's suspicion of, and animosity toward, the federal judiciary.

6. 5 U.S. 137 (1803).

7. 123 S. Ct. 1166 (2003).

8. 123 S. Ct. 1179 (2003).

9. Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("The Eighth Amendment succinctly prohibits 'excessive' sanctions.").

10. 110 Stat. 1214.

11. *Andrade*, 123 S. Ct. at 1173.

12. *Ewing*, 123 S. Ct. at 1180.

13. *Andrade*, 123 S. Ct. at 1179 (Souter, J., disseting); *see also* Nicholas N. Kittrie & Mark H. Allenbaugh, *Jean Valjean Lives: Petty Criminals Face Harsh Future after Three-Strikes Cases*, LEGAL TIMES, Apr. 14, 2003, at 60.

14. 123 S. Ct. 1160 (2003).

15. 123 S. Ct. 1140 (2003).

16. *Smith*, 123 S. Ct. at 1147 (internal quotation marks and citations omitted).

17. *Ewing*, 123 S. Ct. at 1192 (Thomas, J., concurring) (citing Harmelin v. Michigan, 501 U.S. 957, 967-985 (1991) (opinion of Scalia, J.).

18. 463 U.S. 277 (1983).

19. *Id.* at 284, 286.

20. Mistretta v. United States, 488 U.S. 361, 364-65 (1989) ("Historically, federal sentencing — the function of determining the scope and extent of punishment — never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government. Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control. Congress early abandoned fixed-sentence rigidity, however, and put in place a system of ranges within which the sentencer could choose the precise punishment. Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected. This broad discretion was further enhanced by the power later granted the judge to suspend the sentence and by the resulting growth of an elaborate probation system. Also, with the advent of parole, Congress moved toward a 'three-way sharing' of sentencing responsibility by granting corrections personnel in the Executive Branch the discretion to release a prisoner before the expiration of the sentence imposed by the judge. Thus, under the indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch's parole official eventually determined the actual duration of imprisonment.") (Citations omitted).

21. The same holds true for approximately half of the states, which individually have created sentencing commissions that, like their federal counterpart, promulgate and amend sentencing guidelines. Unlike their federal counterpart, however, many of the states' sentencing guidelines are only advisory.

22. See Susan Schmidt, *Judge Accused of Misleading House Panel*, WASH. POST, Nov. 6, 2002, at A18 (reporting on Congressional dissatisfaction with testimony of Judge James M. Rosenbaum, chief judge of the U.S. District Court for Minnesota, and possible use of subpoena to obtain records on Judge Rosenbaum's sentencings); Resolution of the Board of Directors, National Association of Criminal Defense Lawyers, *Opposing Congressional Attacks on Judicial Independence* (Mar. 24, 2003) (opposing issuance of subpoena "to Chief Judge Rosenbaum to oblige him to produce all his notes and records in connection with every drug case in which he found a basis for downward departure since January 1, 1999").

23. See legislative history to Prosecuting Remedies and Tools Against Exploitation of Children Today (PROTECT) Act of 2003, Pub.L. 108-21 (2003).

24. *See* Pub. L. 98-473, Title II, § 217(a), Oct. 12, 1984, 98 Stat. 2017, and amended Pub. L. 99-22, § 1(1), Apr. 15, 1985, 99 Stat. 46.

25. *See* H. Amdt. 19 to H.R. 1104, printed in H. Rep. 108-48.

26. 518 U.S. 81 (1996).

27. See UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002).

28. See, e.g., Brad Wright, "Justice Kennedy Criticizes Mandatory Minimum Sentences," CNN, Apr. 9, 2003.

29. It would not be unreasonable to speculate that with such information, Congress would from time to time require judges to defend their sentences with the possible result that judges who did not do as they were told by Congress would face impeachment.

30. Letter from Rep. F. James Sensenbrenner, Jr. & Rep. Tom Feeney to Colleagues, "Support the Feeney Amendment to H.R. 1104 to Preserve Appropriate and Justifiable Departures under Sentencing Guidelines," Mar. 26, 2003.

