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**IDEAS AND INFORMATION**

**Feeney Amendment**

The House of Representatives voted to essentially outlaw downward departures unless they are supported by the prosecutor ! This legislation is called the "Feeney Amendment" and was passed on March 27, 2003, by the House of Representatives.

The Amendment was part of HR1104, a larger bill that included the "Amber alert" child abduction act and an anti-child pornography bill (designed to over-rule the Ashcroft v. Free speech case).

The Feeney Amendment, was allowed just 20 minutes of debate in the House and came out of the blue. It is a Department of Justice (read Ashcroft) sponsored set of changes to the laws that govern sentencing practice in federal courts. The bill then went to the Senate making a stop along the way for "conferencing". Following a huge lobbying effort by NACDL, ACLU, the judiciary among others, some aspects of the proposal were "toned down" by the a Hatch-Sensenbrenner amendment. When we are relying on Orin Hatch as our "best ally" you know it is a tough situation. While the original proposal sought to effectively bar most non-cooperation downward departures, the amended version is more limited as outlined below. The amendment still directs the Sentencing Commission to amend the guidelines and policy statements **"to ensure that the incidence of downward departures are substantially reduced."** It passed overwhelmingly in both the House (400 to 25) and Senate (98-0). Senator Edward M. Kennedy (D-MA) and Rep. Bobby Scott worked hard to defeat this in conference and MA Representative William D. Delahunt, a former prosecutor spoke out against the proposal on the House floor. From his speech:

"Mr. Speaker, I would like to be able to vote for this bill. It includes provisions that I strongly support-including the "AMBER Alert" system that would aid in finding missing children. But those children have been taken hostage by a bill that also includes so-called "sentencing

reforms"-radical, sweeping changes to the federal sentencing system that were never considered by any committee of either House. Provisions that would cause an explosion in the number of people behind bars-including many who simply do not belong there.

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The rate of incarceration in the U.S. is seven times higher than that of such advanced nations as Germany, Italy, and Denmark. A primary reason for this is that a large number of our prisoners are serving long terms for minor nonviolent offenses. And if this bill becomes law, there will be a lot more of them.

Men in prison cannot raise families, cannot hold jobs, cannot pay taxes, and cannot support the economy. And when they get out, many who might have turned their lives around will have become hardened criminals, ready to return to the only life they know. Conservatives and liberals alike have

recognized that this situation poses a threat to the future of our cities, our families, our economic well-being, and the health of our democracy itself. Growing numbers of prominent conservatives have joined in calls for an end to mandatory minimum sentences. Yet this bill takes a giant-and potentially catastrophic--step in the wrong direction.

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The truth is that the vast majority of the downward departures are sought, not by the judge, but by the government itself. Of the nearly 20,000 downward departures granted in 2001, 79 percent were requested by the prosecution-most in return for the cooperation of the defendant, and the rest in five Mexican border districts in which the government uses departures to clear cases more quickly.

If the sponsors of the bill have concerns about the rate of downward departures, the Justice Department is where they should be making inquiries. As a former prosecutor, I can see plenty of reasons to question the overuse of departures as a law enforcement tool.

But depriving judges of the ability to exercise discretion cannot be the answer. A rigid, mechanical system of sentences cannot do justice-either to the accused or to the society to which the millions we imprison today

will one day return.”

**Summary of Feeney Amendment as passed:**

1. Establishes new, separate departure procedure and standards for child-related offenses and sex offenses. Only permissible departures are those that the Commission specifically enumerates.
2. Limits departures based on age and physical impairment in child and sex cases.
3. Prohibits departures based on gambling dependence, aberrant behavior, family ties, and diminished capacity in child and sex cases only.
4. Establishes de novo appellate review of all departures (thus overruling *Koon* ).
5. Prohibits downward departure on remand based on new grounds in all cases.
6. Requires government motion for extra 1-level adjustment based on timely acceptance of responsibility, repeals timely disclosure as basis for adjustment, and prohibits the Commission from ever altering this amendment.
7. Chills departures by imposing more burdensome reporting requirements on judges who depart, and gives DOJ access to Commission data files that identify each judge's departure practices.
8. Requires DOJ to report downward departures to Judiciary Committees, unless within 90 days AG reports to Congress on new regulations for opposing and appealing downward departures.
9. Directly amends pornography guidelines and commentary and prohibits the Commission from ever altering that text.
10. Prohibits the Commission, for a period of two years, from adding new departure grounds or passing amendments that are inconsistent with the departure restrictions.
11. Directs the Sentencing Commission to amend the guidelines and policy statements "to ensure that the incidence of downward departures are [sic] substantially reduced."
12. Limits the number of judges on the Sentencing Commission to three.

In addition to Guideline items the bill:

- Establishes a national communications network to facilitate the recovery of abducted children. The Amber Alert system is named after Amber Hagerman, a 9-year-old girl abducted in Arlington, Texas, and later found murdered.
- Prohibits pandering or soliciting anything represented to be child pornography,