31. Letter from Alfred P. Carlton, Jr., President, American Bar Ass'n to congressional representatives, Apr. 9, 2003.

32. Letter from NACDL to congressional representatives, Apr. 9, 2003.

33. Letter from the Chief Justice to Sen. Patrick Leahy (Apr. 7, 2003).

34. Letter from Current Commissioners to Sen. Hatch and Sen. Leahy (Apr. 2, 2003).

35. *Id.*; see also Letter from Current and Former Chairs of Commission to Sen. Hatch and Sen. Leahy (Apr. 2, 2003).

36. *See* Stogner v. California, No. 01-1757 (oral argument heard Mar. 31, 2003) (presenting issue as to whether abolition of statute of limitations and retroactive application thereof violates the *Ex Post Facto* Clause).

37. See George W. Bush, President of the United States of America, Proclamation, "National Crime Victims' Week, 2003" (Apr. 4, 2003).

38. Mistretta v. United States, 488 U.S. 361, 404 (1989) (Blackmun, J.).

39. See Statement by George W. Bush, President of the United States of America (Apr. 30, 2003).

40. *Marbury*, 5 U.S. at 177.

41. *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, _ AM. CRIM. L. REV. _ (forthcoming 2003) (discussing how departures fit within the Guidelines' philosophy).

42. *See id.*

43. Immanuel Kant, THE METAPHYSICAL ELEMENTS OF JUSTICE 101 (1797, trans. John Ladd 1965).

44. See Editorial, *House without Mercy*, WASH. POST, Apr. 4, 2003, at A20.

45. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES, Ch.1, Pt. A (2002).

46. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 191 (1993).

47. *See Koon*, 518 U.S. at 113 ("The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system.").

48. *Id.*

49. 28 U.S.C. § 991(b)(1)(B).

50. Indeed, taking too many factors into account may make the Guidelines wholly unworkable as they necessarily would become more complex. An example of where this might already be occurring is with the Theft/Fraud Guideline at USSG § 2B1.1 As of the Nov. 2002 edition of the Guidelines, § 2B1.1 alone has 12 specific offense characteristics, 4 cross-references, and 15 application notes.

51. Hon. Marvin E. Frankel, United States District Court Judge for the Southern District of New York, "A Commission on Sentencing," selection from MARVIN FRANKEL, CRIMINAL SENTENCES (1972), *reprinted in* SENTENCING 348 (Hyman Gross & Andrew von Hirsch, eds. 1981).

52. Letter from Justice John Marshall to Joseph Story, Aug. 13, 1821, reproduced in James F. Simon, WHAT KIND OF NATION 9 (2002).

53. Banks v. United States, 614 F.2d 95, 99 (6th Cir. 1980) *(quoted in* United States v. Ruiz-Rodriguez, 277 F.3d 1281, 1292 (11th Cir. 2002)).

54. United States v. Curry, 767 F.2d 328, 331 (7th Cir. 1985) (*quoted in* United States v. Ruiz-Rodriguez).

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(SIDEBAR 1)

NACDL'S FIGHT TO SAVE JUDICIAL DISCRETION

As approved by the House of Representatives March 27, 2003, the original Feeney Amendment would have virtually abolished judicial discretion under the Sentencing Guidelines. This version applied to *all* federal offenses and, among other things, would have prohibited departures based on grounds not specified in the Sentencing Guidelines and repealed many of the most important specified grounds. While the final legislation is very troubling, significant improvements were achieved through the efforts of NACDL, its members and other groups.

As soon as this stealth rider to the Amber Alert bill came to light, NACDL immediately spread the word and prepared a letter in opposition, which was signed by the Leadership Conference on Civil Rights, Families Against Mandatory Minimums and others. Notwithstanding our swift efforts, the House agreed (357-58) to accept the amendment and went on to pass the bill. A procedural maneuver allowed the bill to bypass the Senate Judiciary Committee and move directly to Conference Committee.

With the critical and central involvement of President Lawrence S. Goldman and Board member Carmen Hernandez, Legislation Director Kyle O'Dowd worked in earnest to defeat the Feeney Amendment. In the short time leading up to the Conference Committee meeting, NACDL and its members helped generate a groundswell of opposition.

Strong letters urging defeat of the Feeney Amendment were sent by Chief Justice Rehnquist, the secretary of the Federal Judicial Conference, the Sentencing Commission, the ABA, 70 law professors, the Cato Institute, the conservative Washington Legal Foundation, and several industry trade organizations. Additionally, NACDL's work with the press helped bring about favorable and timely editorials in *The Washington Post*, *The New York Times* and other newspapers.

In response to growing opposition, Senators Orrin Hatch (R-UT) and Lindsey Graham (R-SC) and Rep. Jim Sensenbrenner (R-WI) unveiled a substitute amendment at the Conference Committee meeting. Claiming they had satisfied the judges' concerns, Senator Hatch described the "compromise" (which none of the Democratic conferees had seen) as "limited to those serious crimes against children and sex crimes." In fact, the Hatch-Sensenbrenner-Graham substitute retained much of the underlying Feeney Amendment and contained new provisions to limit judicial discretion. The Conference Committee approved the compromise by a nearly party-line vote.

Working with Ron Weich of the Leadership Conference on Civil Rights, NACDL quickly circulated an accurate bill summary that yielded yet another compromise — this one more in keeping with Senator Hatch's description. This version of the Feeney Amendment was included in the final conference report, which was adopted by the House (400-25) and the Senate (98-0) on April 10.

The issue of sentencing discretion will continue to top NACDL's legislative agenda. Our challenge now is to prevent overzealous implementation by the Sentencing Commission and further encroachments by Congress.

If you have a case that illustrates the importance of departure decisions, you can help us by sending a citation or summary to Kyle O'Dowd, at kyle@nacdl.org. Information on this and other related issues is available on our comprehensive and up-to-date Web page, *www.nacdl.org/departures*. n

— **Ralph Grunewald NACDL Executive Director**

(SIDEBAR 2)
The Irony of *Apprendi*

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held 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. It is equally clear that such facts must be established by proof beyond a reasonable doubt." The circuit courts have continued to wrestle with whether this language requires facts triggering mandatory minimum penalties to be treated as elements of the offense.

In *Harris v. United States*, 122 S. Ct. 2406 (2002), despite five justices agreeing that the logic of *Apprendi*'s holding applies to facts triggering mandatory minimums, a plurality of the Court nevertheless held that facts triggering mandatory minimum penalties in *firearms* cases need not be treated as elements. (Conceding that *Apprendi* applies to mandatory minimum sentencing structures, Justice Breyer, a dissenter in *Apprendi*, declined to apply *Apprendi* to the firearms minimums insofar as he continued to disagree with the holding in *Apprendi*).

Recently, the Ninth Circuit in *United States v. Velasco-Heredia*, 319 F.3d 1080, (9th Cir. 2003), held that even under *Harris*, facts triggering mandatory minimums in drug offense cases must be treated as elements, and that the district court's error in not treating drug amount as an element was not harmless. Other circuits soon may follow its reasoning.

Given that the PROTECT Act of 2003 creates a new mandatory minimum 20-year sentence for certain kidnapping offenses and requires that the Guidelines be structured in a manner consistent with all mandatory minimum penalties, there certainly is an argument that such Guidelines facts must be treated as elements of an offense. Furthermore, PROTECT requires the Commission to study and revise the Guidelines in order to "ensure that the incidence of downward departures are [*sic*] substantially reduced." The upshot is that some, if not all, the Guidelines may become, in effect, mandatory minimum penalties, and thus, each sentencing factor would have to be treated as an element of the offense. This, of course, would make prosecution of such cases exceedingly more difficult than is the case now.

In light of the fact that the Court in *Apprendi* expressly reserved applying its holding to the Guidelines, many defendants are sure to make such an argument even if it ultimately proves unsuccessful. The PROTECT Act thus may ultimately serve more to "protect" sex offenders than the very children for which it was designed.

In this age of the " War on Terrorism" and continuing corporate scandals, it also is worth noting the unintended irony of disallowing departures only for child sex offenders in order to ensure more severe sentences. The irony is that judges still have the authority to depart downward in cases of terrorism and for white collar offenses: offenses that can and do have significant adverse impact both on our national security and economy. Is Congress to be understood as viewing such offenses as less serious? The same can be asked with respect to violent offenses. Congress thus may be sending the wrong message by singling out one type of offense. n

— Mark Allenbaugh